
JUDICIAL DEFERENCE TO AGENCY ACTION

By Thomas W. Merrill*

One of the most important questions in administrative law concerns how closely and critically judges review action taken by administrative agencies. This is often said to be the question of what “scope of review” courts will use in assessing a challenge to an agency decision.

Generalizing broadly, one can distinguish three types of agency determinations: findings of fact, conclusions of law, and determinations of policy. There is obviously interaction and overlap here. Views of law and policy will influence which facts are relevant, findings of fact can influence policy judgments, and questions of law shade off into questions of policy. But in principle, these types of agency determination are distinct, and are associated with different traditions regarding the appropriate scope of review.

Consider, by way of illustration, a decision of the Environmental Protection Agency (EPA) setting a standard for permissible exposure levels to air-borne mercury. The decision will include findings of fact about the effects on human health from exposure to different levels of mercury in the air. It will also include policy judgments, such as what frequency of disease or death in the population is acceptable based on exposure to air pollutants, and whether industry should be expected to incur costs in abating such pollution that exceed the expected benefits from the abatement. And it will include legal judgments about what procedures the EPA should follow in answering the factual and policy questions presented, and whether the statutes enacted by Congress constrain the policy judgments the agency must make in setting a standard. Once EPA resolves these issues, and establishes an exposure standard, its decision is likely to be challenged in court on one or more of these dimensions, either by environmental groups that think the standard should be tougher, or by industry groups that think it is too demanding. The court hearing such challenges will have to decide what the proper scope of review is as to each of the issues raised by the challengers. This will require a prior determination of whether the issue is one of fact, law, or policy.

The verbal formulas that courts employ in describing the scope of review are based on the Administrative Procedure Act (APA). Sometimes the scope of review is prescribed by a more specific statute that applies to a particular agency. But even here, Congress tends to use the verbal formulas found in the APA, and courts interpret these formulas in light of precedents based on the APA.

Questions of fact are governed by the “substantial evidence” standard when the agency decision is based on a record compiled at a hearing; otherwise fact questions are reviewed under the “arbitrary, capricious or abuse of discretion” standard.¹ Questions of policy are governed by the “arbitrary, capricious or abuse of discretion” standard.² Questions of law, according to the APA, are to be resolved by the court itself exercising independent judgment. The APA says: “[T]he reviewing court shall decide all relevant questions of law,” and

shall hold unlawful and set aside agency action that is found to be “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” or “without observance of procedure required by law.”³ As we shall see, the Supreme Court has significantly modified—some would say ignored—the APA’s provisions regarding the scope of review of questions of law.

The verbal formulas themselves do not tell us very much about the actual scope of review that courts apply in reviewing agency decisions. The real question in every case is how much deference the court will give to executive or agency determinations. The possibilities here range along a spectrum, from complete deference, on the one hand, to complete substitution of judgment, on the other. Nearly everyone recognizes that some issues belong at one end of the spectrum or the other. The President’s decision about who he will nominate to serve as the head of a department or agency would be regarded by everyone as one as to which the courts will give complete deference. It is said to be a “political question” or “unreviewable.” A question about whether an agency was constituted in an unconstitutional manner, perhaps because the head of the agency was not properly appointed by the President, would be recognized by nearly everyone as something the courts should decide independently, without giving any weight to the views of the agency. Courts here are said to exercise “independent judgment” or to decide the question “de novo.” The history of administrative law, very broadly speaking, has witnessed an evolution from a world in which most exercises of judicial review clustered around one of the two poles—courts either refused to review administrative action at all or decided matters or themselves—to one in which most action by administrative agencies falls somewhere in between these two poles. Courts will generally review agency action when it is challenged by an aggrieved party. But in doing so, the courts will give some weight or deference to the views of the agency, rather than simply deciding the matter themselves.

A critical question in the great preponderance of administrative law cases, therefore, is just how much deference courts should give to the agency along the particular dimensions of the particular agency decision that has been challenged. This question is answered not so much by the verbal formulas employed as by applying loose conventions developed by courts in reviewing agency decisions. The U.S. Supreme Court plays a leading role in establishing these conventions. Lower court judges, agencies, and lawyers attend carefully to the Supreme Court’s decisions reviewing agency action. One or two Supreme Court decisions do not necessarily establish a convention. But a reasonably consistent pattern of review by the Court over time defines an attitude or “mood”⁴ about how much deference to give to agency determinations of fact, policy, and law. Other legal actors emulate this attitude or mood. The result has a significant impact on the distribution of power among the branches within our system of government.

