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John H. Reese

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Cover Page Footnote

Professor of Law, University of Denver Sturm College of Law. I would like to thank Professors Robert A. Anthony, William M. Beaney, John A. Carver, Ronald Levin, Victor Rosenblum, Peter Strauss, and Eli Wald for their important comments and suggestions on the manuscript. I also am indebted to College of Law Professors J. Robert Brown, K.K. DuVivier, Kristian Miccio, and David Thomson. The valuable work of my research assistants Mariya Barmak and John Sharp was essential. Their observations and suggestions contributed as much to the product as did their research. Diane Burkhardt, Research Librarian in the College of Law, also contributed significantly to the product. Finally, I must express my appreciation to the faculty support staff that were so skillful in the production stages of the project: Kristin Schneider, Marianna Galstyan, and Laura Wyant.

BURSTING THE *CHEVRON* BUBBLE: CLARIFYING THE SCOPE OF JUDICIAL REVIEW IN TROUBLED TIMES

*John H. Reese**

"Another way of expressing our disenchantment with the Board's interpretation is to say that it strikes us as contrary to the policies and purposes underlying the Act."[1]

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1. Bob Evans Farms, Inc. v. NLRB, 163 F.3d 1012, 1020 n.4 (7th Cir. 1998) (Cudahy, J.).

INTRODUCTION

The continuing social and political aftermath of the September 11, 2001 attacks; the legislative responses of Congress to the attacks, such as the controversial USA Patriot Act;[2] the announcement of an undeclared "War on Terror"; fears of possible Al-Qaeda "sleepers" living among us; and the slow progress in pacifying Iraq consistently dominate the U.S. print and broadcast news media.[3]

Accordingly, U.S. government officials, employers and their employees, interest groups, and individual citizens are keenly focused on how such events and actions may impact Americans and the American way of life. Expanded administrative agency authority and responsibility for implementing the emerging programs and policies are central to the frenzied efforts of Congress and the White House to respond to an extensive array of terrorist threats.

Understandably, questions are being raised about the legality-constitutionality of several of the government's terrorist threat countermeasures.[4] Such questions immediately imply judicial review of those measures in order to assess their legality-constitutionality. Thus, the emerging questions are: Is judicial review available? What is the scope of judicial review that a federal court will employ to evaluate an agency's interpretations of its legal authority? And, are the courts reliable guardians of individual rights in times of crisis? On

2. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, § 203, 115 Stat. 272, 278-81 (2001).

3. A July 11, 2004, LexisNexis news search in the "U.S. Newspapers and Wire Services" database for the week of July 4-10, 2004 yielded 2931 results.

4. *See, e.g.*, *Federal Judge Rules Part of Patriot Act Unconstitutional*, Am. Const. Soc'y Bull., Jan. 30, 2004, *available at* http://www.acslaw.org/bulletins/01-30-04.htm.

the assumption that judicial review generally will be available, this Article addresses the scope of judicial review question.[5]

Comprehensive analysis of scope of judicial review principles regarding an agency's constructions of its authorizing legislation should not begin with the 1984 *Chevron* case,[6] although *Chevron*'s notoriety might suggest otherwise.[7]

Many lower courts and commentators perceived *Chevron* to be a watershed decision that established a new model of judicial analysis for review of an agency's constructions of its own legislation. Yet, a unanimous U.S. Supreme Court stated early in its *Chevron* opinion

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5. Professor David Cole states that "the conventional wisdom is that courts function poorly as guardians of liberty in times of crisis," citing as examples U.S. Supreme Court cases from World War I, World War II, and the Cold War. David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 Mich. L. Rev. 2565, 2565 (2003). However, Cole does not agree with that view. He says the following:

> But the conventional wisdom is too pessimistic. It is akin to arguing that *Marbury* demonstrates the weakness of the judiciary because the Court failed to afford Marbury himself relief for the violation of his rights.
>
> Considered over time, judicial review of emergency and national security measures can and has established important constraints on the exercise of emergency powers and has restricted the scope of what is acceptable in future emergencies.

Id. at 2566. Although the judges were under "tremendous pressure[,] . . . . a surprising number of judicial decisions initially upheld claims of constitutional rights against official antiterrorist measures . . . . [G]iven the history of judicial deference in times of crisis, the early decisions were quite stunning." *Id.* at 2578. Professors Owen Gross and Mark Tushnet, on the other hand, propose affirmative recognition of extra-constitutional emergency powers. Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 Yale L.J. 1011 (2003); Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 Wis. L. Rev. 273. On this view, the courts would not play a role in restraining such authority. Cole, however, finds that "[t]hese proposals are misguided." Cole, *supra*, at 2587. Cole would hesitate to adopt the Gross-Tushnet position for several reasons:

> First, it is predicated on a distinction between "emergency" periods and "normal" periods that . . . simply cannot be maintained . . . .
>
> Second, the Gross-Tushnet proposal . . . would be likely to undermine the protection of rights during emergencies (and by extension, during normal times that officials call emergencies). . . .
>
> Third, there is little reason to trust the political process to do the job of judging that Gross and Tushnet would assign to it. . . .
>
> Finally, Gross and Tushnet's proposal rests on the conventional wisdom that courts cannot be trusted to perform well in times of crisis.

Id. at 2587-91.

6. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).

7. *See, e.g.*, David J. Galalis, *Environmental Justice and Title VI in the Wake of* Alexander v. Sandoval*: Disparate-Impact Regulations Still Valid Under* Chevron, 31 B.C. Envtl. Aff. L. Rev. 61, 78 n.138 (2004) ("The test that *Chevron* elucidated was not new, but firmly rooted in long established precedent." (relying on United States v. Shimer, 367 U.S. 374, 382-83 (1961))).

that the decision was based on "well-settled" principles[8] of judicial review.[9]

Therefore, in Section II of its opinion, the Court discussed and cited as authority many of its earlier cases to articulate the proper role of courts when performing this reviewing function.[10] More than two dozen of its cases, dating from 1827 through 1982, were said to support the following principles:

> Courts are the final authority on issues of statutory construction where the "intent of Congress is clear . . . on the precise question at issue."[11]
>
> "If the statute is silent or ambiguous" on the "specific issue" the court decides whether the agency's construction is "permissible."[12]
>
> To be "permissibl[e]" the agency construction need not be the only one it could have adopted, nor conformable to "the reading the court would have reached if the question initially had arisen in a judicial proceeding."[13]
>
> Agency power to administer a legislative program "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[14]
>
> Delegation of authority to the agency to fill any explicit or implicit gap may be express or implied.[15]
>
> Courts should give "considerable weight" to agency constructions pursuant to the long recognized principle of deference to them.[16]
>
> Where statutory constructions involve reconciling conflicting policies and more than ordinary knowledge is necessary for "a full understanding . . . of the statutory policy," an agency "choice . . . [that] represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute" should not be disturbed "unless . . . the accommodation is not one that Congress would have sanctioned."[17]

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8. *Chevron*, 467 U.S. at 845.
9. *Id.* ("In light of these well-settled principles it is clear the Court of Appeals misconceived the nature of its role in reviewing the regulations at issue.").
10. *Id.* at 842.
11. *Id.* at 842-43.
12. *Id.* at 843.
13. *Id.* at 843 n.11.
14. *Id.* at 843 (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).
15. *Id.* at 843-44.
16. *Id.* at 844.
17. *Id.* at 844-45 (quoting United States v. Shimer, 367 U.S. 374, 382-83 (1961)).

The earlier cases referenced by the Court include *Batterton v. Francis*,[18] *Morton v. Ruiz*,[19] *United States v. Shimer*,[20] *SEC v. Chenery*,[21] and *NLRB v. Hearst*.[22]

This Article represents an attempt to identify in U.S. Supreme Court cases basic and recurring themes of principles of the scope of judicial review of agency legal determinations, and to synthesize them. Accordingly, the Article contains my analysis of the original opinions, which are summarized throughout. Appropriate references to relevant scholarship are included, of course, but the Article is not based primarily on an attempt to discern the basic themes from the scholarship, nor base the synthesis on it. The goal is to produce a synthesis based on findings from case law. Thus, a fresh look at the major Court decisions from 1941 to 2004 is necessary to my purpose.

Therefore, the analysis in this Article will begin with pre-*Chevron* cases, many of which the Court incorporated into its *Chevron* analysis and holding. Of course, *Chevron* and post-*Chevron* cases will also be analyzed through 2004.

In 1950, Professor Nathaniel L. Nathanson of Northwestern University School of Law synthesized Supreme Court precedents and articulated a "principle of limited judicial review"[23] of agency determinations of questions of law and mixed questions of law and fact. Nathanson expressly distinguished this principle from the familiar *Skidmore*[24] doctrine that an agency interpretation of a statute it administers is entitled to the respectful consideration of the reviewing court.[25]

The principle was applicable to both formal agency adjudication and to agency legislative rulemaking. Also, it was said to apply without "an essential difference in the two types of delegation, either from the standpoint of delegation of discretionary authority or the standard of judicial review."[26]

To "avoid both usurpation of administrative authority and abnegation of judicial responsibility,"[27] Professor Nathanson assigned to the reviewing court primary responsibility to decide independently "broader issue[s] of statutory interpretation,"[28] and "basic,"[29]

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18. 432 U.S. 416, 424-26 (1977).
19. 415 U.S. at 231.
20. 367 U.S. at 382, 383.
21. 332 U.S. 194 (1947).
22. 322 U.S. 111 (1944).
23. Nathaniel L. Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 Vand. L. Rev. 470 (1950).
24. Skidmore v. Swift & Co., 323 U.S. 134 (1944).
25. Nathanson, *supra* note 23, at 470.
26. *Id.* at 483.
27. *Id.* at 490.
28. *Id.* at 473.
29. *Id.* at 474.

"fundamental,"[30] or "general"[31] questions concerning the underlying goals and purposes of the statute.

To avoid judicial usurpation of delegated administrative authority, he assigned to the agency primary authority for making interstitial interpretations, applying statutory terms, applying statutory standards to the facts, and making specific applications of broad statutory terms. The reviewing court was to defer to the agency if these types of statutory interpretation were reasonable or had a rational basis.

From the Nathanson concept there emerges the foundation of an allocation model of scope of judicial review with independent judgment of the judiciary limited to questions of the ultimate meaning of the statute. That independent, but limited, role is to satisfy the *Marbury*[32] obligation to "say what the law is."[33] By assigning primary authority to the agency for day-to-day application of statutory terms to facts, establishing interstitial statutory standards, and such matters of administrative routine, the Nathanson model satisfies the separation of powers obligation of the courts to avoid usurpation of delegated administrative authority. Even so, the courts are enabled to monitor agency actions and may provide legitimate review of agency actions through application of the reasonableness or rational basis standard.

In short, pursuant to this model, what I have chosen to label "micromeaning" legislative interpretation questions are left to the agency, if based on delegated legislative or judicial authority, and if reasonable or rational. On the other hand, "macromeaning" legislative interpretation questions are reviewed independently by the court in compliance with the *Marbury* duty to "say what the law is." Further, the agency's "micromeaning" interpretation must be reasonable or rational in light of the "macromeaning" of the statute.

The Nathanson foundation for an allocation model of scope of judicial review, amplified and modified to some extent by my terminology and analysis is, in my judgment, a reasonable, sound model for scope of judicial review of agency legal decisions. I also

30. *Id.* at 474, 476.

31. *Id.* at 476.

32. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

33. *Id.* at 177 ("It is emphatically the province and duty of the judicial department to say what the law is."). Professor Robert A. Anthony described a similar pattern of allocation of primary responsibility in his review of the Court's pre-*Chevron* deference to administrative agency legal determinations. Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 Yale J. on Reg. 1, 8-12 (1990). Professor Clark Byse, quoting Judge Harold Leventhal, pointed out that Congress was willing to delegate its legislative powers broadly to administrative agencies because there is court review to assure that the agency exercises the delegated power within statutory limits. "If our independent judiciary is to perform this role of keeping the agency within its statutory limits, surely the court—not the agency—must decide what the statute means." Clark Byse, *Scope of Judicial Review in Informal Rulemaking*, 33 Admin. L. Rev. 183, 191 (1981).

believe the Supreme Court cases demonstrate the allocation model has, in fact, been applied by the Court quite consistently for many years, and I will attempt to justify that perception.[34] Coupling my analysis of the Court's pre-*Chevron* cases with the fact that the Court itself stated that *Chevron* was based on well-settled principles of scope of judicial review, I have hesitated to accept *Chevron* as a watershed case that established a new mode of judicial review. It is noteworthy that at least thirty-seven law review and journal articles have cited the Nathanson piece.[35] However, only two pointed out how "strikingly similar," as a general theory of statutory interpretation, the Nathanson model is to the language of *Chevron*, thirty-four years later.[36]

I. PRE-*CHEVRON* SCOPE OF REVIEW

I begin by revisiting some of the older Supreme Court cases to examine their premises and evaluate conventional perceptions about them. Applying the micromeaning-macromeaning allocation model, I attempt to demonstrate that consistent scope of review themes run through them. Most of the earlier cases through 1950 are, of course, discussed in the Nathanson article.[37]

A. *Agency Determinations Based on Delegated Judicial and Legislative Authority*

Gray v. Powell[38] and *NLRB v. Hearst*[39] are fundamental to the micromeaning-macromeaning allocation model of primacy on legal

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34. *But see* Jonathon Bloomberg, Note, *The* Chevron *Legacy:* Young v. Community Nutrition Institute *Compounds the Confusion*, 73 Cornell L. Rev. 113, 115 n.13, 116 (1987). Prior to *Chevron*, court review of agency determinations of law fell into one of two fundamental irreconcilable lines of cases: a conventional de novo review approach or a more deferential approach. *Id.* at 115 n.13. Even so, "a framework exists which reconciles" the two lines. *Id.* at 116. "The common thread . . . is the judicial search for congressionally imposed bounds." *Id.* Courts "examin[e] the agency's enabling act . . . [to] decide what authority Congress delegated to the agency to determine whether the agency exceeded [that authority]." *Id.* at 117.

35. *See, e.g.*, Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 Geo. L.J. 1, 63 n.74 (1985).

36. William S. Jordan, III, *Deference Revisited: Politics as a Determinant of Deference Doctrine and the End of the Apparent* Chevron *Consensus*, 68 Neb. L. Rev. 454, 469-70 n.96 (1989); Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 Chi.-Kent L. Rev. 1253, 1267-68 n.62 (1997). Professor Levin also identified other commentators' models of judicial review of a similar orientation. *Id.* (citing Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron*'s Step Two*, 2 Admin. L.J. 255, 262-65 (1988); Henry P. Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1 (1983)).

37. *See* Nathanson, *supra* note 23. A notable exception is *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947). Why Professor Nathanson chose to exclude it is puzzling.

38. 314 U.S. 402 (1941).

39. 322 U.S. 111 (1944).

questions arising out of formal agency adjudication. In both cases the Court decided independently a question of the underlying purposes and goals (macromeaning) of the agency-administered legislation. In both cases the Court deferred to the judgment of the agency in applying a statutory term to undisputed facts (micromeaning).

1. *Gray v. Powell*

Gray involved judicial review of an administrative order denying an exception to a railroad which claimed to be a "producer" of the coal it consumed under the Bituminous Coal Act of 1937.[40] The Commission created to administer the Act was specifically authorized to grant or deny, after opportunity for a hearing, an exemption from the Act's price regulation plan for "coal consumed by the producer or coal transported by the producer to himself for consumption by him."[41]

The railroad company had entered into an arrangement whereby it leased certain mines from their owners. A contractor selected by the railroad simultaneously leased mining equipment on the premises from the owner.[42] The railroad and the contractor also simultaneously entered into a contract for the mining of the coal by the contractor and its delivery to the railroad.[43] The contractor was termed an independent contractor in the document.

The micromeaning legal question was whether the arrangement made the railroad the "producer" of the coal within the meaning of the statutory exemption. The Commission concluded that the railroad was not the "producer" and denied the exemption.[44] The Supreme Court affirmed the Commission. The Court said a determination of this sort "belongs to the usual administrative routine,"[45] Congress having "found it more efficient to delegate that function"[46] to the agency. It said the function of judicial review is fully performed when the court determines there has been a fair hearing and "an application of the statute in a just and reasoned manner."[47] The determination having been left to the administrative body, the "delegation will be respected and the administrative conclusion left untouched."[48] Further, "[i]t is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies."[49]

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40. *Gray*, 314 U.S. at 403.
41. Bituminous Coal Act of 1937, ch. 127, § 4(e)(1), 50 Stat. 72, 90 (repealed 1966).
42. *Gray*, 314 U.S. at 407.
43. *Id.* at 408.
44. *Id.* at 411.
45. *Id.*
46. *Id.* at 412.
47. *Id.* at 411.
48. *Id.* at 412.
49. *Id.*

The larger (macromeaning) question presented was whether the coal was exempt from the Code altogether because there was no sale or other transfer of title to the coal by the producer.[50] The railroad contended that since no title ever passed, from production to consumption, it was immaterial whether its supplier of coal was determined to be the producer. The Court rejected the railroad's contentions. To require a transfer of title, in the technical sense, would have hampered the fundamental, underlying purpose of Congress, which was to stabilize the industry through price regulation. Further, the Act applied to "other disposal" as well as sale.[51] On this question of the fundamental meaning of the Act, the Court decided it independently, leaving the exemption clause issues with the Commission, subject only to the requirement that it proceed along rational lines, and thereby introducing the allocation model of judicial review.[52]

2. *NLRB v. Hearst Publications, Inc.*

The *Hearst*[53] case involved the refusal of Los Angeles newspaper publishers to bargain collectively with a union representing newsboys who distributed their papers in the city.[54] The publishers contended that they were not required to bargain because the employees were not their "employees" within the meaning of that term in the National Labor Relations Act.[55] The Act provided that "[t]he term 'employee' shall include any employee."[56]

After NLRB hearings, the Board found that the newsboys were an integral part of the newspapers' distribution system and circulation organization.[57] Based on those findings, it concluded that the newsboys were employees within the Act.[58] The Board "designated

50. *Id.* at 414; *see also* Nathanson, *supra* note 23, at 472-75, 473 (noting that the real issue was the fundamental question of whether the regulatory provisions of the statute "could be applied to deliveries of coal which involved no change in its ownership").

51. *Gray*, 314 U.S. at 416; *see also* Bituminous Coal Act of 1937, ch. 127, § 4(e)(1), 50 Stat. 72, 90 (repealed 1966).

52. *See* Louis L. Jaffe, *Judicial Review: Question of Law*, 69 Harv. L. Rev. 239, 263 (1955) ("[P]roperly understood the doctrine in *Gray v. Powell* is as traditional as it is sound."); *see also* Eric Stein, Comment, *Status of Captive Mines Under the National Bituminous Coal Act*, 40 Mich. L. Rev. 1093, 1093-96 & n.9 (1942) (noting that the Commission's goal was to restrict to a minimum the "captive mine" exemption from the Act because it had permitted approximately ten percent of all coal produced to escape regulation, and that twenty-five percent of the coal required by industrial consumers came from company-controlled mines).

53. NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111 (1944).

54. *Id.* at 113.

55. 29 U.S.C. § 152(3) (2000).

56. *Id.*

57. *Hearst*, 322 U.S. at 114.

58. *Id.*

appropriate units and ordered elections."[59] After the union was certified, the newspapers refused to bargain with it.[60] Thereupon Board proceedings were instituted, a hearing was held, and the Board found the newspapers had violated the Act.[61] It then ordered them to "cease and desist from such violations and to bargain collectively with the union."[62]

The newspapers petitioned the circuit court of appeals for review and the Board petitioned for enforcement.[63] Rejecting the Board's analysis, the appellate court independently examined the question of whether the newsboys were employees within the Act, decided that the NLRA imported "common-law standards to determine that question, and held the newsboys [were] not employees."[64]

The Supreme Court granted certiorari and reversed the appellate court's decision, holding that the Board's findings were not erroneous, the newsboys were employees within the meaning of the Act, and the newspapers were required to collectively bargain with them.[65]

On the question of applying the statutory term "employee" to the facts, the Court found that the term, like other provisions, must be understood with reference to the purpose of the Act and the facts involved in the economic relationship.[66] Determining who are "employees" is a task assigned primarily to the agency created by Congress to administer the Act. "Determination of 'where all the conditions of the relation require protection' involves inquiries for the Board charged with this duty. . . . Resolving that question, like determining whether unfair labor practices have been committed, 'belongs to the usual administrative routine' of the Board."[67]

The Court said that:

> Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited.[68]

The Court then likened the Board's determination to the "[C]ommissioner's determination under the Longshoremen's & Harbor Workers' Act, that a man is not a 'member of a crew' or that

59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 115.
65. *Id.* at 135.
66. *Id.* at 124-25.
67. *Id.* at 130 (citing Gray v. Powell, 314 U.S. 402, 411 (1941)).
68. *Id.* at 130-31 (citations omitted).

he was injured 'in the course of employment' and the Federal Communications Commission's determination that one company is under the 'control' of another."[69] Accordingly, "the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law."[70]

The question fundamental to the underlying purposes of the Act (macromeaning) arose in the Court's review of the independent decision of the appellate court that the "statute imports common-law standards"[71] to determine the question of who is an "employee." The Court pointed out that there is no simple, uniform, and easily applicable test which the courts have used to determine whether persons doing work for others are either employees or independent contractors.[72] It also noted that common-law results may be contrary, rather than consistent, "depending upon the state or jurisdiction where the determination is made."[73]

Then it concluded: "In short, the assumed simplicity and uniformity, resulting from the application of 'common-law standards' does not exist."[74] It said further that the statute indicates clearly "the intent"[75] that common-law standards should not apply.

> Both the terms and the purposes of the statute, as well as the legislative history, show that... [t]he Wagner Act is federal legislation, administered by a national agency, intended to solve a national problem on a national scale ....
>
> ... Congress had in mind a wider field than the narrow technical legal relation of master and servant, as the common law had worked this out in all its variations, and at the same time a narrower one than the entire area of rendering service to others. The question comes down therefore to how much was included of the intermediate region between what is clearly and unequivocally employment, by any appropriate test, and what is as clearly entrepreneurial enterprise and not employment.[76]

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69. *Id.* at 131 (internal citations omitted).

70. *Id.* Despite the Court's holding, in 1948 to 1949, appellate courts reviewing NLRB interpretations of § 9(a) of the National Labor Relations Act did not apply the *Hearst* allocation model. Instead, they reviewed an NLRB interpretation as a "clear-cut" question of law for the courts to decide. Archibald Cox & John T. Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 Harv. L. Rev. 389, 430 n.129 (1950).

71. *Hearst*, 322 U.S. at 115.

72. *Id.* at 120-21.

73. *Id.* at 122.

74. *Id.*

75. *Id.*

76. *Id.* at 123-25. The macromeaning of legislation may be determined, of course, by either the terms of the text itself, the underlying purposes approach, or a combination of both, as the Court stated.

The consequence of importing common law standards into administration of the statute "would be ultimately to defeat, in part at least, the achievement of the statute's objectives."[77] However, "Congress no more intended to import this mass of technicality as a controlling 'standard' for uniform national application than to refer decision of the question outright to the local law."[78]

When the particular relation and its economic facts make it more nearly one of employment than of independent business enterprise "with respect to the ends sought to be accomplished by the legislation,"[79] these characteristics may bring the relation within the statute's protection. In doubtful situations, applicability is to be determined "by underlying economic facts,"[80] and "with reference to the purpose of the Act."[81]

In *Hearst* it was of no significance that the NLRB could only issue a cease and desist order and later petition for court enforcement. NLRB enforcement power was not essential to the result.[82]

Gray and *Hearst* established the fundamentals of the allocation model of scope of review:[83]

> (1) When an agency uses its delegated authority (duty) to make a "determination" of the meaning of a statutory term as applied in a formal adjudication in the "usual administrative routine" (micromeaning), and
>
> (2) When it does so reasonably or rationally on the record and "with reference to the purpose of the Act" (macromeaning), or "with respect to the ends sought to be accomplished by the legislation" (macromeaning), or with "a reasonable basis in law" (macromeaning),
>
> (3) A reviewing court will defer to the agency's determination.

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77. *Id.* at 125-26.

78. *Id.*; *see also* Jaffe, *supra* note 52, at 253-54; Nathanson, *supra* note 23, at 475 (noting that the Court decided independently the fundamental question of whether the term "employee" was used in contradistinction to the term "independent contractor," and that the Court concluded it was not so used and left application of "employee" in specific cases to the Board, so long as its determination was supported by the record and had "a reasonable basis in law").

79. *Hearst*, 322 U.S. at 128.

80. *Id.* at 129.

81. *Id.*

82. *But see* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 Geo. L.J. 833, 890-91 (2001).

83. *See, e.g.*, Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. Rev. 993, 1029 (1986) (asserting that for administrative law purposes, the Supreme Court settled the standard of review question in the early twentieth century in cases like *Gray* and *Hearst* by reviewing ultimate factfinding for reasonableness).

