"The *Chevron* Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies."

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House Committee on the Judiciary: Subcommittee on Regulatory Reform, Commercial and Antitrust Law

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The question for discussion today is whether, and if so how much, federal courts should defer to federal agency decisions construing the statutes they administer. This is an important issue that has caused great controversy and confusion since the early days of the administrative state. The baseline for today's discussion is the Supreme Court's landmark 1984 decision in Chevron U.S.A., Inc. v. NRDC,[1] which, on its face, appears to greatly increase the degree to which federal courts should defer to agency decisions of statutory construction. In this testimony I will survey the origins and implications of *Chevron* deference, discuss scholarly views on *Chevron* deference and explore possible legislative action to reform the judicial practice of deferring to agency decisions of statutory construction.

I. The Administrative Procedure Act and Agency Statutory Construction.

The proper place to begin is with the language of the Administrative Procedure Act (APA).[2] Passed in 1946, the APA was the culmination of more than a decade of congressional concern over

[1] 467 U.S. 837 (1984).
[2] Pub.L. 79–404, 60 Stat. 237 (1946).

the proper legal framework for judicial review of agency action. APA section 706,[3] which spells out the standards that reviewing courts are supposed to apply when conducting judicial review of agency action, states that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." Reinforcing the judicial role in reviewing agency statutory interpretation, APA section 706(2) provides that "[t]he reviewing court shall . . . hold unlawful and set aside agency action . . . found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" This text strongly implies that Congress expected the federal courts to play a strong role in ensuring that agencies follow Congress's statutory commands.

Congress did not draft § 706 in a vacuum. Judicial deference to agency statutory interpretation was a live issue in the years immediately preceding the passage of the APA. The leading decisions on this matter are *NLRB v. Hearst Publications*[4] and *Skidmore v. Swift & Company*,[5] both decided in 1944. In *Hearst*, the Court reviewed the NLRB's decision that "newsboys" were employees entitled to the protections of the National Labor Relations Act. In the first part of its opinion, applying traditional methods of statutory interpretation, the Court upheld the Board's decision not to apply the tort law definition of "employee" in determinations of employee status under the labor laws. The Court did not appear to defer to the Board at all. Rather, it appeared to decide *de novo* that Congress did not intend for the tort law definition to apply. In the second part of its *Hearst* opinion, however, the Court deferred to the Board's decision that the particular newspaper vendors were "employees" under the Board's definition. The Court explained that "where the question is one of specific application of a broad statutory term . . . the

[3] 5 U.S.C. § 706.
[4] 322 U.S. 111 (1944).

reviewing court's function is limited."[6] The Court then applied a very deferential standard of review, stating that "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."[7]

In *Skidmore*, the Court provided a more comprehensive view on the degree to which reviewing courts should defer to agency statutory construction. In *Skidmore*, a group of the Swift Company's firefighting workers sued, claiming that the company had violated the Fair Labor Standards Act (FLSA) by not paying them for certain periods of inactivity. Although there was no agency decision involved in the case, the Administrator of the Department of Labor's Wage and Hour division filed a brief, *amicus curiae,* construing the FLSA to support the employer's arguments. The Administrator's view was based on the standards laid out in his previously issued bulletin construing the FLSA. The Court explained that in these circumstances, while the agency's views would be taken into account, they were not controlling. The Court concluded that reviewing courts should decide how much to defer to agency interpretive decisions based on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." This is a sliding scale of deference based on the enumerated factors and a totality of the circumstances surrounding the agency's decisionmaking process.

As *Hearst* and *Skidmore* illustrate, the Court's decisions on how much deference reviewing courts owe to agency decisions of statutory construction were confusing at best and inconsistent at worst. This area of law needed clarification, and Congress appears to have done so with the language of the APA. It is in this light that the APA's language was understood by some to assign

[6] *Hearst*, 322 U.S. at 131.
[7] *Id*.

the primary role in statutory construction to the reviewing courts. As one court stated, in an opinion quoted in my colleague Professor John Duffy's excellent article on this subject, "[i]n enacting the Administrative Procedure Act Congress did not merely express a mood that questions of law are for the courts rather than agencies to decide,—it so enacted with explicit phraseology."[8]

II. The Road to Chevron

Although, as noted above, some courts recognized that the language of the APA seemed to assign primary responsibility for legal decisions to the courts, the early cases under the APA were not consistent on this score. In many cases, the Supreme Court decided issues of law without deferring to the agency and without even commenting on whether it should be deferring to the agency.[9] In others, however, the Court referred to pre-APA decisions like *Hearst* as if the language of the APA did not render them obsolete.[10] Still worse, in some decisions, the Court explicitly deferred to agency legal conclusions in the face of the apparently contrary language in the APA. For example, in a 1981 decision, the Court explained that

