Making Law Out of Nothing At All: The Origins of the Chevron Doctrine

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MAKING LAW OUT OF NOTHING AT ALL:* THE ORIGINS OF THE CHEVRON DOCTRINE

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Abstract

Chevron, U.S.A., Inc. v. NRDC has become the most cited case in administrative law - and one of the most cited cases in any field -- by virtue of its now famous “two-step” approach to judicial review of agency legal determinations. It is becoming conventional wisdom, and correctly so, that the Chevron doctrine owes relatively little to the Chevron decision. Yet cases and scholars continue to justify operational features of the Chevron doctrine by reference to the Chevron decision. In an effort to uproot this unproductive enterprise, we trace in detail, we believe for the first time, the precise process by which lower courts constructed the Chevron doctrine (out of very unpromising material) and the Supreme Court adopted that construction essentially by default. We take no position, pro or con, on the merits of the Chevron doctrine in any particular form. We simply want to make known the origins of that doctrine, so that the implications of that origin can be considered by relevant participants in the legal process.

For more than a quarter of a century, federal administrative law has been dominated by the so-called Chevron doctrine, which prescribes judicial deference to many agency interpretations of statutes.1 Chevron, U.S.A., Inc. v. NRDC,2 for which the doctrine is named, has become the most cited case in federal administrative law (and indeed one of the most cited cases in any field),3 and the scholarship on Chevron could fill a small library.4 Love it5 or hate it,6 Chevron virtually defines modern administrative law.

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1 Not all interpretations, but many. For an introduction to the ins and outs of the application of Chevron, see GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 552-610 (6th ed. 2012).


Anyone who has ever taken a course in Administrative Law or Legislation knows the

*Chevron* mantra:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.7

Even after almost thirty years and thousands of recitations, unanswered questions about this *Chevron* framework abound. Does this framework involve two distinct analytical steps or just one unitary decision about the reasonableness of the agency’s interpretation?8 What does it mean to say that the intent of Congress is “clear” on a “precise” question of statutory interpretation?9 What might make an agency’s interpretation of a statute something other than a

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4 A simple WESTLAW search of the “journals and law reviews” database for “(467 /2 837) & *Chevron*” yielded 8,656 hits on August 17, 2012. For a similar search involving article titles, see Peter L. Strauss, “*Deference* Is Too Confusing – Let’s Call Them “*Chevron* Space” and “Skidmore Weight,”” 112 COLUM. L. REV. 1143 (2012).


7 467 U.S. at 842-843.


“permissible construction”? To what class of agency legal interpretations does this framework even apply?

We do not intend to answer any of those questions in this article. Our goal, rather, is to help explain why such questions have proven to be so contentious and seemingly intractable despite decades of prodigious case law and scholarship on judicial review of agency legal interpretations. Part of the problem, we suggest, is the continuing insistence, even on the part of people who know better, to try to answer questions about the *Chevron* doctrine by invoking the *Chevron* decision. The two have very little to do with each other. The modern doctrine of federal court review of federal agency interpretations of statutes does not stem in any substantive way from *Chevron, U.S.A., Inc. v. NRDC*. Rather, it comes from a series of lower court decisions in the mid-1980s that converted a narrow Clean Air Act case about imaginary bubbles over factories into a generalized doctrine of administrative law. The doctrine from that line of decisions was adopted by the Supreme Court essentially by default. Accordingly, there is no canonical decision systematically laying out either the theory or practice of *Chevron*. The *Chevron* decision itself is a very poor well from which to draw, because it did not create, or purport to create, the doctrine that bears its name. The result of this unsystematic origin of the *Chevron* doctrine is a great many unanswered questions about the *Chevron* methodology, a great deal of wiggle room for a wide range of answers to those questions, and no chance whatsoever of finding definitive answers in the place in which too many people continue to look.

10 There is no universally accepted test for determining when an interpretation is impermissible - or, as modern cases tend to frame it, unreasonable. In particular, it is unsettled whether an interpretation can be unreasonable only when it deviates too far (whatever that means) from the statute or also because it is inadequately explained by the interpreting agency. See LAWSON, supra note 1, at 780-87; Gary Lawson, *Outcome, Procedure, and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L.REV. 313 (1996).

At one level, everyone already knows this. It is common knowledge that the *Chevron* decision was not viewed by the Court that issued it -- or by the parties who argued it -- as having any broad implications for administrative law. For some odd reason, however, people seem unwilling to follow through on the obvious conclusion that referring to the *Chevron* decision for answers to questions about the *Chevron* doctrine is worse than pointless.

Our modest goal in this article is to rid the administrative law world of references to the *Chevron* decision (except in cases involving the Clean Air Act and imaginary bubbles over factories, to which it surely continues to have strong relevance). We attempt to do so by tracing in detail the origins of the *Chevron* doctrine, primarily in the D.C. Circuit in the years immediately following the *Chevron* decision. This survey, we believe, has historical value even if it fails to lay the ghost of *Chevron* to rest; the process by which the *Chevron* doctrine developed is a fascinating piece of legal history in its own right, and it deserves to be told.

In Part I, we set out some preliminary matters, including the state of the law as it stood in 1984 when *Chevron* was decided and some methodological problems related to our survey of both pre- and post-*Chevron* case law. We show that the best account of pre-*Chevron* law involved classifying agency legal decisions as either “pure” or “mixed/law-applying” questions and then employing rebuttable presumptions of de novo judicial review to the former and deferential judicial review to the latter. The precise contours of those classifications, the strength of the presumptions, the circumstances that would overcome the presumptions, or the degree of deference due to mixed or law-applying interpretations are impossible to specify – which in part explains the attractiveness and ultimate success of the *Chevron* revolution.

In Part II, we briefly revisit the oft-told story of the *Chevron* decision, explaining that the Court in 1984 saw itself as restating and applying the long-settled law described in Part I. We
add very little to the seminal and definitive work of Tom Merrill on this subject, which has justly and correctly elevated this view of *Chevron* to the status of conventional wisdom.

Part III then shows how lower courts molded the narrow, unpromising *Chevron* decision into a revolutionary doctrinal engine. We trace the evolution of *Chevron* through (we believe) every significant lower court decision in the first year and half after *Chevron* was decided, illuminating the ups and downs – and there were plenty of both – in the breadth of the courts’ readings and applications of *Chevron*. This non-linear developmental process was hardly complete by 1986, but at that point one could meaningfully speak of a “*Chevron* doctrine” – uncertain, unelaborated, in many ways protean, but a doctrine nonetheless -- that was surely not on the mind of anyone on the Supreme Court in 1984 and that had the potential to transform administrative law practice.

Part IV describes how those lower court developments uneasily found their way into Supreme Court jurisprudence, where they continue to guide doctrine in the misguided name of the *Chevron* decision. This process of incorporation – or, more precisely, migration -- was hardly what one normally expects from landmark Supreme Court doctrines. The Court never straightforwardly faced down the crucial questions pertaining to *Chevron*. Instead, the Court stumbled into the *Chevron* doctrine in a series of cases that avoided rather than confronted the major issues. Perhaps no one should see how laws, sausages, or the *Chevron* doctrine are made, but we are going to discuss the latter nonetheless.

Part V briefly concludes with some implications of this research for modern doctrine, most of which amount to the proposition that judges, lawyers, and scholars should stop talking

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12 *But see* Gary Lawson, Katharine Ferguson & Guillermo A. Montero, “Oh Lord, Please Don’t Let Me Be Misunderstood!”: Rediscovering the *Mathews v. Eldridge* and *Penn Central* Frameworks, 81 NOTRE DAME L. REV. 1 (2005) (showing that both the *Mathews v. Eldridge* and *Penn Central* three-part tests did not stem from the cases for which they are named).
about *Chevron, U.S.A., Inc. v. NRDC*. We emphasize that we do not argue here that any
particular aspect of modern doctrine is substantively correct or incorrect. We express no view on
whether the *Chevron* doctrine in general is a step forward or backward from what preceded it.
We argue only that any debate on such questions should take place without reference to the
*Chevron* decision itself.

In sum, we come to bury *Chevron, U.S.A., Inc. v. NRDC*, not to praise (or criticize) it.

I. Before the Dawn

In order to evaluate the impact of *Chevron* on administrative law doctrine and practice in
the years shortly following the decision, one needs (1) to define what the pre-*Chevron* baseline
for judicial review of agency legal determinations looked like, (2) to determine the changes, if
any, to that baseline that *Chevron* was seen by at least some legal actors to require, and (3) to
evaluate the extent to which lower courts actually treated *Chevron* as effecting changes in legal
practice. None of these tasks is easy or straightforward. There is considerable ambiguity about
both the pre-*Chevron* baseline and the nature of the changes, if any, to that baseline prescribed
by *Chevron*. Scholars and courts disagree about almost every aspect of those inquiries except for
the fact of ambiguity in both of them. To make matters more complicated, the process by which
*Chevron* became law – a series of lower court decisions and then default acceptance in the
Supreme Court – prevented those ambiguities from being vented and resolved in an authoritative
forum; instead, they have remained to this day largely submerged and unaddressed. In addition,
what matters for historical purposes is not what either *Chevron* or pre-*Chevron* law actually said,
but rather what lower courts in the months before and following *Chevron believed* them to say.
Those courts almost never expressly articulated whatever beliefs they held, and so much of the
historical inquiry must be grounded in speculation and inference – indeed, in speculation and inference about matters that quite possibly were very poorly understood by the judges themselves.

Nonetheless, despite these enormous methodological difficulties, we think it is possible to give accounts of the pre-

Chevron practice, the 

Chevron decision, and the understandings of that practice and decision evinced by lower courts that are sufficiently warranted by the available materials to permit at least tentative judgments about the development and shape of the 

Chevron revolution. We do not maintain that our accounts of any of these stages in 

Chevron’s evolution are the only possible ones (though we think they are the best available), nor do we maintain that they explain or are consistent with all reported decisions (they do not and are not). But to the extent that having a reasonably coherent account of the evolution of 

Chevron in its early days can help modern courts and scholars wrestle with the problems that still plague judicial review of agency legal conclusions, we think that we can provide at least a starting point for further research.

A. State of Confusion\(^\text{13}\)

In an article written on the eve of the 

Chevron decision, Professor Colin Diver noted that “[t]wo competing traditions in American jurisprudence address the issue of the appropriate allocation of interpretive authority between agencies and courts.”\(^\text{14}\) One tradition, he observed, “views matters of statutory interpretation as questions of ‘law’ reserved for independent

\(^{13}\) With acknowledgement to the sheer brilliance of The Kinks.

\(^{14}\) Colin S. Diver, Statutory Interpretation in the Administrative State, 133 U. Pa. L. Rev. 549, 551 (1985). The article was published after 

Chevron but was obviously written beforehand.
determination by the judiciary,“\textsuperscript{15} while the other “views agencies as delegates, empowered by the legislature to exercise legislative power to articulate and implement public goals,”\textsuperscript{16} and therefore calls for deferential judicial review of agency legal determinations. This seeming duality in judicial approaches had been a staple of administrative law scholarship long before Professor Diver’s article,\textsuperscript{17} and while the Supreme Court said relatively little expressly about it in the pre-\textit{Chevron} era, lower courts were often quite vocal in pointing out the apparent inconsistencies in Supreme Court pronouncements about review of agency legal conclusions.

Perhaps the most famous judicial expression along these lines came from Judge Henry Friendly in 1976:

\begin{quote}
We think it is time to recognize . . . that there are two lines of Supreme Court decisions on this subject which are analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for the case at hand. Leading cases support[] the view that great deference must be given to the decisions of an administrative agency applying a statute to the facts and that such decisions can be reversed only if without rational basis . . . . However, there is an impressive body of law sanctioning free substitution of judicial for administrative judgment when the question involves the meaning of a statutory term.\textsuperscript{18}
\end{quote}

Other courts echoed Judge Friendly’s sentiments. In 1981 in \textit{High-Craft Clothing Co. v. NLRB},\textsuperscript{19} a Third Circuit panel stated that the court’s role in reviewing agency legal

\textsuperscript{15} \textit{Id.}

\textsuperscript{16} \textit{Id.}


\textsuperscript{19} 660 F.2d 910 (3d Cir. 1981).
determinations “is an uncertain one.” After surveying a substantial number of Supreme Court decisions, including a slew of decisions specifically involving the National Labor Relations Board, the court agreed with Judge Friendly that “it is time to recognize that there are two lines of Supreme Court decisions on the subject which are analytically in conflict . . . .” And in 1984, just months before the *Chevron* decision issued, several panels of the D.C. Circuit weighed in on the subject. In *Natural Resources Defense Council, Inc. v. U.S. EPA*, Judge Mikva, writing for a unanimous panel that included then-Judge Scalia, observed:

> The parties sharply contest the standard of review we are to apply to determine whether EPA’s abnegation of all power to reach vessel emissions is “not in accordance with law.” One reason for this dispute is that the case law under the Administrative Procedure Act has not crystallized around a single doctrinal formulation which captures the extent to which courts should defer to agency interpretations of law. Instead, two “opposing platitudes” exert countervailing “gravitational pulls” on the law. *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407 (D.C.Cir.1983) (Wright, J., dissenting). At one pole stands the maxim that courts should defer to “reasonable” agency interpretive positions, *see Udall v. Tallman*, 380 U.S. 1, 16 (1965), a maxim increasingly prevalent in recent decisions. *See, e.g., Public Service Comm’n v. Mid-Louisiana Gas Co.*, [463] U.S. [319] (1983). Pulling in the other direction is the principle that courts remain the final arbiters of statutory meaning, *see FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); that principle, too, is embossed with recent approval. *See, e.g., FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981).