3. *Addison v. Holly Hill Fruit Products, Inc.*

That the allocation model also applied to legislative rulemaking is illustrated by *Addison v. Holly Hill Fruit Products Inc.*,[84] decided in the same year as *Hearst*. The case concerned the validity of a regulation promulgated by the Administrator of the Fair Labor Standards Act[85] to make effective an exemption provision in the Act with respect to employees "within the area of production (as defined by the Administrator), engaged in . . . canning of agricultural . . . commodities for market."[86] Eight members of the Court agreed that by the parenthetical phrase Congress had delegated authority to the Administrator to exercise his discretion to determine the exact meaning to be attributed to the term "area of production" (micromeaning).[87] They also agreed he could exercise that discretion by promulgating legislative regulations.[88] Defining the term was essential to its application by the courts in individual cases. Professor Nathanson concluded that these 1944 regulations would have been classified as legislative rather than interpretative for purposes of the Administrative Procedure Act ("APA")[89] enacted in 1946.[90] His perception was that they were required for application of the exemption provision and that they "involve[d] that element of discretion which was apparently the main reason for the hearing procedure embodied in Section 4 [now § 553] of the Administrative Procedure Act."[91]

Even so, the Court, by a closely divided vote, held the regulation invalid.[92] The reason was that the Court determined it included an unacceptable factor that would apply when ruling on individual applications for exemption.[93] That factor was the number of employees engaged in a particular plant.[94] The Court said that factor was not within the administrative authority, for the structure and detail of the statute indicated it would not bear that meaning.[95] Instead, the statute required "drawing the geographic lines"[96]

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84. 322 U.S. 607 (1944).

85. Fair Labor Standards Act of 1938, ch. 676, § 13(a)(10), 50 Stat. 1060 (repealed 1966).

86. *Addison*, 322 U.S. at 608.

87. *Id.* at 614.

88. *Id.*

89. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C. (2000)).

90. Nathanson, *supra* note 23, at 484 n.60.

91. *Id.*

92. *Addison*, 322 U.S. at 618.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 616. Text, along with the structure and detail of the legislation, was considered by the Court to ascertain the Act's fundamental meaning that limited the administrator's discretion. *See* Nathanson, *supra* note 23, at 483 n.58. Although

(macromeaning). Congress had been very specific elsewhere in the Act where other types of factors, especially numbers of employees, had been stated to be acceptable. So long as he stayed within the statute "Congress left the boundary-making to... the Administrator."[97] In defining the area, the Administrator could weigh and synthesize all relevant factors. If he did so, "judgment belongs to him and not to the courts."[98] Not having stayed within the macromeaning of the statute, the Administrator's micromeaning regulation was, therefore, unreasonable and invalid.

B. *Agency Determinations Based on Executive Authority*

1. *Skidmore v. Swift & Co.*

Skidmore[99] is the common contemporary reference for the quite different model of scope of review noted by Professor Nathanson. Actually, there were many other cases that illustrated or recognized the principle.[100] That is, an interpretation of a statute by the official or agency given primary responsibility for its administration based on its executive authority is entitled to respectful consideration by the reviewing court. Pursuant to this approach, the ultimate test of the validity of the agency executive authority interpretation is whether the reviewing court is convinced (persuaded) it is correct.[101] In short, the reviewing court acts in its ultimate *Marbury* role to "say what the law is." In doing so, it is deciding the question independently, without any legal obligation to the agency, for the agency has not acted on the basis of delegated legislative or judicial authority. The reviewing court defers or yields to the agency only to the extent it is persuaded that the agency's executive, authority-based interpretation should be given total or partial recognition in the outcome. Here there is no formal allocation of lawmaking authority as there is in the *Gray-Hearst* allocation model, for the agency has not taken action that would speak with the force of law.

Skidmore concerned a lawsuit filed in federal district court under the Fair Labor Standards Act ("FLSA").[102] Seven of defendant's

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Justice Frankfurter (for the Court) and Justice Rutledge (dissenting) agree there is an area of discretion and disagree as to what the bounds of that discretion are, "they have no difficulty in isolating the particular issue of statutory interpretation which the Court is called upon to determine, by exercise of its own independent judgment." *Id.*

97. *Addison*, 322 U.S. at 614.

98. *Id.*

99. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

100. *See, e.g.*, NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 131 (1944); McLaren v. Fleischer, 256 U.S. 477, 480-81 (1921); Webster v. Luther, 163 U.S. 331, 342 (1896); Brown v. United States, 113 U.S. 568, 571 (1885); United States v. Moore, 95 U.S. 760, 763 (1878).

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

102. *Id.* at 135.

daytime employees sought to recover, under an oral agreement of employment, overtime pay for additional time they spent on the defendant's premises or within hailing distance while plaintiffs were on-call for the defendant.[103] The plaintiffs were not required to perform any specific tasks during these periods of time, except to answer fire alarms.[104]

The trial court found the evidentiary facts as stipulated by the parties, but it made no findings of fact as to whether, under the arrangement and the circumstances of the case, the fire-hall duty or any part thereof constituted working time.[105] The court "said, however, as a 'conclusion of law' that 'the time plaintiffs spent in the fire-hall subject to call . . . does not constitute hours worked, for which overtime compensation is due them under the Fair Labor Standards Act, as interpreted by the Administrator and the Courts.'"[106] The court of appeals affirmed.[107]

A unanimous Supreme Court reversed and remanded the case to the district court for further proceedings.[108] Justice Jackson, writing for the Court, began by stating that no principle of law in either the FLSA or a decision of the Court precluded "waiting time from also being working time."[109] Whether in a concrete case waiting time is within the Act is a question of fact to be decided by the trial court:[110] "The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was."[111]

Getting to implementation of the FLSA, the Court pointed out that "Congress did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act. Instead, it put this responsibility on the courts."[112] Clearly, therefore, the office of Administrator, created to implement the Act, had no delegated adjudicatory authority "to determine" as did the agencies in *Gray* and *Hearst*. Instead, the Administrator was empowered to inform himself of conditions in employment and industries. It put on him the duty of bringing injunction actions in the courts to restrain violations. Neither did he have delegated power to promulgate general legislative rules.[113]

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103. *Id.*
104. *Id.*
105. *Id.* at 136.
106. *Id.*
107. *Id.*
108. *Id.* at 140.
109. *Id.* at 136.
110. *Id.* at 136-37.
111. *Id.* at 137.
112. *Id.*
113. *See* Samuel Herman, *The Administration and Enforcement of the Fair Labor Standards Act*, 6 Law & Contemp. Probs. 368, 378-81 (1939).

Delegated legislative power may be assumed, erroneously, for in the Court's cases, including the 2000 decision in *Christensen v. Harris County*,[114] there are Code of Federal Regulations ("CFR") references to FLSA regulations.[115] Also, Justice Jackson did not address the point in the Court's opinion. *General Electric Co. v. Gilbert* illustrates that "guidelines" lacking the force of law may, nevertheless, appear in the CFR.[116]

Apparently, there was, at least initially, very limited and quite specific rulemaking authority delegated to the Administrator in some portions of the FLSA. However, there was delegated no broad rulemaking power that would confer on him discretion to determine general applications of the Act.[117] Thus, the Administrator had only the delegated executive authority described above.

The Court continued: "He has set forth his views of the application of the Act under different circumstances in an interpretative bulletin and in informal rulings. They provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it."[118]

Next, Justice Jackson pointed out there was "no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions."[119] The Administrator believed "the problems presented by inactive duty require[d] a flexible solution."[120] His Bulletin attempted to suggest standards and examples for guidance in particular situations.[121] However, the facts of *Skidmore* were not within any of the specific examples. In his amicus curiae brief the Administrator concluded that sleeping and eating time should be excluded from the workweek.[122] Justice Jackson made clear that the views of the Administrator were not conclusive, even in the cases with which they directly dealt, and that "[t]hey do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes,"[123] although they do establish the executive interpretations of the Act that will guide the Administrator's applications for enforcement by injunction.

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114. 529 U.S. 576 (2000).
115. *Id.*
116. General Electric Co. v. Gilbert, 429 U.S. 125, 143, 156, 158 (1976).
117. *See* Herman, *supra* note 113, at 378-81. In section 29(b) of the Fair Labor Standards Amendments of 1974, Congress delegated authority to the Secretary of Labor to prescribe necessary rules, regulations and orders "with regard to the amendments made by this Act." Pub. L. No. 93-259, § 29(b), 88 Stat. 55, 76.
118. Skidmore v. Swift & Co., 323 U.S. 134, 138 (1944).
119. *Id.* at 139.
120. *Id.* at 138.
121. *Id.*
122. *Id.* at 139.
123. *Id.*

Nevertheless, the Administrator's policies and standards were entitled to respect in the same sense that the 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."[124] Justice Jackson concluded this part of the Court's opinion with the statement that the Administrator's "rulings, interpretations and opinions do not control the courts by reason of their authority."[125] They are a body with experienced and informed judgment to which courts and litigants may properly resort for guidance.[126] Then follows the famous statement that the weight given the Administrator's judgment by a court "in a particular case"[127] will depend on its "thoroughness," "reasoning," "consistency," "and all those factors which give it power to persuade, if lacking power to control."[128]

This enumeration does not appear to constitute a precise calculus of factors for guidance of the courts. I perceive it to be a statement of illustration of factors that may be contracted or expanded by the specific facts and by other factors that might be relevant "in a particular case."[129]

2. *General Electric Co. v. Gilbert*

General Electric Co. v. Gilbert[130] follows *Skidmore* in a similar context. The Court held that in enacting Title VII of the Civil Rights Act of 1964, Congress "did not confer upon the [Equal Employment Opportunity] Commission authority to promulgate rules or regulations pursuant to that Title."[131] Nevertheless, as in *Skidmore*, Equal Employment Opportunity Commission ("EEOC") guidelines were "entitled to consideration in determining legislative intent .... But it does mean that courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law."[132] The Court stated that the

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124. *Id.* at 140.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*; *see also* Nathanson, *supra* note 23, at 470. The familiar *Skidmore* doctrine is distinct from the limited judicial review of agency legal determinations illustrated by the leading case *Gray v. Powell* and expressed as the allocation model of judicial review.
129. *Skidmore*, 323 U.S. at 140.
130. 429 U.S. 125 (1976).
131. *Id.* at 141.
132. *Id.*; *see also* Claudia G. Allen & Jean C. Powers, Note, *Sex Discrimination—Court Narrows* Gilbert*—Some Pregnancy Discrimination Is Sex Related*, 27 Buff. L. Rev. 295, 314 (1978). For *Skidmore* deference review of agency interpretations lacking the force of law, and not set aside in toto, such interpretations may be apportioned and different weights assigned the portions. In *Nashville Gas Co. v. Satty*, the Court said: "In *Gilbert*, we rejected another portion of this same guideline.... We did not, however, set completely at naught the weight to be given

EEOC guidelines were interpretative rulings as were those in *Skidmore*. After quoting the *Skidmore* factors paragraph in full, the Court said that "[t]he EEOC guidelines do not fare well under these standards."[133] However, it introduced another standard or factor—"contemporaneous interpretation"[134]—and applied it along with the consistency standard in the *Skidmore* list.

There also were other indicia of the meaning of Title VII with which the EEOC guidelines "sharply"[135] conflicted. They conflicted with the legislative history and with an interpretative regulation promulgated by the Wage and Hour Administrator under the Equal Pay Act. In sum, the Court concluded the EEOC guideline "stands virtually alone."[136]

Skidmore and *General Electric* confirm the earlier principle that courts will give respectful consideration, and, perhaps, deference to the statutory interpretations of an administrative agent, ultimately tested by the court's independent judgment as to whether the administrative interpretation is correct. The reviewing court acts in its *Marbury* role because the intervening decision is based solely on the agent's executive power. In this context, there is no separation of powers issue with which the court must struggle in deciding whether it should defer to the agent's interpretation. The agent has only its executive authority as a platform on which to base an attempt to persuade the court.

Therefore, *Gray*, *Hearst* and *Addison* deference is clearly distinguishable from *Skidmore* and *General Electric* deference, for the basic decision models are categorically separate and distinct. Both models exist independently in Supreme Court precedent.[137] They do not, therefore, represent merely different points on the same judicial review spectrum, i.e., weak and strong deference. Finally, the micromeaning-macromeaning allocation component of *Gray-Hearst* is not employed in the *Skidmore* decision model, except to the extent that the Court chooses to include the distinction in the persuasion analysis. In my judgment, both of these decision models are essential components of a reasonable, sound, comprehensive model of scope of judicial review for agency statutory interpretations.

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the 1972 guideline.... This portion of the 1972 Guideline is therefore entitled to more weight than was the one considered in *Gilbert*." *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 n.4 (1977); *Gilbert*, 429 U.S. at 142.

133. *Gilbert*, 429 U.S. at 142.

134. *Id.*

135. *Id.* at 143.

136. *Id.* at 145.

137. *See* Nathanson, *supra* note 23, at 470-72.

C. *U.S. Supreme Court Decisions Said to Be Inconsistent with the Allocation Model*

1. *Packard Motor Car Co. v. NLRB*

The conventional wisdom holds that the *Packard* case[138] is inconsistent with *Gray-Hearst*.[139] This perceived inconsistency is asserted to be evidence of the pre-*Chevron* confusion in the law of scope of review. However, analyzed differently, *Packard* may not necessarily be inconsistent after all. But first, some background information that relates to *Packard*.

Justice Jackson, who wrote for the majority in *Packard*, supported the principles of *Gray-Hearst*. He joined the Court's eight-person majority decision in *Hearst*. In a 1942 case, *United States v. Carolina Freight Carriers Corp.*,[140] he and Justice Frankfurter dissented on the ground that the Court's decision was inconsistent with the deference principle of *Gray*, having given it only lip service.[141] Further, Justice Jackson is known to have preferred the plain meaning method of statutory interpretation. All the justices in the *Packard* majority had joined the majority decision in *Hearst*. Two of the four *Packard* dissenters had been in the *Hearst* majority. Hence, the *Packard* court was composed of seven justices who participated in *Hearst*, and all of them had been in the *Hearst* majority.

Packard concerned agency interpretation of the National Labor Relations Act, as did *Hearst*. In fact, it involved the same statutory term—"employees"—that was the focus of *Hearst*.[142] In *Hearst*, the National Labor Relations Board decided that the term applied to the publishers' newsboys. The Supreme Court affirmed, deferring to the Board's judgment. In *Packard*, the Board determined that "employee" applied to foremen. The Supreme Court decided, independently, that the Board was correct and ordered enforcement of its decision. The Court did not defer to, nor did it mention, the deference principle of *Hearst*. In fact, the majority did not cite *Hearst*. The Douglas dissent cited *Hearst* solely for the proposition that "employee" "must be considered in the context of the Act."[143] Thus the dissenters said the majority's decision model was inconsistent with *Hearst*. However, there is more to *Packard* than review of a Board decision simply defining the term "employee." *Packard* required defining the term in the larger context of a potential conflict with the

138. Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947).

139. *See, e.g.*, John G. Osborn, Comment, *Legal Philosophy and Judicial Review of Agency Statutory Interpretation*, 36 Harv. J. on Legis. 115, 142 (1999) (discussing "the odd dynamic between *Hearst* and *Packard*").

140. 315 U.S. 475 (1942).

141. *Id.* at 490 (Jackson, J., dissenting).

142. *Packard*, 330 U.S. at 486.

143. *Id.* at 495 (Douglas, J., dissenting).

statutory term "employer." The legislative language stated that "[t]he term 'employee' shall include any employee,"[144] and "[t]he term 'employer' includes any person acting as an agent of an employer, directly or indirectly."[145]

The question before the Court was whether the two terms "classify the operating group of industry into two classes; what is included in one group is excluded from the other."[146] This was the dissenting viewpoint. Or, whether because foremen are also employees "[t]he context of the Act . . . leaves no room for a construction of this section [employer] to deny the organizational privilege to employees because they act in the interest of an employer."[147] This was the majority viewpoint. Manifestly, to consider only the single term "employee" in making this decision would be to attempt to answer half a question. Neither the majority nor the dissenters did so.

The Board had dutifully applied the term "employee" to the facts developed in the proceeding and had concluded that foremen were also employees and could organize.[148] Viewing the case as review of an initial decision by an agency applying a statutory term would seem to bring it within *Hearst*, as presenting a micromeaning question to which, if reasonable, the Court should defer. But, instead, the Court majority viewed the case as presenting a macromeaning question that required reconciliation of key statutory terms concerning the fundamental, underlying goals and purposes of the Act.[149] The question, therefore, is analogous to the Court's independent decision in *Hearst* that common law standards for determining employment were not imported into the National Labor Relations Act. Since deference is not relevant to deciding this macromeaning question, there is no more reason to cite *Hearst* than there is to cite *Marbury*. The tension in *Packard* is among members of the Court at this bedrock level of the meaning of the statute. The majority insisted that the "plain terms" of the Act leave it to Congress, and not the Court, "to create exceptions or qualifications at odds with its plain terms."[150] Also, "[t]here is, however, no ambiguity in this Act to be clarified by resort to legislative history"[151] and, policy matters "concern the wisdom of the legislation; they cannot alter the meaning of otherwise plain provisions."[152]

Even so, the majority did recognize one micromeaning issue of application, and it deferred to the Board's interpretation. The

144. 29 U.S.C. § 152(2)-(3) (2000).
145. *Id.* § 152(2).
146. *Packard*, 330 U.S. at 495.
147. *Id.* at 488.
148. *Id.* at 491.
149. Jaffe, *supra* note 52, at 254-57.
150. *Packard*, 330 U.S. at 490.
151. *Id.* at 492.
152. *Id.* at 493.

question was whether the Act prohibited foremen as a class from constituting an appropriate bargaining unit. On this question "the Act confers upon the Board a broad discretion to determine appropriate units."[153] The majority noted the following: "It involves of necessity a large measure of informed discretion, and a decision of the Board, if not final, is rarely to be disturbed."[154] It held that the Board's bargaining unit decision was valid because it was supported by the evidence and was reasonable in law.

While still speaking of the bargaining unit issue, it said:

> Whatever special questions there are in determining the appropriate bargaining unit for foremen are for the Board, and the history of the issue in the Board shows the difficulty of the problem committed to its discretion. We are not at liberty to be governed by those policy considerations in deciding the naked question of law whether the Board is now, in this case, acting within the terms of the statute.[155]

Consideration of the context in which this "naked question of law" statement was made indicates the phrase refers to the fundamental, underlying macromeaning of the statute.

The dissent refers to "the basic policy questions which underlie the present decision"[156] and states that "tremendously important policy questions are involved in the present decision."[157] Also, it questions whether Congress "had in mind such a basic change in industrial philosophy."[158] Turning to legislative history, the dissent said, "we find no trace of Congressional concern with the problems of supervisory personnel."[159] Turning to related legislation, "we find that when Congress desired to include managerial officials or supervisory personnel in the category of employees, it did so expressly."[160] Concerning policy issues, Justice Douglas said, "I am sure that those problems were not in the consciousness of Congress .... The

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153. *Id.* at 491.

154. *Id.*

155. *Id.* at 492-93; *see* Jaffe, *supra* note 52, at 273.

> The importance of the question to be resolved is sometimes thought of as an independent touchstone of reviewability .... [I]f the question is "important" enough the court may undertake to settle it even though the court holds no clear view of the question .... Importance might probably be defined ... in terms of the purposes of the statute. *Packard*, for example involved a question which reached to the roots of the statutory philosophy of collective bargaining. Understood in this sense "importance" is a crucial factor .... In *Packard* the matter was indeed of great importance ... in the sense suggested above of its relation to the basic issues and purposes of the act.

Id.

156. *Packard*, 330 U.S. at 494 (Douglas, J., dissenting).

157. *Id.* at 495.

158. *Id.*

159. *Id.* at 498.

160. *Id.* at 499.

question is so important that I cannot believe Congress legislated unwittingly on it."[161]

There does not appear in the dissent a single sentence discussing the delegated power of the agency or the reasonableness of its decision at a micromeaning level. Everything considered and every question addressed is at the fundamental, underlying purposes, macromeaning level of the National Labor Relations Act.[162]

Therefore, I conclude that *Packard* is consistent with *Gray-Hearst*, for the Court perceived the issue before it to be at the macromeaning level, the *Marbury* level. Its independent judgment reconciling two key terms in major national legislation was quite appropriate and was consistent with Court precedents.

2. *Social Security Board v. Nierotko*

About one year before *Packard*, the Court decided *Social Security Board v. Nierotko*.[163] Nierotko "was found by the National Labor Relations Board to have been wrongfully discharged for union activity by his employer, the Ford Motor Company."[164] He was reinstated in his employment by the Board with directions for "back pay" for the period he was discharged.[165] The "back pay" was paid by the employer and Nierotko requested the Social Security Board to credit his old age and survivor's insurance account with the sum of the "back pay."[166] The Board refused to credit Nierotko's "back pay" as wages.[167] On judicial review, the district court upheld the Board.[168] The court of appeals reversed and the Supreme Court granted certiorari.[169]

All eight participating justices of the Supreme Court agreed that the question before it addressed the fundamental, underlying macromeaning of the Social Security Act. The Act defined "wages" for old age benefits as "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash."[170] It defined the term "employment" as "any service, of whatever nature, performed within the United States by an employee for his employer."[171]

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161. *Id.* at 500.
162. *See* Jaffe, *supra* note 52, at 263-64.
163. 327 U.S. 358 (1946).
164. *Id.* at 359.
165. *Id.*
166. *Id.* at 360.
167. *Id.*
168. *Id.*
169. *Id.*
170. Social Security Act of 1935, Pub. L. No. 74-271, § 210(a), 49 Stat. 620, 625 (codified as amended at 42 U.S.C. § 409 (2000)).
171. *Id.* § 210(b).

First, the Court explained that federal old age benefits are to provide funds for the "decent support of elderly workmen who have ceased to labor."[172] Eligibility for benefits depends upon the total wages which the employee has received and the periods in which they were paid.[173] The Court continued that while neither the legislative history of the Act and its amendments nor the language of the amendments themselves deals with whether such "back pay" is to be treated as wages under the Act:

> [W]e think it plain that an individual who is an employee under the Labor Act and who receives "back pay" for a period of time during which he was wrongfully separated from his job, is entitled to have that award of back pay treated as wages under the Social Security Act . . . as "remuneration for employment and employment as any service . . . performed . . . by an employee for his employer . . . ."[174]

Thus, "'back pay' is based upon the loss of wages which the employee has suffered from the employer's wrong."[175] It is not a fine or penalty imposed on the employer by the Board.

It was urged that Nierotko did not perform any service for the back pay, but the Court responded as follows:

> We are unable, however, to follow the Social Security Board in such a limited circumscription of the word "service." The very words "any service . . . performed . . . for his employer," with the purpose of the Social Security Act in mind, import breadth of coverage. . . . We think that "service" as used by Congress in this definitive phrase means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer.[176]

Referring to *Gray-Hearst* deference, the Court said administrative determinations must have a basis in law "and must be within the granted authority."[177] Congress could have decided this question or it might have delegated to the Social Security Board authority to determine what compensation paid by employers should be treated as wages. The Court noted, however, that "[e]xcept as such interpretative power may be included in the agencies' administrative functions, Congress did neither. An agency may not finally decide the limits of its statutory power. That is a judicial function."[178] The Court recognized that there may be borderline payments to employees on which courts would follow administrative determinations. It concluded: "[T]he Board's interpretation of this statute to exclude

172. *Nierotko*, 327 U.S. at 364.
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* at 365-66.
177. *Id.* at 369.
178. *Id.*

back pay goes beyond the boundaries of administrative routine and the statutory limits. This is a ruling which excludes . . . payments which we think were included by Congress. It is beyond the permissible limits of administrative interpretation."[179]

Although mentioned by the Court, *Gray-Hearst* deference was irrelevant. The Court considered the question to be at the fundamental, underlying purposes level of the meaning of the Social Security Act. As such, it was a question for the Court to decide independently. Whether the agency made a "reasonable" determination of the question was not important, for the outcome was controlled by the macromeaning, as determined independently by the Court, in its *Marbury* role.