> in determining whether the Commission's action was "contrary to law," the task for the Court of Appeals was not to interpret the statute as it thought best but rather the narrower inquiry into whether the Commission's construction was "sufficiently reasonable" to be accepted by a reviewing court. To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.[11]

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[8] SEC v. Cogan, 201 F.2d 78, 86–87 (9th Cir. 1952), quoted in John E. Duffy, Administrative Common Law in Judicial Review, 77 Tex. L. Rev. 113, 194 n. 48 (1998).
[9] See, e.g., Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 409–12 (1971).
[10] See O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 507–08 (1951),
[11] See Fed. Election Comm. v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 39 (1981).

In short, the Court decided that the APA's command that reviewing courts set aside agency action that is "not in accordance with law" requires only that the agency's decision have a reasonable basis in law, not that it actually be legally correct. However, it was not completely clear just how deferential this standard was, since the search for a "reasonable basis" in law was sometimes conducted via a substantial inquiry into the text, purpose and legislative history of the statute to ensure that the agency's view was not inconsistent with Congress's intent.[12] This was the confusing state of the law when the *Chevron* case arrived at the Supreme Court.

III. *Chevron*: Basics and Basis

A. The Chevron Two-Step Standard

In *Chevron U.S.A., Inc. v. NRDC*,[13] decided in 1984, the Supreme Court announced what appeared to be a startling new approach to judicial review of statutory interpretation by administrative agencies. In the first step of its now-familiar two-step formulation, *Chevron* stated that

> [w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.[14]

Chevron's second step provides that:

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[12] E.g. Democratic Senatorial Campaign Comm., 454 U.S. at 39-43.
[13] 467 U.S. 837 (1984).
[14] 467 U.S. at 842-43.

> [i]f, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. . . . If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.[15]

Because *Chevron* stated that a statute is ambiguous whenever Congress has not "directly spoken to the precise question at issue," on its face, it appears to require courts to defer to a broad swath of agency decisions of statutory construction, much broader than ever before.[16]

B. Chevron's Basis.

The underlying basis of the *Chevron* decision is its most controversial aspect. *Chevron* is based on the Court's view that whenever Congress has passed an ambiguous statute or failed to directly address an issue, it intends to delegate primary interpretive authority to the agency administering the statute, rather than to the reviewing court. Not only is this inconsistent with the language of the APA, for numerous reasons, it is inconsistent with a common sense understanding of the legislative process and the intent of Congress.

[15] 467 U.S. at 843-44.

[16] It is often noted that Justice Stevens, Chevron's author, and his colleagues on the Court probably did not intend to make a major reform in judicial review of agency statutory construction. See Thomas Merrill, The Story of Chevron: The Making of an Accidental Landmark, 66 Admin. L. Rev. 253 (2014). It is also clear, however that application of *Chevron* in later cases resulted in a major change, at least in how the cases are argued and understood.

When Congress does not address an issue in a statute, it is much more logical to assume that Congress simply failed to think of the issue.[17] As any student of the legislative process knows, it is unrealistic to expect a legislative body to anticipate every situation to which its enactments might apply. As far as ambiguity is concerned, it is much more likely that Congress tried, but failed, to express itself clearly on the issue. In both cases, based on *Marbury v. Madison*'s emphatic statement that it is "the province and the duty of the Judicial Department to say what the law is,"[18] the reviewing court should attempt, as best it can, to discern Congress's intent based on the language, context, structure and purpose of the statute.

Even Justice Scalia, often a proponent of deference to administrative agencies, thought that *Chevron* was based on "fictional, presumed intent" and not on an actual delegation of interpretive authority to agencies.[19] In my view, major decisions concerning the distribution of authority among the branches of the Federal Government should not be based on fiction.

There are undoubtedly instances in which Congress intends to delegate interpretive authority to an agency. In some statutes, for example, Congress employs language such as "as defined by" to indicate that it intends for the administering agency to make the legal determination, subject to judicial review for reasonableness.[20] There may also be sensitive areas such as foreign policy or national security in which it makes sense to defer to Executive Branch views on the meaning of congressional enactments. But with regard to the vast majority of statutes, there is no reason to believe that ambiguity or incompleteness implies delegation to an agency. Rather, either

[17] *See, e.g.*, NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 504 (1979) ("Our examination of the statute and its legislative history indicates that Congress simply gave no consideration to church-operated schools.")
[18] 5 U.S. 137, 177 (1803).
[19] See Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 517 (1989).
[20] E.g., 7 U.S.C. § 87b(d)(2)(D) (2006).