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20 *Id.* at 912.

21 *Id.* at 913-14.

22 725 F.2d 761 (D.C. Cir. 1984).

23 *Id.* at 767 (citations omitted). The court determined that it did not need to decide the appropriate level of deference, because the decision to remand the case to the agency “is not based upon our assessment of the accuracy of the result reached by the agency, but rather upon the agency's complete failure to consider the criteria that should inform that result; as a consequence, whatever deference might be owing to the agency's conclusions under other circumstances, on this issue none at all is warranted. *Id.* at 768. In other words, the agency decision was held to be “arbitrary or capricious” because there was a defect in the agency’s decision-making process. *See Lawson, supra* note -- (describing the differences among judicial review of agency outcomes, agency procedures, and agency decision-making processes).
In *Trailways, Inc. v. ICC*,\(^{24}\) a unanimous panel, consisting of Judges Wright, Wilkey, and Wald, noted:

The Commission suggests that, because the regulation at issue is an agency interpretation of one of its own governing statutes, it is entitled to great judicial deference. Trailways, on the other hand, argues that courts are the final arbiters of the meaning of statutes, and that this court therefore must exercise its own judgment . . . . The principle urged by the Commission and that advanced by Trailways, though conflicting, are both well-entrenched in the case law.\(^{25}\)

It is, of course, one thing to say that there are competing lines of authority and quite another thing to say that those lines are irreconcilable or that there are no principles determining when one or the other line is appropriate. While some notable figures in the pre-*Chevron* period were prepared to say all of the above,\(^{26}\) there were also plenty of others who sought to find some kind of order in the seeming chaos of conflicting standards of review.\(^{27}\)

While we do not believe that any single principle can either account for all pre-*Chevron* Supreme Court decisions or (more to the point for this study) describe the views of all pre-*Chevron* lower courts about the law prescribed by pre-*Chevron* Supreme Court decisions, we think that the best account of pre-*Chevron* law and the best account of pre-*Chevron* lower-court perceptions actually converge on a single model, implicit in Judge Friendly’s description in *Pittston Stevedoring*, in which the key inquiry is whether the legal question decided by the agency and under review by the court is a pure question of legal interpretation or a mixed question of law application to a particular set of facts. In the former case, reviewing courts

\(^{24}\) 727 F.2d 1284 (D.C. Cir. 1984).

\(^{25}\) Id. at 1287 (citations omitted).


\(^{27}\) For notable efforts to rationalize the varying approaches, see Diver, *supra* note --; Jaffe, *supra* note --; Ronald A. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1 (1985); Nathanson, *supra* note --.
would *presumptively* conduct de novo review, subject to modification by various factors counseling deference in specific cases. In the latter case, courts would *presumptively* grant great deference to the agency, reviewing its decision only for reasonableness, again subject to modification by various factors counseling against deference. But before we present the evidence in favor of this account of pre-*Chevron* law, which is hardly original with us, several preliminary issues about the nature of administrative deference need to be addressed.

First, the word “deference” is used in many different senses, and the usages are not always consistent even within individual opinions. A full exploration of the concept of deference would require a book (which one of us is currently planning), but certain ideas central to the *Chevron* saga need to be clarified at the outset.

Deference can mean anything from complete entrustment of decision-making authority to another -- essentially the absence of review -- to simple acknowledgment that someone else has an opinion on the subject at hand. This possible range in the scope of deference afforded administrative legal interpretations has been an important part of administrative law doctrine at least since *Skidmore v Swift*, and whenever one sees the word “deference,” one must accompany it with the question “how much”? The answer to the question is critical: “reasonableness review” and “careful respect” can both legitimately be called “deference,” but to lump them together for purposes of a scholarly study of “deference” is wildly misleading. A good portion of the time, however, judges who use the term “deference” may not have thought very hard about the different meanings of the term, which makes any generalizations about

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28 This is more or less the schema identified by Nat Nathanson more than half a century ago. See Nathanson, *supra* note --.

29 For similar observations, see Strauss, *supra* note --, at 1145.

30 323 U.S. 134 (1944).
deference based on scrutiny of judicial opinions very treacherous.\textsuperscript{31} We do not have a solution to this problem other than to acknowledge it openly and to try hard to tease out the usage intended in any given context.

More importantly for this study, there can be very different \textit{reasons} for affording deference (in any particular degree) to agency decisions – or indeed to any kind of decisions.\textsuperscript{32} Sometimes, one might defer to the views of another because one thinks that the other’s decision is \textit{good evidence of the right answer}. That is, one sets out with the express goal of determining the correct answer to a problem but concludes along the way that someone else is better situated than you to resolve all or some portion of that problem. For lack of a better term, we call this kind of evidence-based deference \textit{epistemological deference}.

On other occasions, however, one might give deference to another’s decision \textit{simply because it is their decision}, without regard to whether it is good or bad evidence of the right answer. Consider the treatment of jury verdicts. Jury decisions get deference – and in the case of acquittals in criminal cases absolute deference – simply because they are jury decisions, with no case-by-case assessment of whether any particular jury was likely to have gotten the right answer. Again for lack of a better term, we call this kind of deference that is based simply on the identity of the prior decision-maker \textit{legal deference}. Of course, a well-functioning legal system is unlikely to craft a regime of legal deference unless there are plausible reasons to think that the actors to whom deference is given are likely to reach right answers in a wide range of cases, but once the system of legal deference is in place, there is no need to consider whether any given decision shows specific indicia of correctness. Once one has identified it as the decision of a

\textsuperscript{31} See Diver, supra note --, at 565-67.

\textsuperscript{32} The foregoing typology of reasons for deference was set forth in Gary Lawson & Christopher D. Moore, \textit{The Executive Power of Constitutional Interpretation}, 81 IOWA L. REV. 1267, 1271, 1278-79, 1300-02 (1996).
legally favored actor, the person or entity reviewing the decision must, as a matter of law, give
the decision a prescribed degree of deference.

    Epistemological deference, as we have described it, does not require any specific doctrine
for implementation. It is simply common sense applied to the task of figuring out right answers.
If the views of another actor are relevant for the correct resolution of a dispute, it would be bad
judging, and more generally poor reasoning, not to consider those views for whatever they are
worth. 33 So-called Skidmore deference, 34 in which agency views expressed in such non-binding
instruments as amicus briefs and interpretative rules are given whatever respectful consideration
their reasoning and pedigree warrant, 35 is a species of epistemological deference. It makes no
more sense to treat it as a “doctrine” than it would to formulate a doctrine called “Lawson
deference” for giving weight to Gary-Lawson-authored amicus briefs to reflect the fact (if one
wisely deems it a fact) that Gary Lawson is more likely to be right about certain matters that he
has studied in great depth than would be a judge who has not engaged in that study.

    In this article, we are primarily concerned with legal deference: the extent to which
courts are obliged to give a certain degree of deference to agency legal decisions simply because
they are the legal decisions of agencies. That is plainly the kind of deference about which the
various debates over Chevron are concerned. To be sure, courts do not draw, and have never
drawn, the distinction between legal and epistemological deference as sharply as we have here.

33 This observation is subject to the qualification that such epistemological deference would be inappropriate if the
costs of considering someone’s else’s views, including the costs involved in discovering, interpreting, and
processing those views, exceed the likely benefits. In that circumstance, it would be poor reasoning to engage in
such deference.

34 Named for Skidmore v. Swift & Co., 323 U.S. 134 (1944), and invigorated in modern times by Christensen v.
Harris County, 529 U.S. 576 (2000).

35 See generally Kristin E. Hickman & Matthew D. Krueger, In Search of the Modern Skidmore Standard, 107
Indeed, that particular distinction is not even part of the formal vocabulary of the law. But it is analytically crucial to understanding both the theoretical and practical scope of any doctrine of deference, and we will accordingly do our best to try to isolate aspects of court decisions that are best explained in terms of one or the other kind of deference. Because we are layering this framework on top of decisions that in most cases probably did not think about what they were doing in those terms, we are surely “contaminating” our sample in the process. Again, we do not see any way out of this problem other than to acknowledge it.

Second, both pre-

Chevron

and post-

Chevron

case law distinguish statutes administered by agencies from statutes applied by agencies. Roughly speaking, agencies administer those statutes for which they have some special responsibility, as when an agency interprets the substantive provisions of its own organic act. They often apply and interpret statutes for which they have no such responsibility, either because all or many agencies equally apply those statutes,36 because some other agency administers the statute in question,37 or because the statutes are primarily entrusted to (administered by) courts rather than agencies.38 In this study, we confine ourselves only to the interpretation of statutes administered by agencies. Because this particular distinction pre-dates

Chevron

, it should have little or no effect on the course of

\footnotesize{36} Key examples include the Administrative Procedure Act, the Federal Tort Claims Act, the Regulatory Flexibility Act, and the Back Pay Act.

\footnotesize{37} For example, a ratemaking agency may well have to apply and interpret the Internal Revenue Code, but only the Internal Revenue Service administers the code.

\footnotesize{38} The Department of Justice, for example, does not administer (in the specialized administrative law sense) the federal criminal code; the courts do so. Provisions in organic acts for judicial review of agency decisions also fall into this category. See

Murphy Exploration & Production Co. v. United States Dep't of the Interior, 252 F.3d 473, 478–80 (D.C.Cir.2001). One might think the same of statutes of limitations in organic acts, but the case law on that point is oddly inconclusive. See

AKM LLC v. Secretary of Labor, 675 F.3d 752, 754-55 (D.C.Cir.2012) (leaving the question open); id. at 764-69 (Brown, J., concurring) (forcefully arguing that agencies do not administer such provisions).}
doctrinal development. All of the cases upon which we focus in this study involve statutes that are obviously administered by the agencies in question, under either pre- or post-Chevron law.

Third, agency conclusions of law are, at least as a formal matter, reviewed differently from agency determinations of policy. Policy decisions are subject to review under section 706(2)(A) of the APA, which tells courts to reverse agency decision that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Technically, one could use this same provision as the statutory source for review of agency legal conclusions (and one encounters some cases that do so), but the application of this provision to agency policy determinations is quite different from its application (if it has any) to agency legal conclusions. As the law has developed over the past half-century, agency policy decisions – or at least policy decisions that reach a certain threshold of consequence – are reviewed under the so-called “hard look doctrine,” which requires agencies to articulate the reasons behind their actions and requires courts to ensure that agencies have seriously thought about the problems before them and considered the relevant factors. This review, which focuses on the process by which agencies reach and justify conclusions, is quite different from substantive review that focuses on whether the agency’s outcomes meet some criteria of fit with external sources, such as the record in the case of agency fact-finding or statutes in the case of agency law-finding. Unfortunately, the line between agency policymaking and agency law-finding is anything but sharp, especially in a world from which the non-delegation doctrine has been largely expunged. If a statute is sufficiently vacuous, an agency’s “interpretation” of that statute simply cannot be described as interpretation. The task of giving meaning to an empty shell of a statute is a legislative rather


40 See LAWSON, supra note 1, at --.

41 See id. at --.
than a legal or interpretative task. If an agency, for example, administers a statute that instructs the agency to award licenses for the “public interest, convenience, or necessity,” all agency actions under that statute are, at least as a formal matter, “interpretations” of the statute, but in reality the agency is constructing rather than construing the law through its actions. The statute empowers the agency but does not even purport to constrain it in any serious way. But because the form of the agency’s action is “interpretation” of a statute, a reviewing court might well cast its analysis in terms of reviewing an agency’s statutory construction, when in fact the court is (or should be) reviewing the agency’s exercise of policy-making discretion.