3. *NLRB v. Highland Park Manufacturing Co.*

NLRB v. Highland Park Manufacturing Co.[180] is another case that is said to illustrate the Court's refusal to defer to an agency's legislative interpretation.[181] The question was whether § 9(h) of the National Labor Relations Act applied to the A.F. of L. and C.I.O.[182] The provision barred the NLRB from considering petitions or issuing complaints at the request of a labor organization unless certain conditions were met. Each of its officers and the officers of any national or international labor organization with which it was affiliated were required to have filed with the Board an affidavit that the officer was not a member of the Communist Party.[183]

The officers of the Textile Workers Union had filed the requisite affidavits, but the officers of the C.I.O., with which the Union was affiliated, had not done so.[184] The Board ruled that it could, nevertheless, entertain the Textile Workers Union petition filed by the Union and order Highland Manufacturing Company to bargain with it.[185] The courts of appeals had split on the question in other cases.[186] The Supreme Court ruled that the Board could not act on the charge filed by this Union.[187]

Justice Jackson wrote for the Court. Again using his preferred plain meaning approach, he began:

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179. *Id.* at 369-70.
180. 341 U.S. 322 (1951).
181. *See* Stephen G. Breyer & Richard B. Stewart, Administrative Law and Regulatory Policy 273 n.19 (2d ed. 1985); Bernard Schwartz, Administrative Law 659 (2d ed. 1984).
182. *Highland Park*, 341 U.S. at 323-24.
183. *Id.* at 323.
184. *Id.*
185. *Id.* at 324.
186. *See id.*
187. *Id.*

> The definition of "labor union" in the statute concededly includes the C.I.O. It is further conceded that the phrase "labor organization national or international *in scope*" as found in § 10(c) refers to the A.F. of L. and the C.I.O. (Italics added.) But it is claimed that when the adjectives "national" or "international" are alone added, they exclude the C.I.O., because it is regarded in labor circles as a federation rather than a national or international union. We think, however, that the use of geographic terms to reach nation-wide or more than nation-wide unions does not exclude those of some particular technical structure.... If Congress intended geographic adjectives to have a structural connotation or to have other than their ordinarily accepted meaning, it would and should have given them a special meaning by definition.[188]

He continued:

> As the Courts of Appeals for both the Fourth and Fifth Circuits have said, the congressional purpose was to "wholly eradicate and bar from leadership in the American labor movement, at each and every level, adherents to the Communist party and believers in the unconstitutional overthrow of our Government." It would require much clearer language of exemption to justify holding that the very top levels of influence and actual power in the labor movement in this country were untouched while only the lower levels were affected.[189]

The Court, therefore, disagreed with the Board's interpretation of the legislation, but it did not invade the area of micromeaning or specific application ordinarily allocated to the agency. Here the Court determined the fundamental meaning, the underlying purposes, of the amendment to the NLRA eliminating Communists from union leadership positions. This is a macromeaning issue, and properly is to be decided independently by the Court according to the doctrine of *Gray-Hearst*.

The thrust of the dissents of Justices Frankfurter and Douglas was to take the Jackson majority to task for refusing to use the legislative history of the Act and other extrinsic aids as guides to the underlying meaning of the legislation.[190] Justice Frankfurter makes clear that he views the question as one of micromeaning application for the Board.[191]

He said:

> The best source for us in determining whether a term used in the field of industrial relations has a technical connotation is the body to which Congress has committed the administration of the statute. Certainly, if there is no reasonable ground for rejecting the

188. *Id.* at 324-25.
189. *Id.* at 325.
190. *See id.* at 326-28 (Frankfurter & Douglas, JJ., dissenting).
191. *See id.*

> determination of the National Labor Relations Board, its view should not be rejected.[192]

That would be true, if the issue had been considered by the Court majority to be one of specific application of a statutory term.

In conclusion, Justice Frankfurter referred to a Board decision consistent with his view and said: "Nothing called to our attention has put in question this authoritative finding by the National Labor Relations Board. We ought not, therefore, to reject it."[193] If he had persuaded a majority of the Court that the question should have been perceived to be a micromeaning issue as he stated, the Court should have, and probably would have, deferred to the Board. The deference principle of *Gray-Hearst* then would have applied.

Justice Douglas said there was no answer to the Frankfurter analysis

> if objectivity is our standard and if the expertise of administrative agencies is to continue as our guide .... Until today the test has been not whether the construction would be our own if we sat as the Board, but whether it has a reasonable basis in custom, practice, or legislative history.[194]

Again, he and Justice Frankfurter would have been correct if the Court majority had been convinced the question was one of micromeaning application for the Board.

Justice Jackson would respond, of course, that the Board's interpretation would be given respectful consideration and weight, but that it would not be controlling on a question involving the underlying policy and purposes of the amendment to the NLRA.

4. *NLRB v. Bell Aerospace Co.*

NLRB v. Bell Aerospace Co.[195] serves as a final example of a case said to evidence Court inconsistency by refusing to defer to an agency determination.[196] In this case, the union representing the company's workers petitioned the NLRB for an election to determine whether it could be certified as the bargaining representative of the buyers at a

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192. *Id.* at 327.

193. *Id.*

194. *Id.* at 327-28 (citing NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 131 (1944); Gray v. Powell, 314 U.S. 402 (1941)); *see* Jaffe, *supra* note 52, at 266-67. Professor Jaffe said the Douglas dissent suggested that the expertise of the agency is a factor of independent significance sufficient to override the considered opinion of the Court. In Jaffe's view, such a position would be unsound: "Where the meaning of a statute is involved, special knowledge, constituting as it does only a part of the material for judgment, can never be the sole determinant. In judicial review, the court must evaluate the relevance and weight of expertness." *Id.* at 267.

195. NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

196. *See* Richard J. Pierce, Jr. et al., Administrative Law and Process 375 (3d ed. 1999).

company plant.[197] The company opposed the petition, asserting that the buyers, as "managerial employees," were not covered by the National Labor Relations Act.[198] The Board held that Congress intended to exclude from the Act only those "managerial employees" whose participation in a labor union would create a conflict with their job responsibilities, and ordered the company to bargain with the union.[199]

The court of appeals denied enforcement of the Board's order, concluding that Congress had intended to exclude all true "managerial employees" from the protection of the Act.[200] The court added, however, that the Board would not be precluded from determining that buyers or some types of buyers are not true "managerial employees" and, therefore, are covered by the Act.[201] The Board petitioned the Supreme Court for review.[202]

The Court noted, initially, that supervisory employees are expressly excluded from the Act in § 2(11).[203] While speaking about the subsequent legislative reversal of the *Packard* decision in the Taft-Hartley Act, the Court said the Douglas dissent in *Packard* "is especially pertinent."[204] Accordingly, the majority referred to and quoted from it extensively. All the references and quotes from the dissent address the fundamental, underlying goals and purposes of the NLRA. Indeed, as stated earlier, there is nothing other than fundamental, underlying goals and purposes language in the Douglas dissent in *Packard*.

Both the House and Senate Reports on the Taft-Hartley Act "voiced concern over the Board's broad reading of the term 'employee' to include those clearly within the managerial hierarchy."[205] The Senate Report focused on the Douglas dissent. The House Report said that "[w]hen Congress passed the Labor Act, we were concerned, as we said in its preamble, with the welfare of 'workers' and 'wage earners,' not of the boss."[206]

The Court also said:

> The Court of Appeals in the instant case put the issue well:
>
> "Congress recognized there were other persons so much more clearly 'managerial' that it was inconceivable that the Board would treat them as employees. Surely Congress could not have supposed

197. *Bell*, 416 U.S. at 269.
198. *Id.*
199. *Id.* at 272.
200. *Id.*
201. *Id.* at 273.
202. *Id.* at 274.
203. *Id.* at 274 n.4.
204. *Id.* at 278.
205. *Id.* at 281.
206. *Id.* at 282 (quoting H.R. Rep. No. 80-245, at 13 (1947)).

> that, while 'confidential secretaries' could not be organized, their bosses could be. In other words, Congress failed to enact the portion of Mr. Justice Douglas' *Packard* dissent relating to the organization of executives, not because it disagreed but because it deemed this unnecessary."[207]

In its footnote thirteen, the Court said: "In addition, the dissent [in this case] completely ignores the fundamental change in industrial philosophy which would be accomplished through unionization of 'managerial employees.'"[208] Furthermore, "[e]xtension of the Act to cover true 'managerial employees' would indeed be revolutionary, for it would eviscerate the traditional distinction between labor and management. If Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly."[209]

The majority also quoted from a 1956 Board opinion: "It was the clear intent of Congress to exclude from the coverage of the Act all individuals allied with management."[210] Referring again to that 1956 opinion, the majority pointed out that until a 1970 decision, the Board consistently followed this reading of the Act: "It never certified any unit of 'managerial employees,' separate or otherwise, and repeatedly stated that it was Congress' intent that such employees not be accorded bargaining rights under the Act. And it was this reading which was permitted to stand when Congress again amended the Act in 1959."[211]

Finally, the Court declared:

> In sum, the Board's early decisions, the purpose and legislative history of the Taft-Hartley Act of 1947, the Board's subsequent and consistent construction of the Act for more than two decades, and the decisions of the courts of appeals all point unmistakably to the conclusion that "managerial employees" are not covered by the Act. We agree with the Court of Appeals below that the Board is not now free to read a new and more restrictive meaning into the Act.[212]

And, in its footnote eighteen:

> The contrary interpretation of the Act urged by the dissent would have far-reaching results. Although a shop foreman would be excluded from the Act, a wide range of executives would be included .... If Congress intended the unionization of such executives, it most certainly would have made its design plain.[213]

It seems clear that the Court majority viewed the issue as one concerning the fundamental, underlying purposes of the statute.

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207. *Id.* at 284 (citation omitted).
208. *Id.* at 285 n.13.
209. *Id.*
210. *Id.* at 287 (quoting Swift & Co., 115 N.L.R.B. 752, 753-54 (1956)).
211. *Id.* at 287-88.
212. *Id.* at 289.
213. *Id.* at 296-97 (White, J., dissenting).

Thus, from their perspective it was a question for the Court to decide independently.

The dissenters argued that although Congress excluded particular groups, it did not intend to exclude in express terms the entire category of "managerial employees."[214] The dissent closed with the following statement:

> But this Court has consistently said that it will accept the Board's determination of whether a particular individual is an "employee" under the Act if that determination has "'warrant in the record' and a reasonable basis in law." There is no reason here to hamstring the Board and deny a broad category of employees those protections of the Act which neither the statutory language nor its legislative history requires simply because the Board at one time interpreted the Act—erroneously it seems to me—to exclude all managerial as well as supervisory employees.[215]

What the dissent says, of course, is correct, if a majority of the Court were to agree that the question presented was a micromeaning application issue as was presented in *Hearst*. Here, it seems clear the majority thought it was a question addressing the fundamental macromeaning of the statute, and, consistent with *Hearst*, they decided it independently.

D. *A Supreme Court Prelude to* Chevron

Just six months before *Chevron*, and in the same term, a unanimous Supreme Court decided *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*,[216] in which the Court virtually wrote an essay restating the basic allocation principles of scope of judicial review of agency legislative interpretations.

> Title VII of the Civil Service Reform Act of 1978 requires federal agencies to grant "official time" to employees representing their union in collective bargaining with the agencies. The grant of official time allows the employee negotiators to be paid as if they were at work, whenever they bargain during hours when they would otherwise be on duty. The Federal Labor Relations Authority concluded that the grant of official time also entitles employee union representatives to a per diem allowance and reimbursement for travel expenses incurred in connection with collective bargaining. In this case, the Court of Appeals . . . enforced an [Federal Labor Relations Authority ("FLRA")] order requiring an agency to pay a

214. *Id.* (citing NLRB v. United Ins. Co., 390 U.S. 251, 260 (1968) (White, J., dissenting); NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 131 (1944)).

215. *Id.* at 311 (citing *United Ins. Co.*, 390 U.S. at 260 (White, J., dissenting); *Hearst*, 322 U.S. at 131).

216. 464 U.S. 89 (1983).

> union negotiator travel expenses and a per diem, finding the Authority's interpretation of the statute "reasonably defensible."[217]

The Authority adjudicates various types of labor-management disputes, and, in addition, may engage in legislative rulemaking.[218] It also is specifically required to "'provide leadership in establishing policies and guidance relating to matters' arising under the Act."[219] It "may seek enforcement of its adjudicatory orders in the . . . courts of appeals."[220] Furthermore, "persons, including federal agencies, aggrieved by any final FLRA decision may also seek judicial review."[221]

The facts of the case were as follows: The Bureau of Alcohol, Tobacco and Firearms ("BATF") maintained a regional office in Lodi, California, and notified the union representing BATF employees stationed in Lodi that it intended to move the office to Sacramento and establish a reduced duty post in Lodi. The union notified the agency that it wanted "to negotiate aspects of the move's impact on employees in the bargaining unit."[222] The designated employee agent for these negotiations "asked that his participation in the discussions be classified as 'official time,'" but the agency denied his request and directed him to take either annual leave or leave without pay for the day of the meeting.[223] The union then filed an unfair labor practice charge with the FLRA, claiming that BATF had improperly compelled its agent to take annual leave for the sessions.[224]

While the charge was pending, "the FLRA issued an 'Interpretation and Guidance' of general applicability which required federal agencies to pay salaries, travel expenses, and per diem allowances to union representatives engaged in collective bargaining with the agencies."[225]

Meanwhile, "[b]ased on the [union's] pending charge against BATF, the Authority issued a complaint and notice of hearing."[226] The union amended its complaint to add a claim that the employee should also have been paid his travel expenses and a per diem allowance.[227] After a formal hearing, the administrative law judge ("ALJ"), bound to follow the FLRA "Interpretation and Guidance," concluded that BATF had committed an unfair labor practice by

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217. *Id.* at 90-91 (citations omitted).
218. *Id.* at 92-93.
219. *Id.* at 93 (internal quotations omitted).
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.* at 94.
225. *Id.*
226. *Id.* at 95.
227. *Id.*

failing to comply with the statute.[228] Accordingly, he ordered the agency to pay the employee's regular salary for the day in question, as well as his travel costs and a per diem allowance.[229] The FLRA affirmed the ALJ's decision, adopted his "findings, conclusions, and recommended relief."[230] The Supreme Court granted review of the Court of Appeals' enforcement order.[231]

The Court initially described the Authority as follows:

> Like the National Labor Relations Board, . . . FLRA was intended to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the Act. Consequently, the Authority is entitled to considerable deference when it exercises its "special function of applying the general provisions of the Act to the complexities" of federal labor relations.[232]

Here, the FLRA had done so in a formal adjudication as the NLRB had done in *Hearst*.

The Court continued:

> On the other hand, the "deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." Accordingly, while reviewing courts should uphold reasonable and defensible constructions of an agency's enabling Act[,] they must not "rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." Guided by these principles, we turn to a consideration of the FLRA's construction of [the relevant section]. [A]n agency acting within its authority to make policy choices consistent with the congressional mandate should receive considerable deference from courts, provided, of course, that its actions conform to applicable procedural requirements and are not "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law." 5 U.S.C. § 706(2)(A). When an agency's decision is premised on its understanding of a specific congressional intent, however, it engages in the quintessential judicial function of deciding what a statute means. In that case, the agency's interpretation, particularly to the extent it rests on factual premises within its expertise, may be influential, but it cannot bind a court [citing *General Electric Co. v. Gilbert* and *Skidmore v. Swift & Co.*] . . . [thus,] "we conclude that the FLRA's decision in this case neither rests on specific

228. *Id.* at 95-96.
229. *Id.* at 95.
230. *Id.* at 96.
231. *Id.*
232. *Id.* at 97 (citations omitted).

> congressional intent nor is consistent with the policies underlying the Act."[233]

In its footnote thirteen, the Court again analogized to the NLRB and further recognized the micromeaning-macromeaning distinction: "[T]here are undoubtedly areas in which the FLRA, like the National Labor Relations Board, enjoys considerable freedom to apply its expertise to new problems, provided it remains faithful to the fundamental policy choices made by Congress."[234] Thus, the Court concluded "that the FLRA's interpretation . . . constitutes an 'unauthorized assumption by [the] agency of [a] major policy decisio[n] properly made by Congress.'"[235]

E. *Summary of Pre-*Chevron *Scope of Review*

There are other cases that could be included in a study of the scope of review of agency interpretation of legislative language. Lists of independent judicial judgment cases and judicial deference cases have been compiled.[236] The lists of cases have been contrasted in an attempt to demonstrate the pre-*Chevron* judicial inconsistency and chaos in the field. Nevertheless, a careful reading of the cases demonstrates that there is, indeed, a central theme that runs through them. That theme is the micromeaning-macromeaning allocation model developed in *Gray* and *Hearst*.

In some cases, the style or approach taken in the Court's opinion may induce confusion. The Court may simply state that its role is to determine the reasonableness of the agency action. In others, the Court may first state the limits (the poles, the underlying purpose, the extremes) of the legislation and then announce whether the agency acted within those limits. If the action is within the limits, the Court then decides whether the agency action was reasonable. In other cases the Court indicates that it is deciding, independently, the underlying meaning of the legislation. In still other cases, either deference or independent judgment may be signaled by a simple statement that reasonableness controls or that courts interpret legislation. Differences in style or approach, and simplicity or complexity in an opinion should not be allowed to camouflage what, in fact, the Court has done.

Another possible reason for confusion is the fact that there are no clear-cut criteria by which to distinguish a micromeaning question from a macromeaning question and to make the appropriate

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233. *Id.* at 97-98 & n.8 (citations omitted).

234. *Id.* at 103 n.13.

235. *Id.* at 108 (quoting Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 318 (1965) (alterations in original)).

236. *See* Bloomberg, *supra* note 34, at 113; Eric M. Braun, Note, *Coring the Seedless Grape: A Reinterpretation of* Chevron U.S.A., Inc. v. NRDC, 87 Colum. L. Rev. 986, 987-90 (1987).

allocation. On a spectrum between these two poles, it is a matter of degree, a question of predominance as to which type of question is presented. In many situations the distinction may be apparent, but in others it may be obscure. Therefore, reviewing courts may need to make use of other aids to arrive at a determination.[237] The task is similar to distinguishing between rulemaking and adjudication or distinguishing between legislative rules and interpretative rules—a matter of degree. Nevertheless, by whatever criteria they apply, the Justices do make the choice and join the coalition representing that choice. The perception of the largest coalition will control the analysis. In *United States v. Mead Corp.*,[238] Justice Souter recognized the spectrum problem and accepted it: "Judges in other, perhaps

237. *See* Jaffe, *supra* note 52, at 261-64, 276. Professor Jaffe asserts that "clear statutory purpose" should be the primary or basic criterion for purposes of allocating between the agency and the reviewing court primary authority to determine legal issues. *Id.* Even so, he believed there were additional considerations which determine its application. They are: (1) the degree to which the determination appears to depend on expertise, (2) the clarity with which a determination can be made to emerge and be given a stable form and content, (3) the importance of the determination in the statutory and administrative scheme (i.e., the clear purposes of the statute), (4) the possible psychological advantage of a judicial pronouncement, and (5) the role of the reviewing court as the guardian of the integrity of the legal system. *Id.* For another proposed multifactor analysis to discern congressional delegation of interpretive authority to the agency that goes beyond statutory ambiguity, see Braun, *supra* note 236, at 996-1007. Factors suggested as useful include: special agency expertise, a required balancing of multiple statutory purposes, and inherently broad statutory language lacking further statutory criteria or specific statutory definitions. *Id.* at 997. Factors said to be not useful include: highly specific portions of a statute that appear to conflict and contemporaneous construction of the statute, longstanding agency interpretation, and similar expressions that go to the persuasiveness of the agency interpretation and have no bearing on whether Congress delegated interpretive authority to the agency. *Id.* at 1000. Three "danger signals" also are identified that are said to indicate deference is less appropriate: the presence of constitutional issues, agency interpretations of statutorily required procedures, where an agency interpretation shapes a statute's core meaning (macromeaning), and where an agency has a special interest in its interpretation. *Id.* at 999. Professor Elizabeth Garrett advanced a third proposed multifactor list for determining whether Congress delegated interpretive authority to the agency. *See* Elizabeth Garrett, *Legislating* Chevron, 101 Mich. L. Rev. 2637, 2649-51 (2003). The factors suggested are: (1) the kind of question arguably delegated—is it broad or narrow, is expertise needed on the issue, whether it depends primarily on qualitative or quantitative assessments, and whether it relates to other areas in which the agency has broad authority; (2) the kind of procedure authorized and used by the agency—whether there is transparency of the process, the degree of participation by affected interests, the legal effect of the resulting product (broadly applicable or self-enforcing); (3) who in the agency made the decision and based on what authority; and (4) the characteristics of the particular agency (ignored by courts)—the agency capabilities generally, its reputation and qualifications, independent or executive branch status, liable to capture by powerful interest groups, what sort of interest group activity is typical, how politically salient its issues are for the general public, political pressures brought to bear on the agency by Congress, its committees and the President, and indications that the President, Office of Management and Budget ("OMB"), or other executive branch officers do not trust the agency. *Id.*

238. 533 U.S. 218 (2001).

harder, cases will make reasoned choices between the two examples, [*Chevron* and *Skidmore*] the way courts have always done."[239]

The cases reviewed, the Court's unanimous decision in *BATF*, six months before it decided *Chevron*—and the indication in the papers of Justices Blackmun[240] and Marshall that the Court did not consider *Chevron* to be anything special,[241] persuade me that the Court did not intend *Chevron* to be a revolutionary decision. However, Professor Percival suggests the Justices did not "realiz[e] the full implications of their landmark administrative law decision . . . in *Chevron*."[242] As indicated above and in the following Part III, my analysis suggests the Court knew exactly what it was doing. The misperceptions of the case appear to be from the lower courts and the commentators.

II. *CHEVRON U.S.A., INC. V. NRDC*

Chevron[243] needs little introduction.[244] It involved judicial review of a legislative regulation promulgated by the Environmental Protection Agency ("EPA"). The issue in the case was "whether [the] EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble' is based on a reasonable construction of the statutory term 'stationary source.'"[245]

A. *Background Information*

First, some background information that may have contributed to the style of the *Chevron* opinion's discussion of scope of judicial review. *Chevron* came to the Court based on a 1982 decision of the U.S. Court of Appeals for the D.C. Circuit concluding that the EPA's "bubble" concept regulation could not be employed in the Clean Air Act's nonattainment program.[246] Judge Ginsburg (now Justice Ginsburg) wrote the opinion. An important point in the case was that

239. *Id.* at 237 n.18.

240. The Blackmun Papers, Library of Congress, Box 397, Folder 82-1005.

241. Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 Envtl. L. Rep. 10606, 10613 (1993).

242. *Id.* (arguing that the Justices did not seem to "realize the full implications of their landmark administrative law decision in . . . *Chevron*," based on a review of Justice Thurgood Marshall's papers).

243. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984). Professor Jordan considered *Chevron* to be "the classic application of *Hearst*." Jordan, *supra* note 36, at 483-86.

244. *Chevron* is probably the most cited administrative law case of the twentieth century, and has been the topic of innumerable law review articles. *See* John F. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the* Chevron *Era*, 64 Geo. Wash. L. Rev. 35, 36 n.3 (1995). Coverdale's article lists forty-seven major articles on *Chevron*; note that it does not include all the available *Chevron* literature. *Id.*

245. *Chevron*, 467 U.S. at 840.

246. NRDC v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982).

the panel found itself bound by 1978[247] and 1979[248] decisions of the Circuit. She said, "[w]e are therefore impelled by the force of our precedent in *Alabama Power* and *ASARCO* to hold that EPA's . . . employment of the bubble concept . . . in nonattainment areas, is impermissible."[249] And, she added a statement that the panel expressed no view on the decision it would reach if these two cases did not control its judgment.

> These decisions, particularly in *Alabama Power* panel's reconciliation of its holding with *ASARCO* . . . establish as the law of this Circuit a bright line test for determining the propriety of EPA's resort to a bubble concept. The bubble concept . . . is mandatory for Clean Air Act programs designed merely to maintain existing air quality; it is inappropriate, both *ASARCO* and *Alabama Power* plainly signal, in programs enacted to improve the quality of the ambient air.[250]

Judge Ginsburg pointed out that *ASARCO* was written broadly and could well be read "to imply that the bubble concept is inappropriate to any portion of the Clean Air Act."[251] *Alabama Power* narrowed *ASARCO*'s scope by indicating that although the Act as a whole is designed to enhance air quality, in ruling on the application *vel non* of the bubble concept, the Court must look to the purpose of the Clean Air Act program at issue.[252] The Court found that "[i]n the *Alabama Power-ASARCO* context, 'purpose' clearly means goal, objective. The goal of the nonattainment program is undoubtedly to improve air quality . . . ."[253]

At several points in *Chevron*, the Court includes remarks which may indicate its irritation with the D.C. Circuit's performances in *ASARCO* and *Alabama Power*. For example, in Section VI, the Court said that in 1980 the EPA adopted a regulation that "took particular note of the two . . . Court of Appeals decisions, which had created the bright-line rule . . . . Relying heavily on those cases . . . [the EPA's] primary legal analysis was predicated on the two Court of Appeals decisions."[254]

In Section VII, the Court said it was significant that not the Agency, but the Court of Appeals read the Statute inflexibly. "We conclude that it was the Court of Appeals, rather than Congress or any of the decision-makers who are authorized by Congress to administer this

247. Asarco Inc. v. EPA, 578 F.2d 319 (D.C. Cir. 1978).
248. Ala. Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979).
249. *Gorsuch*, 685 F.2d at 720.
250. *Id.* at 726.
251. *Id.* at 726 n.37.
252. *Id.*
253. *Id.* at 727.
254. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 857 (1984).

legislation, that was primarily responsible for the 1980 position taken by the agency."[255]

Further, "[j]udges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, resolve competing political interests, but not on the basis of the judges' personal policy preferences."[256]

And finally,

> [w]hen a challenge to an agency construction of a statutory provision . . . really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress . . . federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.[257]

The relevant court of appeals opinions and the Court's *Chevron* remarks about the responsibilities of judges suggest that irritation with the D.C. Circuit influenced the style of the Court's opinion in Section II dealing with judicial scope of review regarding agency construction of agency-administered legislation.[258] Irritation may have influenced inclusion of the so-called "two-step" doctrine employed to introduce section II of its opinion. The two steps stated were well-established principles of statutory construction long before the Court wrote its *Chevron* opinion.[259] Accordingly, the two steps may have been meant as nothing more than a cease and desist lecturing of the D.C. Circuit.