With respect to review of findings of fact by administrative agencies, the attitude or mood appears to be fairly stable. Whether the case calls for application of the “substantial

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shifted authority dramatically from courts to agencies over matters of statutory interpretation. Previously the Court had recognized that courts should defer to agency interpretations when Congress has explicitly delegated authority to interpret to an agency; *Chevron* seemed to say that Congress should be deemed to delegate authority to interpret to an agency whenever it leaves a gap or ambiguity in a statute that the agency is charged with administering.

The *Chevron* doctrine has blossomed into the most frequently litigated and hotly debated issue in administrative law. *Chevron* itself gave multiple reasons for why agencies should have primary authority in resolving gaps or ambiguities in statutes. The Court mentioned the traditional view that agencies have greater expertise, particularly in interpreting technical provisions with which they have greater familiarity.¹² It also mentioned the superior accountability of agencies to the public, given that agencies answer to the President, who is elected by all the people.¹³ A third explanation was that Congress, by delegating authority to make policy judgments to the agency, should be understood also to want statutory gaps and ambiguities resolved primarily by the agency, because the process of filling gaps and resolving ambiguities also entails resolving policy questions.¹⁴ In recent years, the Court has had to face a number of difficult issues about the meaning and scope of the *Chevron* doctrine. For example, the Court has had to decide whether agency interpretations must be announced in a proceeding that has the “force of law” in order to receive *Chevron* deference, or whether interpretations that are merely advisory such as opinion letters or amicus briefs are also entitled to such deference. In *United States v. Mead Corp.*,¹⁵ the Court indicated that interpretations rendered in proceedings that lack the “force of law” are not entitled to *Chevron* deference. But the Court’s opinion, written by Justice Souter, was unclear as to the rationale for this limitation, as was its understanding of the meaning of “force of law.”

Whatever its rationale and scope, *Mead* effectively creates three tiers of deference in matters involving questions of law. If the conditions for *Chevron* deference are met, then courts must accept reasonable agency interpretations of statutory gaps and ambiguities. If *Chevron* does not apply, and the issue is one as to which the agency has special expertise, then Courts are to ask whether the agency interpretation is “persuasive,” given a variety of contextual factors such as the consistency with which the interpretation has been maintained by the agency. This is known as *Skidmore* deference.¹⁶ Finally, if neither *Chevron* nor *Skidmore* applies, perhaps because the statute applies to all agencies and hence no agency has any special expertise in the matter, then courts are to interpret the statute without giving any deference to agency views.

Another vexing issue concerns the question whether agency interpretations trump judicial interpretations rendered before the agency has offered an interpretation eligible for *Chevron* deference. Decisions reached shortly after *Chevron* was decided held that agency interpretations must yield to prior judicial interpretations. Then the Court reversed course, and in *National Cable & Telecommunications Ass’n v. Brand X Internet Services*,¹⁷ held that agency decisions trump prior judicial interpretations, provided the agency interpretation

otherwise qualifies for *Chevron* deference. Many variations on this question remain undecided, such as what happens when a court upholds an agency decision applying *Skidmore* deference, and then the agency changes its mind in a decision entitled to *Chevron* deference.

A third troubling issue, which remains unresolved, is whether agency decisions interpreting statutes to preempt state law are entitled to *Chevron* deference. Preemption is grounded in statutory interpretation, but it also has major consequences for the division of powers between the federal government and the states. In particular, a determination of preemption displaces state authority in the area preempted, leaving the federal government with a monopoly of regulatory authority. Agency expertise is relevant here, because agencies have a good sense of what impact the continued application of state law will have for a federal regulatory scheme. But state interests may not be well represented or well served by federal agencies, and states may not easily accept agencies as having primary authority over preemption questions. The question whether *Chevron* applies in this context was raised but not reached in *Watters v. Wachovia Bank, N.A.*¹⁸ Three dissenting justices (Stevens, Roberts and Scalia) reached the issue and said *Chevron* should not apply here.