There is no hard and fast line describing when agency action that takes the form of statutory interpretation is instead best treated as an instance of agency policy-making. In the course of this study, we exercise some measure of ill-defined judgment when deciding which cases to include in our sample of decisions involving review of agency legal conclusions. We do not believe that changing our sample at the margins would alter our results in any noticeable way, but we thought it necessary to note the problem.

B. From the Beginning

Consider three noteworthy cases involving agency interpretations of statutes decided between 1941 and 1951: *Gray v. Powell,*[^43] *NLRB v. Hearst,*[^44] and *O’Leary v. Brown-Pacific-

[^42]: With acknowledgement to the artistry of Emerson, Lake, and Palmer

[^43]: 314 U.S. 402 (1941).

[^44]: 322 U.S. 111 (1944).
Maxon, Inc.\textsuperscript{45} Each case reflects a pattern of judicial review that serves as a framework for the law leading up to \textit{Chevron} (and beyond).\textsuperscript{46}

\textit{Gray} involved an interpretation of the Bituminous Coal Act of 1937\textsuperscript{47} by the Director of the Bituminous Coal Division of the Department of the Interior. The Act authorized the agency to prescribe a detailed code for the regulation (really the cartelization) of the bituminous coal industry. In order to coerce coal producers to submit to the regulatory scheme, the Act imposed a punitive 19 ½ percent tax “upon the sale or other disposal of bituminous coal produced within the United States, when sold or otherwise disposed of by the producer thereof,”\textsuperscript{48} with a blanket exception from the tax for any producer who was a “code member”\textsuperscript{49} under the statute and whose transaction complied with the code.\textsuperscript{50} For purposes of the tax provision, the Act defined “disposal” of coal to “include[,] consumption or use . . . by a producer, and any transfer of title by the producer other than by sale,”\textsuperscript{51} but then carved out an exception from the terms of the coal code for “coal consumed by the producer or . . . coal transported by the producer to himself for consumption by him.”\textsuperscript{52} The effect of these provisions was to exempt from the code, and therefore from the punitive tax for non-compliance with the code, coal that was consumed by its producer.

\textsuperscript{45} 340 U.S. 504.

\textsuperscript{46} The discussion in this section draws upon material found in Professor Lawson’s casebook. See LAWSON, supra note 1, at --. He is profoundly grateful to Thomson/Reuters for permission to use and adapt that material.

\textsuperscript{47} 50 Stat. 72 (1937).

\textsuperscript{48} Section 3(b), 50 Stat. 75.

\textsuperscript{49} Id.

\textsuperscript{50} There was also an exception from the tax for any coal sold exclusively to a governmental entity. See \textit{id.} § 3(e), 50 Stat. 75-76.

\textsuperscript{51} Section 3(a), 50 Stat. 75.

\textsuperscript{52} Section 4(l), 50 Stat. 83.
Seaboard Air Line Railway Company was a large coal consumer. If it had bought coal on the open market from a mine, there is no doubt that such a transaction would have come within the statute and thus would have needed to comply with the code provisions in order to avoid the tax penalty. If it had owned its own mine, hired its own employees to mine coal, and then consumed the coal from its own mines, there is no doubt that it would have fallen within the statute’s producer/consumer exception. Seaboard did neither of these things. Instead, it leased coal lands and then hired an independent contractor to mine the coal and deliver it to Seaboard. Seaboard owned the coal, for all common-law purposes, from ground to locomotive, but at some point the coal had to be transferred from the possession of the independent mining company that dug it up to Seaboard. Seaboard (through its receiver) asked the Director of the Bituminous Coal Division to declare these transactions exempt from the coal code, and the Director refused.

On appeal, Seaboard advanced two arguments. First, it argued that it was actually the producer of the coal, just as much as if it had hired its own employees rather than independent contractors to dig it up. If that argument had been correct, Seaboard would clearly be exempt from the code as a producer/consumer. Second, it argued that even if its independent contractor was actually the producer of the coal, the transfer of possession of the coal from the contractor to Seaboard was not a “sale or other disposal” subject to tax for non-compliance because title to the coal never changed hands. The Supreme Court ruled in favor of the agency on both counts – but did so for very different reasons and with very different accounts of the deference owed to agencies.

With respect to whether Seaboard was actually the producer of the coal, the Court declared, after examining in some detail the contractual arrangements between Seaboard and one of its contractors:
The separation of production and consumption is complete when a buyer obtains supplies from a seller totally free from buyer connection. Their identity is undoubted when the consumer extracts coal from its own land with its own employees. Between the two extremes are the innumerable variations that bring the arrangements closer to one pole or the other of the range between exemption and inclusion. To determine upon which side of the median line the particular instance falls calls for the expert, experienced judgment of those familiar with the industry. Unless we can say that a set of circumstances deemed by the Commission to bring them within the concept “producer” is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the Court's duty to leave the Commission's judgment undisturbed.\textsuperscript{53}

This is very strong deference indeed. The Court reviewed the agency decision for reasonableness rather than correctness.\textsuperscript{54}

With respect to whether transactions between a producer (assuming, as the agency and Court found, that the independent contractor was the producer) and Seaboard were outside the scope of the Act because there was no transfer of title to the coal, and therefore no “sale or other disposal” within the statute, the Court affirmed the agency in a lengthy discussion that made no reference at all to deference.\textsuperscript{55} The Court simply determined, after what appears to be strict \textit{de novo} review, that the agency had correctly construed the statute. The shift in both analysis and tone from one issue to the other within the opinion is inescapable.

There is an obvious difference between those issues that readily explains\textsuperscript{56} the Court’s differential treatment of them. The question whether a “sale or other disposal” of coal within the

\textsuperscript{53} 314 U.S. at 413.

\textsuperscript{54} Three Justices would have reviewed this decision \textit{de novo}. See id. at 417 (Roberts, J., dissenting).

\textsuperscript{55} See id. at 414-17.

\textsuperscript{56} We do not mean to suggest that the Court’s differential treatment of these issues was inevitable, or even doctrinally correct. Three Justices in 1941 obviously thought otherwise. We mean only that the Court’s differential treatment is understandable.
meaning of section 3(a) of the Bituminous Coal Act of 1937 requires a transfer of title to the coal is a question that requires no special knowledge of the coal industry to answer. A law professor in an ivory tower who has never seen a lump of coal could apply ordinary tools of statutory interpretation (language, structure, legislative history, purpose, etc.) to figure out the best construction of the statute. The legal question involved is abstract, or pure, in the sense that it can be addressed in principle using nothing more than conventional tools of legal analysis. By contrast (or so the Court could reasonably have thought), the question whether Seaboard was a “producer” of coal when it leased the mines but hired contractors to mine them is not necessarily something that can be answered abstractly from an ivory tower. To be sure, one could conclude that any arrangement in which the consumer owns the mine makes that consumer the “producer,” in which case one needs only the same legal skills necessary to determine whether a transfer of title is a statutory prerequisite for a “sale or other disposal” of coal. But one could also believe that the Act’s failure to provide a definition of “producer” suggests a more calibrated inquiry, in which case “producer” status other than at the obvious poles (open-market purchases and own-employee mining) may turn on subtleties in the particular arrangements between the mine-owning consumer and the workers who mine the coal. In that circumstance, detailed knowledge of and expertise in the coal industry may well be essential to a reasoned determination of whether any particular entity is a “producer.” More precisely, figuring out whether an entity such as Seaboard is a producer may require an inductive rather than deductive form of inquiry. Instead of fixing the meaning of the statute and then asking whether Seaboard maps onto that meaning, one might instead define the statute precisely by a common-law-like process of inclusion and exclusion, based on detailed study of the specific facts governing Seaboard’s transaction. This kind of inquiry is best described as law application – the application of legal
terms to specific factual settings -- rather than law determination -- the abstract ascertainment of statutory meaning -- to reflect its inductive character. And in that context it makes a measure of sense to give deference to the supposedly expert agency charged with the task of applying that particular statute.

So understood, Gray v. Powell describes a framework in which the deference afforded agencies in their legal interpretations depends to a great degree upon the kind of legal interpretation involved. Pure, abstract, “ivory tower” legal questions call for de novo review, while fact-bound, inductive, law application questions call for a good measure of deference.

This pattern was at work in many pre-Chevron cases. In NLRB v. Hearst, one of the most famous of the New Deal-era administrative law cases, the National Labor Relations Board determined that newsboys – generally adult vendors with fixed sales locations – were “employees” for purposes of the mandatory-bargaining provisions of the Wagner Act. The statute unhelpfully defined (and still defines) an “employee” as “any employee.” The newspaper company refused to bargain with the newsboys’ union on the ground that the Wagner Act incorporated the common-law distinction between employees and independent contractors and that the newsboys were independent contractors rather than employees under generally accepted common-law principles. The Court affirmed the agency decision, but as in Gray did so in two distinct steps.

First, the Court rejected the newspaper’s claim that the Wagner Act’s definition of “employee” incorporated common-law standards for determining employee status. The Court’s discussion of that point of statutory interpretation was lengthy, employing a range of considerations including the need for national uniformity, the uncertainty of the common-law

standard(s), and the purposes of the policies of the Wagner Act. At no point did the Court indicate that it was at all relevant that the NLRB had already construed the statute in that fashion. Rather, the Court engaged in *de novo* review – as one would expect from the framework set forth in *Gray v. Powell*. After all, the question whether the word “employee” in the Wagner Act is meant to incorporate pre-existing common-law standards for determining employee status is a classic pure, abstract, “ivory tower” legal question. One can ask and answer it without knowing anything about the newspaper industry – and indeed without even knowing that there is a controversy involving the newspaper industry. One only needs traditional tools of statutory interpretation.

Once one has decided that the common law does not determine the statute’s meaning, however, there still remains the problem of interpreting and applying the statute in the case at hand. The newspaper likely would have won (as it did in the lower court) if the common law controlled the case, but that does not mean that the newspaper necessarily must lose if the common law does not control the case. One must still determine whether the newsboys at issue were “employees” under whatever non-common-law meaning of the term applies in the Wagner Act. On that question, the Court said that “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 . . . . [T]he 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.”

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58 322 U.S. at 120-29.

59 *Id.* at 131.
As with determining who is a “producer” under the Bituminous Coal Act, determining who is an “employee” under the Wagner Act, at least once one has rejected the common law as controlling, seems like an inductive process of inclusion and exclusion based on detailed understanding of factual settings. The process of filling out the meaning of “employee,” after abstractly concluding that its meaning cannot be deduced from the common law, is a process of law application rather than strict law determination, and that process plausibly warrants deference to the agency charged with administering the statute.

This framework also appeared in *O'Leary v. Brown-Pacific-Maxon, Inc.* John Valak was an employee of the defendant company in Guam. The company provided a recreation center that was near a channel “so dangerous for swimmers that its use was forbidden and signs to that effect erected.”60 While at the recreation center one day, Valak braved the channel in an attempt to rescue some men trapped on a reef and drowned in the process. His mother brought a claim under the Longshoremen’s and Harbor Workers’ Compensation Act of 1927 (“LHWCA”), which requires the company to provide benefits for “accidental injury or death arising out of and in the course of employment.”61 The agency awarded a death benefit under the statute. The company objected that the statutory term “in the course of employment” was meant (shades of *Hearst*) to incorporate pre-existing common-law standards, and that however noble Valak’s actions may have been, they were surely (as the Court of Appeals concluded) a frolic and detour at common law and hence not subject to the statutory compensation provisions.

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60 340 U.S. at 505.

The Court agreed with the agency that the statute extended beyond the common-law meaning of “course of employment,” but as in Gray and Hearst did so with no mention of deference to the agency. The question whether the LHWCA meant to define “course of employment” by strict reference to the common law is clearly a pure, abstract, “ivory tower” kind of legal question that requires no special expertise in employment relations to resolve. One could ask and answer it without even knowing whether any specific dispute turns on the answer.

Once one extends the statute beyond the common law, however, there remains the problem, as there was in Hearst, of determining whether this particular action by this particular employee fell within the expanded boundaries of the statute. The resolution of that problem, as with establishing the statutory meanings of “producer” and “employee,” is the kind of inductive, fact-specific, law application question for which deference is appropriate under the Gray framework. And the agency got plenty of deference on that point.

The Gray/Hearst/O'Leary framework provides a workable and plausible, even if not inevitable or incontestable, mechanism for reviewing agency legal determinations. It is not always easy to determine whether a legal question is a “pure” question of law determination or a “mixed” question of law application, but much of the time it is a pretty straightforward inquiry. And once that classification is made, the appropriate deference rule seems to follow automatically.