B. *Scope of Judicial Review*

In section I of its opinion, the Court said that "[t]he basic legal error of the Court of Appeals was to adopt a static judicial definition of the term 'stationary source' when it had decided that Congress itself had not commanded that definition."[260]

Section II is devoted completely to a review of "well-settled principles" of the scope of judicial review of agency legal determinations. It opens with the familiar two-question language which has become known as the "two-step." The first question is whether congressional intent is clear on the precise question at issue. If it is, both court and agency "must give effect to the unambiguously expressed intent of Congress."[261] This question does not strike me as innovative or revolutionary. Both the plain meaning and the

255. *Id.* at 864. Court irritation with the D.C. Circuit also had occurred in the late 1970s in connection with agency rulemaking. *See* Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 Admin. L. Rev. 1139, 1175-78 (2001).

256. *Chevron*, 467 U.S. at 865.

257. *Id.* at 866.

258. Pierce et al., *supra* note 196, at 377; *see also* Jordan, *supra* note 36, at 485-86.

259. *See infra* Part III.B.

260. *Chevron*, 467 U.S. at 842.

261. *Id.* at 843.

legislative purpose methods of statutory interpretation purport to seek out what the legislature intended. If the court, using either method, determines that it has found that intent, it gives it effect. To do otherwise would violate separation of powers principles and would constitute judicial usurpation of the authority of another branch of government. This proposition has been repeated in the cases for many years.

In footnote nine, entered at the end of his statement of the first question, Justice Stevens wrote that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."[262] This statement is not remarkable either. The constitutional legitimacy of the administrative agency as an organ of government was based, in part, on the authority of reviewing courts to make certain that administrators neither violated legislative intent nor exceeded the limits imposed upon them by the legislation. In the same footnote nine, and as support for this statement, Justice Stevens cited a group of nine Supreme Court cases (from 1896 to 1981) in which agency interpretation of legislation had been evaluated.[263]

One of the cases was *Federal Maritime Commission v. Seatrain Lines, Inc.*[264] The Court elaborated on the proper role of courts when reviewing agency statutory constructions.[265] In doing so, it incorporated into its statement citations to three of the other cases cited by Justice Stevens. The Court said:

> As this Court held in a related context, "[t]he construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a reasonable basis in law. . . ." But the courts are the final authorities on issues of statutory construction and "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."[266]

Justice Stevens concluded footnote nine by indicating that if a court ascertained congressional intention "on the precise question at issue," it must be given effect.[267] The cases cited, and the *Volkswagenwerk* case elaborating on four of them, included both agency application of the statute questions (micromeaning deference) and fundamental, underlying-purposes-of-the-statute questions (macromeaning

262. *Id.* at 843 n.9.
263. *Id.*
264. 411 U.S. 726 (1973).
265. *Id.* at 745-46.
266. *Id.* (citing Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 272 (1968)).
267. *Chevron*, 467 U.S. at 843 n.9.

independent judgment). Thus, the "precise question" could be of either type. I do not take "precise," in this context, to mean only agency application or micromeaning questions. In some of the cases, a macromeaning question is quite precise. My reading of both the language and the cases in footnote nine is that they validate the *Gray-Hearst* allocation model of scope of judicial review that was in place pre-*Chevron*.

The statement of the second question begins, in my judgment, with an admonition directed to the D.C. Circuit. It is that if the court determines Congress has not directly addressed the precise issue in question (as was true of the "bubble" concept issue here) the court does not simply impose its own construction on the statute[268] (as the D.C. Circuit did here) if there is an agency authorized to determine the issue initially (as was the EPA here). If "the statute is silent or ambiguous" with respect to the specific issue (as it was here), the question for the Court is whether the agency's answer is based on a permissible construction of a statute.

The last part of the second question could be read literally to include both micromeaning and macromeaning interpretations by an agency as "the precise question" or as "the specific issue." If so read, it would require courts to defer to all reasonable agency constructions of the statute, even if at the fundamental or underlying purpose level.[269] But such a literal reading would completely conflict with the statements and cases in footnote nine, which recognized that an agency court shared responsibility for deciding micro and macro questions of statutory meaning.

Section II continues with a reiteration of scope of review principles of legislative rules required or necessary to implement a specific portion of a statute, or legislative rules arising out of delegated general rulemaking authority. The Court then stated it has long recognized that considerable weight should be given to administrative constructions of a statutory scheme it is entrusted to administer. *Hearst* is one of the cases cited.

The Court's reiteration concludes with an extensive quotation from *United States v. Shimer*,[270] which illustrates deference to a reasonable administrative interpretation reconciling conflicting policies. *Hearst* is among the cases cited in *Shimer* to support the proposition.[271] The final portion of the quotation from *Shimer* follows:

> If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its

268. *Id.* at 843 ("[A]s would be necessary in the absence of an administrative interpretation.").

269. *See* Braun, *supra* note 236, at 992-96.

270. 367 U.S. 374 (1961).

271. *Id.* at 382.

> legislative history that the accommodation is not one that Congress would have sanctioned.[272]

The last paragraph of Section II of *Chevron* significantly says: "In light of these well-settled principles it is clear that the Court of Appeals misconceived the nature of its role in reviewing the regulations at issue."[273] The Court then applied the principles.

After the court of appeals determined that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was "whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one."[274] The Court's precise references to the permit program and to "this particular program" indicate it considered the question to be one of application, primarily for the EPA to decide. Its approach would be consistent with *Gray-Hearst* deference.

Why would the Court reiterate "well-settled principles" of administrative law and say the court of appeals erred by failing to follow them if it intended to introduce a significant change in the law of scope of review? The style of this section of the opinion may have been chosen to instruct the D.C. Circuit by enumerating the obvious steps in the process of applying the "well-settled principles." It also may have been addressed to any other circuit court, which might entertain similar notions about the proper role of courts in this context.[275]

C. *The Types of Questions Presented for Review*

1. Micromeaning Question

There are other portions of the *Chevron* opinion that support the conclusion that the statutory interpretation question in *Chevron* was one of the micromeaning of the statute. For example, the final portion of the Court's quote from *Shimer*[276] indicates the issue was

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272. *Id.* at 383.

273. *Chevron*, 467 U.S. at 845.

274. *Id.*

275. Judge Kenneth Starr stated that *Chevron* was a watershed decision. Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 Yale J. on Reg. 283 (1986). Professor Pierce said that *Chevron* "transformed dramatically" the scope of review. Pierce et al., *supra* note 196; *see* Jordan, *supra* note 36, at 456 n.8, 482-83 n.185; Bloomberg, *supra* note 34, at 118 n.44. Other commentators did not perceive a significant departure from the existing principles of scope of review. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 380-81 (1986); Byse, *supra* note 353, at 255; Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 Admin. L. Rev. 803, 836 (2001).

276. *Chevron*, 467 U.S. at 845.

one of application. At the outset of Section IV the Court pointed out that the Clean Air Act Amendments are lengthy, detailed, and a comprehensive response to a measure of social issue. Then it says a small portion of the statute expressly deals with the non-attainment areas. The Court said the focal point of the controversy is "one phrase" in that portion of the amendments.[277] In section VII under "Legislative History," the Court stated that the legislative history is "consistent with the view that the EPA should have broad discretion in implementing the policies of the 1977 Amendments."[278] Conferring broad discretion on a federal agency is not, however, unique to the EPA. Many of the agencies involved in the Court's cases which evolved the *Gray-Hearst* doctrine possessed broad discretion to implement their organic legislation.

The Court indicated that the agency advanced a reasonable explanation for its conclusion that the regulations serve both the environmental objectives and the reasonable economic growth objectives of the statute.[279] It added that the Administrator's interpretation represented a reasonable accommodation of manifestly competing interests and is entitled to deference.[280] In the final paragraph of the opinion, the Court holds that the EPA's definition of the statutory term is a "permissible construction of the statute which seeks to accommodate progress in reducing air pollution" while not stifling economic growth.[281] The regulations adopted provided "what the agency could allowably view as [an] effective reconciliation" of those two conflicting goals.[282]

2. Macromeaning Question

In section V of its opinion, the Court identified the fundamental, underlying purposes of the non-attainment provisions to be the accommodation of conflicting goals, i.e., economic growth and improvement of air quality.[283] In section VII, the Court said that Congress intended to accommodate both economic growth and improvement of air quality but did not do so on the level of specificity presented in the case.[284] And in the last paragraph of the opinion, the Court again described the statute as seeking to "accommodate progress in reducing air pollution with economic growth."[285]

277. *Id.* at 848-49.
278. *Id.* at 862.
279. *Id.* at 863.
280. *Id.* at 865.
281. *Id.* at 866.
282. *Id.*
283. *Id.* at 851-52.
284. *Id.* at 865.
285. *Id.* at 866.

Chevron allocates the roles of agency and court at the micromeaning or application level of legislative interpretation. It does not have the court abdicate its duty to "say what the law is" at the macromeaning level. Therefore, *Marbury* lives![286] Even so, the meaning of the *Chevron* decision has been debated since it was announced. Part of the difficulty may be the Court's later inartful recitations of *Chevron* language without identifying precisely the functional contexts in which its language is meant to apply. Another problem may be some of the Court's word choices which may be read to mean that *Chevron* allocates authority to agencies to make macromeaning interpretations of legislation. An example of this confusion occurs in the Court's decision in *INS v. Cardoza-Fonseca*.[287]

III. POST-*CHEVRON* SCOPE OF REVIEW

This part presents a number of post-*Chevron* cases. First are two sample post-*Chevron* cases that indicate that the Court continued to apply the allocation model of scope of review that was in place pre-*Chevron*.[288] Others are available and could be included as well, but these suffice to illustrate the point. Second is the *Christensen*[289] case that reaffirms the 1944 *Skidmore*[290] principle of persuasive deference review of agency executive action that does not have the force of law.

Justice Scalia's concurrence in *Christensen* also is included, for in it he presented four of the Court's cases, decided after *Chevron* that he contended illustrated the Court had accorded *Chevron* deference to "authoritative agency positions" despite the earlier *Skidmore* approach.[291] I analyze them and conclude that in each of them there is legally "something more" than a mere agency statement of its executive opinion that served to justify the Court's decision. I also have included two additional cases that Justice Scalia later contended in his *Mead* dissent also illustrated his point.[292] Third, the Court's 2000 tobacco regulation case is included because of its similarity to,

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286. Professor Cass R. Sunstein has said that "*Chevron* . . . has become a kind of *Marbury* or counter-*Marbury* for the administrative state." Cass R. Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071, 2075 (1990).

287. 480 U.S. 421 (1987).

288. *See* Bloomberg, *supra* note 34, at 122-29 nn.75-125. Most post-*Chevron* cases follow the traditional pre-*Chevron* approach of *Hearst*. *See supra* notes 55-83 and accompanying text. The search for congressional intent must center on both the specific statutory language and the statute as a whole. *But see* Richard J. Pierce, Jr., *The Supreme Court's New Hyptertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 Colum. L. Rev. 749 (1995) (criticizing the Court for its inconsistency in applying its announced principles of deference); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 Duke L.J. 1051, 1070-71 (1995).

289. Christensen v. Harris County, 529 U.S. 576 (2000).

290. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

291. *See infra* Part III.B.

292. *See infra* Part III.D.

and its consistency with, the 1944 *Packard* case.[293] The final case in this part is *United States v. Mead*, which clarifies *Chevron*, and, in my judgment, reaffirms the pre-*Chevron* allocation model of *Gray-Hearst*.[294]

A. INS v. Cardoza-Fonseca

INS v. Cardoza-Fonseca[295] involved an INS adjudicative action in which the agency refused to grant either relief from deportation or asylum to an alien who contended that if she were returned to her home country she would be in physical danger. The Immigration and Nationality Act of 1980, as amended by the Refugee Act of 1980, contained two provisions that were relevant to the alien's case. In one provision, the Act provided for relief from deportation, based on a standard of clear probability of persecution.[296] In another section, the Act provided for a discretionary grant of asylum by the Attorney General, based on a standard of "well-founded fear of persecution."[297] The issue in the case was whether the standards used in applying these two provisions were the same or different. The INS contended they were the same and applied a single standard in the administrative hearing and in the administrative review proceeding to both types of relief.

The court of appeals determined that the standards were different, that the issue was one of statutory construction for the court, the congressional intent was clear, and thus, no deference was due the INS interpretation. The Supreme Court agreed and attempted to explain how *Chevron* played out in this situation. Justice Stevens, writing for the Court, said:

> The question whether Congress intended the two standards to be identical is a pure question of statutory construction for the courts to decide. Employing traditional tools of statutory construction, we have concluded that Congress did not intend the two standards to be identical .... 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 .... 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 .... But our task today is much narrower and is well within the province of the Judiciary ....[298]

293. *See infra* Part III.E.
294. *See infra* Part III.F.
295. 480 U.S. 421 (1987).
296. Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(A) (2000).
297. Refugee Act of 1980, 8 U.S.C. § 1101(a) (2000).
298. *Cardoza-Fonseca*, 480 U.S. at 446-48 (internal citations omitted).

The phrase, "pure question of statutory construction," is reminiscent of Justice Jackson's "naked question of law" phrase in *Packard*, where the Court's task was to reconcile the meaning of the terms "employee" and "employer" in the NLRA.[299] The Court's independent interpretation of the clear meaning, the underlying purposes of the NLRA, controlled the answer to the interstitial, micromeaning question.

Similarly, the Court's task in *Cardoza-Fonseca* was to reconcile the two legislative standards and determine, independently, whether they were the same for purposes of agency application. In both cases the "pure question" to be decided independently by the Court was at the macromeaning level of the legislation. In its concluding statement, the Court said:

> Whether or not a "refugee" is eventually granted asylum is a matter which Congress has left for the Attorney General to decide. But it is clear that Congress did not intend to restrict eligibility for that relief to those who could prove that it is more likely than not that they will be persecuted if deported.[300]

B. Rust v. Sullivan

In 1970, Congress enacted Title X of the Public Service Health Act. Section 1008 of the Act provides that "none of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning."[301]

Rust v. Sullivan involved events in 1988, when "the Secretary promulgated new regulations designed to provide 'clear and operational guidance' to grantees about how to preserve the distinction between Title X funded programs and abortion as a method of family planning."[302] The regulations imposed three principal conditions on Title X funds: (1) they forbade counseling concerning abortion as a method of family planning or referral for abortion as a method of family planning; (2) they barred lobbying for legislation to increase the availability of abortion; prohibited developing or disseminating material advocating abortion; prohibited pro-abortion speakers; barred using legal action to make abortion available; and forbade paying dues to any group that advocates abortion; and (3) they required that Title X projects must be organized to be physically and financially separate from prohibited abortion activities.

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299. Packard Motor Co. v. NLRB, 330 U.S. 485, 486 (1947).
300. *Id.* at 450.
301. 42 U.S.C. § 300a-6 (2000).
302. Rust v. Sullivan, 500 U.S. 173, 179 (1991).

The regulations were challenged by doctors and grantees as not authorized by Title X and in violation of their First and Fifth Amendment rights.

As for the fundamental, underlying purposes of the Act, the Court said:

> The Secretary based the need for the separation requirements "squarely on the congressional intent that abortion not be a part of a Title X funded program".... Indeed, if one thing is clear from the legislative history, it is that Congress intended that Title X funds be kept separate and distinct from abortion-related activities. It is undisputed that Title X was intended to provide primarily pre-pregnancy preventive services.[303]

As for the Act's interstitial meaning in terms of the limitation expressed in § 1008, the Court held the language of § 1008 to be ambiguous:

> At no time did Congress directly address the issues of abortion counseling, referral, or advocacy .... When we find, as we do here, that the legislative history is ambiguous and unenlightening on the matters with respect to which the regulations deal, we customarily defer to the expertise of the agency.[304]

Therefore, in *Rust v. Sullivan,* the Court: (1) "said what the law is" by declaring the fundamental, underlying meaning of the Act, (2) found there was no clear congressional intent on the interstitial issue of how the § 1008 prohibition was to be implemented, and (3) accordingly, deferred to the Secretary's reasonable interpretation of § 1008 in the regulations. Perceived in this manner, the Court's approach is quite consistent with *Chevron* and *Cardoza-Fonseca.* It also is consistent with *Gray-Hearst.*

C. Christensen v. Harris County[305]

This recent case is probably well known to most readers.[306] Briefly, the question was whether, under the Fair Labor Standards Act of 1938, states and their political subdivisions may require employees to schedule time off from work to reduce the amount of their accrued compensatory time. Harris County, Texas, implemented such a plan to avoid paying cash compensation to employees who did not use their accumulated time. County deputy sheriffs sued, claiming that the FLSA does not permit an employer to compel an employee to use

303. *Id.* at 190.
304. *Id.* at 185-86.
305. Christensen v. Harris County, 529 U.S. 576 (2000).
306. Sixteen years after *Chevron* was decided, this case began the court's recently introduced process of clarifying its meaning in light of the variety of interpretations it had been given by lower courts and commentators.

compensatory time in the absence of an agreement permitting the employer to do so.

The complainants' point was supported by an opinion letter from the Acting Administrator of the Wage and Hour Division of the Department of Labor. The letter stated the Administrator's position to be that a public employer may schedule compensatory time as directed, if there is a prior agreement specifically providing for it. Absent such an agreement, the Administrator's position was that "neither the statute nor the regulations permit an employer to require an employee to use accrued compensatory time."[307]

1. The Court's Opinion

The Court held that nothing in the FLSA or its implementing regulation prohibits a public employer from compelling the use of compensatory time. In so holding, the Court rejected the contention that it should defer to the Department of Labor's opinion letter on the basis of *Chevron*:

> Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference .... Instead, interpretations contained in formats such as opinion letters are "entitled to respect" under our decision in *Skidmore v. Swift & Co.*.. but only to the extent that those interpretations have the "power to persuade" ....[308]

Thus began the process of resurrecting the *Skidmore* prong of the well-established pre-*Chevron* principles of scope of judicial review.

2. Justice Scalia's Concurring Opinion—Authoritative Agency Position

In his concurring opinion, Justice Scalia objected to the Court's refusal to give effect to "the position"[309] of the Department of Labor in its opinion letter, because it

> is entitled only to so-called "*Skidmore* deference," .... *Skidmore* deference to authoritative agency views is an anachronism, dating from an era in which we declined to give agency interpretations (including interpretive regulations, as opposed to 'legislative rules')

307. Christensen, 529 U.S. at 581 (quoting Op. Ltr. Dept. of Labor, Wage & Hour Div. (Sept. 14, 1992), *available at* 1992 WL 845100).

308. *Id.* at 587 (internal citations omitted). Professor Robert Anthony states that in *Christensen* the Court takes an "eminently sound position." Robert A. Anthony, *Three Settings in Which Nonlegislative Rules Should Not Bind*, 53 Admin. L. Rev. 1313, 1314-16 (2001).

309. *Christensen*, 529 U.S. at 589 (Scalia, J., concurring).

> authoritative effect. That era came to an end with our watershed decision in *Chevron*.[310]

He continued: "Quite appropriately, therefore, we have accorded *Chevron* deference not only to agency regulations, but to authoritative agency positions set forth in a variety of other formats."[311] He followed with what he considered to be illustrations of those "other formats." This was, apparently, to support his belief that "the position"[312] of the Department of Labor that the County's action was unlawful unless permitted by the terms of an agreement "warrants *Chevron* deference if it represents the authoritative view of the Department of Labor."[313] Those illustrations deserve review and evaluation.

Illustration 1: *INS v. Aguirre-Aguirre*[314] is, of course, quite acceptable for *Aguirre-Aguirre* was a formal adjudication, based on delegated authority and having the force of law. *Chevron* deference to formal adjudicatory decisions, as well as legislative rules, was established in *Cardoza-Fonseca*.[315]

Illustration 2: *NationsBank of N.C., N.A. v. Variable Annuity Life Insurance Co.*[316] involved application, pursuant to a Comptroller's regulation for permission to serve as an agent in the sale of annuities.[317] The Comptroller granted that permission and authorized the bank to broker annuities. The Court restated the familiar *Chevron* procedure and said: "If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment 'controlling weight.'"[318]

However, there is more to the Comptroller's action than it being simply an administrator's reading to which the court gave *Chevron* deference. The suit by Variable challenging the Comptroller's decision sought declaratory and injunctive relief pursuant to the APA and sections of the U.S. Code.[319] Licensing is defined as an "agency process respecting the grant . . . of a license" . . . in section 551(9) of the APA.[320] Section 551(8) defines "license" to include "the whole or a part of an agency permit . . . approval . . . or other form of

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310. *Id.*
311. *Id.* at 590.
312. *Id.* at 591.
313. *Id.*
314. 526 U.S. 415 (1999) (adjudication).
315. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).
316. NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co, 513 U.S. 251 (1995) (letter of Comptroller of the Currency).
317. 12 C.F.R. § 5.34 (1994).
318. *Id.* at 270 (citing Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 844 (1984)).
319. 28 U.S.C. §§ 2201-2202 (2000).
320. 5 U.S.C. § 551 (2000).

permission."[321] Section 551(6) defines "order" to mean "the whole or a part of a final disposition . . . of an agency in a matter other than rule making but including licensing."[322] Section 551(7) defines "adjudication" to mean agency process for the formulation of an order."[323]

Thus, the Comptroller actually granted NationsBank a license to broker annuities. It was a final agency action and had the force of law. That is, should the Comptroller have second thoughts and decide to withdraw, suspend, revoke, or cancel the license, he would be required to follow procedures under section 558(c) of the APA[324] to do so. The procedure would have to meet due process standards as well.

Therefore, *Chevron* deference was properly accorded the Comptroller's decision in the format of a licensing action as an informal adjudication. Notice of the action was conveyed by letter, but deference was not because it was in the format of a "letter of Comptroller of the Currency."

Illustration 3: *Pension Benefit Guaranty Corp. v. LTV Corp.*[325] involved PBGC, a government corporation that administers and enforces Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA").[326] Title IV includes a mandatory government insurance program that protects the pension benefits of more than thirty million private sector workers who participate in plans covered by Title IV. When a Title IV plan terminates with insufficient assets to satisfy its pension obligations to the employees, PBGC becomes trustee of the plan and uses its assets to cover what it can of the benefit obligations. PBGC then adds its own funds to insure payment of most of the remaining benefits. Plans may be terminated voluntarily by an employer or involuntarily by PBGC. PBGC also has authority to restore the plan to its pre-termination status.

LTV filed for reorganization under Chapter 11 of the Bankruptcy Code with its Title IV plans dramatically underfunded. Accordingly, PBGC acted to terminate the plans to protect its insurance program from unreasonable risk of losses. LTV then created new pension agreements to which PBGC objected as an arrangement designed to wrap around the PBGC insurance benefits to provide both retirees and active participants the same benefits they would have received had no termination occurred.

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321. *Id.*
322. *Id.*
323. *Id.*
324. 5 U.S.C. § 558(c).
325. Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633 (1990) (decision by Pension Benefit Guaranty Corp. ("PBGC") to restore a pension benefit plan).
326. Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406, tit. IV, 88 Stat. 1028 (codified as amended at 29 U.S.C. § 1347 (2000)).

Later, anticipating a dramatic turnaround in the steel industry and LTV's fortunes, PBGC's Director issued a Notice of Restoration to LTV indicating PBGC's intention to restore the terminated plans. That meant the plans would be ongoing, and that LTV again would be responsible for administering and funding them. LTV refused to comply with the restoration decision. PBGC instituted enforcement action in federal court.

The district court vacated the PBGC restoration order as exceeding its authority. The court of appeals held, *inter alia*, that the agency's restoration order was arbitrary and capricious under the APA because PBGC's informal adjudication decision process lacked adequate procedural protections. The Supreme Court granted certiorari.[327]

PBGC argued that in holding its restoration decision arbitrary and capricious, "the Court of Appeals departed from traditional principles of statutory interpretation and judicial review of agency construction of statutes."[328] The Court agreed with PBGC, introduced the *Chevron* formula, applied it, and concluded the agency action should be given deference.