Congress has expressed itself imperfectly or, as Justice Scalia believed, "didn't think about the matter at all."[21]

C. *Chevron* Applied

A. The Evolution of Chevron Step One

Regardless of one's views on the wisdom of *Chevron* or the accuracy of its assumption that silence and ambiguity indicate Congress's intent to delegate interpretative authority to agencies, the application of *Chevron* over the past thirty-plus years has been a complete mess, indicating that its two-step process is simply unworkable. In my view, the primary reason for *Chevron*'s unworkability is its lack of a sound, generally accepted, theoretical basis. This opens the door to disagreement among the Justices of the Supreme Court and Judges of the lower federal courts and spawns inconsistent characterizations and applications of the *Chevron* doctrine.

The Supreme Court contributed substantially to the failure of *Chevron* to create a stable, workable standard of judicial review of agency legal interpretations. In the *Chevron* opinion itself, the Court noted, in apparent tension with the rest of the opinion, 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. . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law, and must be given effect."[22]

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[21] Scalia, 1989 Duke L.J. at 517. See also David J. Barron & Elena Kagan, Chevron's Nondelegation Doctrine, 2001 Sup. Ct. Rev. 201, 212–25 (agreeing that *Chevron*'s basis is a fiction).
[22] *Chevron*, 467 U.S. at 843 n.9.

This language, which has been picked up on in numerous subsequent decisions,[23] expands the scope of *Chevron* step one, thereby greatly increasing the likelihood that the reviewing court will not defer to the agency's statutory interpretation. Basically, it substitutes "traditional tools of statutory construction" for "directly spoken to the precise question at issue." This makes it more likely that the reviewing court will decide the case without deferring to the agency. To those who disagree with the narrower version of *Chevron* step one under which virtually all cases would be decided under the extremely deferential step two, the "traditional tools" doctrine might seem to be a virtue. Perhaps it would be if it were applied consistently. However, because reviewing courts are free to pick and choose which version of *Chevron* to apply, the whole enterprise runs the risk of devolving into a skirmish over judges' policy views rather than an application of the statutory standards specified by Congress.

B. Is Chevron about Statutory Construction or Policy?

A fundamental problem with the *Chevron* doctrine is that even now after more than thirty years of experience with it, it is unclear whether *Chevron* is about judicial review of agency decisions of statutory meaning or about agency policy determinations.[24] In one decision, the D.C. Circuit attempted to resolve this difficulty by adding a third step—judicial review of the agency's policy choice among available reasonable or permissible interpretations.[25] The Supreme Court has, on occasion, stated that *Chevron* step two is the equivalent of judicial review of the wisdom

[23] *See, e.g.*, Dole v. United Steelworkers of America, Inc., 494 U.S. 26 (1990); INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987).
[24] For scholarly commentary on this issue, see Michael Herz, Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron, 6 Admin. L.J. Am. U. 187, 189–90 (1992); Michael C. Harper, Judicial Control of the National Labor Relations Board's Lawmaking in the Age of Chevron and Brand X, 89 B.U.L. Rev. 189, 210 (2009).
[25] See Int'l Bhd. of Elec. Workers v. ICC, 862 F.2d 330, 338 (D.C. Cir. 1988). In this case, after determining that the agency's interpretation was reasonable under *Chevron*, the D.C. Circuit, in an opinion by Judge Harry Edwards, went on to examine whether the agency's decision to adopt that particular interpretation was arbitrary, capricious or an abuse of discretion. Judge Edwards' suggestion to add a third step to *Chevron* cases has not been adopted by other judges or courts.

of agency policy under the arbitrary, capricious standard.[26] But *Chevron* step two's focus on the reasonableness or permissibility of an agency's statutory construction is nothing like the careful consideration the Court often undertakes of the wisdom of agency policy under the arbitrary, capricious test. In those cases, the Court examines whether the agency has considered the factors made relevant by Congress, has provided a rational explanation for its decision and whether the agency's decision is plausible, such that it is safe to conclude that the agency applied its expertise to the problem.[27]

This conflation of *Chevron* step two with arbitrary, capricious review establishes another way in which the *Chevron* doctrine is inconsistent with § 706 of the APA. In § 706, Congress instructed reviewing courts to substantively review agency policy decisions for non-arbitrariness. In *Chevron* cases, the federal courts abdicate their responsibility for ensuring rational policymaking if they defer whenever an agency has reasonably or permissibly construed governing statutes. This is a fundamental problem with the *Chevron* doctrine that ought to be corrected.