62 See id. at 506-07.

63 See id. at 507-09. The Court’s discussion was a bit muddled by its willingness to indulge the agency Deputy Commissioner’s labeling of the question of “course of employment” as a question of fact. Of course it is not a question of fact, and of course Justice Frankfurter, who authored the majority opinion, knew that it was not a question of fact. The best reading of the opinion, given that it was issued on the same day as Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), is that Justice Frankfurter meant that the degree of deference afforded agency applications of law is comparable in scope to the degree of deference afforded agency findings of fact under the “substantial evidence” standard of review. See 5 U.S.C. § 706(2)(E) (2006).
Of course, if things were that simple, this Article probably would be unnecessary. The framework was never that simple, so understanding pre-

_Chevron_ law requires attention to several modifications to the framework.

_C. Burning Down the House_64

The need for some kind of modification to the framework became very clear in 1947 when the Court decided _Packard Motor Car Co. v. NLRB_.65 As in _Hearst_, the question concerned whether a particular class of persons were “employees” under the Wagner Act. This time, the class of persons was a group of foremen at an auto plant, who the NLRB determined were an appropriate bargaining unit under the statute. The company countered that the foremen – with responsibility for managing, disciplining, and making recommendations concerning line employees – were part of the “employer” under the statute rather than employees. The Court, by a 5-4 vote, agreed with the NLRB – and Congress agreed with the company by promptly passing the Taft-Hartley Act and overruling the decision.

For our purposes, it does not matter whether the Court correctly or incorrectly interpreted the Wagner Act. All that matters is that the Court affirmed the agency without resorting to any deference. Indeed, the only mention of the agency’s prior decision was a recitation offered by the company of the agency’s checkered history of “inaction, vacillation and division . . . in applying this Act to foremen.”66 The Court’s response was that “[i]f we were obliged to depend

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64 With acknowledgement to the Talking Heads, who Professor Lawson does not think were as brilliant as The Kinds or as artistic as Emerson, Lake, and Palmer.


66 330 U.S. at 492.
upon administrative interpretation for light in finding the meaning of the statute, the inconsistency of the Board's decisions would leave us in the dark,"67 but that it was unnecessary to make such reference in this case “in deciding the naked question of law whether the Board is now . . . acting within the terms of the statute.”68

Of course, if the relevant issue of statutory meaning really was a “naked question of law,” the conclusion of “no deference” followed logically from the Gray framework. That characterization would only be accurate, however, if the relevant legal issue was whether all people who bore the label “foreman” at all times and under all circumstances were outside the coverage of the Act. That was not the issue. No one believed that a company could simply apply the label “foreman” to someone and thereby remove that person from the statute. The real question was whether persons with the responsibilities, duties, and status of the people labeled “foremen” in this particular case were “employees” within the statute. One could resolve even that issue as a “naked question of law” by saying, as the majority opinion at some points seemed to say, that anyone who draws a salary from the company is an “employee.” But that would have the intriguing consequence, as the dissenting opinion pointed out, of making corporate executives, including the president of the company, employees subject to the Wagner Act.69 Charity demands that one not attribute such a position to the Court. Accordingly, the best interpretation of the opinion is that it really was treating the relevant issue as more akin to the inductive, fact-specific, law-applying process involved in deciding whether newsboys are “employees.” On that understanding, one would expect the agency decision to receive a great deal of deference, amounting essentially to reasonableness review.

67 Id.

68 Id. at 493.

69 See id. at 494 (Douglas, J., dissenting).
A long tradition of viewing Packard and Hearst as in tension with each other is explicable only by viewing Packard, notwithstanding its language, as a case involving law application rather than law determination. And if that is the correct characterization of the case, then Packard does represent a break, and a fairly sharp one at that, with the Gray framework. Why defer to the agency’s inductive construction of the term “employee” in Hearst but not in Packard?

There are many reasons for doubting the agency’s judgment in Packard. As the company pointed out, the agency had vacillated for a long term. The NLRB had also developed a reputation for being blatantly pro-labor, and while that might not matter too much to anyone other than newsboys and newspapers in a case like Hearst, the decision in Packard threatened to re-make industrial relations across the country. From the standpoint of epistemological deference, these are all plausible reasons for reluctance to defer to the agency. But how can they be relevant from the standpoint of legal deference?

The answer must be that the framework set forth in Gray, Hearst, and O’Leary was a presumptive framework: Normally, a court would defer to an agency’s exercise of law application while reviewing de novo agency exercises of law determination, but if certain epistemologically relevant factors are present, those default rules could be altered. Under the right circumstances, agencies might fail to get deference in law application, as in Packard, or receive deference in pure law determination, as arguably happened much later in FEC v.

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70 Or at least, as explained above, the law determination aspect of the case was so obvious that it did not warrant Supreme Court attention.

71 JAFFE, supra note --, at 561.
Democratic Senatorial Campaign Committee.\textsuperscript{72} What circumstances are those? In 1985, Professor Diver famously identified no fewer than ten factors that Supreme Court decisions had appeared to regard as relevant for determining whether to grant deference to agency legal interpretations.\textsuperscript{73} Sometimes one could find a good percentage of those factors at work in a single opinion.\textsuperscript{74} Accordingly, the seemingly simple framework of \textit{Gray} was subject to override by a mélange of factors, with no clear metric for determining how much or when those factors weigh in the balance.

Another important modification to the \textit{Gray} framework stems from the language of certain kinds of statutes. On occasion, Congress will specifically and expressly indicate that an ambiguous term is to be defined by the agency, even where the process of definition could involve abstract law determination rather than inductive law application. For example, in \textit{Batterson v. Francis},\textsuperscript{75} the relevant statute expressly gave the Secretary of HEW the power to determine, through rulemaking, the standards for “unemployment” by referring to “unemployment (as determined in accordance with standards prescribed by the Secretary).”\textsuperscript{76} While defining such a term through a rulemaking would ordinarily involve abstract law determination, the Court noted that Congress

\textit{expressly} delegated to the Secretary the power to prescribe standards for determining what constitutes ‘unemployment’ for purposes of AFDC-UF

\textsuperscript{72} 454 U.S. 27 (1981) (deferring to the agency’s view that a statute forbidding political committees from making expenditures on behalf of candidates did not prevent those committees from acting as spending agents for other organizations).

\textsuperscript{73} See Diver, \textit{supra} note --, at 562 n. 95 (contemporaneousness, duration, consistency, reliance, significance, complexity, rulemaking authority, self-execution, congressional ratification, quality of explanation).

\textsuperscript{74} See 454 U.S. at 37-38.

\textsuperscript{75} 432 U.S. 416 (1977).

\textsuperscript{76} 42 U.S.C. § 607(a) (1976).
eligibility. In a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts regulations with legislative effect. A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner.77

Once it is settled that assigning this law-determining power to agencies does not violate the nondelegation doctrine,78 express congressional grants of this kind amount to a command to courts to afford legal deference to agency decisions pursuant to such statutes. Conceivably, one might be able to infer such a command from language that is less than express, but presumably that would require some kind of unusual, statute-specific evidence indicating that Congress intends for agencies rather than courts to provide statutory meaning.

Accordingly, we think that the best account of pre-Chevron law is that it required reviewing courts to conduct roughly the following inquiry:

(1) Does the agency administer the statutory provision at issue? If not, then the agency gets, at most, epistemological deference pursuant to Skidmore v. Swift if warranted by all of the facts and circumstances. If yes, then . . .

(2) Is the agency’s legal interpretation a pure, abstract, “ivory tower” legal question that can be asked and answered without knowing anything about the particular dispute before the agency? If no, then the agency presumptively gets a strong measure of deference, tantamount to reasonableness review, unless a constellation of factors counsels against it. If yes, then the court

77 Id. at 425 (emphasis added).

78 That has been settled, however wrongly, for quite some time. See generally Gary Lawson, Delegation and Original Meaning, 88 VA. L. REV. 327 (2002).
presumptively reviews the matter *de novo*, against subject to a constellation of factors that might counsel against it.

(3) Also, if Congress has *expressly* entrusted the law-determination function to the agency, then courts must honor the congressional allocation of authority and give the agency’s decision great deference regardless of the classification of the legal question involved.

**D. Is This the Real Life? Is This Just Fantasy?**

Assume that we are right about the best account of pre-*Chevron* law as articulated by the Supreme Court. There still remains the question whether that account was accepted and applied, either explicitly or implicitly, by lower courts in the period leading up to *Chevron*. While we cannot say that every lower court decision that we have encountered is consistent with this understanding, on the whole the lower courts appeared to be acting in accordance with this framework.

We looked through the *Federal Reporter* at every reported decision from the D.C. Circuit Court of Appeals that was decided between 1982 and the issuance of *Chevron* on June 25, 1984. (We looked as well at a non-random sample of cases from other circuits, but that number is too small to change any conclusions that we reached.) We selected from that sample all cases that seemed to us to involve review of agency legal determinations of statutes administered by the agency. It is quite possible that we wrongly omitted some decisions by mis-classifying cases involving statutory interpretation (which are relevant to our sample) as cases involving policy

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79 With acknowledgement to the virtuosity of Queen.
determinations (which are not), but given our results we cannot believe that any such errors could make a difference.\textsuperscript{80} It is also possible that the D.C. Circuit was not representative of the practices of lower courts in general, but there are strong theoretical and anecdotal reasons to doubt whether this is a serious problem: the D.C. Circuit set the tone for administrative law during that era, as it continues to do today, and a quick glance at cases from other circuits does not reveal any great differences in approach across federal courts. Accordingly, we think that these D.C. Circuit cases give a good flavor for how lower courts in general understood the law governing review of agency legal determinations in the two years leading up to \textit{Chevron}.

A significant majority of these cases involved what we would classify as pure or abstract legal questions; relatively few involved mixed questions of law application. That is not surprising: appeals from rulemakings, particularly pre-enforcement appeals, are very likely to involve such questions; and even in adjudications parties are likely to focus at the appellate level on pure legal questions. Indeed, if we are right that agencies presumptively received great deference on mixed questions of law application but not on pure questions of law determination, it would make sense for parties challenging agency decisions to concentrate their fire on pure legal questions in the courts of appeals. To be sure, courts very seldom expressly identified the legal questions involved as being either pure or mixed. The classifications are ours, not theirs, and conceivably a different set of eyes would put at least some of the cases into a different category. Some of them seem to us to be very close calls that could plausibly go either way. Accordingly, we do not claim any kind of empirical rigor for our observations. We simply offer them for what they are worth.

\textsuperscript{80} Could we also have wrongly \textit{included} some decisions that are best understood as policy calls rather than interpretations of statutes? Of course we could have. As we noted earlier, the line between questions of law and questions of policy is fuzzy at best. Again, however, we see no way that any such marginal errors could affect the validity of our overall results.
Most of the courts facing pure or abstract questions of law decided those issues with no significant measure of deference, of either the legal or epistemological variety, to the interpreting agencies. Much of the time, the courts did not even mention the concept of deference, whether they were affirming the agencies\(^\text{81}\) or reversing them.\(^\text{82}\) A few courts gave a very brief nod to what today we would call “Skidmore deference” (or epistemological deference) in connection

\(^{81}\) See, e.g., Continental Seafoods, Inc. v. Schweiker, 674 F.2d 38, 42-43 (D.C. Cir. 1982) (statute giving the FDA jurisdiction over “added” substances does not refer solely to substances added by humans rather than by natural processes that occur after production of the regulated item); Int’l Union of the United Ass’n of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Unions Nos. 141, 229, 681, and 706 v. NLRB, 675 F.2d 1257 (D.C.Cir. 1982) (affirming, by a 2-1 vote, the NLRB’s conclusion that state right-to-work laws foreclosed bargaining over provisions assessing union representation costs against non-union workers, with no mention of deference to the agency even in response to a vigorous dissenting opinion); United States Lines v. Baldridge, 677 F.2d 940, 944-45 (D.C. Cir. 1982) (affirming, with no mention of deference, agency determination that shipping line had to repay a portion of government construction subsidies when ships were used for domestic rather than foreign commerce, even when the domestic use was under a military charter); McIlwain v Hayes, 690 F.2d 1041 (D.C. Cir. 1982) (affirming, with no mention of deference, FDA’s conclusion that there is no implicit statutory time limit on how long the agency can delay requirement of proof of safety of food additives in light of changing technology); Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982) (affirming, with no mention of deference, ICC determination that it need not retroactively impose labor-protective conditions on terminations of lines by state-run railroads); Duquesne Light Co. v. EPA, 698 F.2d 456 (D.C. Cir. 1983) (affirming, with no mention of deference, EPA regulations implementing pollution penalties); B.J. McAdams, Inc. v. ICC, 698 F.2d 498 (D.C. Cir. 1983) (affirming, with no mention of deference, the ICC’s conclusion that it could pass on an application to remove restrictions on service without considering issues that go back to the original license grant); Action on Smoking and Health v. CAB, 699 F.2d 1209 (D.C. Cir. 1983) (affirming, with no mention of deference, CAB determination that statute giving it power to ensure “safe and adequate service” included the power to regulate the quality of service and hence to regulate smoking on aircraft); Process Gas Consumers Group v. FERC, 712 F.2d 483 (D.C. Cir. 1983) (affirming, with no mention of deference, FERC’s decision to consider cost and not simply availability of alternative fuels when setting gas priorities); Multi-State Communications, Inc. v. FCC, 728 F.2d 1519 (D.C. Cir. 1984) (affirming, with no mention of deference, the FCC’s determination that the word “allocate” does not necessarily mean “assign”).