On the matter of the court of appeals ruling that the agency procedures were inadequate in the case, the Court discussed both *Vermont Yankee Nuclear Power Corp. v. NRDC*[329] and *Citizens to Preserve Overton Park, Inc. v. Volpe*[330] to evaluate the informal adjudication process by which the restoration decision was made. The Court pointed out that "[h]ere, unlike in *Overton Park*, the Court of Appeals did not suggest that the administrative record was inadequate to enable the court to fulfill its duties under [APA] § 706."[331]

The Court held no provision in ERISA or the APA gave LTV the procedural rights it identified as necessary. Thus the court of appeals holding "ran afoul" of both *Vermont Yankee* and *Overton Park*. In conclusion, the Court said:

> The determination in this case, however, was lawfully made by informal adjudication, the minimal requirements for which are set forth in [§ 555] of the APA, . . . and do not include such elements [as those identified by LTV]. A failure to provide them where the Due Process Clause itself does not require them (which has not been asserted here) is therefore not unlawful . . . . Finally, we find the

327. *Pension Benefit Guar. Corp.*, 496 U.S. at 644.

328. *Id.* at 647.

329. Vt. Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 524 (1978) ("[C]ourts are not free to impose upon agencies specific procedural requirements that have no basis in the APA.")

330. *Pension Benefit Guar. Corp.*, 496 U.S. at 655-56 (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419-21 (1971)). "[M]andating that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision." *Id.* at 654.

331. 5 U.S.C. § 706 (2000).

> procedures employed by the PBGC to be consistent with the APA.[332]

The PBGC restoration order is more accurately described as in the format of an informal adjudication under the APA, rather than as a "decision by PBGC to restore [the] pension benefit plan."[333]

Illustration 4: *Young v. Community Nutrition Institute*.[334] The Food, Drug, and Cosmetic Act ("FDCA") provides that when the addition of any poisonous or deleterious substance to food is required in the production thereof or cannot be avoided by good manufactory practice, the Secretary of Health and Human Services "shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health."[335]

Rather than setting a "tolerance level" (legislative regulation) for aflatoxin, a potent carcinogen that is invariably present in some foods, the Food and Drug Administration ("FDA") announced an action level of twenty parts per billion. An action level assures food processors that the FDA ordinarily will not enforce the Act's general adulteration provisions against them if the quantity of the harmful substance is less than the action level.

The central question in the case concerned construction of the § 346 provision, "the Secretary shall promulgate regulations."[336] Since the enactment of the Act in 1938, the FDA consistently had interpreted it to give it the discretion to decide whether to promulgate a § 346 regulation, known in the administrative vernacular as a "tolerance level." The regulations are promulgated through a process similar to formal evidentiary rulemaking. On occasion, the FDA sets "action levels" through a less formal process, apparently not pursuant to § 553 of the APA rulemaking procedures.

In 1980, the FDA published a notice in the Federal Register to the effect that it "will not recommend regulatory action for violation"[337] of the Act with respect to interstate shipment of corn from the 1980 crop harvested in North Carolina, South Carolina, and Virginia "which contains no more than 100 ppb aflatoxin"[338] and provided such corn was to be used only as feed for mature, non-lactating livestock, and mature poultry. This Federal Register exemption notice prompted

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332. *Pension Benefit Guar. Corp.*, 496 U.S. at 655-56.

333. 29 U.S.C. § 4047.

334. Young v. Cmty. Nutrition Inst., 476 U.S. 974 (1986) (stating that the Food and Drug Administration's "longstanding interpretation of the statute" was reflected in a no-action notice published in the Federal Register).

335. 21 U.S.C. § 346 (2000).

336. *Young*, 476 U.S. at 977.

337. *Id.* at 978 (quoting 46 Fed. Reg. 7448 (Jan. 23, 1981).

338. *Id.*

two public interest groups and a consumer to sue the Commissioner of the FDA in federal court.

They alleged (1) that the Act requires the FDA to set a "tolerance level" for aflatoxin before allowing food containing it to be shipped in interstate commerce; (2) that the FDA had employed insufficient procedures to set its aflatoxin "action level" even if a "tolerance level" was not required; and (3) that the FDA's decision to grant the 1980 exemption from the "action level" independently violated the Act and the FDA's own regulations.[339] The district court deferred to the FDA's interpretation of § 346 and ruled a "tolerance level" was not required prior to interstate shipment of aflatoxin-tainted corn in interstate commerce. The court of appeals reversed the district court's conclusion as to the proper interpretation of § 346 and the Supreme Court granted certiorari.

Significantly, the court of appeals had considered none of the other issues before the district court. Therefore, only the § 346 issue was before the Supreme Court. Its analysis began with *Chevron*. Finding the statutory language ambiguous, and interpreted consistently by the FDA for forty-eight years, it said: "This view of the agency charged with administering the statute is entitled to considerable deference.... We find the FDA's interpretation of § 346 to be sufficiently rational to preclude a court from substituting its judgment for that of the FDA."[340]

> To this point the case appears indeed to illustrate *Chevron* deference in a format of the FDA's longstanding interpretation of § 346. However, the only action the agency took to prompt the lawsuit was to publish its no-action notice. What it did was assert its enforcement authority discretion and announce its decision to decline to pursue enforcement in a specific situation.

The broad enforcement discretion granted to the FDA by Congress was elaborated in *Heckler v. Chaney*.[341] The Court said there: "An agency generally cannot act against each technical violation of the statute it is charged with enforcing.... For good reasons, such a decision has been 'committed to agency discretion,' and we believe that the Congress enacting the APA did not intend to alter that tradition."[342] The complainants initially challenged the FDA's decision to grant the exemption as violating the Act and its own regulations. But the court of appeals did not consider the issue and it did not come before the Court.

Despite the fact that the Court's decision is, therefore, technically limited to construction of a statutory provision, the agency no-action

339. *Id.* (quoting Chem. Mfrs. Ass'n v. NRDC, 470 U.S. 116, 125 (1985)).
340. *Id.* at 981 (internal citations omitted).
341. Heckler v. Chaney, 470 U.S. 821 (1985).
342. *Id.* at 831-32.

decision and its announcement in the Federal Register, generated the case. This seems quite different from a case said to illustrate *Chevron* deference to a "longstanding interpretation of the statute." *Chevron* deference was appropriate because the agency action was an authoritative, final decision not to enforce the FDCA in a specific situation, and it also may have been judicially unreviewable under *Heckler v. Chaney*.

From my perspective, these four cases do not support the proposition that a reasonable, authoritative agency position, without more, warrants *Chevron* deference. If persuasive, however, it may warrant *Skidmore* deference (or now *Skidmore-Christensen* deference).

In each of the cases there was something more. *Aguirre-Aguirre* was a formal adjudication having the force of law. *NationsBank* was an informal licensing adjudication having the force of law. *Pension Benefit Guaranty Corp.* clearly was an informal adjudication having the force of law. *Young* was an agency enforcement policy decision having the force of law under *Heckler v. Chaney*. In each case the agency acted reasonably on the basis of delegated authority, and its action had the force of law. Thus, *Chevron* deference was appropriate. Two additional cases should be included in this review and evaluation of "authoritative agency positions" said to have been given *Chevron* deference. They are both discussed below. Justice Scalia later included them in his extensive dissent in *United States v. Mead Corp.*[343] as other illustrations of the proposition.

D. *Two Additional Authoritative Agency Position Cases*

1. *Mead Corp. v. Tilley*[344]

Prior to 1974, many employees' rights to earned benefits under private retirement plans were frustrated. This situation resulted from back-loaded accrual schedules and abrupt plan terminations by employers. To prevent such action from further depriving employees with long years of service of their anticipated retirement benefits, Congress enacted ERISA.[345] The Act imposes controls on funding and termination of private retirement plans and establishes a system of insurance for benefits provided by such plans. It is administered by the PBGC within the Department of Labor.

This case deals with the question of whether, upon termination of a defined benefit plan, § 4044(a) of Title IV of the Act requires a plan administrator to pay plan participants unreduced early retirement

343. United States v. Mead Corp., 533 U.S. 218, 239 (2001) (Scalia, J., dissenting).
344. Mead Corp. v. Tilley, 490 U.S. 714 (1989).
345. 29 U.S.C. §§ 1001-1461 (2000).

benefits provided under the plan before residual assets may revert to an employer.[346] Title IV covers the termination of private pension plans and establishes a system of insurance for benefits provided by such plans.[347] Titles I and II provide requirements for plan participation, benefit accrual, and vesting and plan funding. Title III contains general administrative provisions.[348]

Title IV requires that plan assets be distributed, upon termination, in accord with a six-tier allocation scheme set forth in § 4044(a). It also provides that if funds remain after "all liabilities of the plan to participants and their beneficiaries have been satisfied,"[349] they may revert to the employer.

In 1983, Mead terminated its retirement plan. It paid individual early retirement benefits only to those employees who had met both the age and years of service requirement under Article V of its plan. Article V required thirty or more years of service and retirement after age sixty-two. The complainants were five employees, four of whom had more than thirty years of service and a fifth who had twenty-eight years of service. None had reached age sixty-two. Each received the present value of the normal age sixty-five retirement benefit. Had Mead paid the present value of the unreduced early retirement benefits, each would have received an average of $9000 more. In their legal action, complainants contended Mead violated ERISA by failing to pay them the present value of the unreduced early retirement benefits and then recouping approximately $11 million after the distribution of assets was completed.

The district court ruled in favor of Mead, concluding that "'the Plan's language, the legislative history, and the case law in the [F]ourth [C]ircuit ... clearly demonstrate that early retirement benefits are not 'accrued benefits' under ERISA.'"[350] The court of appeals, however, reversed, holding that before plan assets may revert to an employer, the sixth category of the statutory allocation scheme requires payment of early retirement benefits to plan participants "'even if those benefits were not accrued at the time of termination.'"[351]

Before the Supreme Court, complainants conceded that, at the time the plan was terminated, they had not satisfied both the age and service requirements for unreduced early retirement benefits. Nevertheless, they claimed entitlement to such benefits on the ground that contingent early retirement benefits, even if not accrued, are

346. *Tilley*, 490 U.S. at 717.
347. *Id.*
348. *Id.*
349. 29 U.S.C. § 1344(d)(1)(A).
350. *Tilley*, 490 U.S. at 720-21 (internal citations omitted).
351. *Id.* at 721.

"benefits under the plan"[352] and therefore must be distributed before the employer can recoup any residual plan assets.

The Court noted, "preliminarily,"[353] that PBGC had rejected the complainants' argument. It viewed § 4044(a)(6) as not creating additional retirement benefits, but merely providing for the orderly distribution of benefits already earned under the plan. The PBGC view consistently had been expressed in its Opinion Letters on plan terminations. The Department of Labor and the IRS agreed with PBGC that § 4044(a)(6) was limited to benefits created elsewhere.[354]

The Court then applied the *Chevron* principles, beginning with whether there was clear congressional intent on the precise question at issue.[355] First, the language of the statute:

> Section 4044(a) in no way indicates an intent to confer a right upon plan participants to recover unaccrued benefits. On the contrary, the language . . . "benefits *under the plan*" can refer only to the allocation of benefits provided by the terms of the terminated plan. The limited function of § 4044(a) as an allocation mechanism is made clear by its introductory language . . . . Finally, any possible ambiguity is resolved against . . . [complainants] by the title of § 4044(a)—"[a]llocation of assets."[356]

Neither did the structure of the statute provide any support for the complainants' view: "Title IV, which contains § 4044(a), simply provides insurance for benefits created elsewhere. It is inconceivable [that] the section was designed to modify the carefully crafted provisions of Title I."[357]

As for the legislative history, the complainants contended "Congress' failure to include in category 6 the word 'accrued,' . . . evinces an intent to require the provision of unaccrued as well as accrued benefits."[358] The Court disagreed, saying "[t]here is simply nothing in the legislative history suggesting that Congress intended § 4044(a) to be a source of benefit entitlements rather than an allocation scheme. Neither the House nor the Senate bill provided for allocation of assets on plan termination to benefits that were not created elsewhere."[359] Although it referred, "preliminarily," to the PBGC's views, the Court's decision is reached at so-called *Chevron* step one. It found clear congressional intent on the issue. There was no reason to defer to the views of the agency under *Chevron*.

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352. 29 U.S.C. § 1344(a)(6).
353. *Tilley*, 490 U.S. at 722.
354. *Id.*
355. This case was cited by the Court in *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 648 (1990), as "applying Chevron principles to the PBGC's construction of ERISA."
356. *Tilley*, 490 U.S. at 722-23.
357. *Id.* at 723.
358. *Id.*
359. *Id.* at 723-24.

Complainants made an alternative statutory argument, as well. Because all accrued benefits vest upon plan termination pursuant to another section of ERISA,[360] they are nonforfeitable benefits which are within category 5 of the allocation scheme. The Court pointed out that PBGC had consistently maintained that for purposes of guarantee and asset allocation under section 4044(a) whether benefits are "forfeitable or nonforfeitable depends upon their status before plan termination."[361]

The Court continued:

> [Complainants] have failed to persuade us that the PBGC's views are unreasonable. On the contrary, it is... [complainants'] interpretation which cannot be squared with the statute. For if category 5 included benefits that were forfeitable before plan termination as well as those that were nonforfeitable, there would be no guarantee that nonforfeitable benefits would be paid before forfeitable benefits in cases where plan assets are insufficient to cover both. This result would contravene the clear directive of the allocation scheme to give priority to nonforfeitable benefits.[362]

Thus, the agency position actually was stated in its regulations[363] and not merely in opinion letters, guidelines, etc., that would lack the force of law. Further, the Court appears to say that, in any event, the agency position was consistent with the clear directive of the allocation provision of the statute, in contrast to the position of the complainants. *Chevron* deference is irrelevant because congressional intent is clear on the specific issue.

Because the court of appeals relied exclusively on § 4044(a)(6) as the basis for deciding in favor of the complainants, the Court reversed its judgment. The lower court had not considered two alternative grounds concluding that ERISA requires payment of unreduced early retirement benefits before surplus assets revert to the employer: "[F]irst, unreduced early retirement benefits may qualify as 'accrued benefits' under ERISA; and, second, unreduced early retirement benefits may be 'liabilities' within the meaning of § 4044(d)(1)(A)."[364]

Accordingly, the Court remanded

> for a determination whether [complainants] are entitled to damages on the basis of either of these alternative theories. In deciding these issues, the Court of Appeals should consider the views of the PBGC and the IRS. For a court to attempt to answer these questions

360. 29 U.S.C. § 1344(a)(6) (2000).

361. *Tilley*, 490 U.S. at 725 (citing 29 C.F.R. §§ 2613.6(b), 2618.2 (1987) ("Benefits that become nonforfeitable solely as a result of the termination of a plan [are] considered forfeitable.")).

362. *Id.*

363. 29 C.F.R. §§ 2613.6(b), 2618.2.

364. *Tilley*, 490 U.S. at 726.

> without the views of the agencies responsible for enforcing ERISA, would be to "embark[] upon a voyage without a compass."[365]

In its footnote eleven, the Court stated that although the parties and several amici curiae had discussed these alternative theories, the PBGC and the IRS had not. The PBGC brief stated it expressed no view on the question

> "arising under Titles I and II of ERISA, whether early retirement benefits are accrued benefits". . . . The PBGC brief does not mention the § 4044(d)(1)(A) liabilities issue. . . . Without the views of the agencies responsible for enforcing ERISA or an opinion by the Court of Appeals, we are reluctant to address these complicated and important issues pertaining to the private pensions of millions of workers.[366]

Hence, the Court's disposition of the case avoided deciding a major question until the "views" of PBGC and the IRS could be considered by the court of appeals on the remand. Of course, no deference was accorded to agency views not yet known.

In dissent, Justice Stevens said: "Perhaps the Court is prudent to await the advice of the Solicitor General before deciding the principal question presented by this case."[367] But he was persuaded the benefits the complainants sought were contingent liabilities that must be paid before surplus assets revert to the employer.

2. *FDIC v. Philadelphia Gear Corp.*

FDIC v. Philadelphia Gear Corp.[368] decided the question of whether a standby letter of credit backed by a contingent promissory note is insured as a "deposit" under the federal deposit insurance program. Justice O'Connor wrote for the majority and, at the outset, said:

> We hold that, in light of the longstanding interpretation of . . . [the] Federal Deposit Insurance Corporation (FDIC) that such a letter does not create a deposit and, in light of the fact that such letter does not entrust any noncontingent assets to the bank . . .[it] does not give rise to an insured deposit.[369]

The Penn Square Bank issued the standby letter of credit in the amount of $145,000 for the benefit of Philadelphia Gear. The Court explained: "Because the letter of credit was intended to provide payment to the seller only if the buyer of the invoiced goods failed to make payment, the letter of credit was what is commonly referred to as a 'standby' or 'guaranty' letter of credit."[370] It is distinguished from

365. *Id.* (quoting Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 568 (1980)).
366. *Id.* at 726-27 & n.11.
367. *Id.* at 727.
368. 476 U.S. 426 (1986).
369. *Id.* at 427.
370. *Id.* at 428.

a conventional letter of credit, where the seller obtains payment from the issuing bank without looking to the buyer for payment.

Later, Penn Square was declared insolvent, and the FDIC was appointed as its receiver. Shortly thereafter, Philadelphia Gear presented drafts on the standby letter of credit for payment of goods delivered before Penn Square's insolvency. The FDIC returned the drafts unpaid. Philadelphia Gear sued the FDIC, alleging that the standby letter of credit was an insured deposit and that it was, therefore, entitled to $100,000 in deposit insurance from the FDIC. The district court held that the letter was an insured deposit on which the FDIC was liable for $100,000. The court of appeals affirmed the district court decision on this issue. The Supreme Court granted review and reversed.

The FDIC argued that it had consistently interpreted this section of the Act not to include standby letters of credit backed only by a contingent promissory note. The interpretation was based on the fact that the note does not represent hard assets, thus the alleged deposit consists only of a contingent liability and does not give rise to a "deposit" that Congress intended the FDIC to insure.

The Court said that:

> The FDIC's interpretation . . . is consistent with Congress' desire to protect the hard earnings of individuals by providing for federal deposit insurance. Since the creation of the FDIC, Congress has expressed no dissatisfaction with the FDIC's interpretation of "deposit"; indeed, Congress in 1960 adopted the FDIC's regulatory definition as the statutory language. When we weigh all these factors together, we are constrained to conclude that the term "deposit" does not include a standby letter of credit backed by a contingent promissory note.[371]

Continuing, the Court discussed "the genesis of the Federal Deposit Insurance Act . . . for the light it shed on Congress' purpose in passing the Act."[372] The Court considered that its

> purpose . . . was clear. Faced with virtual panic, Congress attempted to safeguard the hard earnings of individuals against the possibility that bank failure would deprive them of their savings . . . . The focus of Congress was therefore upon ensuring that a deposit of "hard earnings" entrusted by individuals to a bank would not lead to a tangible loss in the event of a bank failure.[373]

And, "[t]his purpose is not furthered by extending deposit insurance to cover a standby letter of credit backed by a contingent

371. *Id.* at 431-32.
372. *Id.* at 432.
373. *Id.* at 432-33.

promissory note which includes no such surrender of assets or hard earnings to the custody of the bank."[374]

Finally,

> [a]t no point did Congress disown its initial, clear desire to protect the hard assets of depositors. At no point did Congress criticize the FDIC's longstanding interpretation .... In fact, Congress had reenacted the 1935 provisions in 1950 without changing the definition of 'deposit' at all .... When the statute giving rise to the longstanding interpretation has been reenacted without pertinent change, the "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." Indeed, the current statutory definition of "deposit," added by Congress in 1960, was expressly designed to incorporate the FDIC's rules and regulations on "deposits".... Congress, therefore, has expressly incorporated into the statutory scheme the regulations that the FDIC devised to assist it in determining what constitutes a "deposit" within the statutory scheme. Under these circumstances, we must obviously give a great deal of deference to the FDIC's interpretation of what these regulations do and do not include within their definition of "deposit."[375]

The Court made extensive references to clear congressional intent on the macromeaning of the Act and Congress's reenactment of the relevant provision without change to the agency's "longstanding interpretation." That failure to revise or repeal the interpretation "is persuasive evidence that the interpretation is the one intended by Congress."[376] Therefore, the agency interpretation had been adopted as the clear intent of Congress on the specific issue, and deference to the FDIC interpretation had become irrelevant. It is a decision at the *Chevron* so-called first step.

If, however, deference of some sort must be given the FDIC's interpretation of its own regulation, which has been incorporated into the statute, it should be *Seminole Rock*[377] deference and not *Chevron* deference.

At the end of its opinion, the Court restates its belief that, "whatever the relevant State's definition of 'letter of credit' or 'promissory note,' Congress did not by using those phrases ... intend to protect with deposit insurance a standby letter of credit backed only by a contingent promissory note."[378] If, therefore, the congressional intent is clear on the issue, the court is actually saying

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374. *Id.* at 435.
375. *Id.* at 437-38 (citations omitted).
376. *Id.*
377. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14 (1945); *see also* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 510-14 (1994); Lyng v. Payne, 476 U.S. 926, 939 (1986); Udall v. Tallman, 380 U.S. 1, 16-17 (1965).
378. *Philadelphia Gear*, 476 U.S. at 440.

the agency decision is correct as a matter of law because it is consistent with clear congressional intent. Again, *Chevron* deference to the agency interpretation is irrelevant because the FDIC "got it right" at the *Chevron* first step.

As in the four cases from *Christensen*, there also was something legally more than an authoritative agency position in these cases. In *Mead,* the Court's decision was based on the clear congressional intent identified. It said "it is . . . [complainant's] interpretation which cannot be squared with the statute."[379] The agency position actually was stated in its regulations, which had the force of law, and not merely in opinion letters, guidelines, etc. On the remaining questions of liability, the Court decided to await the views of the PBGC and the IRS following the remand. In *FDIC v. Philadelphia Gear Corp.* the Court referred to the clear congressional intent on the macromeaning of the Act and congressional adoption of the agency interpretation as the clear intent of Congress on the specific issue.[380] Where congressional intent is found, deference is irrelevant.

E. FDA v. Brown & Williamson Tobacco Corp.[381]

This case repeats an earlier type of application of the allocation model of scope of judicial review. In *Packard*, the Justices agreed that the issue before the Court was the fundamental, underlying meaning of the National Labor Relations Act. As such, it was a question for independent determination by the Court. The disagreement among the members of the Court was about that fundamental, underlying meaning regarding the right of foremen to organize.[382]

In this case, the FDA promulgated regulations regulating tobacco products, which were challenged by the industry. The Court majority found that Congress had directly spoken to the issue and precluded FDA jurisdiction: "[W]e believe that Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products."[383] It would be "inconsistent with the intent that Congress has expressed in the FDCA's overall regulatory scheme and in the tobacco-specific legislation that it has enacted subsequent to the FDCA."[384]

Toward the end of its opinion, the majority said: "Deference under *Chevron* . . . is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps . . . . In extraordinary cases, however, there may

379. Mead Corp. v. Tilley, 490 U.S. 714, 725 (1989).
380. *Philadelphia Gear*, 476 U.S. at 431-34, 437, 439.
381. 529 U.S. 120 (2000).
382. Packard Motor Co. v. NLRB, 330 U.S. 485, 485-86 (1947).
383. *FDA*, 529 U.S. at 126.
384. *Id.*

be reason to hesitate before concluding that Congress has intended such an implicit delegation . . . ."[385]

The Court then referred to a statement by Justice Breyer in a 1986 article, in which he said: "A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."[386]

That is the central principle of the allocation model and its accommodation of a court's *Marbury* authority to "say what the law is" at the fundamental, underlying purpose level of a statute. Courts defer to reasonable agency determinations of "interstitial matters," and have done so since *Gray*, *Hearst*, and *Chevron*. Here the meaning of the statute was thought to be clear (at the macromeaning level) that Congress had not given the FDA jurisdiction over tobacco products.

The dissent by Justice Breyer stated that "the statute's basic purpose—the protection of public health—supports the inclusion of cigarettes within its scope."[387] And "[t]he statute's language, then, permits the agency to choose remedies consistent with its basic purpose—the overall protection of public health."[388] On at least three more occasions, Justice Breyer restated his view that the fundamental, underlying purpose of the statute was to protect public health.

Therefore, all the Justices, as in *Packard*, indicate the issue to be the fundamental, underlying purpose of the FDCA. As in *Packard*, they disagree about what it is. The *Chevron* model is consistent with *Gray-Hearst* in this application, for it also recognizes that if the issue is at the fundamental level of meaning, deference is irrelevant. The reviewing court decides the question independently. Here, the majority believed the specific issue to be fundamental, that Congress had addressed it directly, and that it had denied jurisdiction to the FDA to regulate tobacco products as currently marketed. From the majority's view, there was no impropriety in refusing to defer to the FDA. It simply performed its *Marbury* duty to "say what the law is."