The difficulty of distinguishing cases involving policy decisions from cases of statutory construction to which *Chevron* might apply is exemplified by the Court's opinion in *Judulang v. Holder*,[28] a 2011 decision in which the Court declined to defer to a Board of Immigration policy governing discretionary relief from deportation for noncitizen convicted criminals. The Court applied the arbitrary, capricious standard of review rather than *Chevron*, apparently on the ground that the case involved a policy decision, not a matter of statutory construction. The government

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[26] Household Credit Services, Inc. v. Pfennig, 541 U.S. 232, 242 (2004). For scholarly discussions of this issue, see Ronald M. Levin, The Anatomy of Chevron: Step Two Reconsidered, 72 Chi-Kent L. Rev. 1253, 1276 (1997) (suggesting that *Chevron* Step Two is simply arbitrary, capricious review); Jack M. Beermann, Chevron at the Roberts Court: Still Failing after All These Years, 83 Fordham L. Rev. 731, 746 (2014).
[27] See Motor Vehicle Manufacturers Ass'n v. State Farm, 463 U.S. 29 (1983); Fox Television, 556 U.S. at 506 (2009).
[28] 132 S. Ct. 476 (2011).

argued that the Court should apply *Chevron*, but the Court demurred, observing that the decision could not be one of statutory interpretation since the statute "does not mention deportation cases."[29] But in *Chevron*, statutory silence was one of the grounds the Court cited as evidence that Congress had delegated a legal determination to the agency. As the Court stated in *Chevron*, "if the statute is *silent* or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[30] This further illustrates that the *Chevron* doctrine is crying out for reform.

C. Chevron Step Zero: The *Mead* Doctrine

The Court has further complicated the *Chevron* landscape with its jurisprudence on when *Chevron* applies when all agree that the agency decision under review is a matter of statutory construction. The Court recognized relatively quickly after the *Chevron* decision that not every agency pronouncement of statutory meaning deserved the extreme deference afforded by *Chevron* step two, even when all agree that the underlying statute is ambiguous. For example, agency positions taken exclusively for the purposes of litigation or in the context of informal, decentralized actions may not warrant *Chevron* deference.

The Court's first decision in this line involved a dispute over the application of the Fair Labor Standards Act to a local Sheriff Department's policy to require employees, under certain circumstances, to use their accrued compensatory time off. The employer wrote to the Administrator of the Wage and Hour Division for advice and in response received an opinion letter concluding that one aspect of the policy was illegal, but the Sheriff implemented it anyway. The employees argued that the Administrator's opinion letter was entitled to *Chevron* deference, but

[29] 132 S. Ct. at 483 n.7.
[30] *Chevron*, 467 U.S. at 843 (emphasis supplied).

the Court balked at this suggestion, concluding that the process of formulating the opinion letter lacked the formality necessary for *Chevron* deference: "Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters– like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law–do not warrant *Chevron*-style deference."[31]

United States v. Mead Corp.,[32] with its elaboration of *Christensen's* "force of law" standard for application of *Chevron*, has become the definitive statement of *Chevron* step zero. *Mead* involved whether tariff classifications issued relatively informally, but treated by the agency as binding between it and the party whose product has been classified, should receive *Chevron* deference. The determination that Mead's product was subject to a 4% tariff was made in a pair of ruling letters issued by the Customs Headquarters. While the first letter contained virtually no reasoning, the second letter, issued after Mead's protest, was characterized by the Supreme Court as "carefully reasoned."[33]

Justice Souter's opinion for the Court in *Mead* noted that the lynchpin for applying *Chevron* is whether Congress delegated interpretive authority to the agency. In *Mead*, as in *Christensen*, the Court characterized this delegation as agency power to make decisions with the force of law. In *Mead*, the primary factor the Court relied upon for determining whether such a delegation had been made was the formality of the procedures Congress authorized the agency to employ. As the Court stated:

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[31] Christensen v. Harris County, 529 U.S. 576, 587 (2000).
[32] 533 U.S. 218 (2001).
[33] 533 U.S. at 225.

> We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed. It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.[34]

The *Mead* doctrine compounds *Chevron*'s fundamental error of equating statutory ambiguity and silence with delegation of lawmaking power by measuring delegation on an unrealistic and unclear yardstick.

It is simply unrealistic to equate procedural formality with delegation of lawmaking power. Congress takes a variety of factors into account when it determines the level of procedural formality that agencies should employ. These include meeting the requirements of the Due Process Clause, ensuring that all policy interests are fairly represented in the agency decisionmaking process, facilitating the provision and careful consideration of technical input, and ensuring that agency decisionmaking accurately reflects the intent of Congress. *Chevron* was wrong to equate silence and ambiguity with delegation of lawmaking power and *Mead* is incorrect when it equates procedural formality with delegation of lawmaking power.