In Ashton v. Pierce, 716 F.2d 56 (D.C. Cir. 1983), the court (and evidently the parties as well) treated the relevant question – whether an “imminent hazard” includes lead in unchipped paint – as a pure question of law, see id. at 60, and gave no deference to the agency. See id.at 60-63. This seems to us to be a paradigmatic “mixed” question of law application, but once one chooses to treat it as a pure question of law, the court’s analysis is consistent with the usual pattern for such questions.

\(^{82}\) See, e.g., Kennecott Corp. v. EPA, 684 F.2d 1007 (D.C. Cir. 1982) (reversing, without mentioning deference, an EPA interpretation of the Clean Air Act that allows use of certain technologies only when use of alternative technologies would force a plant closure); Wilkett v. ICC, 710 F.2d 861 (D.C. Cir. 1983) (reversing, with no mention of deference, ICC conclusion that the “fitness” for a license of a company can include consideration of the “fitness” of its owner as an individual).
with pure questions of law but said nothing to suggest any measure of legal deference in those circumstances.\textsuperscript{83}

On some occasions, the courts engaged in quite substantial discussions of statutory interpretation methodology without mentioning deference as an element in that analysis. For example, in \textit{Nat’l Insulation Transportation Committee v. ICC},\textsuperscript{84} the court, in affirming the ICC’s conclusion that it had the discretion not to order refunds when it found that a carrier’s practice, but not the carrier’s ultimate rate, was unreasonable, consumed four pages of the \textit{Federal Reporter} with discussion of statutory interpretation, but made no reference at all to deference to the agency.\textsuperscript{85} Similarly, in \textit{Nat’l Soft Drink Ass’n v. Block},\textsuperscript{86} the court held that the Department of Agriculture did not have statutory authority to restrict the sales of snack foods at all times during the school day and at all places within the school. Rather, said the court, “[a]n examination of the legislative history leads to the conclusion, \textit{albeit inconclusively}, that the Congressional intent was to confine the control of junk food sales to the food service areas during the period of actual meal service.”\textsuperscript{87} The court devoted seven paragraphs to the methodology of statutory interpretation,\textsuperscript{88} but never invoked deference to the agency, even though it admitted that the legal question was close. Both of these cases involved what we could

\textsuperscript{83} \textit{See}, e.g., United Food & Commercial Workers Int’l Union Local No. 576, AFL-CIO v. NLRB, 675 F.2d 346, 351 (D.C. Cir. 1982); Railway Labor Executives Ass’n v. US, 675 F.2d 1248, 1254 (D.C. Cir. 1982); American Federation of Gov’t Employees, AFL-CIO, Local 2782 v. FLRA, 702 F.2d 1183 (D.C. Cir. 1983); Interstate Natural Gas Ass’n of America v. FERC, 716 F.2d 1 (D.C. Cir. 1983).

\textsuperscript{84} 683 F.2d 533 (D.C. Cir. 1982).

\textsuperscript{85} \textit{See id.} at 537-40.

\textsuperscript{86} 721 F.2d 1348 (D.C. Cir. 1983).

\textsuperscript{87} \textit{Id.} at 1353 (emphasis added).

\textsuperscript{88} \textit{See id.} at 1532-33.
call pure or abstract legal questions, involving the statutory authority of the relevant agencies, and deference played no role in the decisions.

Under the model that we have laid out, deference would be appropriate even for pure questions of law if the statute clearly or expressly allocated authority to make those determinations to the agency. We found no cases in our sample in which the D.C. Circuit invoked this doctrine as grounds for deference. The court did, however, once refer to that doctrine while finding it inapplicable to the case at hand because there was insufficient evidence that Congress had granted the agency such specific law-determining authority.\(^{89}\)

A number of cases granted the agencies deference on what we would call questions of law application or mixed questions of law and fact, precisely as our proposed model would predict. These cases involved such matters as whether promulgation of work performance standards were management prerogatives under the federal labor laws,\(^{90}\) whether commercial paper – specifically “prime quality commercial paper, of maturity less than nine months, sold in denominations of over $100,000 to financially sophisticated customers rather than to the general public”\(^{91}\) – are “securities,”\(^{92}\) whether a rail carrier has an “interest” in a water carrier if the stock is held in a voting trust,\(^{93}\) whether treating classes of utility customers differently results in “discriminatory” rates,\(^{94}\) whether a certain job was “temporary,”\(^{95}\) and whether a certain facility

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89 See Vanguard Interstate Tours, Inc. v. ICC, 735 F.2d 591, 595-97 (D.C. Cir. 1984).

90 See Nat’l Treasury Employees Union v. FLRA, 691 F.2d 553, 558-59 (D.C. Cir. 1982).


92 See id. at 140 (specifically noting that “deference to an agency's construction of the statute is called for because the agency's decision applies general, undefined statutory terms -‘notes and securities’-to particular facts”) (emphasis in original).

93 See Water Transport Ass’n v. ICC, 715 F.2d 581, 591-92 (D.C. Cir. 1983).

counted as a “mine.” These are all questions that involve filling out the meaning of ambiguous statutory terms through case-by-case determinations on particular facts, which are precisely the kinds of questions that Gray, Hearst, and O'Leary presumptively entrusted to agencies.

On some occasions, courts would refuse to defer to agencies on purely legal matters while deferring to them on questions of law application within the same case. For example, in Western Union Telegraph Co. v. FCC, the court reversed the agency on a pure question of law by holding that a domestic carrier who initiates a call that is eventually transmitted overseas by an international carrier is the carrier that “originated” the call under the statute and is therefore responsible for tariffing, billing, and collecting on that call. The court made no mention of deference to the agency’s view that the international carrier could be tasked with billing and collecting functions. But with respect to a separate question of law application – how to allocate revenues when more than one carrier is involved in a call – the court explicitly gave “considerable deference” to the FCC and found that it had not acted “unlawfully or unreasonably.”

We certainly do not suggest that every decision during this time period neatly fell within the framework laid out (so we argue) by pre-1984 Supreme Court case law. That most assuredly

95 See Moon v. U.S. Dep’t of Labor, 727 F.2d 1315 (D.C. Cir. 1984).
96 See Donovan v. Carolina Stalite Co., 734 F.2d 1547, 1552-53 (D.C. Cir. 1984) ("We have before us just the sort of determination the Secretary was empowered by Congress to make. That determination is well within the bounds of reasonableness . . . and we accord it the deference it deserves").
97 729 F.2d 811 (D.C. Cir. 1984).
98 See id. at 814-15.
99 Id. at 816. To be sure, the court emphasized that the agency had to act quickly with very little information, see id., which could be taken to suggest that the mere classification of the issue as one of law application was insufficient for deference.
100 Id.
did not happen. There certainly were a substantial number of cases in which courts spoke at length about deference when reviewing pure questions of law, though it was never clear whether the courts meant epistemological deference (which should always be on the table regardless of the kind of legal question at issue) or legal deference. In one especially intriguing case, the court managed to defer and not defer at the same time. In *Conference of State Bank Supervisors v. C.T. Conover*, the Comptroller construed section 4(a) of the International Banking Act, which authorizes the Comptroller to permit foreign banks to operate within a state when “establishment of a branch or agency, as the case may be, by a foreign bank is not prohibited by State law,” to allow the Comptroller to approve specific foreign operations unless the relevant state would prohibit all foreign operations of that kind. The states instead urged an interpretation that would allow them to adopt policies that might allow some foreign banks but not others to operate within the state; New York, for example, sought to deny Australian banks branching rights that they would grant to other country’s banks because of a state policy to grant rights only when the relevant foreign country extended reciprocal rights to New York banks. The parties thus essentially disagreed about whether the phrase “a foreign bank” in section 4(a) means “any foreign bank” (the Comptroller’s view) or the specific foreign bank applying for a federal license (the states’ view). The court noted that “[t]he language of section 4(a) does not preclude either of the proffered interpretations” and that “the legislative

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101 See, e.g., Planned Parenthood Federation of America v. Heckler, 712 F.2d 650, 655 (D.C. Cir. 1983); Bargmann v. Helms, 715 F.2d 638, 641 (D.C. Cir. 1983); ITT World Communications, Inc. v. FCC, 725 F.2d 732, 741 (D.C. Cir. 1984). Cf. Northern Colorado Water Conservancy District v. FERC, 730 F.2d 1509, 1517 (D.C. Cir. 1984) (agency asked for deference; the court held the agency interpretation unreasonable and therefore reversible even if deference was granted).

102 715 F.2d 604 (D.C. Cir. 1983).

history of the IBA does not offer clear guidance on the meaning of section 4(a).”

“In short,” said the court, “we find two arguably correct interpretations of an ambiguous statutory provision.”

The court nonetheless resolved the question in the agency’s favor solely by reference to the perceived purposes of the statute, with no mention at all of deference to the agency. In the next breath, however, the court granted deference to the Comptroller’s interpretation of section 5(a) of the IBA, which forbids federal chartering of a foreign bank unless “its operation is expressly permitted by the State in which it is to be operated.”

The Comptroller construed “operation” to mean allowance of banks per se rather than specific “operation[s],” or practices, of the bank. Again, as with the Comptroller’s interpretation of section 4(a), this had the effect of allowing federal licensing of foreign banks unless states prohibited the entire category of activities in which those banks sought to engage. The court had dealt, at considerable length, with the section 4(a) issue without even a nod to deference, but on this matter (which seems every bit as pure and abstract as the interpretation of section 4(a)), the court felt “obliged to defer to the Comptroller's interpretation of the IBA because ‘the interpretation of an agency charged with the administration of a statute is entitled to substantial deference.’”

And just to cover all bases, on another pure legal issue – whether foreign banks could accept deposits from non-United States citizens under section 4(d) of the IBA – the court chastised the district court, which upheld the Comptroller’s affirmative answer to that question,

104 715 F.2d at 614.

105 Id. at 615.

106 See id. at 615-17.


108 715 F.2d at 622 (quoting Blum v. Bacon, 457 U.S. 132, 141 (1982)). See also id. at 623 (making clear that the court was reviewing the agency’s decision only for reasonableness).
because it “believe[d] the District Court deferred to the Comptroller when no deference was
due.”

Our model has no explanation for this case, but we defy any model to accommodate it.

Notwithstanding the nontrivial but nonetheless small number of “outlier” cases, the
general pattern in the D.C. Circuit from 1982 to 1984 was broadly consistent with the scheme of
review that we have attributed to the pre-

Supreme Court. The decisions generally did
not speak openly about whether they were addressing pure questions of law or questions of law
application, nor did they distinguish in any meaningful fashion legal deference from
epistemological deference. But the cases corresponded reasonably well to a framework that
would put those concepts front and center. Put another way, the courts behaved as though the
relevant inquiry required identification of the kind of legal question at issue. Indeed, the pattern
is strong enough to make what followed even more remarkable than it might seem at first glance.

II. Chevron Rising

“Most landmark decisions are born great – they are understood to be of special
significance from the moment they are decided.” However, when Chevron was briefed and
argued in the Supreme Court, no one thought that it was a case involving any serious, general
question about the standard of review for questions of law. Instead, all of the parties and Justices
understood the case to be an important but relatively narrow dispute about the permissibility of
the “bubble concept” under the Clean Air Act, with no broader implications for administrative

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109 Id. at 626. To be sure, the court held that the statute’s plain language, which says flatly that “a foreign bank
shall not receive deposits or exercise fiduciary powers at any Federal agency,” 12 U.S.C. 3102(d) (2006), required
reversal, which would render any deference to the agency irrelevant, since no amount of deference can turn “shall
not receive deposits” into “shall not receive deposits unless the depositor is not a United States citizen.”

110 Thomas W. Merrill, The Story of Chevron USA Inc. v. Natural Resources Defense Council, Inc.: Sometimes
Great Cases Are Made Not Born, in STATUTORY INTERPRETATION STORIES 165, 168 (William N. Eskridge, Jr.,
Philip P. Frickey & Elizabeth Garrett eds., 2011).
law doctrine. To understand the significance (or lack thereof) of the decision for scope of review doctrine, it is imperative to have a firm grasp of what the actual controversy in *Chevron* involved.