F. United States v. Mead Corp.[389]

Technically, this case concerned a tariff classification ruling, i.e., "a written statement . . . that interprets and applies the provisions of the Customs and related laws to a specific set of facts."[390] The Court said classification rulings "are best treated like 'interpretations contained

385. *Id.* at 159 (citations omitted).
386. *Id.* (citing Breyer, *supra* note 275, at 370).
387. *Id.* at 162.
388. *Id.* at 178.
389. 533 U.S. 218 (2001).
390. *Id.* at 222 n.1 (quoting 19 C.F.R. § 177.1(d)(1) (2001)).

in policy statements, agency manuals, and enforcement guidelines.' They are beyond the *Chevron* pale."[391]

However, the Court also said: "We granted certiorari in order to consider the limits of *Chevron* deference owed to administrative practice in applying a statute."[392] Then it stated the principles of its holding. First, an administrative implementation of a statutory provision qualifies for *Chevron* deference when Congress has delegated authority to the agency to make rules having the force of law or by delegation of power to engage in adjudication "and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority."[393] This "[d]elegation of such authority may be shown . . . by some other indication of a comparable congressional intent."[394] Second, if the implementation fails to qualify, it may, nevertheless, "claim respect according to its persuasiveness"[395] under the principles of *Skidmore*. *Skidmore* also applies where there is delegated authority to make rules but "where such authority was not invoked."[396] This model also is consistent with *Gray-Hearst*, if not a restatement of *Gray-Hearst*.

The Court's inclusion of "or by some other indication of a comparable congressional intent" apparently was designed to address the "implicit" delegation on a "particular question" statement in *Chevron*.[397] The Court stated that "[it] can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law."[398] I suspect this indicated undue Court concern about some of its cases that Justice Scalia had construed as giving *Chevron* deference in situations where the agency action did not have the force of law. The four cases he cited in his *Christensen* concurrence are examples. They were addressed earlier along with two others he included in his *Mead* dissent.

For instance, in *Mead*, the Court defensively tried to support the *NationsBank* decision where the Comptroller granted a bank permission to broker annuities.[399] Citing this case, Justice Souter said: "[W]e have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was

391. *Id.* at 234 (citing Christensen v. Harris Cmty., 529 U.S. 576, 587 (2000)).
392. *Id.* at 226 (citation omitted).
393. *Id.* at 226-27. Professor Russell L. Weaver contends that the *Mead-Christensen* dual deference standards "produce the wrong balance" and are not congruent with the reality of judicial review of agency legal determinations. Russell L. Weaver, *The Emperor Has No Clothes:* Christensen, Mead *and Dual Deference Standards*, 54 Admin. L. Rev. 173, 175-81 (2002).
394. *Mead*, 533 U.S. at 227.
395. *Id.* at 221.
396. *Id.* at 237.
397. *Id.* at 227.
398. *Id.* at 229.
399. *Id.* at 231.

afforded . . . ."[400] He need not have been so concerned about *NationsBank* and the longstanding precedent concluding that decisions of the Comptroller are entitled to *Chevron* deference.[401] *NationsBank* involved an APA agency licensing action which had the force of law.

My research indicates that the Court has been consistent, and that there are no straightforward examples of *Chevron* deference being accorded to "mere authoritative agency positions." *Chevron* deference is warranted in situations where there is some reasonable basis for concluding that the agency action was based on delegated authority, that it was consistent with the macromeaning of the relevant legislation, and had the force of law.

Thus, *Mead* clarified *Chevron* fundamentals,[402] but it also left several problems for our further study. Of course, there may be others, but I will comment on five problems that are significant.

IV. *MEAD* CLARIFICATIONS OF *CHEVRON*

A. *Delegated Authority Must Be Exercised to Qualify for* Chevron *Deference*

First, in *Mead*, the Court made clear that delegated authority must be exercised if the agency interpretation is to qualify for *Chevron* deference. Three of the Court's statements so indicate. For example, it said: "We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation

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400. *Id.* (citing NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co, 513 U.S. 251, 256-57, 263 (1995)).

401. *See id.* at 231 n.13.

402. Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 Admin. L. Rev. 807, 833-34 (2002). Professor Merrill also concluded that *Mead* clarified *Chevron*. He said, in summary:

> On the whole, "the *Mead* doctrine" is a sound development . . . . To be sure, the decision comes up short in terms of articulating a meta-rule to guide court[s] in future controversies . . . . But nothing the Court did or said precludes future decisions that brush away the fuzziness in the majority's exposition, leaving us with a clear and defensible meta-rule. Finally . . . *Mead* secures a bright future for the *Chevron* doctrine . . . . With these propositions established, judges are more likely to take *Chevron* seriously . . . . In the long run this compact, but powerful, *Chevron* doctrine should enhance, rather than retard, the transfer of interpretational power from courts to agencies.

Id. *But see* William S. Jordan, III, *Judicial Review of Informal Statutory Interpretations: The Answer is* Chevron *Step Two, Not* Christensen *or* Mead, 54 Admin. L. Rev. 719 (2002); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 Admin. L. Rev. 735 (2002); Ronald M. Levin, Mead *and the Prospective Exercise of Discretion*, 54 Admin. L. Rev. 771 (2002).

claiming deference was promulgated in the exercise of that authority."[403] Also, "that a ruling may be precedent in later transactions, precedential value alone does not add up to *Chevron* entitlement; interpretive rules may sometimes function as precedents,[404] and they enjoy no *Chevron* status as a class."[405] Finally,

> [i]ndeed, in holding here that *Chevron* left *Skidmore* intact and applicable where statutory circumstances indicate no intent to delegate general authority to make rules with force of law, or where such authority was not invoked, we hold nothing more than we said last Term in response to the particular statutory circumstances in *Christensen*. . . .[406]

B. *Implicit Delegation of Authority*

Second, there is the problem of learning how post-*Mead* courts will make decisions "recognizing that even without express authority to fill a specific statutory gap, circumstances pointing to implicit congressional delegation present a particularly insistent call for deference."[407] Implicit delegation may, of course, be derived by statutory construction of imprecise language that indicates it should be implied. In *Chevron,* the Court recognized that "[s]ometimes the legislative delegation to an agency on a particular question is implicit."[408]

Pre-*Chevron*, in *Chrysler Corp. v. Brown*,[409] the Court found it necessary to determine whether certain Department of Labor regulations had the "force and effect of law" within the meaning of the Trade Secrets Act,[410] thereby authorizing government officers and employees to disclose information concerning, *inter alia*, trade secrets of persons or corporations or associations. The agency regulations in question made available to the public Chrysler documents regarding its equal employment opportunity and affirmative action programs. The Court said

> [t]he pertinent inquiry is whether under any of the arguable *statutory* grants of authority the . . . disclosure regulations relied on . . . are reasonably within the contemplation of that grant of authority . . . unless we were to hold that any federal statute that implies some authority to collect information must grant *legislative* authority to

403. *Mead*, 533 U.S. at 226-27. Professor Weaver states the "force of law" standard misdirects the deference decision. Weaver, *supra* note 393, at 181-90.

404. *See* Peter L. Strauss, *The Rulemaking Continuum*, 41 Duke L.J. 1463, 1472-73 (1992).

405. *Mead*, 533 U.S. at 232.

406. *Id.* at 237-38.

407. *Id.* at 237.

408. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 844 (1984).

409. Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

410. 18 U.S.C. § 1905 (2000).

> disclose that information to the public, it is simply not possible to find in these statutes a delegation of the disclosure authority asserted . . . .
>
> This is not to say that any grant of legislative authority to a federal agency by Congress must be specific before regulations promulgated pursuant to it can be binding on courts in a manner akin to statutes. What is important is that the reviewing court reasonably be able to conclude that the grant of authority contemplates the regulations issued.[411]

The case of *Ford Motor Credit Co. v. Milhollin*[412] is another pre-*Chevron* example of implicit delegation. The issue in *Ford Motor Credit* was "whether the Truth in Lending Act ('TILA') requires that the existence of an acceleration clause always be disclosed on the face of a credit agreement."[413]

The purpose of TILA is to promote informed use of credit by requiring "meaningful disclosure of credit terms"[414] to consumers.

> Because of their complexity and variety, however, credit transactions defy exhaustive regulation by a single statute. Congress therefore delegated expansive authority to the Federal Reserve Board to elaborate and expand the legal framework governing commerce in credit . . . . For the reasons following we conclude that the issue of acceleration disclosure is not governed by clear expression in the statute or regulation, and that it is appropriate to defer to the Federal Reserve Board and staff in determining what resolution of that issue is implied by the truth-in-lending enactments.[415]

In footnote eight, the *Ford* Court quoted from four Staff Interpretation and Information Letters which the court of appeals had "spurned . . . [in an earlier case] as a source of interpretative guidance on the ground that the several letters were 'conflicting signals.'"[416] The Court, however, said the Opinion and Letters were fundamentally consistent.

> Accordingly, caution must temper judicial creativity in the face of legislative or regulatory silence. At the very least, that caution requires attentiveness to the views of the administrative entity appointed to apply and enforce a statute. And deference is especially appropriate in the process of interpreting the Truth in Lending Act and Regulation Z. Unless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive . . . . Congress delegated broad

411. *Chrysler*, 441 U.S. at 306, 308.
412. 444 U.S. 555 (1980).
413. *Id.* at 557 (citation omitted).
414. 15 U.S.C. § 1601(a) (2000); *Ford*, 444 U.S. at 559.
415. *Ford*, 444 U.S. at 559-60.
416. *Id.* at 565 n.8.

> administrative lawmaking power to the Federal Reserve Board when it framed TILA. The Act is best construed by those who gave it substance in promulgating regulations thereunder.[417]

In footnote nine, the Court acknowledged that the administrative interpretations involved in the case were

> issued by Federal Reserve staff rather than the Board. The Court said it would be unrealistic to draw a radical distinction between opinions issued [by] the Board and those issued as official staff memoranda. At any rate, it is unnecessary to explore the Board/staff difference at length, because Congress has conferred special status upon official staff interpretations .... Furthermore, Congress has specifically designated the Federal Reserve Board and staff as the primary source for interpretation and application of truth-in-lending law.[418]

An amended statutory provision provided creditors with a defense from liability upon good faith compliance with any interpretation or approval by Federal Reserve staff authorized by the Board to issue such interpretations or approvals: "The enactment and expansion of § 1640(f) has significance beyond the express creation of a good faith immunity. That statutory provision signals an unmistakable congressional decision to treat administrative rulemaking and interpretation under TILA as authoritative."[419]

The regulatory framework of TILA appears to consist of circumstances pointing to implicit congressional delegation of authority to the agency and its staff to take "authoritative agency positions" that have the force of law.

C. *Delegation of Authority by Congressional Expectation*

Third, the Court recognized another method of identifying delegation of authority that also would give agency action the force and effect of law. Justice Souter said the following:

> Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law .... When circumstances implying such an expectation exist, a

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417. *Id.* at 565-66.

418. *Id.* at 566.

419. *Id.* at 567-68. Further, the Court said:

> The explicit purpose of the amendment was to relieve the creditor of the burden of choosing "between the Board's construction of the Act and the creditor's own assessment of how a court may interpret the Act".... Thus, while not abdicating their ultimate judicial responsibility to determine the law judges ought to refrain from substituting their own interstitial lawmaking for that of the Federal Reserve so long as the latter's lawmaking is not irrational.

Id. (citation omitted).

> reviewing court . . . is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable . . . . [A]s significant as notice and comment [rulemaking] is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded. The fact that the tariff classification here was not a product of such formal process does not alone, therefore, bar the application of *Chevron*. There are, nonetheless, ample reasons to deny *Chevron* deference here. The authorization for classification rulings, and Customs's practice in making them, present a case far removed not only from notice-and-comment process, but from any other circumstances reasonably suggesting that Congress ever thought of classification rulings as deserving the deference claimed for them here.[420]

Thus, the circumstances in *Mead* did not justify finding a "congressional expectation" that Customs speaks with the force of law in making classification rulings. Nevertheless, the Court created a new, vague "congressional expectation" indicator of delegation of authority. Where it is apparent from "the agency's generally conferred authority and other statutory circumstances"[421] "that Congress would expect" it, definitive agency action will speak with the force of law and *Chevron* deference will apply.[422]

I suspect that its new "congressional expectation" format for identifying congressional delegation of authority to an agency to speak with the force of law is, at least in part, designed to avoid having to wrestle directly with the question of whether informal APA adjudications also should be given *Chevron* deference. One could be cynical and posit that, perhaps, the Court has not yet come to realize that some of the cases reviewed are, in fact, informal APA adjudications. I doubt that. It seems to me to be too obvious to be overlooked by astute minds aided by astute clerks. Yet, no sitting member of the current Court has expressly identified any of the *Chevron* deference cases as based on informal APA adjudication. Chief Justice Rehnquist, Justices Scalia, Kennedy, O'Connor, and Stevens were, however, on the Court when it decided the 1990 case, *Pension Benefit Guaranty Corp. v. LTV Corp.*,[423] discussed below in Part IV.D. In that case the Court expressly applied *Chevron* deference to an expressly recognized informal APA adjudication. Nevertheless, informal adjudication in connection with *Chevron*

420. United States v. Mead, 533 U.S. 218, 229-31 (2001) (footnotes and citations omitted).

421. *Id.* at 229.

422. *Id.*

423. 496 U.S. 633 (1990).

deference has not been mentioned since by anyone on the Court and *Pension Benefit Guaranty Corp.* has been ignored by the Court.

In his *Mead* dissent, Justice Scalia made at least five references to the possibility that the Court's "congressional expectation" approach to *Chevron* might also include informal adjudication. Even so, he refrained from identifying any specific Court decision according *Chevron* deference as based on an informal adjudication.

Two Court decisions in the 2001 Term appear to illustrate what "generally conferred authority and other statutory circumstances" will suffice to justify a finding "that Congress would expect it." And, therefore, there is a congressional delegation of authority justifying *Chevron* deference to definitive agency action that is not based on express or implied (by construction) delegation of rulemaking or formal adjudication authority.

1. *Wisconsin Department of Health & Family Services v. Blumer*[424]

This case required the Court to interpret the "spousal impoverishment" provisions of the Medicare Catastrophic Coverage Act of 1988 ("MCCA"). Those provisions permit a spouse living at home to reserve, sheltered from diminution, certain income and assets to meet the monthly minimum maintenance needs he or she will have when the other spouse is institutionalized and becomes eligible for Medicaid. In determining whether the community spouse is entitled to shelter assets in excess of the standard resource allowance, Wisconsin, along with a majority of the other states, uses an "income-first" method as required by its statutes.[425]

Irene Blumer challenged the income-first method as being inconsistent with the MCCA provision governing upward revision of the community spouse resource allowance. A divided Court, voting 6 to 3, concluded that neither the text of the statutory provision nor the structure of the MCCA forbids the Wisconsin approach. Therefore, the provision is ambiguous, and "[c]onsistent with the position adopted by the Secretary of Health and Human Services, we hold that the income-first method represents a permissible interpretation of the Act."[426]

The Secretary's position was adopted by having "issued several statements supporting the income-first method."[427] Initially, the Secretary interpreted the MCCA as requiring state hearing officers to use that method. More recently, the Secretary concluded that the Act permits both income-first and "some other reasonable interpretation

424. 534 U.S. 473 (2002).
425. *Id.* at 474.
426. *Id.* at 478.
427. *Id.* at 484.

of the law."[428] Most recently, the Secretary circulated for comment a proposed rule allowing states the choice of either the income-first or the resources-first method.

To justify its holding that the "position adopted" by the Secretary was entitled to *Chevron* deference as a "congressional expectation" that the agency would speak with the force of law, the Court referred to the following factors: that it had long noted Congress' delegation of "extremely broad regulatory authority" in the Medicaid area;[429] that the Secretary had "never wavered from the position that the income-first method represents at least a permissible interpretation of the Act";[430] that the Secretary's "significant expertise [was] particularly appropriate in the context of a complex and highly technical regulatory program";[431] that the MCCA "affords large discretion to the States" on the level of the minimum allowance "accorded the community spouse . . . and the amount of assets the couple is permitted to retain";[432] and that nothing in the Act persuaded the Court that similar latitude was inappropriate with respect to application of the MCCA provision governing upward revision of the community spouse resource allowance.[433] Accordingly, the Court concluded "[t]he Secretary's position warrants respectful consideration."[434]

The dissenters concluded that the statutory provision was not ambiguous. Thus, they objected to the majority's paying respectful consideration under *Mead* to the Secretary's opinion letter and policy memoranda and giving them *Chevron* deference. Instead, they believed the Secretary's position should be given only *Skidmore-Christensen* deference under *Mead*. They would have given no deference to the agency position, for they found the state statute to be in conflict with the (unambiguous in their view) MCCA provision and, therefore, invalid.

2. *Barnhart v. Walton*

Barnhart v. Walton[435] was decided about six weeks after *Blumer* and provided a second illustration of the elements of the "congressional expectation" method of delegating authority. The case presented two questions about the Social Security Administration's interpretation of the term "disability" in the Social Security Act. First, the agency read

428. *Id.* (internal quotation and citation omitted).
429. *Id.* at 496 n.13.
430. *Id.* at 497 n.14.
431. *Id.* at 497 (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)).
432. *Id.* (citations omitted).
433. *Id.* at 498.
434. *Id.* at 497 (citations omitted).
435. 535 U.S. 212 (2002).

the term "inability" (to engage in any substantial gainful activity) as including a "12 month" requirement.[436] In its view the "inability" must last, or be "expected to last," for at least twelve months. Second, the agency read the phrase "expected to last" as applicable only when the "inability" has not yet lasted twelve months.[437] Under the agency's interpretations, a person was not "disabled" if his inability lasted less than twelve months, even if the inability was expected to last twelve months or more.[438]

Applicant Walton was found to have suffered an "inability" for only eleven months and, therefore, was not entitled to disability benefits.[439] The U.S. Court of Appeals for the Fourth Circuit held that the statutory language was clear and unambiguous.[440] Therefore, Walton was entitled to benefits despite agency regulations restricting benefits to an "inability" lasting twelve months. The court also decided that because, prior to Walton's return to work, one would have expected his "inability" to last twelve months, the agency regulations refusing to look back to decide hypothetically whether the "inability" might have been expected to last twelve months violated the clear command of the statute. The government sought certiorari, pointing out that this holding conflicted with those of other circuits, was contrary to well-settled law, and would create additional social security costs of $80 billion over ten years.[441]

The Supreme Court first held that the statute did not unambiguously forbid the agency regulations, for it said nothing explicit about the duration of "inability": "[S]uch silence, after all, normally creates ambiguity. It does not resolve it."[442] Second, the Court found the agency's interpretation permissible (i.e., reasonable).[443] The agency's interpretation was said to make sense in terms of the statute's basic objectives, and the agency regulations reflected the agency's own longstanding interpretation.[444]

Walton asked the Court "to disregard the Agency's interpretation of its formal regulations on the ground that the agency only recently promulgated those regulations, perhaps in response to the litigation before the Court."[445] The Court refused to do so, having previously rejected similar arguments.

At this point the Court's opinion includes a lengthy essay on the agency's longstanding interpretation of the statute. It explained that

436. *Id.* at 214-15.
437. *Id.* at 215.
438. *Id.*
439. *Id.*
440. *Id.* at 216.
441. *Id.* at 216-17.
442. *Id.* at 218.
443. *Id.* at 219.
444. *Id.*
445. *Id.* at 221.

Christensen and *Mead* permit *Chevron* deference to agency interpretations reached through means less formal than notice-and-comment rulemaking, and it cited on this point *NationsBank*[446] as did Justice Souter in *Mead*. *NationsBank* was said to indicate that "[w]hether a court should give such deference depends in significant part upon the interpretive method used and the nature of the question at issue."[447]

Then, the opinion listed the factors that led the Court to conclude the agency's longstanding interpretation was lawful and entitled to *Chevron* deference. Included were the following:

> [T]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the agency had given the question over a long period of time. . . .[448] [Thus] *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.[449]

The elaboration of these factors indicates the Court had decided they disclosed a "congressional expectation" that the agency's longstanding interpretation of the statute should have the force of law.

Nevertheless, in a 2004 case, the Court appears to have pulled back from some of the language in *Barnhart* that seems to say an agency's "interpretation . . . of long standing," without more, may be dispositive and entitled to *Chevron* deference.[450]

3. *Alaska Department of Environmental Conservation v. EPA*[451]

The case involved litigation concerning the EPA's construction of specified sections of the Clean Air Act. That construction was of long standing and was expressed in three documents known as "guidance memorand[a]" in 1983, 1988, and 1993.[452] The Court said: "We 'normally accord particular deference to an agency interpretation of 'longstanding' duration,' recognizing that 'well-reasoned views' of an expert administrator rest on 'a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"[453]

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446. NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995).

447. *Barnhart*, 535 U.S. at 222.

448. *Id.*

449. *Id.* (citing United States v. Mead Corp., 533 U.S. 218 (2001)).

450. Alaska Dep't of Envtl. Conservation v. EPA, 124 S.Ct. 983 (2004).

451. *Id.*

452. *Id.* at 987.

453. *Id.* (citations omitted); *see also* Katherine A. Roek, Alaska v. EPA*: Supreme Court Upholds the EPA's Authority Under the Clean Air Act*, 56 Admin. L. Rev. 575, 579-83 (2004) (analyzing the Supreme Court's decision and its future impact).

It continued by stating that the Court had "previously accorded dispositive effect to EPA's interpretation of an ambiguous CAA [Clean Air Act] provision" in *Chevron*. Even so, the agency's interpretation here "presented in internal guidance memoranda, however, does not qualify for the dispositive force described in *Chevron*," as the Court notes, citing and quoting *Christensen* for the proposition that interpretations in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law, do not warrant *Chevron* deference. Then the Court said: "Cogent 'administrative interpretations . . . not [the] products of formal rulemaking . . . nevertheless warrant respect' . . . . We accord EPA's reading of the relevant statutory provisions . . . that measure of respect."[454] Such respect was *Skidmore-Christensen* respect.

We now return to *Barnhart* and consider Walton's second claim which was that the agency's regulation was invalid. He asserted that, because the regulation rejected his interpretation of the words "*can be expected* to last for a continuous period of not less than 12 months,"[455] the statute would have allowed the agency to "look back" prior to his return to work and would have required it to conclude both his impairment and his "inability" to work "*can be expected* to last . . . not less than 12 months."[456]

The Court concluded, however, that the agency regulation was valid as a reasonable, hence permissible, interpretation of the statute. The Court also confirmed the applicability of the "congressional expectation" principle to its analysis of the regulation's validity. In the final paragraph of its analysis of the rule, the Court said the following:

> The statute's complexity, the vast number of claims it engenders, and the consequent need for agency expertise and administrative experience lead us to read the statute as delegating to the Agency considerable authority to fill in, through interpretation, matters of detail related to its administration. The interpretation at issue here is such a matter. The statute's language is ambiguous. And the Agency's interpretation is reasonable.[457]

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454. *Alaska*, 540 U.S. at 1001 (citations omitted).

455. Barnhart v. Walton, 535 U.S. 212, 223 (2002).

456. *Id.*

457. *Id.* at 225 (citation omitted). Professor Robert Anthony contends this statement, if taken seriously, would emancipate reviewing courts "from *Mead's* mandate to test for delegation of force-of-law authority [and they] would enjoy considerable freedom to decide *Chevron*'s applicability vel non." Robert A. Anthony, *Keeping* Chevron *Pure*, 5 Green Bag 2d 371, 373 (2002). He also points out that Justice Breyer's 1986 essay on determining *Chevron*'s applicability suggested that reviewing courts could do so "by weighing sundry factors drawn from pre-*Chevron* case law" such as those Breyer cited in *Barnhart*. *Id.* As Professor Anthony notes, "Judge Breyer thought, a court could infer an implicit congressional intention that the agency interpretation be accorded a certain (higher or lower) degree of deference. But such an implied congressional intention does not amount to a delegation to act

In a concurring opinion in *Barnhart*, Justice Scalia began by stating that the agency regulations were entitled to *Chevron* deference, and that he would not, therefore, go on to address the agency's prior interpretations of the definition of "disability" in a ruling, a manual, and a letter.[458] He also disagreed with the Court's giving "particular deference" to an agency's longstanding statutory interpretation.[459] He pointed out that since *Chevron*, there is a range of permissible interpretations of statutory language and the agency is free to move from one to another, so long as the most recent interpretation is reasonable.[460] Its antiquity should make no difference. Such flexibility would permit policy-based changes by different administrations, as exemplified in *Chevron*.