Even more troubling, the Court expressly disclaimed clarity in *Mead*, creating even more uncertainty over when *Chevron* applies. The Court disclaimed reliance on the procedural informality alone to deny *Chevron* deference to the agency's ruling in *Mead*:

[34] *Mead*, 533 U.S. at 229-30.

> [T]he want of that procedure [notice and comment] 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*.[35]

The Court then listed additional factors supporting its determination that *Chevron* deference was not warranted in *Mead*, including the decentralized nature of the decisionmaking process, the high number of decisions concerning tariff classifications and the "independent" judicial review available in the Court of International Trade. The Court did not explain why these factors are relevant to Congress's intent to delegate lawmaking power, but perhaps their inclusion shows that the Court itself recognizes procedural formality often has little to do with delegation of power to take action with the force of law.[36] As Justice Scalia lamented in dissent, the Court has created a "wonderfully imprecise" standard for determining when *Chevron* applies.[37]

This is not an exhaustive analysis of the controversies over the reach of *Chevron*, but it should serve to illustrate the morass that *Chevron* has spawned. In my opinion, it is time to consider reforms that might clarify the doctrines that govern judicial review of important agency policy decisions and reinforce the primacy of congressional intent in statutory interpretation.

D. Additional Problems with Chevron

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[35] *Mead*, 522 U.S. at 231.

[36] Scholarly commentary on *Mead* has generally been negative. A good example is Lisa Schultz Bressman, How Mead Has Muddled Judicial Review of Agency Action, 58 Vand. L. Rev. 1443 (2005).

[37] For very recent examples of cases in the Courts of Appeals that presented difficult questions under *Mead*, *see* Ford Motor Co. v. U.S. 809 F.3d 1320 (Fed. Cir. 2016) and Knox Creek Coal Corp. v. Secretary of Labor, Mine Safety and Health Admin., 811 F.3d 148 (4th Cir. 2016). In the Ford Motor Co. case, Judge Reyna dissented from the majority's decision to apply *Chevron*. *See* 809 F.3d 1320, 1331-33 (Reyna, J. dissenting).

The *Chevron* doctrine poses numerous additional problems. Many are stated and analyzed in a comprehensive law review article appended to this testimony which I published in 2010.[38] One serious problem raised in the article worth mentioning here implicates the authority of Congress. *Chevron* encourages agencies and reviewing courts to ignore congressional intent. Agencies expecting that their interpretive decisions will be reviewed under a deferential version of *Chevron* are free to disregard congressional intent and impose their own policy views even when it is possible to have at least a good sense of how Congress would have wanted the agency to act.[39] Reviewing courts can brush off serious challenges to agency decisions by invoking *Chevron* without engaging in serious consideration of whether the agency is thwarting imperfectly expressed congressional intent. This has altered the balance of power over lawmaking that Congress sought to preserve when it passed the APA.

E. *Chevron*'s Virtues.

Despite all of the criticisms detailed above, *Chevron* is thought to have its virtues. Professor Richard Pierce, a supporter of deference to agencies generally and of *Chevron* deference in particular, has explained two, involving democracy and clarity. Pierce argues forcefully that insofar as *Chevron* results in greater acceptance of agency decisions, it increases democracy and accountability because the alternative to deference is less accountable judicial decisionmaking.[40]

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[38] Jack M. Beermann, End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled, 42 Conn. L. Rev. 9 (2010).

[39] This helps explain why the rate of affirmance of agency action has not increased substantially under *Chevron*. The possibility of extreme deference encourages agencies to depart further from statutory language, leading to more serious questions of agency statutory construction on judicial review. This phenomenon has been observed at the Environmental Protection Agency. *See* E. Donald Elliott, Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts, and Agencies in Environmental Law, 16 Vill. Envtl. L.J. 1, 8 (2005).

[40] Richard J. Pierce, Jr., Democratizing the Administrative State, 48 Wm. & Mary L. Rev. 559, 562 (2006) (describing *Chevron* as "a major step toward legitimating and democratizing the administrative state").

Pierce echoes Justice Scalia's concern that non-deferential judicial review leads to judges making value judgments that should be left to the political branches of government.[41]

The second virtue Pierce finds in *Chevron* is its potential to greatly simplify judicial review of agency legal decisions.[42] This is only a potential virtue because it depends on courts consistently applying the original, very narrow, version of step one under which nearly all agency action would be reviewed under the highly deferential step two. Reviewing agency interpretations for reasonableness or permissibility is much simpler than actually exploring the language, context, structure, purpose and legislative history of a statute and would result in much more deference to administrative agencies.