Fortunately, Professor Tom Merrill has exhaustively explored the arguments and decision in *Chevron*,¹¹¹ and we leave the details of the *Chevron* decision to him. The following paragraphs essentially summarize and reference his analysis and conclusions, with little value added.

The Clean Air Act Amendments of 1977 required certain states with designated pollution problems to establish a permit program to regulate “new or modified major stationary sources” of air pollution.¹¹² Specifically, no permit for a new or modified stationary source could issue from so-called “non-attainment states” – that is, states that failed to meet national guidelines for specified pollutants – without meeting stringent criteria.¹¹³ It was fairly clear that the paradigm of a “major stationary source[]” was something like a refinery, factory, power plant or smelter. It was less clear, however, precisely how the statute required states to treat multiple pollution-emitting devices within a single facility. One possible interpretation of the statute would treat each distinct opening – for example, each smokestack of a factory or refinery – as a “major stationary source[],” so that no additions or modifications even to individual smokestacks could be made without complying with the tough permitting requirements. Alternatively, one could treat each integrated economic unit, such as a power plant, refinery, or other facility, as a single

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¹¹¹ See Merrill, *supra* note --. This article is an updated version of a prior study, with which we suspect many readers will be familiar. See Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark, in Administrative Law Stories* 399 (Peter L. Strauss, ed., 2006). For our purposes, the differences between these two versions of Professor Merrill’s article are unimportant, and we equally well could have cited to either.


¹¹³ See id. § 7503.
“source[],” so that modifications or additions to some segment of the unit would be permissible without triggering the stringent permitting requirements as long as overall emissions from the entire unit did not increase. (Indeed, if the modification or addition substituted a more efficient for a less efficient production process, the new or modified source could reduce overall emissions from the plant as a whole.) After several years of vacillation, the EPA adopted a rule embodying the latter definition of a “source” that allowed an existing plant to obtain a permit for new equipment that did not meet otherwise-applicable permit conditions as long as the overall plant output of omissions did not increase. This is the so-called “bubble concept,” which treats each facility as though it were covered by an imaginary “bubble” within which pollution is measured.

The Natural Resources Defense Council and other environmental groups challenged the EPA’s rule and won in the D.C. Circuit,\textsuperscript{114} essentially on the strength of prior precedents in that court,\textsuperscript{115} without much discussion of statutory interpretation. The Supreme Court granted certiorari.\textsuperscript{116} The “Question Presented” on which it granted review said nothing about deference, scope of review, or even statutory interpretation. Rather, as framed by Chevron, U.S.A.’s merits brief, the question asked:

2. Did the Court of Appeals err in substituting its judgment for that of the Environmental Protection Agency on basic policy determinations, where the court below did not, and could not, find the regulations to be unreasonable? In particular, was it unreasonable for the Environmental Protection Agency

(a) to promulgate regulations which simply confirmed EPA’s regulatory definition of “stationary source” to the definition set forth in the Clean Air Act; and

\textsuperscript{114} See Chevron U.S.A., Inc. v. NRDC, 685 F.2d 718 (D.C. Cir. 1982).

\textsuperscript{115} See id. at 725-26.

\textsuperscript{116} 461 U.S. 956 (1983).
(b) to promulgate regulations which the undisputed record shows comply with the Congressional purpose in enacting the Clean Air Act?\(^{117}\)

The other merits briefs similarly framed the relevant question(s) without reference to broad (or even narrow) issues of statutory interpretation. The American Iron and Steel Institute, speaking for a wide range of industry groups, asked:

1. Whether the court below impermissibly intruded upon the discretion vested in the states by the Clean Air Act when that court deprived the states of the authority to define the term “source” as an industrial plant for their new source review programs in nonattainment areas, even where such a definition is demonstrated to be consistent with reasonable further progress toward, and timely attainment of, national ambient air quality standards.

2. Whether the court below wrongfully substituted its policy judgment for that of EPA, when it determined, without support in the language or legislative history of the Clean Air Act or in the record before it, that EPA had no authority to define “source” as an industrial plant or to allow the states to adopt a similar definition of “source” for the purpose of new source review programs in nonattainment areas.\(^{118}\)

And the Environmental Protection Agency’s brief, filed by the Solicitor General, said that the issue was

Whether the Clean Air Act prohibits EPA from allowing a state to adopt a plantwide approach to new source review in nonattainment areas in circumstances where the state can demonstrate that its State Implementation Plan maintains all of the elements required by the Clean Air Act and provides for timely attainment and maintenance of air quality standards.\(^{119}\)

Respondents, for their part, framed the issue as

\(^{117}\) Brief for Petitioner Chevron U.S.A., Inc., at I, Nos. 82-1005, 82-1247 & 82-1591. We have focused on the “Questions Presented” in the merits briefs rather than in the petitions for certiorari because the latter contained extraneous issues regarding the exclusive role of the D.C. Circuit in reviewing EPA regulations under the Clean Air Act. The substantive questions were framed identically at both the certiorari and merits stages. For discussion of the EPA’s petition for certiorari, see Merrill, supra note --, at 178-79.

\(^{118}\) Brief for Petitioners American Iron and Steel Institute, et al., at i, Nos. 82-1005, 82-1247 & 82-1591. There were two other questions identified in this brief, but they involved issues that ultimately played no role in the Chevron story.

\(^{119}\) Brief for the Administrator of the Environmental Protection Agency, at i, Nos. 82-1005, 82-1247 & 82-1591.
Whether the court of appeals, ruling on provisions of the Clean Air Act for meeting the health-based National Ambient Air Quality Standards where they are now violated, correctly held that the Administrator of the Environmental Protection Agency exceeded her authority when she redefined the term “source” to mean whole industrial plants only and thereby exempted from permit requirements the major industrial installations (such as boilers and blast furnaces) built within such plants.  

The substantive discussions in the briefs were similarly devoid of any broad references to deference doctrine. No one was gearing up for a debate over general principles of administrative law.

As Professor Merrill has documented at considerable length, the oral argument, the conference voting, and the decision-writing process in the Court all similarly framed this case as a narrow but important question about environmental law and policy, with no consciousness that principles of deference were seriously at issue. As far as statutory interpretation doctrine was concerned, all of the parties and all of the Justices seemed to view the *Chevron* case as an application of well-settled law. That much is now beyond cavil.

The question for us is how the lower courts viewed the *Chevron* decision. And thereby hangs a tale. We tell that tale by focusing on cases involving review of what pre-*Chevron* law would have called pure or abstract legal questions, because those are the cases in which the *Chevron* framework might make a difference. Agency decisions involving mixed or law-applying questions would be presumptively entitled to deference under pre-*Chevron* law, and no one has ever suggested that *Chevron* to be construed to lower the amount of deference agencies would receive in that context.

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120 Respondent’s Brief in Opposition to the Petition, at i, Nos. 82-1005, 82-1247 & 82-1591.

121 See Merrill, *supra* note --, at 180-85.
III. **Chevron Ascendant(?)**

*Chevron* was decided on June 25, 1984. Obviously, a good many cases involving judicial review of agency decisions were briefed and argued in the courts of appeals before that date but decided after *Chevron* issued. Lower courts are certainly aware of major Supreme Court cases that bear on not-yet-issued opinions, so to gauge the impact of *Chevron*, it is reasonable to look at lower court opinions issued in the few months after *Chevron*, even if *Chevron* was not part of the briefing and argument in those cases. Accordingly, our sample of cases includes decisions from late 1984 that were argued before the *Chevron* opinion was issued.

**A. Where’s the Beef?**

*Chevron* got off to a very slow start. No court of appeals cited the case in decisions issued in either June or July of 1984. Citations in August 1984 were limited to passing mentions involving deference to agencies in cases of law application, to which deference was already due under the pre-*Chevron* framework;\(^\text{122}\) deference to the EPA in the application of criteria for approval of State Implementation Plans under the Clean Air Act;\(^\text{123}\) and, in a case that did not even involve agency interpretation of a statute, the broad proposition that policy arguments “are

\(^{122}\) *See* State of South Dakota v. CAB, 740 F.2d 619, 621 (8th Cir. 1984) (citing *Chevron*, along with other authorities, for the uncontroversial proposition that the Civil Aeronautics Board deserves deference when defining “essential air transportation,” 49 U.S.C. § 1389(a)(2)(B) (2006), for communities affected by airline deregulation); Cospito v. Heckler, 742 F.2d 72, 85 n.21 (3d Cir. 1984) (noting, in a footnote, that regulations defining “inpatient hospital services,” 42 U.S.C. § 1396d(a)(14) (2006), need only be reasonable).

\(^{123}\) *See* Bethlehem Steel Corp. v. Gorsuch, 742 F.2d 1028, 1036 (7th Cir. 1984).
more properly addressed to legislators or administrators, not to judges.”

There was certainly no consciousness in the lower courts that *Chevron* required any kind of immediate reassessment of their practices in administrative law cases.

Perhaps the best indication of the post-*Chevron* state of the law is found in a First Circuit opinion authored by then-Judge (and former administrative law professor) Stephen Breyer in a case argued six weeks before *Chevron* was issued but decided on August 2, 1984. *Mayburg v. Sec’y of Health & Human Services* involved a Department of Health and Human Services interpretation of provisions of the Medicare Act. At the time of the decision, Medicare would pay for ninety days of hospital inpatient care and one hundred days of post-hospitalization extended care during each distinct “spell of illness,” which the statute defined as the period

1. beginning with the first day (not included in a previous spell of illness) (A) on which such individual is furnished inpatient hospital services or extended care services, and (B) which occurs in a month for which he is entitled to benefits under part A, and

2. ending with the close of the first period of 60 consecutive days thereafter on each of which he is neither an inpatient of a hospital nor an inpatient of a skilled nursing facility.

The question was how to handle a person who lived in a nursing home but received only custodial rather than medical care from it. When that person was released from hospitalization – let us say after ninety days of inpatient care to make the example clear -- to the nursing home, was she an “inpatient” of the nursing facility? If so, her “spell of illness” never stopped, because there was no period when she was “neither an inpatient of hospital nor an inpatient of a skilled

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125 740 F.2d 100 (1st Cir. 1984).


127 *Id.* at § 1395x(a) (1982).
nursing facility,” so if she again needed hospitalization, it would not be covered by Medicare because the ninety day limit on each “spell of illness” would have been exhausted. On this interpretation, persons who live in nursing homes would often be at risk of facing uncovered hospitalization. On the other hand, a contrary interpretation of the statute that would try to distinguish nursing home stays that provided medical services from those that did not could produce many difficult cases in the administration of the laws; it surely would be much easier simply to treat all nursing home residents as “inpatient[s]” rather than to adopt an interpretation that required a case-specific inquiry to determine whether any particular resident was an “inpatient.”

The Department of Health and Human Services opted for the former interpretation that treated all nursing home stays as “inpatient” stays even when the resident received only custodial rather than medical care, with the effect that a “spell of illness” did not stop when the patient went from a hospital to a nursing home. One would think that this interpretation of the term “inpatient” in the definition of a “spell of illness” would be a pure question of law; whether one must receive medical services in order to be an “inpatient” does not require knowledge of the facts or circumstances of any particular case. Accordingly, under pre-Chevron law, a court would decide this question without any legal deference to the agency, barring some special circumstance requiring it (which does not appear to be present in this case). If Chevron changed the law to require the two-step framework in all cases in which the agency administers the relevant statute, however, deference would be appropriate, as the agency clearly administers the statute in question.

Judge Breyer’s opinion faithfully followed the pre-Chevron framework in rejecting the agency’s interpretation. He noted multiple reasons, all grounded in traditional tools of statutory
interpretation, why the agency interpretation should not be followed: the weight of prior judicial authority, ordinary language, sound policy, canons of construction, and legislative history.\(^{128}\)

The agency responded to these arguments with a call for deference, though the case was argued before *Chevron* could formally be part of that response. Judge Breyer’s answer to this call, including his reference to the recently-decided *Chevron* decision and his articulation of the distinction (without employing the terms) between epistemological and legal deference, is telling, and it merits reproduction in full (minus only most of the copious citations to Supreme Court and academic authority):

The Secretary also argues that this court should simply defer to HHS’s interpretation of the statute. She points to a line of Supreme Court cases that, she argues, compel such deference. See, e.g., *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39, 102 S.Ct. 38, 45-6, 70 L.Ed.2d 23 (1981) (inquiry is “whether the Commission’s construction was ‘sufficiently reasonable’ to be accepted by a reviewing court”). . . . A different line of Supreme Court cases, however, cautions us that “deference” is not complete; sometimes a different, and more independent judicial attitude is appropriate . . . . Moreover, the Administrative Procedure Act states that “the reviewing court,” not the agency, “shall decide all relevant questions of law.” 5 U.S.C. § 706.