After expressing his concerns about the Court's elaborate explanation of why the agency's longstanding interpretation of the statute had the force of law, he said, "[i]f however, the Court does wish to credit the SSA's earlier interpretations . . . then I think the Court should state why those interpretations were authoritative enough (or whatever-else-enough *Mead* requires) to qualify for deference."[461] He concluded by noting that the agency's recently enacted "regulations emerged from notice-and-comment rulemaking and merit deference. No more need be said."[462]

Mead, *Blumer*, and *Barnhart* suggest the Court was anxious to establish the "congressional expectation" method of determination that agency action will have the force and effect of law. Its anxiety is probably traceable to the fact that some of its post-*Chevron* opinions may be said to have granted *Chevron* deference to agency action that, indeed, had not involved the usual means by which agencies speak with the force of law, i.e., rulemaking and formal adjudication.

The tension was introduced in *Christensen* and rose to a peak in *Mead*, principally because of Justice Scalia's separate opinions in those cases. In his lengthy dissent in *Mead*, Justice Scalia again cited and discussed *NationsBank*, a case that was prominent in the Court's opinion in *Mead* and in *Barnhart*. Again he criticized the Court for ignoring cases in which it previously gave *Chevron* deference to

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with the force of law, even an implied one." *Id.* at 373-74; *see also* Breyer, *supra* note 275, at 370-71, 381; Braun, *supra* note 236, at 998 (noting that factors such as "contemporaneous" with enactment of the statute, "'consistent and longstanding,' or 'considered in a detailed and reasoned fashion . . . do not bear on the question whether Congress delegated interpretive authority to the agency," but instead go to the persuasiveness of the agency interpretation). See Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 Geo. Wash. L. Rev. 347 (2003), for a criticism of *Mead*'s approach permitting circumstances to indicate delegation of interpretive authority by Congress.

458. *Barnhart*, 535 U.S. at 226.

459. *Id.*

460. *Id.*

461. *Id.* at 226-27.

462. *Id.* at 227.

agency "official positions" not arrived at through rulemaking or formal adjudication.[463] Manifestly, his contentions left the Court with some explaining to do. It attempted to provide that explanation in the *Mead* language quoted above and in its *Blumer* and *Barnhart* opinions, above, but modified in *Alaska Department of Environmental Conservation v. EPA*.[464]

D. *Informal Adjudication*

The Court's opinion in *Mead* identified three formats of agency action that have the force and effect of law—rulemaking, formal adjudication, and "congressional expectation." A fourth format also warrants consideration although it was not mentioned expressly by the Court. That format is informal adjudication. Although the Court said in *Mead* "the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of . . . formal adjudication,"[465] there are at least two examples of the Court's having applied *Chevron* to informal adjudication, as considered earlier. *NationsBank*,[466] discussed above in connection with Justice Scalia's concurring opinion in *Christensen*,[467] is the first. To repeat briefly, *NationsBank* involved application by a bank, pursuant to a Comptroller's regulation,[468] for permission to serve as an agent in the sale of annuities.[469] The Comptroller granted that permission. Justice Souter in *Mead*, and Justice Breyer in *Barnhart*, both used *NationsBank* to illustrate the Court's application of *Chevron* deference to agency action in the congressional expectation delegation format.

However, as discussed, agency process respecting the grant of a permit is defined as "licensing" in the APA, and the APA also defines "licensing" as a type of "adjudication" even though the process may be informal. Thus, the Comptroller actually granted NationsBank a license to broker annuities.[470] It was an informal final agency adjudicative action and had the force of law. As such it should warrant *Chevron* deference.

In neither *Mead* nor *Barnhart* did the Court allude directly to the fact that *NationsBank* was a case of informal adjudication under the APA. Perhaps that was implied where, in *Mead*, the Court said "we have sometimes found reasons for *Chevron* deference even when no

463. United States v. Mead Corp., 533 U.S. 218, 252-53 (2001).
464. Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461 (2004).
465. *Mead*, 533 U.S. at 230.
466. NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995).
467. Christensen v. Harris County, 529 U.S. 576, 589 (2000); *see also supra* Part III.C.2.
468. 12 C.F.R. § 5.34 (1994).
469. *NationsBank*, 513 U.S. at 254-55.
470. *Id.* at 255.

such administrative formality was required and none was afforded,"[471] in reference to *NationsBank*. Rather, the Court applied the "congressional expectation" delegation format.[472]

Pension Benefit Guaranty Corp.[473] is the second example of the Court's having applied *Chevron* to informal adjudication. This case also was discussed in connection with Justice Scalia's concurrence in *Christensen*.[474]

Again, to summarize briefly: the PBGC administers and enforces Title IV of ERISA. LTV filed for reorganization under Chapter 11 of the Bankruptcy Code with its Title IV retirement plans dramatically underfunded.[475] PBGC terminated the plans. Later, PBGC restored the terminated plans. That meant the plans would be ongoing, and that LTV would again be responsible for administering and funding them. LTV refused to comply with the restoration decision. PBGC instituted enforcement action in federal court.[476]

The Court agreed with PBGC, introduced the *Chevron* formula, applied it and concluded the agency should be given deference.[477] It said that the agency determination was lawfully made by informal adjudication in accord with the minimal requirements set forth in § 555 of the APA, which do not include the procedural elements argued by LTV to be necessary.[478] Neither did the Due Process Clause require them in this case. The Court held the PBGC procedures to be consistent with the APA.[479]

Perhaps ninety percent of the federal agency "adjudications," as defined by the APA, are informal. Lacking significant procedural requirements in the APA, the actual procedures followed by the agencies making informal adjudications must vary widely, and we know little about those procedures.

The Court's hesitation to recognize expressly informal adjudication as final agency action which has the force of law—and therefore entitled to *Chevron* deference—is understandable. Yet, informal adjudications are authorized generally by Congress through the APA, and generally carry the force and effect of law. Some may provide a fair proceeding while others may not. Even so, there are potential controls on informal adjudication. If these controls were implemented widely, the Court might be more inclined to recognize informal adjudications as another format of agency action that

471. *Mead*, 533 U.S. at 231.
472. *Id.* at 229.
473. Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633 (1990).
474. *Mead*, 533 U.S. at 231.
475. *Pension Benefit Guaranty Corp.*, 496 U.S. at 637.
476. *Id.* at 640-44.
477. *Id.* at 647.
478. *Id.* at 655.
479. *Id.* at 655-56.

qualifies for *Chevron* deference. What is available to bring some structure and consistency into this process?

We have some guidance from *Overton Park*[480] about the "administrative record" as a basis for decision. We know it must be sufficient to enable a reviewing court to perform its functions. We know that the agency legislation may provide some procedural protections. We know that § 555 of the APA provides some non-procedural protections, but little else. We know that applicable agency procedural rules, if any, would structure the process and provide consistency. We know that such procedural rules generally are exempt from APA § 553 procedures and may be promulgated efficiently. We know that procedural due process will apply in most situations and may be asserted to assure what process would be due in the particular situation. Although procedural due process is of diminished importance or of no relevance in original application situations, we know that equal protection of the laws is applicable to original applications. Finally, we know that any relevant court case decisions would apply.

A serious problem for potential court efforts to regularize informal adjudication procedures is presented, however, by *Vermont Yankee Nuclear Power Corp. v. NRDC.*[481] In *Pension Benefit Guaranty Corp.*, the Supreme Court held the lower court had violated *Vermont Yankee* by imposing on the agency certain procedural rights not provided for by the APA or by ERISA.

Hence, some nonjudicial way must be found to implement some of these controls widely—perhaps uniformly—in informal adjudications. To succeed, it should be some single unifying source of control over such agency procedures. Possibly that source of control could be the APA. Both the new principle of delegation of authority to speak with the force of law through "congressional expectation" and informal APA adjudication are unruly because they currently are not controlled procedurally by the APA. Informal APA adjudication also could be said to be an example of a congressional expectation that the agency would speak with the force of law because Congress included it in the APA. One possible approach would be to amend § 555(e) of the APA by adding new language providing parties to informal adjudications with notice of material on which the agency plans to base a decision; affording parties an opportunity to offer contrary evidence; conducting proceedings in accord with relevant procedural rules; informing the parties of standards relevant to the decision; and providing the parties with a statement explaining its reasoning in applying those standards.

480. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).
481. 435 U.S. 519 (1978).

Some sort of amendment to § 555(e) could possibly have important impacts. First, by regularizing rudimentary informal adjudication procedures, the general quality and public acceptability of such informal agency decisions could be enhanced without undue formalization or inappropriate expense. Counsel and parties would know more about how to prepare intelligently for informal adjudications, and also be assured of a fundamentally fair process of decision making. Courts could review more appropriate and more useful administrative records—perhaps the Supreme Court could be persuaded that such improved informal adjudications should receive *Chevron* deference. If that could be accomplished, the Court would not need to be embarrassed about its decisions (*NationsBank* and *Pension Benefit Guaranty Corp.*) that already have given informal adjudications *Chevron* deference, and it would not need to employ the mask of "congressional expectation" to hide the fact that many such decisions actually may constitute informal APA adjudications.

E. *Section 706 of the Administrative Procedure Act*

Fifth, there is the APA § 706[482] problem that is significant to Justice Scalia.[483] The original introductory language of § 706 was included because of disenchantment with the deferential bias of *Gray* and *Hearst*. The language was supposed to stem the tide and make certain courts decide the legal questions, à la *Marbury*. Post-APA court practice demonstrates that the literal language has not been followed and, of course, the Bumpers effort[484] to amend the APA failed.

As early as 1950, Professor Nathanson concluded the § 706 language did not affect the micro-macro allocation model of scope of review. He said the following:

> [W]hen two conflicting interpretations of a statutory provision are permissible under the language and relevant legislative history, the court will give decisive weight to a rational administrative judgment as to which interpretation will best effectuate the statutory objectives . . . [for] there is no conflict at all with the quoted language of the Act. Despite the decisive weight given to the administrative judgment with respect to evaluation of practical consequences, by itself, under this view, takes full responsibility for the ultimate determination with respect to the meaning of the statute. . . .

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482. 5 U.S.C. § 706 (2000) ("[T]he reviewing court shall decide all relevant questions of law, interpret . . . statutory provisions.").

483. The issue was raised by Justice Scalia in his *Mead* dissent. He contended the court had not been faithful to this APA provision. *See* United States v. Mead Corp., 533 U.S. 218, 241-43 & n.2 (2001) (Scalia, J., dissenting).

484. *See* James T. O'Reilly, *Deference Makes a Difference: A Study of Impacts of the Bumpers Judicial Review Amendment*, 49 U. Cin. L. Rev. 739, 747-67 (1980) (describing Congressional attempts to amend the judicial review provisions of the APA from 1975-1980).

> When administrative action involves the exercise of delegated authority to implement broad statutory standards . . . the area of administrative judgment is no more aptly described as statutory interpretation, than a similar exercise of judgment in the grant or denial of a license or the establishment of a reasonable rate for the future. Such an exercise of judgment is hardly a determination of law within the meaning of the Administrative Procedure Act; and even if it were, it would clearly be within the scope of the exception provided . . . for "agency action . . . by law committed to agency discretion."[485]

F. *Justice Scalia's Criticism of* Skidmore *Deference*

In his *Mead* dissent, Justice Scalia also criticized the Court for reviving the *Skidmore* case, which he considered to be anachronistic after the *Chevron* decision.

1. The Scalia Criticism

"There is, in short, no way to avoid the ossification of federal law that today's opinion sets in motion. What a court says is the law after according *Skidmore* deference will be the law forever, beyond the power of the agency to change even through rulemaking."[486]

2. The Court's *Mead* Response

The Court did not respond directly to Justice Scalia's charge in its *Mead* opinion. Nevertheless, it did include some explanatory comment on its decision to recognize both *Chevron* and *Skidmore* deference. First, it said the position it had taken

> is a choice about the best way to deal with an inescapable feature of the body of congressional legislation authorizing administrative action. That feature is the great variety of ways in which the laws invest the Government's administrative arms with discretion, and with procedures for exercising it, in giving meaning to Acts of Congress.[487]

Second, the Court made clear that the Judiciary is obligated to defer to some administrative action. It said the following:

> Although we all accept the position that the Judiciary should defer to at least some of this multifarious administrative action, we have to decide how to take account of the great range of its variety . . . . The Court's choice has been to tailor deference to variety. This acceptance of the range of statutory variation has led the Court to recognize more than one variety of judicial deference, just as the

485. Nathanson, *supra* note 23, at 490-92 (citation omitted).
486. *Mead,* 533 U.S. at 249-50.
487. *Id.* at 235-36.

> Court has recognized a variety of indicators that Congress would expect *Chevron* deference.[488]

Third, and more specifically directed to *Skidmore*, the Court stated: "The Court . . . said nothing in *Chevron* to eliminate *Skidmore*'s recognition of various justifications for deference depending on statutory circumstances and agency action . . . . Indeed, in holding here that *Chevron* left *Skidmore* intact . . . we hold nothing more than we said . . . in *Christensen* . . . ."[489]

Finally, the Court summarized its position on judicial deference:

> We think in sum, that Justice Scalia's efforts to simplify ultimately run afoul of Congress's indications that different statutes present different reasons for considering respect for the exercise of administrative authority or deference to it. Without being at odds with congressional intent much of the time, we believe that judicial responses to administrative action must continue to differentiate between *Chevron* and *Skidmore*, and that continued recognition of *Skidmore* is necessary for just the reasons Justice Jackson gave when that case was decided.[490]

Justice Breyer made a comment about *Skidmore*'s vitality in his dissent in *Christensen*. He stated that *Chevron* made no relevant change, but simply focused on an additional, separate legal reason for deferring to certain agency determinations. The reason was that Congress had delegated to the agency the legal authority to make those determinations. He concluded: "I believe that *Skidmore* nonetheless retains legal vitality. If statutes are to serve the human purposes that called them into being, courts will have to continue to pay particular attention in appropriate cases to the experienced-based views of expert agencies."[491]

3. A Case Analysis Response to Justice Scalia

a. Skidmore *Revisited*

Any nonjudicial response to Justice Scalia should begin at the beginning, with a brief review of *Skidmore*.[492] The case involved the question of overtime pay under the Fair Labor Standards Act for inactive duty in the company fire-hall. This involved no task except to answer alarms. The employees involved brought an action to recover overtime pay for their service. The district court denied their claim and the circuit court of appeals affirmed that decision.

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488. *Id.* at 236-37 (footnote omitted).
489. *Id.* at 237-38.
490. *Id.* at 238.
491. Christensen v. Harris County, 529 U.S. 576, 597 (2000) (Breyer, J., dissenting).
492. For the initial analysis of *Skidmore*, see *supra* Part I.B.1.

The Administrator of the Act had no authority to promulgate regulations having the force of law, but based on his executive responsibility to implement it and bring injunction actions to restrain violations, he "set forth his views of the application of the Act under different circumstances in an interpretative bulletin and in informal rulings."[493] The Court noted that these materials "provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it."[494] It continued:

> [T]he conclusion of the Administrator . . . is that [in this case] the general tests which he has suggested point to the exclusion of sleeping and eating time of these employees from the workweek and the inclusion of all other on-call time. . . . There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions. And, while we have given them notice, we have had no occasion to try to prescribe their influence . . . . They are not, of course, conclusive, even in the cases with which they directly deal . . . . They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes . . . .[495]

Significantly, the Court explained the administrative-judicial relationship as follows:

> But the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. They do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons. . . . 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.[496]

Having explained the importance of congruity between administrative and judicial administration except where "justified by

493. Skidmore v. Swift & Co., 323 U.S. 134, 138 (1944). The Department of Labor later acquired rulemaking authority with respect to the provisions in issue in *Christensen*. Fair Labor Standards Act Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 790 (codified at 29 U.S.C. §§ 201-216 (2000)). Had it exercised that authority in *Christensen*, *Chevron* deference would have applied. The fact that the agency did not have rulemaking authority at the time of *Skidmore* is not significant, for in both *Skidmore* and *Christensen* the agency did not act in a format that had the force of law. As *Mead* makes clear, for *Chevron* deference to apply such delegated authority must be employed. *See* Levin, *supra* note 402, at 804.

494. *Skidmore*, 323 U.S. at 138.

495. *Id.* at 139.

496. *Id.* at 139-40.

very good reasons," the Court addressed the district court's approach to its decision on the validity of the workers' claim. First, it noted that in a companion case[497] the lower courts had weighed the evidence in the particular case "in the light of the Administrator's rulings and reached a result consistent therewith."[498] Thus, the lower courts in *Armour* were "persuaded" that the administrative interpretation of the statute was correct and they gave it effect.

However, in *Skidmore*, the district court had found the evidentiary facts as stipulated, but had made no findings of fact as to whether under the arrangement of the parties and the circumstances of the case, the fire hall duty or any part thereof constituted working time. Instead, it found as a conclusion of law that "the time plaintiffs spent in the fire-hall subject to call to answer fire alarms does not constitute hours worked, for which overtime compensation is due them under the Fair Labor Standards Act, as interpreted by the Administrator and the Courts . . . ."[499]

The Court continued with the following: "But in this case, although the District Court referred to the Administrator's Bulletin, its evaluation and inquiry were apparently restricted by its notion that waiting time may not be work, an understanding of the law which we hold to be erroneous."[500] Earlier in its opinion the Court had said that the "[f]acts may show that the employee was engaged to wait, or they may show that he waited to be engaged . . . . The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was."[501]

Therefore, *Skidmore* demonstrates clearly the responsibility of reviewing courts to give serious consideration to the administrative viewpoint when performing the role of "saying what the law is" where the agency has not acted in a format that has the force of law.[502] If *Skidmore's* teaching is taken seriously, reviewing courts will not leap to assert their authority to reject an administrative interpretation as "not persuasive" without having first considered carefully the need for judicial administration to work in harmony with good administration of legislation.[503] If they do that, but are "not persuaded" by the administrative viewpoint, the ossification of the law on the point at

497. Armour & Co. v. Wantock, 323 U.S. 126 (1944).
498. *Skidmore*, 323 U.S. at 140.
499. *Id.* at 136 (internal quotation marks omitted).
500. *Id.* at 140.
501. *Id.* at 137.
502. NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 130 (1944) ("Undoubtedly questions of statutory interpretation . . . are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute."); *see* Levin, *supra* note 402, at 782-83.
503. "For a court to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to 'embar[k] upon a voyage without a compass.'" Mead Corp. v. Tilley, 490 U.S. 714, 726 (1989) (quoting Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 568 (1980)).

issue will have been justified by very good reasons.

Skidmore was decided in 1944—eight months after the same Court decided *Hearst*. Therefore, it was well aware of the allocation of the micromeaning and macromeaning legal issues it made in the *Hearst* formal agency adjudication that had the force of law. In *Skidmore* it again demonstrated its understanding of the constitutional separation of powers principle, and its respect for the administrative process. Although the agency interpretation did not have the force of law and thus released the Court from any duty to allocate any authority over the legal question to the agency, it did not decide the question without first considering carefully the agency view. In the final analysis, the Court was persuaded and it accepted the Administrator's interpretation of the Act that waiting time may be time worked, but that sleeping and eating time may not be included. The lower courts in *Armour* had so ruled and the Court affirmed.[504]

b. *Analysis of Cases Cited by Justice Scalia in* Mead

As support for his "ossification" of the law charge, Justice Scalia cited three of the Court's cases to illustrate that stare decisis would bar any attempt by an agency to make an interpretation of its legislation that conflicted with an earlier Court interpretation.[505] Those cases are analyzed below.

i. *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*

In *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*,[506] a common carrier sued to recover freight undercharges for interstate shipments performed by its subsidiary for a shipper.[507] The subsidiary had privately negotiated rates with the shipper that were lower than its rates on file with the Interstate Commerce Commission ("ICC").[508]

The carrier later filed for bankruptcy and an audit disclosed massive undercharges resulting from the subsidiary's practice of billing the shipper at the lower negotiated rates instead of the filed rates.[509] Although billed for the undercharges, the shipper refused to pay. The shipper's right to refuse payment under a new ICC policy that relieved the shipper of the obligation to pay the filed rate when the shipper and the carrier had negotiated a lower rate.[510]

The district court found these matters to be within the primary jurisdiction of the ICC, stayed the proceeding, and referred the case to

504. Armour & Co. v. Wantock, 323 U.S. 126, 134 (1944).
505. United States v. Mead Corp., 533 U.S. 218, 247 (2001).
506. 497 U.S. 116 (1990).
507. *Id.* at 122.
508. *Id.* at 123.
509. *Id.*
510. *Id.*

the ICC.[511] The ICC ruled in the shipper's favor, rejecting the carrier's argument that the Commission lacked the statutory power to release a shipper from liability for such undercharges. After return to the district court, the court granted summary judgment for the shipper.[512] The circuit court affirmed, agreeing that the ICC's new policy was consistent with the Act.[513]

On review, the Supreme Court held that there was a strict statutory duty to follow rate requirements and that the new ICC policy was inconsistent with the Interstate Commerce Act. It reversed the circuit court and remanded the case for further determination. It stated that

> [t]his Court has long understood that the filed rate governs the legal relationship between shipper and carrier .... This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated.... This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.... [T]he departure from the filed tariff schedule that the ICC set forth in its... policy rests on an interpretation of the Act that is contrary to the language and structure of the statute as a whole and the requirements that make up the filed rate doctrine in particular.[514]

The ICC argued that its interpretation of the statute was entitled to *Chevron* deference, but the Court disagreed.

> For a century, this Court has held that the Act... forbids as discriminatory the secret negotiation and collection of rates lower than the filed rate.... The ICC has permitted the very price discrimination that the Act by its terms seeks to prevent.... Compliance with [rate requirements] is utterly central to the administration of the Act.... [This policy] conflicts directly with the core purposes of the Act.[515]

The quoted language makes clear that the Court perceived the legal question to be one of the fundamental, underlying purposes of the Interstate Commerce Act for it to decide independently under the *Gray-Hearst-Chevron-Mead* allocation model as a macromeaning issue.

On the stare decisis point the Court said, "[o]nce we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the

511. *Id.* at 124.
512. *Id.* at 125.
513. *Id.*
514. *Id.* at 126-30 (internal quotations omitted).
515. *Id.* at 130-33 (internal quotations omitted).

statute's meaning."[516] It is apparent that the Court's purpose was to "ossify" the law on this point to prevent any further ICC attempt to deviate from the filed rate doctrine. In this situation, the Court's decision was appropriate.

ii. *Lechmere, Inc. v. NLRB*[517]

In this case a union filed an unfair labor practice charge against a company with the NLRB. It asserted the company had barred nonemployee organizers from its property in violation of the NLRA.[518] Applying Board criteria, an ALJ ruled in the union's favor.[519] The Board affirmed the ALJ's judgment and adopted the recommended order.[520] A divided panel of the court of appeals denied the company's petition for review and enforced the Board's order.[521] The Supreme Court granted certiorari.

Section 7 of the NLRA provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations."[522] The Court said that "[b]y its plain terms, thus, the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers."[523] It added, however, that in the 1956 *Babcock* case,[524] the Court recognized that employees' right of self-organization may depend on their ability to learn the advantage of self-organization from others. Therefore, in certain limited circumstances § 7 of the NLRA may restrict an employer's right to exclude nonemployee union organizers from his property.

In *Babcock,* before the NLRB, the union successfully challenged the company's refusal to allow nonemployee union organizers on its property. The Board acknowledged that there were alternative, non-trespassory means for the union to communicate with employees, but it held that contact at the workplace was preferable and ordered the company to allow the organizers to distribute literature on the company's parking lot and exterior walkway.[525]

The court of appeals refused to enforce the Board's order and the Supreme Court affirmed. It found the Board had erred by failing to make the "critical distinction" between the organizing activities of employees and nonemployees. As a rule, then, an employer cannot be compelled to allow distribution of literature by nonemployee union

516. *Id.* at 131.
517. 502 U.S. 527 (1992).
518. *Id.* at 529.
519. *Id.* at 531.
520. *Id.*
521. *Id.* at 533.
522. 29 U.S.C. § 157 (2000).
523. *Lechmere*, 502 U.S. at 532.
524. NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).
525. *Id.* at 107-08.

organizers on his property, for "no such obligation is owed nonemployee [union] organizers."[526] Thus, *Babcock* indicates that an employer may not always bar nonemployee union organizers from his property, but "his right to do so remains the general rule."[527] To gain access, the union must show that no other reasonable means of communication exists. "That the burden imposed on the union is a heavy one is evidenced by the fact that the balance struck by the Board and the courts under the *Babcock* accommodation principle has rarely been in favor of trespassory organizational activity."[528]

Nevertheless, the Board apparently believed that the Supreme Court had modified its *Babcock* holding in a later case. Thus, it created a three-factor balancing test to apply in all such nonemployee access cases. In *Lechmere*, citing its role as the agency responsible for implementing national labor policy, the Board maintained its balancing principle was entitled to judicial deference. The Court declined to do so, finding that it conflicted with *Babcock*, and then it quoted the stare decisis language from *Maislin*. It noted that "[i]n *Babcock* . . . we held that the Act drew a distinction 'of substance' between the union activities of employees and nonemployees."[529] The Board's error in *Lechmere* was its failure to implement the *Babcock* principle that "it is *only* where . . . access is infeasible"[530] that it becomes necessary and proper to balance employee and employer rights. The Court concluded: "We cannot accept the Board's conclusion, because it 'rest[s] on erroneous legal foundations.' As we have explained, the exception to *Babcock's* rule is a narrow one."[531]

Justice Stevens dissented in *Lechmere*, but said the *Babcock* decision "rejected the Board's view that the rules applicable to union organizing draw no distinction between employees and nonemployees."[532]

In its *Babcock* opinion the Court had made clear that the legal question was one concerning the fundamental, underlying macromeaning purposes of the National Labor Relations Act. It said as follows:

> This is not a problem of always open or always closed doors for union organization on company property. Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may

526. *Id.* at 113.
527. Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 205 (1978).
528. *Id.*
529. Lechmere, Inc. v. NLRB, 502 U.S. 527, 537 (1992) (citation omitted).
530. *Id.* at 538.
531. *Id.* at 539 (quoting *Babcock*, 351 U.S. at 112).
532. *Id.* at 548.