Another important virtue of *Chevron* is that it allows for agency flexibility. Under non-deferential judicial review, once a reviewing court has determined the meaning of a statute, that decision is binding unless and until the court decides to overrule its prior decision.[43] Because a reviewing Court applying *Chevron* does not impose its own view of the meaning of the statute at issue, the fact that an agency interpretation has been upheld under *Chevron* step two does not preclude the agency from changing its view and adopting a different, but permissible or reasonable, construction in the future.[44] This has led Justice Scalia to express concern over the loss of agency flexibility whenever it appears that the Court is not following *Chevron* but rather determining the

[41] See Richard J. Pierce, Jr., Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions, 41 Vand. L. Rev. 301, 313 (1988).
[42] See Richard J. Pierce, Jr., Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions, 41 Vand. L. Rev. 301, 311 (1988).
[43] *See* Maislin Industries, U.S. Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990); Lechmere Inc. v. NLRB, 502 U.S. 527 (1992).
[44] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005); United States v. Mead Corp., 533 U.S. 218, 244 (2001) (Scalia, J., dissenting).

meaning of a statute itself.[45] It is an open question, discussed further below in the section on statutory reform, whether reviewing courts would allow agencies to change their views on matters of statutory construction approved under a standard other than *Chevron* deference.

IV. Scholarly Views on Chevron

There has been a tremendous volume of scholarship on the *Chevron* doctrine, much too much to review here. Although in my view the weight of scholarly opinion is critical of *Chevron*, the scholarship is far from uniform. In the immediate aftermath of the *Chevron* decision, some scholars argued that *Chevron* was inconsistent with separation of powers. For example, distinguished Harvard Law School administrative law scholar Clark Byse argued in 1988 that the *Chevron* standard violated separation of powers by reducing judicial control over administrative agencies.[46] Other distinguished scholars sounded similar themes in the wake of *Chevron*.[47] My article lists ten significant problems with *Chevron*.[48] Other scholars have also noted the complexity of *Chevron* and its tendency to spawn tricky collateral issues. For example, in 2001, Thomas Merrill and Kristin Hickman noted fourteen unanswered questions concerning the scope of *Chevron*.[49]

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[45] See *Mead*, 533 U.S. at 247 (Scalia, J. dissenting) ("[T]he majority's approach will lead to the ossification of large portions of our statutory law. . . . Once the court has spoken, it becomes unlawful for the agency to take a contradictory position; the statute now says what the court has prescribed.")

[46] Clark Byse, Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron's Step Two, 2 Admin. L.J. 255, 261 (1988).

[47] *See* Henry P. Monaghan, Marbury and the Administrative State, 83 Colum. L. Rev. 1, 2 (1983) (characterizing *Marbury* as suggestive of a condemnation of judicial deference to administrative construction of law); Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L. Rev. 452, 478–81 (1989) (describing how the nondelegation doctrine prohibits the legislature from ceding lawmaking authority to another entity).

[48] Jack M. Beermann, End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled, 42 Conn. L. Rev. 9 (2010).

[49] Thomas W. Merrill & Kristen E. Hickman, Chevron's Domain, 89 Geo. L.J. EO. L.J. 833, 849-52 (2001).

The negative view of *Chevron* is, however, not unanimous. Professor Richard Pierce, for example, has argued that *Chevron* is a step toward increasing the legitimacy of the administrative state.[50] Professor Lisa Schultz Bressman, in a fine article, has argued that scholars have exaggerated the extent to which *Chevron* is built on a fictional view of congressional intent.[51]

V. Possible Statutory Reforms

The final question I will address is whether it would be desirable to recommend statutory reforms to the *Chevron* doctrine and if so, what form might such reforms take. In my view, it would be appropriate for Congress to craft legislation in reaction to all of the problems *Chevron* deference has caused. There is ample precedent for legislative reforms directed at the proper standard of judicial review. Going way back, Congress re-shaped judicial review of formal adjudicatory hearings when it was concerned that courts were being too deferential to agencies.[52] More recently, Congress enhanced judicial review of Federal Trade Commission (FTC) unfair and deceptive practice rulings after courts recognized the FTC's power to define unfair and deceptive practices by rule.[53]

There may be concern that statutory reform would be futile because the courts would interpret statutory language to be consistent with current practice. Although I recognize that this is a possibility, I do not think it is likely that the courts, including the Supreme Court, would ignore legislative reform of a major doctrine like *Chevron*. Congress has stated emphatically and

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[50] *See* Richard J. Pierce, Jr., Democratizing the Administrative State, 48 Wm. & Mary L. Rev. 559, 562 (2006) (describing *Chevron* as "a major step toward legitimating and democratizing the administrative state")
[51] *See* Lisa Schultz Bressman, Reclaiming the Legal Fiction of Congressional Delegation, 97 Va. L. Rev. 2009, 2009 (2011).
[52] This was discussed extensively by the Supreme Court in Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 476-92 (1951).
[53] See the federal Trade Commission Improvement Act of 1974, codified at 15 U.S.C. § 57a (requiring "substantial evidence" review of FTC trade regulation rules).

repeatedly that Congress is the master of administrative procedure and that courts lack the authority to impose their own views of proper administrative process.[54] I would expect the Court to accept and apply any reform of APA § 706.