In order to apply correctly what Judge Friendly has described as conflicting authority, (see *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 49 (2d Cir.1976) . . . ), we must ask why courts should ever defer, or give special weight, to an agency’s interpretation of a statute’s meaning. And, here there are at least two types of answers, neither of which supports more than a modicum of special attention here.

First, one might argue that specialized agencies, at least sometimes, know better than the courts what Congress actually intended the words of the statute to mean. Thus, in *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944), the Supreme Court wrote

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment

\(^{128}\) See id. at 102-04.
in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

_Id._ at 140, 65 S.Ct. at 164. The fact that a question is closely related to an agency’s area of expertise may give an agency greater “power to persuade.” Its interpretation may also carry more persuasive power if made near the time the statute was enacted when congressional debates and interest group positions were fresh in the administrators’ minds . . . . An interpretation that has proved to be administratively workable because it is consistent and longstanding is typically more persuasive . . . , as is an interpretation that has stood throughout subsequent reenactment of the statute . . . . All these factors help to convince a court that the agency is familiar with the context, implications, history and consequent meaning of the statute. But, still, under _Skidmore_ the agency ultimately must depend upon the persuasive power of its argument. The simple fact that the agency has a position, in and of itself, is of only marginal significance.

In the case before us, the fact that the agency’s interpretation is consistent, longstanding, and left untouched by Congress all count in its favor. Nonetheless, HHS points to no significantly adverse administrative consequences that might flow from the contrary interpretation. Under these circumstances, the considerations mentioned in Part I are simply more persuasive. They convince us, as they have convinced other courts, that in this instance, HHS has not interpreted the statute as Congress meant.

Second, a court might give special weight to an agency’s interpretation of a statute because Congress intended it to do just that in respect to the statute in question. In _Social Security Board v. Nieroiko_, 327 U.S. 358, 66 S.Ct. 637, 90 L.Ed. 718 (1946), for example, the Court noted that an agency, “when it interprets a statute” may act “as a delegate to the legislative power.” And the Court added that “such interpretive power may be included in the agencies’ administrative functions.” _Id._ at 369, 66 S.Ct. at 643. If Congress expressly delegates a law-declaring function to the agency, of course, courts must respect that delegation . . . . But, if Congress is silent, courts may still infer from the particular statutory circumstances an implicit congressional instruction about the degree of respect or deference they owe the agency on a question of law. _See Chevron v. Natural Resources Defense Council, Inc._, 467 U.S. 837, ----, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (U.S.1984). They might do so by asking what a sensible legislator would have expected given the statutory circumstances. The less important the question of law, the more interstitial its character, the more closely related to the everyday administration of the statute and to the agency’s (rather than the court’s) administrative or substantive expertise, the less likely it is that Congress (would have) “wished” or “expected” the courts to remain indifferent to the agency’s views . . . . Conversely, the larger the question, the more its answer is likely to clarify or stabilize a broad area of law, the more likely Congress intended the

In this instance, the “spell of illness” provision is central to the statutory scheme. The interpretive skills called for seem primarily judicial, not administrative, in nature. The “administrative” implications seem trifling, or non-existent. And, nothing else suggests any specific congressional intent to place the power to construe this statutory term primarily in the agency’s hands. Thus, the arguments for completely deferring to the agency’s interpretation of the statute are not strong here.\(^\text{129}\)

Judge Breyer treated Chevron as a case in which Congress effectively instructed courts to give legal deference to agencies on pure questions of law even without an explicit directive to that effect. On Judge Breyer’s analysis, however, one can only find such an implied instruction based on a careful, multi-factor, statute-by-statute analysis, in which the more important the question involved, the less likely one is to find an implicit instruction to defer. One can certainly question whether the issue of interpretation involved in Chevron was unimportant, but as a formal matter, Judge Breyer simply worked Chevron into the pre-existing structure for review of agency legal determinations and thereby gave it a very narrow construction. His response to the agency’s call for deference would have been substantively identical had the Mayburg decision come out three months earlier.

Judge Breyer reiterated this quite narrow view of Chevron a month after the Mayburg decision. In New England Telephone and Telegraph Co. v. Public Utilities Comm’n of Maine,\(^\text{130}\) the First Circuit held that a statute granting a private right of action to parties to enforce in district court “any order”\(^\text{131}\) of the Federal Communications Commission did not encompass enforcement of FCC rules. The decision was issued on June 29, 1984. The plaintiff sought

\(^{129}\) Id. at 105-07.

\(^{130}\) 742 F.2d 1 (1st Cir. 1984).

rehearing, and its position that the term “order” included “rule” was then supported by the FCC, which argued on rehearing that its view of the statute should be given deference. Of course, either before or after *Chevron*, the most that could be claimed by the agency in this case was *Skidmore*-style epistemological deference. The agency, which was not a party to the case, expressed its view in an amicus brief, and it is very hard to see how the agency could be thought to “administer” the provisions of a statute authorizing private parties to bypass the agency and sue directly in court. In a denial of rehearing issued on September 10, 1984, the court accordingly (and correctly) observed that “[w]hile [the agency] counsel's experience entitles his opinion to respect, it cannot bind a court as to the meaning of a jurisdictional statute.”

Judge Breyer went on, however, to make the following enlightening comments:

> Moreover, the FCC's legal argument here threatens a highly anomalous result. Its view of statutory construction is one that would place primary authority to decide pure questions of statutory law in the hands of the agency. At the same time, its interpretation of the statute in question is one that would place considerable authority to decide questions of communications policy in the hands of the courts. Each institution—court and agency—would receive comparatively greater power in the area in which it, comparatively, lacks expertise. The resulting picture is one of classical administrative law principle turned upside down. At least, the position seems inconsistent with the sound court/agency working partnership that administrative law traditionally has sought.

Note that Judge Breyer makes clear that, in his view, pure questions of law are primarily for the court, not the agency – and this is almost three months after *Chevron*. His position is grounded in a view of comparative institutional competence that clearly echoes the “legal process” view expressed most famously by Harvard Law School professors Henry Hart and Al Sacks.

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132 742 F.2d at 11.

133 *Id.*

which is not all surprising given that Judge Breyer was a former administrative law professor at Harvard Law School. That view is broadly consistent with what we have described as the pre-
Chevron framework, in which agencies get primary interpretative responsibility when “interpretation” requires attention to facts, circumstances, and policy, while courts get principal responsibility for matters of pure legal interpretation.

In any event, it is clear that as of Fall 1984, Judge Breyer, and at least some other First Circuit judges, did not view Chevron as more than very modestly changing the methodology for review of agency legal decisions, perhaps by expanding in some slight fashion the range of cases in which one might find congressional delegations to agencies to interpret pure legal questions.

B. A Spark of Life

In the six months following its issuance, Chevron was cited by circuit courts twenty-two times, with eleven of those citations by the D.C. Circuit. Therefore, it is clear that examining D.C. Circuit opinions is the best starting point for determining whether and how Chevron actually influenced courts’ methodology in deferring to agencies. The D.C. Circuit hears a disproportionate share of federal administrative law cases,\(^{135}\) and it is universally recognized as the leading court in the shaping of administrative law doctrine. It is also the source of what today we know as the Chevron doctrine.

\(^{135}\) See John G. Roberts, Jr., What Makes the D.C. Circuit Different? A Historical View, 92 VA. L. REV. 375, 376-77 (2006) (observing that, whereas “[o]ne-third of the D.C. Circuit appeals are from agency decisions,” “[t]hat figure is less than twenty percent nationwide”).
In examining the cases that emerged from that circuit in 1984 and 1985, we have to engage in a bit of imaginative reconstruction. In order to know whether and how any particular understanding or application of *Chevron* affected case decisions, one would have to know how those cases would have been decided if there was no *Chevron* doctrine. This kind of counterfactual inquiry is particularly difficult given that the courts, both before and after *Chevron*, often said little about the methodology that they were employing and the assumptions that they were making. There is a very large risk of reading into these decisions reasons or frameworks that simply were not present. We see no way to avoid this risk other than to acknowledge it – and accordingly to discount to some degree whatever conclusions can be drawn from analysis of the cases. Even with a healthy discount, however, we think that the story of *Chevron*’s evolution emerges with reasonable clarity.

The *Chevron* doctrine as we know it originates with *General Motors Corp. v. Ruckelshaus*,\(^\text{136}\) an en banc decision of the D.C. Circuit that issued on September 7, 1984 – slightly more than four months after the case was argued on April 25, 1984. The case turned on section 207(c)(1) of the Clean Air Act, which provides, in pertinent part:

> If the Administrator determines that a substantial number of any class or category of vehicles or engines, although properly maintained and used, do not conform to the regulations prescribed under section 7521 of this title [*i.e.*, EPA emission standards], when in actual use throughout their useful life (as determined under section 7521(d) of this title), he shall immediately notify the manufacturer thereof of such nonconformity, and he shall require the manufacturer to submit a plan for remedying the nonconformity of the vehicles or engines with respect to which such notification is given. The plan shall provide that the nonconformity of any such vehicles or engines which are properly used and maintained will be remedied at the expense of the manufacturer.\(^\text{137}\)

\(^{136}\) 742 F.2d 1561 (D.C. Cir. 1984).

In essence, this provides for EPA-ordered recalls of classes of vehicles that fail to meet EPA emissions standards. The EPA interpreted this provision to authorize the recall of all members of a nonconforming class of vehicles, except those not “properly maintained and used,” regardless of the age or mileage of any given member. General Motors, by contrast, insisted that the phrase “throughout their useful life” limited the scope of any permissible recalls to vehicles that fall within the statutory criterion for a vehicle’s useful life of “five years or fifty thousand miles (or the equivalent), whichever first occurs.”

This is a dispute over a pure question of law: it simply concerns whether the EPA’s recall authority extends to vehicles that have exceeded their useful lives when they are part of a class of vehicles a substantial number of which have not so exceeded their useful lives. Under the pre-
*Chevron* methodology, there is no apparent reason to depart from the presumptive baseline of de novo review with respect to legal deference, leaving the agency’s reasoning to stand or fall on its merits. This was essentially the methodology of the three dissenting judges, who found that the usual mélange of case-specific factors governing the degree of (epistemological) deference to an agency counseled against upholding the agency’s rule:

The rule was not a contemporaneous interpretation of the Clean Air Act, and there is no evidence that it reflects a longstanding interpretation of the Act by the agency. Nor, in my view, did the rule “simply restate[ ] the consistent practice of the agency in conducting recalls pursuant to section 207(c)” —a proposition upon which the majority places substantial weight. Finally—and this point can scarcely be overemphasized—the interpretative rule at issue in this case does not involve the kind of fact-intensive questions concerning which great deference need be given the agency’s technical expertise; rather, as the agency itself concedes. “[s]ince the rule simply expresses an interpretation of the law based on the language, legislative history and policy of the Clean Air Act, no factual data need be analyzed or commented on.”

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138 *Id.* at § 7521(d)(1) (2006).

139 742 F.2d at 1574-75 (Bazelon, J., dissenting) (footnotes omitted).
The majority, however, took a somewhat different approach. Judge Wald, writing for eight judges, seemed to view *Chevron* as changing, and now governing, the inquiry:

The Supreme Court has recently outlined our proper task in reviewing an administrative construction of a statute that the agency administers. First, we must determine whether Congress “has directly spoken to the precise question at issue.” *Chevron, U.S.A. v. National Resources Defense Council*, 104 S.Ct. 2778 at 2781, 81 L.Ed.2d 694 (1984). If the administrative construction runs counter to clear congressional intent, then the reviewing court must reject it. See *id.* at n. 9, 104 S.Ct. at 2782 n. 9; see also *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32, 102 S.Ct. 38, 42, 70 L.Ed.2d 23 (1981). On the other hand, if the administrative construction does not contravene clearly discernible legislative intent, then the reviewing court “does not simply impose its own construction on the statute.” *Chevron*, 104 S.Ct. at 2782. Instead, we then must conduct the “narrower inquiry into whether the [agency's] construction was ‘sufficiently reasonable’ to be accepted by a reviewing court.”

This is the first opinion in which *Chevron* was treated as a general statement of scope-of-review doctrine. It is significant that this treatment appears in a case that rather clearly presents a pure legal question, which is precisely the context in which a broad reading of *Chevron* would be likely to make a difference. The rest of the majority opinion is filled with multiple references to the reasonableness of the agency’s interpretation. It seems clear that the majority was shifting away from classification of the relevant legal issue combined with a multi-factor epistemological deference inquiry towards a facially simpler “reasonableness” inquiry.