Questions about the scope of the *Chevron* doctrine do not divide justices along familiar ideological lines. Three distinctive perspectives can be discerned on the Court.

One perspective, which is associated most closely with Justice Clarence Thomas, resolves these issues by attending to the logic of implied delegation. This perspective understands *Chevron* to be grounded in a delegation from Congress to the agency to make policy, including the resolution of gaps and ambiguities in the statute the agency administers. The implied delegation theory strongly suggests that *Chevron* should be limited to occasions when an agency exercises its delegated power by acting with the force of law, and that agency interpretations that reflect an implied delegation should trump prior judicial interpretations. Justice Thomas’s majority opinions in *Christensen v. Harris County*,¹⁹ a precursor of *Mead* and *Brand X*, are clear examples of this perspective.

Another perspective, which is associated with Justice Antonin Scalia, would resolve these issues by treating *Chevron* as a simplifying rule about the appropriate scope of review of questions of law. The virtue of *Chevron*, from this perspective, is that it eliminates much of the clutter that has complicated the determination of the appropriate scope of review, notwithstanding the apparent simplicity of the APA. Courts should determine whether the statute has a clearly preferred meaning. If it does, that is the meaning they should enforce. If it does not, they should defer to any reasonable official agency interpretation. Consistent with this perspective, Justice Scalia dissented in both *Mead* and *Brand X*. *Mead*, according to Justice Scalia, created undue complexity in determining the scope of review. *Brand X* he disparaged for creating unnecessary instability and devaluing judicial authority.

A third perspective, associated perhaps most clearly with Justice Breyer, sees *Chevron* as just one decision in a larger universe in which the scope of review of questions of law is driven by a mix of pragmatic factors. This perspective in effect

driven by a mix of pragmatic factors. This perspective in effect treats *Skidmore* as the true expression of the scope of review, with courts weighing the persuasiveness of agency interpretations case by case, looking to multiple factors.²⁰ *Chevron* simply emphasizes one factor—whether authority to interpret as been delegated to the agency—but was not intended to eliminate other factors. This perspective, by denying that there is anything distinctive about the *Chevron*, has the effect of muddying questions about the scope of review, to the point where no structure can be discerned at all.

CONCLUSION

Future appointments to the Supreme Court will undoubtedly have an important effect on the shape and scope of the *Chevron* doctrine. As is revealed by the distinctive perspectives of Justices Thomas and Scalia on these issues, it is difficult to predict how larger jurisprudential commitments will translate into positions on the scope of review of administrative action. Justice Thomas's clear commitment to the implied delegation conception of *Chevron* may provide the most promising basis for achieving coherence in this area of the law. His views are grounded in a plausible reading of *Chevron* and leading post-*Chevron* decisions, they reflect a rigorous commitment to the logic of those decisions, and they have commanded the support of a majority of justices in recent critical cases, such as *Chrestensen* and *Brand X*. Justice Scalia has been unable to convince any other justice to embrace his perspective on the nature and scope of *Chevron*. And Justice Breyer's rootless pragmatism seems to invite courts to do whatever they want to do, rather than delineate a sound conception of proper institutional roles between reviewing courts and agencies.

Endnotes

- 1 See 5 U.S.C. § 706(2) (E); id. § 706(2)(A).
- 2 *Id.* § 706(2)(A).
- 3 5 U.S.C. § 706; id. § 706(2)(C), (D).
- 4 See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951) (observing that Congress in adopting the "substantial evidence" formula for review of fact questions did not change the verbal formula but evidenced a "mood" that required a more searching scope of review than had been applied in the past).
- 5 522 U.S. 359 (1998).
- 6 *Id.* at 366-67.
- 7 The phrase was coined by Judge Harold Leventhal in *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970).
- 8 463 U.S. 29 (1983).
- 9 467 U.S. 837 (1984).
- 10 *Id.* at 842.
- 11 *Id.* at 843.
- 12 *Id.* at 865.
- 13 *Id.*
- 14 *Id.* at 844.
- 15 533 U.S. 218 (2001).
- 16 *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).
- 17 545 U.S. 967 (2005).

18 127 S.Ct. 1559 (2007).

19 529 U.S. 576 (2000).

20 See *Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002) (Breyer, J.).