I now turn to the question of what form an amendment directed at *Chevron* should take. My suggestion is to add the following language to APA § 706, after sub-section 2(F):

> Unless expressly required otherwise by statute, the reviewing court shall decide all questions of law de novo, with due regard for the views of the agency administering the statute and any other agency involved in the decisionmaking process.

Under this standard, courts would likely apply the pre-APA *Skidmore* factors for determining how much to defer to agency interpretations, but they would have flexibility to shape the deference doctrine to meet modern concerns and legal doctrine.[55]

If Congress, through the passage of this statute and in legislative history, expresses serious misgivings about judicial deference to agency legal decisions, courts might conclude that "due regard" implies minimal deference. There might be contexts in which minimal deference is inappropriate, for example where Congress has expressed strong policy preferences but in ambiguous language. In my opinion, however, omitting the "due regard" language altogether would go too far: courts have always considered the views of the agency at least to some extent when reviewing agency legal decisions. Concerns over excessive deference would be met by application of the *Skidmore* factors, informed by fidelity to Congress's expressed preference for less deference than has been the case under *Chevron*.

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[54] See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978); Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633 (1990).

[55] For clarity's sake, § 706 with the proposed amendment is reproduced in Appendix A to this testimony.

This reform would have several advantages over *Chevron*. For one, it restores the law to the standard prescribed in the APA by making it clear that the Court was incorrect when it equated statutory silence and ambiguity with congressional intent to delegate statutory interpretive authority to the agencies. It also confirms that the Court was incorrect when it concluded that relatively formal procedures signaled a similar congressional intent. Rather, only explicit statutory language should be sufficient to determine that Congress has delegated final lawmaking authority to an agency.

Second, *Skidmore* includes a sensible set of criteria for determining whether an agency interpretation is worthy of deference. These factors are "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." These have long been the factors that courts not following *Chevron* have applied when deciding whether to defer to agency statutory interpretation. Agency interpretations deserve deference when the agency has thoroughly considered the question, when its reasoning makes good sense and when its views have been consistent (and thus not shifting with the political winds). These factors are good indications that the agency has applied its expertise to the matter and acted with due regard to Congress's intent underlying the statute being construed.

Third, by requiring express language to increase (or decrease) deference from the APA baseline, this reform would restore to Congress the determination of how much deference reviewing courts should give to agency legal decisions. Under *Chevron*, that determination is made by reviewing courts using unrealistic and indeterminate criteria. This reform would require de novo review of legal decisions unless Congress expressly provides otherwise.

This reform proposal raises three concerns that I would like to address here. First, as Justice Scalia stated in his *Mead* dissent, traditionally, when a court approves an agency's statutory construction under *Skidmore*, the court's determination of the meaning of the statute is considered final even if the court found that, under *Skidmore*'s factors, the agency's interpretation was entitled to deference. In other words, when an agency's statutory interpretation is approved under *Skidmore*, it is considered the only correct construction of the statute. While Justice Scalia's view of the tradition was correct, it need not be so. There is no reason why Congress could not preserve *Chevron*'s flexibility by clarifying in the legislative history underlying this reform that when a court defers to an agency's interpretation, this does not ordinarily foreclose the possibility that the agency might, in the future, adopt a different interpretation that could also be affirmed on deferential review.[56]

It should be noted that Justice Scalia expressly rejected the idea that an agency was free to change a statutory interpretation that had been approved on judicial review under the *Skidmore* factors. Justice Scalia opined that this "is probably unconstitutional. . . . Article III courts do not sit to render decisions that can be reversed or ignored by executive officers."[57] With all due respect, I disagree with Justice Scalia's conclusion here. He is correct insofar as the agency is bound to honor the judgment in the particular case, but there is no constitutional problem if an agency proposes, in a different case, a different view of the meaning of a statute. Further , Justice Scalia's concern is met by the proposed amendment's specification of de novo judicial review of agency statutory interpretation, subject to discretionary deference to the agency's views. The Executive Branch is not ignoring or reversing any judicial decision. Rather, an agency decision to

[56] Of course, the fact that the agency's new interpretation was inconsistent with its prior views weighs against deference under *Skidmore*. But that should not be fatal to arguments for deference under other factors.
[57] National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967 1017 (2005) (Scalia, J. dissenting).

alter its previously announced interpretation would still be subject to judicial review under APA § 706, as amended.