> not affirmatively interfere with organization; the union may not always insist that the employer aid organization. But when the inaccessability of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize.[533]

Therefore, under the pre-*Chevron* "well-settled principles" of judicial review of agency legal determinations by means of the *Gray-Hearst* allocation model, the legal question in *Babcock* was one properly for the Court to decide independently. Its only obligation was to be "slow to overturn an administrative decision"[534] by the agency having the responsibility of applying the Act to infinite combinations of events.

iii. *Neal v. United States*[535]

This is the most recent of the cases cited by Justice Scalia. It concerned the U.S. Sentencing Guidelines promulgated by the United States Sentencing Commission. A prisoner had been convicted of possession of LSD. He was subject to the ten-year mandatory minimum sentence specified in the Anti-Drug Abuse Act of 1986.[536] After his sentencing, the Commission revised the method of calculating the weight of LSD in the Guidelines. Departing from its former approach of weighing the entire "mixture or substance" containing LSD, the amended Guideline instructed courts to give each dose of LSD on a carrier medium a constructive or presumed weight of 0.4 milligrams.

The revised Guideline was retroactive and one month later the prisoner filed a motion to modify his sentence. He contended the weight of the LSD attributable to him under the amended Guideline was 4.58 grams. For that amount, the applicable sentencing range would be seventy to eighty-seven months of imprisonment, or approximately five to seven years. The 4.58 gram calculation would be well short of the ten grams necessitating a ten-year minimum sentence. The Supreme Court granted certiorari to resolve a conflict among the courts of appeals over whether the revised Guideline governed the calculation of the weight of LSD for purposes of § 841(b)(1) of the Act.

The decision in *Neal* was based on the Court's earlier decision in *Chapman v. United States*.[537] In that case, the Court had interpreted

533. *Babcock*, 351 U.S. at 112.
534. *Id.*
535. 516 U.S. 284 (1996).
536. 21 U.S.C. § 801 (2000).
537. 500 U.S. 453 (1991).

the provision of the Act that provided a mandatory minimum sentence of five years for trafficking in an LSD "mixture or substance" that weighed one gram or more. As it explained, "LSD is diffused among the fibers of the paper .... and the LSD cannot be distinguished from the blotter paper, nor easily separated from it."[538] Therefore, the Court held that the actual weight of the blotter paper, with its absorbed LSD was determinative under the statute.[539]

The prisoner in *Neal* contended that the method approved in *Chapman* was no longer appropriate. In his view the Commission intended its newer dose-based method to supplant the actual weight method used in *Chapman.* The prisoner conceded that the Commission did not have the authority to amend the statute construed in *Chapman,* but argued, nonetheless, that because the Commission is charged with responsibility for interpreting penalty statutes and is expert in sentencing matters, its later construction of the statute should be given *Chevron* deference. The prisoner's position was that Congress intended the Commission's rulemaking to respond to judicial decisions in developing a coherent sentencing structure, thus deference was appropriate even though its newer interpretation postdated *Chapman.*

The Court commented that the Commission's choice of an alternative method for weighing LSD did not alter its interpretation of the statute in *Chapman.* Initially, it said it was doubtful that the Commission intended the dose-based method to displace the actual-weight method that *Chapman* required for statutory minimum sentences. The Commission's commentary on the Guideline suggested to the Court that the Guideline calculation was independent of the statutory calculation, and that the statute controls if they conflict. Hence, the Commission appeared to do no more than acknowledge it had no authority to override the statute as the Court had construed it. At that point the Court said: "Were we, for argument's sake, to adopt petitioner's view ... he still would not prevail. The Commission's dose-based method cannot be squared with *Chapman.*"[540] It continued with a statement that in those circumstances the Court did not need to decide what, if any, deference was due the Commission in order to reject its contrary interpretation, because of the doctrine of stare decisis. It followed with the stare decisis quote from *Lechmere* and *Maislin.*[541]

The language used by the Court in its *Chapman* opinion indicates that there, too, it perceived the question to be at the fundamental, underlying purposes meaning of the statute. Accordingly, it was a question for the Court to decide independently. Examples include the

538. *Id.* at 462.
539. *Id.* at 468.
540. *Neal*, 516 U.S. at 294.
541. *Id.* at 294-95.

following:

> [T]he statute refers to a mixture or substance containing a detectable amount. [So long as it contains a detectable amount,] the entire mixture or substance is to be weighed when calculating the sentence. This reading is confirmed by the structure of the statute.... Thus, with respect to these two drugs [PCP and methamphetamine], Congress clearly distinguished between the pure drug and a "mixture or substance containing a detectable amount" of the pure drug. But with respect to drugs such as LSD ... Congress declared that sentences should be based exclusively on the weight of the "mixture or substance." Congress knew how to indicate that the weight of the pure drug was to be used to determine a sentence, and did not make that distinction with respect to LSD.... Congress clearly intended the dilutant, cutting agent, or carrier medium to be included in the weight of those drugs for sentencing purposes.... Congress did not want to punish retail traffickers less severely, even though they deal in smaller quantities of the pure drug, because such traffickers keep the street markets going.... The penalty scheme set out in the [Act] is intended to punish severely large-volume drug traffickers at any level.... Blotter paper seems to be the carrier of choice, and the vast majority of cases will therefore do exactly what the sentencing scheme was designed to do—punish more heavily those who deal in larger amounts of drugs.[542]

4. Summary of Case Analysis Response

This analysis of the relevant cases concerning *Skidmore* deference and Justice Scalia's criticism, is based on the allocation model of scope of judicial review illustrated by *Gray-Hearst*. The allocation model is part of the "well-established principles" of judicial review in place pre-*Chevron* that in my judgment were applied in *Chevron* and later clarified in *Mead*. Therefore, the analysis is based on the premise that *Chevron* was an evolved version of *Gray-Hearst* rather than a watershed case that established a new regime of scope of judicial review. Some of the implications of the analysis should be identified.

First, *Skidmore* made clear the congruity necessary to be maintained between good administration of legislation and good judicial administration. It teaches us that they should be at variance only where "justified by very good reasons."[543]

Second, we learn from *Skidmore* that courts should consider carefully the views of agencies in situations where the agency action is not in a format that has the force of law, although in that context, the reviewing court has no legal obligation to do so.

Third, the cases cited by Justice Scalia as examples of the stifling

542. *Chapman*, 500 U.S. at 453-54.
543. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

effect of applying *Skidmore* deference teach that the Court has, in fact, heeded Justice Jackson's admonition. The baseline cases all illustrated independent Court judgment at the fundamental, underlying purposes meaning of the statutes. The Court did not rush to judgment in any of them although it clearly acted in its *Marbury* role to "say what the law is." Because the various issues decided were fundamental to the statute construed, the Court thereby demonstrated that in some situations it is quite appropriate for reviewing courts to ossify the law at the fundamental statutory meaning level to prevent an agency from further attempts to develop conflicting policies through construction.

Fourth, based on its opinions in these cases, there is reason to believe the Court is sensitive to the respect for agencies implicit in the separation of powers principle and that it (and presumably the lower courts) will not assert its independent authority in a whimsical manner. Being aware of the "ossification" problem inherent in saying what the law is, reviewing courts may be expected to respond more readily to agency advocacy that is designed to persuade where it cannot control. Indeed, the congruity approach suggests reviewing courts should feel obligated to consider agency views when making a decision in their *Marbury* role. If these themes from the cases are implemented, perhaps the dire consequences of applying *Skidmore* deference perceived by Justice Scalia will prove to be more fanciful than real.

5. Responses by Other Commentators

Other commentators also have addressed the stare decisis-ossification problem. Most of them appear to have accepted *Chevron* as a watershed case, ushering in a new mode of scope of judicial review of agency legislative interpretations. Thus, these commentators seem to accept much of the conventional wisdom, confused though it is, about the meaning of *Chevron* and they build on that foundation.

One approach suggests that *Skidmore* constructions should be considered to be defeasible, judicial policy judgments rather than as definitive declarations of what the law is.[544] Another commentator proposes that a *Chevron*-eligible interpretation by an agency should trump a federal court's provisional precedent construing the statute.[545] A third concludes that *Skidmore* constructions should serve only as persuasive dicta for a future court and that agencies should be able to overrule *Skidmore* decisions with legislative rules that would warrant

544. Richard Murphy, *A "New" Counter-*Marbury*: Reconciling* Skidmore *Deference and Agency Interpretive Freedom*, 56 Admin. L. Rev. 1 (2004).

545. Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. Rev. 1272 (2002).

Chevron deference.[546] Professor Richard Murphy also suggests that the Court's decision in *Edelman v. Lynchburg College*,[547] responds obliquely to Justice Scalia's charge, where it says: "We, of course, do not mean to say that the EEOC's position is the 'only one permissible.'"[548] He concludes that the Court majority implied that agency interpretive flexibility can survive a judicial construction without reliance on the *Chevron* framework.

V. SYNTHESIZING RECURRING THEMES OF SCOPE OF REVIEW: A MODEL FOR THE FUTURE

Based on the research and analysis presented in this Article, I suggest a basic model for the scope of court review of agency legislative determinations. The model is based on a synthesis of recurring themes the Court has applied in scope of review decisions from *Gray-Hearst* to *Skidmore*, *Addison*, *BATF v. FLRA*, *Chevron*, and in later cases through *Christensen*, *Mead*, *Blumer*, *Barnhart*, and *Alaska Department of Environmental Conservation.* Accordingly, with further refinement, if the need arises, it should be applied by courts in future cases.

Chevron is the case commonly cited by federal courts on scope of review, and its clarification was the focus of the Supreme Court's decision in *Mead.* Therefore, the courts probably will continue to begin with a recitation of its two-step formulation, although the so-called two-step was not innovative as a principle of statutory interpretation by courts.

Although *Chevron* may continue to be the case commonly cited, *Mead* makes clear that it is inappropriate to view *Chevron* as a seminal case, as some have perceived it to be. The Court itself said *Chevron* was based on well-settled principles. The *BATF v. FLRA* case decided by the same Court in the same Term and a short six months before *Chevron* reaffirmed the well-settled principles. Pre-*Chevron* precedents remain alive and well and the Court's 1944 decision in *Skidmore* was expressly reaffirmed in *Christensen* and *Mead.* The Marshall and Blackmun papers disclose nothing unusual about *Chevron. Christensen* made clear that *Chevron* deference does not apply to agency interpretations lacking the force of law, for *Skidmore* controls in that context Finally, *Mead* made clear that *Chevron* deference applies where Congress delegated legislative or adjudicative authority to the agency, and the agency employed it in making a legal determination having the force of law.

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546. Paul A. Dame, Note, *Stare Decisis,* Chevron *and* Skidmore*: Do Administrative Agencies Have the Power to Overrule Courts?*, 44 Wm. & Mary L. Rev. 405 (2002).

547. 535 U.S. 106 (2002); Murphy, *supra* note 544, at 32-36.

548. *Edelman*, 535 U.S. at 114 n.8.

A. *The First Phase of the Reviewing Court's Analysis*

In this phase of its analysis, the reviewing court's goal should be to determine whether the *Chevron* deference formulation will apply in the particular situation. That is, the court should make this initial determination before attempting to apply the *Chevron* formulation to the case. There are threshold issues that should be addressed to make that determination. They are:

> If the precise question at issue addresses the fundamental, core macromeaning of the statute, the *Chevron* formulation will not apply. Because Congress cannot delegate to an agency authority to determine the ultimate meaning of a statute, the reviewing court should move into its *Marbury* "say what the law is" role. Accordingly, the court should determine, independently, this macromeaning issue while according the agency views respectful consideration and whatever *Skidmore-Christensen* deference it deems persuasive.
>
> If, however, the court is unable to conclude that the precise question at issue is a fundamental macromeaning question, it should, nevertheless, consider the remaining threshold issues. It should not yet assume that *Chevron* deference may or will apply.
>
> If the court determines that Congress has not delegated to the agency legislative or judicial authority to interpret the precise question at issue with the force of law, the *Chevron* formulation will not apply. Although they are conceptually separate, the delegation question is functionally related to the micromeaning-macromeaning nature of the precise question at issue. The Court's opinions suggest that Congress is less likely to delegate to an agency force of law interpretive authority to determine a question that approaches the fundamental, core macromeaning of a statute. Hence, the nature of the specific question may aid the court in determining the delegation question, and vice versa.
>
> If the court determines that the agency has been delegated legislative or judicial authority to interpret the precise question at issue with the force of law, but that the agency did not exercise its delegated authority to make the statutory interpretation, the *Chevron* formulation will not apply.
>
> If, at this point, the reviewing court cannot conclude that the precise question at issue addresses the fundamental, core macromeaning of the statute, it should apply the *Chevron* formulation, provided none of the threshold issues indicate that it will not apply. In most cases, the court will be able to determine whether the specific issue addresses the statute's macromeaning, but if not, the court should proceed to apply the *Chevron* formulation.
>
> If the court determines that the precise question at issue addresses an interstitial application, or other micromeaning interpretation of

> the statute, it should apply the *Chevron* formulation, provided none of the threshold issues indicates it will not apply.

Assuming the court has canvassed the threshold issues and has determined that in the case before it there is no indication the *Chevron* formulation will not apply, it should begin the process of implementing the *Chevron* principles.

B. *The* Chevron *Two-Step Formulation*

1. *Chevron* Step One

Chevron step one is not really different from the standard methods of statutory interpretation that preceded it. Those methods are, primarily, the plain meaning approach and the legislative purpose approach that courts have employed for many years. All statutory interpretation methods seek to ascertain what Congress intended with respect to the specific issue presented.

If, after its analysis, having employed the traditional tools of statutory construction, the reviewing court finds that on the precise question at issue the intent of Congress is clear, that intent must be given effect, without deference to the agency's interpretation.

If, however, the court finds that Congress did not address the precise question at issue and the statute is silent on the point, it should apply *Chevron* step two. Likewise, if Congress did address the specific issue, but the court finds that its expression of intention is ambiguous, it should apply *Chevron* step two.

2. *Chevron* Step Two

Having found at step one that the statute is either silent or ambiguous with respect to congressional intent on the precise question at issue, the reviewing court should apply step two. That is, the court should determine whether the agency's interpretation is based on a "permissible" or "reasonable" construction of the statute.

There are several significant questions, among others, that the court should consider in deciding whether the agency's interpretation is a permissible or reasonable construction warranting *Chevron* deference: What is the micromeaning-macromeaning nature of the precise question at issue? Is it clearly an interstitial application or other micromeaning interpretation of the statute? Or is it an issue that shades toward the fundamental, core macromeaning of the statute? If the latter, what are the possible ramifications of its interpretation by the agency?

Another important question is whether the agency interpretation of the precise question at issue is "permissible" or "reasonable" in light of the fundamental, underlying core purposes of the statute? Or, as

the Court has put it: "If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment 'controlling weight.'"[549]

C. *The Second Phase of the Reviewing Court's Analysis—Auxiliary Matters*

1. Rulemaking

Ordinarily, delegation of legislative authority is accomplished by statutory language authorizing an agency to promulgate such rules or regulations as it deems necessary to administer the statute. In addition, such delegation may be limited in scope or applicability or both. Delegation of legislative authority also may be implied by judicial construction of agency statutes. Most agencies are subject to the APA, and such rules are termed "Substantive Rules—rules other than organizational or procedural . . . issued by an agency pursuant to statutory authority and which implement the statute . . . such rules have the force and effect of law."[550]

To have the force of law, the rules must be promulgated pursuant to the procedures stated in § 553 of the APA, unless they concern matters that are exempted.[551] Section 553 rulemaking procedure may consist of informal notice and comment. That is, Federal Register notice to the public of a proposed rule, followed by an opportunity for the public to comment on the proposal. Or, the language of the agency legislation may "trigger" application of the formal, trial-type procedures of APA §§ 556 and 557. In that event, the rule must be promulgated in compliance with those procedures.

Agency legislation also may impose a range of procedures, in addition to notice and comment, but short of formal trial-type procedures. After consideration and promulgation by the agency, the rule must be published in the Federal Register. Later it is codified into the Code of Federal Regulations.

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549. NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257 (1995) (quoting Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 844 (1984)).

550. U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947); *see* Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977).

551. Proposed rules may be exempt from the § 553 procedures (1) because of their subject matter, i.e.,

> military or foreign affairs function[s] . . . matter[s] relating to agency management or personnel or to public property, loans, grants, benefits, or contracts . . . (2) because they are interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or [(3)] when the agency for good cause finds . . . that notice and public procedure are . . . impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. § 553(a), (b) (2000).

2. Adjudication

Agencies also may be delegated authority to decide specific cases arising during their performance of the tasks assigned. Such authority may be expressly delegated by statutory language so stating, or implied, for example, by language authorizing the grant, denial, suspension, or revocation of permits, licenses, or benefits. Adjudicatory authority also may be delegated implicitly by language authorizing the agency to regulate the activities of persons and entities in specified activities.

The APA provides formal, trial-type procedures in §§ 556 and 557,[552] for adjudications that are required to be made after opportunity for an on the record hearing. The APA provides no procedures for informal adjudications except some peripheral rights in § 555.[553] *Mead* recognized agency formal adjudications as justifying *Chevron* deference. However, as discussed, *Mead* does not consider whether informal adjudications will also be accorded *Chevron* deference. Indeed, as indicated, there are problems presented by the great variety of procedures used in making informal adjudications. Even so, *NationsBank*[554] and *Pension Benefit Guaranty Corp.*[555] are evidence that the Court has, in fact, given *Chevron* deference to informal adjudications.

Such informal adjudicatory actions authorized by Congress in the APA, if based on delegated authority, also have the force of law. Final agency actions, which consist of cease and desist orders, are enforced by courts. Such orders are considered to be legally binding and also to have the force of law in the judicial review context. An excellent example is the order of the NLRB in *Hearst*. It made no difference that the agency order was not self-enforcing.[556]

3. Congressional Expectation

In *Mead*, the Court said that delegation of authority to make decisions having the force of law may be shown by an agency's power to adjudicate or make rules, or by some other indication of a comparable congressional intent.[557] It could be apparent from "the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law"[558] or "circumstances pointing to implicit

552. 5 U.S.C. §§ 556, 557.
553. *Id.* § 555.
554. NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995).
555. Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633 (1990).
556. *But see* Merrill & Hickman, *supra* note 82, at 890-91.
557. United States v. Mead Corp., 533 U.S. 218, 227 (2001).
558. *Id.* at 229.

congressional delegation."[559]

The vagueness of this delegation format is troublesome, as are the Court's authorities presented to justify it. *NationsBank* is probably the most troublesome. How is "congressional expectation" to be recognized? By what criteria? It is incumbent on the Court to provide further clarification and guidance for determining when, in fact, such delegation has occurred. *Blumer, Barnhart*, and *Alaska Department of Environmental Conservation* begin this process, but they do not clarify, and they are confusing. In those cases the Court appeared to apply factors that go to the reasonableness of the agency's interpretation of the statute rather than to the question of whether Congress delegated force of law interpretive authority to the agency on the precise question at issue.

4. Delegated Authority Must Be Employed

Finally, in *Mead* the Court made clear that it is only when the agency actually employs its delegated authority to make a legal determination that it will be accorded *Chevron* deference. Even then, deference is given only if its interpretation is "reasonable in light of the legislature's revealed design."[560] Failure to exercise delegated authority to interpret in a format having the force of law leaves the agency with nothing except its executive power upon which to assert that its decision warrants *Chevron* deference. But *Christensen, Mead*, and *Alaska Department of Environmental Conservation* make clear that such interpretations warrant only *Skidmore-Christensen* persuasive deference.

CONCLUSION

This basic model for scope of judicial review of agency legal determinations is the product of an attempt to synthesize the major themes that have recurred in U.S. Supreme Court opinions for many years. Perhaps it will be useful as we move further into a time of terrorism. The Administrative Procedure Act should not be assumed to provide adequate procedural protection for persons caught up in agency administration of the multifarious legislative responses to the September 11, 2001 attacks.[561]

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559. *Id.* at 237.

560. NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co, 513 U.S. 251, 257 (1995).

561. *See* Michael Fitzpatrick, *Code Orange: Will it Be Used to "End-Run" Federal Rulemaking Requirements?*, 29 Admin. & Reg. L. News 11 (2004).

> This legislation includes: the USA PATRIOT Act (P.L. 107-56); the Public Health Security and Bioterrorism Preparedness and Response Act (P.L. 107-188); the Terrorism Risk Insurance Act (P.L. 107-297); the Enhance Border Security and Visa Entry Reform Act (P.L. 107-173); the Maritime Transportation Security Act (P.L. 107-295); the Aviation and Transportation

First, the APA rulemaking procedures do not apply to a "military or foreign affairs function"[562] nor to "a matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts."[563]

Second, the APA rulemaking procedures do not apply to agency

> interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or . . . when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.[564]

Agency rules promulgated pursuant to the good cause exception may be made effective immediately.

Third, the APA adjudication procedures apply only to formal, on the record proceedings required by statute[565] or the Constitution; and they do not apply to "the conduct of military or foreign affairs functions. . . ."[566]

Fourth, statutes containing specific procedural components that conflict with the general procedures of the APA "trump" the APA provisions by reason of the coordinating language in APA § 559.[567]

Finally, the due process-based, general principle of a right to a hearing before the government acts to deprive a person of a life, liberty, or property interest may not be available. That is, agencies may be vested with authority to act summarily, and in public emergencies or extraordinary situations act immediately to effect a deprivation of an interest protected by due process of law. Thus, the process due in the particular situation will be deferred, although it is to be provided promptly after the deprivation. What constitutes an acceptable period of delay will depend on the particular situation.[568]

Security Act (P.L. 107-71); and the Agricultural Bioterrorism Protection Act (P.L. 107-188). Perhaps most significantly, the Homeland Security Act (P.L. 107-296) created a vast new Department of Homeland Security charged with protecting the nation against emerging terrorist threats. Embedded in this expansive legislation were at least three other formerly free-standing bills—the Homeland Security Information Sharing Act ("HSIA"), the Critical Infrastructure Information Act ("CIIA") and the Support Anti-Terrorism by Fostering Effective Technologies Act ("SAFETY Act").

Id.

562. 5 U.S.C. § 553(a)(1) (2000).

563. *Id.* § 553(a)(2).

564. *Id.* § 553(A)(B); Fitzpatrick, *supra* note 561, at 11; Ellen R. Jordan, *The Administrative Procedure Act's "Good Cause" Exemption*, 36 Admin. L. Rev. 113 (1984).

565. 5 U.S.C. § 554(a).

566. *Id.* § 554(a)(4).

567. 5 U.S.C. § 559.

568. There are a number of illustrations of this U.S. Supreme Court doctrine. *See, e.g.*, Gilbert v. Homar, 520 U.S. 924 (1997) (summary suspension of a state university police officer arrested in a drug raid); FDIC v. Mallen, 486 U.S. 230 (1988) (summary

Therefore, a model for scope of review of agency legal determinations that synthesizes the precedents and clarifies the judicial role in various administrative action contexts should be a useful tool for reviewing courts. Such a model would promote consistency among the courts. Most importantly, it would aid their efforts to maintain an acceptable balance between national security and individual rights in cases involving judicial review of agency interpretations of their legislation.

removal of bank officials indicted for criminal conduct); Hodel v. Va. Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981) (summary administrative order to cease surface mining operations believed harmful to the environment); Barry v. Barchi, 443 U.S. 55 (1979) (summary suspension of a horse trainer's license); Dixon v. Love, 431 U.S. 105 (1977) (summary suspension of drivers' licenses); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (summary seizure of technically misbranded drugs); Fahey v. Mallonee, 332 U.S. 245 (1947) (financial exigency requiring summary removal of bank officials); North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908) (city health officers' summary embargo of warehouse containing poultry believed to be unsafe for human consumption).