The Court's willingness to consider agency changes in statutory interpretation is illustrated by *FCC v. Fox Television Stations, Inc.*,[58] a decision written by Justice Scalia involving application of the Communications Act's prohibition of "obscene, indecent, or profane language" on broadcast media between the hours of 6 a.m. and midnight. For years, the FCC interpreted this not to prohibit fleeting, nonliteral uses of vulgar language, but in 2004, the agency reversed its view and began to take action against broadcasters even over nonliteral single uses of vulgar language. On judicial review, the Court approved the FCC's changed interpretation under the arbitrary, capricious standard. Although the Court treated the case as if it involved only a change in policy, in truth the FCC had changed its construction of the statute,[59] and the Court did not find that problematic as long as the agency provided an adequate explanation for the change.

Of course, if a reviewing court finds that there is only one correct interpretation of a statute, the agency would not be free to alter its interpretation. In such cases, change could occur only through legislation or by convincing the reviewing court to overrule its prior decision. This is already true when the courts determine the meaning of a federal statute under *Chevron* step one and it would thus place no greater burden of specificity on the courts than exists today.

The second potential problem with the proposed reform is that it introduces a number of vague standards into an important determination. There is no question that the proposal's "due regard" standard leaves discretion to the reviewing courts to determine whether a particular agency

[58] 556 U.S. 502 (2009).
[59] This is discussed in Jack M. Beermann, Chevron at the Roberts Court: Still Failing after All These Years, 83 Fordham L. Rev. 731, 743-44 (2014).

interpretation is entitled to deference. However, these factors are not as uncertain as might be feared. For one, pre-*Chevron* caselaw, including *Skidmore*, provides substantial guidance on when agency statutory construction merits deference. Further, the proposal's specification of "de novo" review will lead courts to err on the side of not deferring, just as the Supreme Court understood in 1951 that the APA expressed a "mood" in Congress indicating that judicial review under the substantial evidence test should be made less deferential than it had previously been.[60]

Third, my colleague Gary Lawson has expressed the fear that if *Chevron* is eliminated, reviewing courts may re-characterize cases as raising policy concerns, not statutory interpretation questions, and thus turn to arbitrary, capricious review rather than the statute's version of *Skidmore* deference. This is, in my view, a real possibility, but it should be viewed as a virtue of the proposal rather than a concern, for at least three related reasons. First, it is clear that under current law, policy decisions are often reviewed under *Chevron* step two's hyper-deferential standard when they should be analyzed under *State Farm* and *Overton Park*'s arbitrary, capricious factors. Second, review under the arbitrary, capricious standard is more faithful to the language of the APA than review under the non-statutory *Chevron* standard. Third, because the boundary between *Chevron* and arbitrary, capricious review is so unclear, courts already have this discretion, so at worst the proposal would not make any change in governing standards of review. In sum, had the Court simply applied the APA's arbitrary, capricious standard to cases currently reviewed under *Chevron*, there would be no need for this hearing.

VI. Conclusion

[60] See Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 487 (1951) ("It is fair to say that in all this Congress expressed a mood. And it expressed its mood not merely by oratory but by legislation. As legislation that mood must be respected, even though it can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of applications.")

From the start, there have been grave concerns that *Chevron* was contrary to the APA. This alone should give pause. Even if that is not sufficient reason for reform, after more than thirty years of experience, it is clear that the *Chevron* doctrine has failed to bring clarity and consistency to judicial review of agency statutory interpretation. The doctrine is ripe for reexamination in a judicial or legislative forum. While pre-*Chevron* practice under *Skidmore* may not have been perfect, it was easier to administer and led to decisions that were more consistent with Congress's intent. *Chevron* has spawned a deeply flawed, complex and unclear set of rules and practices that, over time, venture farther and farther away from Congress's intent as embodied in regulatory statutes and the APA. In some technical and sensitive areas of law, complexity and uncertainty are inevitable and perhaps worthwhile. But in administrative law, clarity and realism are important virtues. Administrative law cuts across a wide swath of governmental functions, implicating important policy issues and fundamental separation of powers concerns. There are good reasons to consider, at this time, reforms designed to make judicial review more responsive to Congress's intent and to bring judicial review back in line with the principles underlying the APA.

APPENDIX A

5 U.S. Code § 706 - Scope of review [with proposed amendment in brackets]

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

[Unless expressly required otherwise by statute, the reviewing court shall decide all questions of law de novo, with due regard for the views of the agency administering the statute and any other agency involved in the decisionmaking process.] In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.