The dissenting opinion, authored by Judge Bazelon and joined by Judges Tamm and Wilkey, wrote as though *Chevron* changed nothing. The dissent’s only citation to *Chevron* was for the proposition that “‘[t]he judiciary is the final authority on issues of statutory

140 Id. at 1566-67 (footnote omitted).

141 See id. at 1567 (“EPA reasonably mandated”); id. (“agency reasonably required”); id. at 1568 (“EPA reasonably reads”); id. (“the May 30 rule is not precluded by the statute’s definition of ‘useful life’ “); id. at 1569 (“a reasonable method”); id. at 1570 (“a reasonable agency interpretation”); id. at 1571 (“agency may therefore reasonably require”).
construction.’ “142 The only deference that the dissent would offer was Skidmore epistemological deference,143 under which “[t]he EPA rule does not ‘receive high marks,’ “144 for reasons presented at the outset of this discussion.

Thus were the seeds planted. But there was still a lot of growth to come. The majority did not expressly say that Chevron materially altered prior law, nor did it elaborate in any way on what a new Chevron framework, if one existed, might entail.

The seeds began to germinate a bit in Rettig v. Pension Benefit Guaranty Corp.,145 which is arguably the first clear application of the “Chevron two-step” in the lower courts. The Employee Retirement Income Security Act of 1974 (“ERISA”) required pre-retirement vesting for most employer pension plans and also provided a federal insurance program, administered by the Pension Benefit Guaranty Corporation (“PBGC”), to guarantee benefits to retirees if their plans terminated with insufficient assets to cover vested liabilities. Importantly, as part of the transition to the new ERISA regime, the statute specified that, for purposes of determining the amount of benefits to retirees guaranteed by the PBGC, “any increase in the amount of benefits under a plan resulting from a plan amendment which was made, or became effective, whichever is later, within 60 months before the date on which the plan terminates shall be disregarded.”146 The evident purpose of this “phase-in” section was to “prevent abuse of the termination

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142 Id. at 1578 n.33 (quoting Chevron).
143 Id. at 1573-74.
144 Id. at 1574 (quoting General Electric Co. v. Gilbert, 429 U.S. 125, 143 (1976)).
145 744 F.2d 133 (D.C. Cir. 1984).
146 Id. § 1322(b)(1)(B) (2006).
insurance program by plan administrators who might ‘balloon’ benefits, and thus unfunded plan liabilities, in anticipation of termination.”

The PBCG issued a rule defining “increase in the amount of benefits” to include “not only increases in the amount of monthly benefits but also ‘any change in plan provisions which advances a participant's ... entitlement to a benefit, such as liberalized participation requirements or vesting schedules, reductions in the normal or early retirement age under a plan, and changes in the form of benefit payments.’” This rule barred consideration of changes in vesting rules made within five years of plan termination, even when those vesting rules were themselves mandated by other provisions of ERISA. Plaintiffs were employees of a company that changed its vesting rules within the five-year time period and then terminated its plan with insufficient assets. The PBGC ruled that it could not consider the vesting changes made within the five-year period, and the plaintiffs appealed.

Rettig presents a classic pure, “ivory tower” question of law: whether the phrase “increase in the amount of benefits” can include matters such as changes in vesting rules that do not directly change the periodic amounts payable to retirees. One can ask and answer that question without reference to the specific facts of any particular case. Under the pre-Chevron regime, such a pure question of law would be addressed through a de novo standard of review, absent some (in this case non-evident) special reason to defer to the PBGC.

Instead, the panel opinion, which was authored (as was the opinion in General Motors v. Ruckelshaus) by Judge Wald and issued on September 11, 1984, laid out the now-familiar Chevron two-step framework:

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147 744 F.2d at 137.
148 Id. at 138.
We are initially confronted with the familiar task of reviewing an agency's construction of the statute it is charged with implementing, a task which of course we undertake with due deference to the agency's congressional mandate and expertise. See Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). As we understand the Supreme Court's most recent pronouncements in Chevron, our inquiry consists of two steps. First, we must determine whether Congress had a specific intent as to the meaning of a particular phrase or provision. Id. at ----, 104 S.Ct. at 2781. To do this, we analyze the language and legislative history of the provision. As the Court noted in Chevron, “[t]he judiciary is the final authority on issue of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.” Id. at ---- n. 9, 104 S.Ct. at 2782 n. 9. Thus, in ascertaining the congressional intent underlying a specific provision, we are not required to grant any particular deference to the agency's parsing of statutory language or its interpretation of legislative history.

However, if that inquiry fails to answer the precise question before us -- if it appears that “Congress did not actually have an intent” regarding the particular question at issue, id. at ----, 104 S.Ct. at 2783 -- then we must seriously consider whether Congress implicitly delegated to the agency the task of filling the statutory gap. At this second stage, when policy considerations assume a prominent role, we must uphold the agency's interpretation if it “represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute.” Id. (quoting United States v. Shimer, 367 U.S. 374, 383, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908 (1961)). In this case, if we conclude that “Congress did not actually have an intent” with respect to the phase-in of mandatory vesting improvements, we are required to grant a considerable degree of deference to the PBGC's reconciliation of competing statutory policies . . . .

The court then engaged in a lengthy analysis of the statute’s language, purpose, and legislative history, and while it said that “we emerge from our foray into the statute and its history with the indubitable impression that Congress intended that the PBGC fully guarantee benefits to those employees meeting the vesting standards . . . ;” it found itself “unable to characterize as entirely clear and unambiguous the evidence reviewed here of the intent of Congress as to the precise question before us.” Accordingly, the court felt compelled to “proceed to the second

149 Id. at 140-41.
150 Id. at 150.
151 Id.
stage of our task of statutory construction, and determine whether the PBGC's interpretation of
the statute reflects ‘a reasonable accommodation of conflicting policies . . . committed to the
agency’s care by the statute.’ ” 152 Somewhat anticlimactically for our purposes, the court found
that the agency’s interpretation failed to take account of all relevant factors, and it remanded the
case to the agency for reconsideration. 153

While the court surely would have sided with the plaintiffs in the absence of *Chevron,* 154 so that the precise framework employed likely did not affect the outcome of the case, it is
significant that the court couched its entire discussion in terms of what it saw *Chevron* to
prescribe. It is also significant that the court moved to step two and deferred to the agency even
though it believed that there was a *best* interpretation of the statute. That alone was not enough
to end the case at step one; the court in some manner understood the search for a “specific intent”
of Congress to require some level of confidence in the statutory meaning beyond an “indubitable
impression.” Thus, not only was the court employing something recognizable as the *Chevron*
framework; it was starting the long, difficult, and still radically incomplete path towards making
that framework operational. At a minimum, the opinion certainly reads as though *Chevron*
changes the methodology for scope of review of agency legal conclusions.

C. *Two Steps Back*

152 Id. (quoting *Chevron*).

153 See id. at 155-56. This disposition anticipated the still-vibrant debate whether *Chevron’s* second step
duplicates, overlaps with, or complements hard-look review under the arbitrary or capricious test of section
706(2)(A) of the APA. See LAWSON, *supra* note --, at --.

154 See 744 F.2d at 152.
The D.C. Circuit did not rush to embrace the framework set forth by Judge Wald in *General Motors* and *Rettig*. Far from it. The early reception in the D.C. Circuit to the *Chevron* two-step was decidedly mixed. Indeed, on the court’s next occasion to employ *Chevron*, the majority ignored it entirely.

*Middle South Energy, Inc. v. FERC* concerned the Federal Power Act. As it stood in 1984, the Act required electric utilities subject to Federal Energy Regulatory Commission (“FERC”) jurisdiction to file rate schedules and to notify the FERC of any changes in rates, and – crucially for this case – it provided that “[w]henever any such new [rate] schedule is filed the Commission shall have authority . . . to enter upon a hearing concerning the lawfulness of such rate . . . ; and, pending such hearing and the decision thereon, the Commission . . . may suspend the operation of such schedule . . . .” This provision clearly gave the FERC the authority to suspend, pending a hearing, changes in rates. The agency now claimed power under this provision to suspend, pending hearing, *original* rates even in the absence of any changes or new filings. The case essentially came down to whether the phrase “such new schedule” refers only to schedules *changing* rates or also to schedules *establishing* rates in the first instance. This is a pure question of law. Under pre-*Chevron* law, the agency would receive no legal deference. Under the framework set out in *General Motors* and *Rettig*, both of which also involved pure questions of law, the FERC would be entitled to some measure of legal deference regardless of the classification of the question, and the court should decide only whether the agency’s view is reasonable.

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155 Along the way, *Chevron* was briefly cited, in a case plainly involving law application, for the general proposition that agencies receive deference subject to the ultimate authority of courts to pronounce the law. See *Coal Exporters Ass’n of U.S.*, Inc. v. United States, 745 F.2d 76, 96 (D.C. Cir. 1984).

156 747 F.2d 763 (D.C. Cir. 1984).

The majority opinion, authored by Judge Bork and issued on November 6, 1984, rejected the agency’s position without a mention of deference and without a citation to *Chevron*. The court relied entirely on the statute’s language and legislative history and the agency’s prior interpretations.158 This was not for lack of awareness of *Chevron*: although the case was argued on March 8, 1984, well before *Chevron* was decided, Judge Ginsburg’s dissenting opinion explicitly invoked *Chevron* for the proposition that “FERC’s current interpretation merits deferential judicial consideration.”159 Judge Ginsburg found the reference in the statute to “such new schedule” to be ambiguous between original schedules and changed schedules, found that the statute “bears the reading FERC now gives it,”160 and would have affirmed the agency on that point. The majority evidently wanted no part of it.

*Chevron* was more prominent, though not necessarily recognizably so, in *State of Montana v. Clark*,161 a case that was decided on November 20, 1984 after having been argued on September 25, 1984 -- the first case we have thus far discussed that was argued after *Chevron*. A statute provided for the allocation of funds from mine reclamation “in any State or Indian reservation . . . to that State or Indian reservation.”162 The Secretary of the Interior construed the statute as though the term “Indian reservation” meant “Indian lands,” with the effect that Indian tribes could receive funds from reclamation projects on lands in which they had a beneficial interest but which were not actually on their reservations. The State of Montana challenged the agency’s regulation, and the D.C. Circuit affirmed.

158 747 F.2d at 767-71.

159 *Id.* at 774 (Ginsburg, J., dissenting).

160 *Id.*

161 749 F.2d 740 (D.C. Cir. 1984).

The case involved a pure, abstract question of law, as the court (in a rare recognition of the problem of categorization) expressly acknowledged: “Montana raises a pure question of law, whether the challenged regulation is inconsistent with the organic statute.”163 As such, the case brought into focus “two superficially conflicting principles of statutory interpretation.”164 On the one hand, Montana invoked “the principle that the judiciary is uniquely responsible for the final determination of the meaning of statutes,”165 while the “federal appellees, on the other hand, acknowledge the purely legal nature of the question but insist that this court should afford substantial deference to the Department of the Interior's construction of a statute it is entrusted to administer.”166

Judge Wright’s opinion found this conflict “more apparent than real,”167 because “properly understood, deference to an agency's interpretation constitutes a judicial determination that Congress has delegated the norm-elaboration function to the agency and that the interpretation falls within the scope of that delegation . . . . Thus the court exercises its constitutionally prescribed function as the final arbiter of questions of law when it evaluates the breadth of congressional delegation and, in so doing, determines the degree of deference warranted in the particular controversy before it.”168 Judge Wright saw Chevron as expressing this principle and prescribing “the appropriate methodology for ascertaining whether to afford

163 749 F.2d at 744.
164 Id.
165 Id.
166 Id.
167 Id. at 745.
168 Id.
deference to an agency construction of its governing statute.” After setting forth the standard elements of the *Chevron* two-step framework, however, Judge Wright then explained that to determine whether Congress had delegated interpretative authority to the agency, so that (legal) deference was warranted, required a multi-faceted, statute-specific inquiry:

[W]e must determine whether the agency’s construction warrants deference by measuring the breadth of delegation . . . . [T]he absence of several of the typical indicia of broad congressional delegation to the agency counsels against deference . . . . [T]he construction . . . required no technical or specialized expertise . . . . Similarly, the statutory language at the center of this controversy is not “of such inherent imprecision * * * that a discretion of almost legislative scope was necessarily contemplated.”

On the other hand . . . , Congress expressly recognized that the jurisdictional status of Indian lands was too uncertain to permit effective allocation of regulatory authority for those regions . . . . Given this rather remarkably mixed message, we can only conclude that, pending congressional clarification, Congress afforded the Secretary substantial discretion in the administration of the fund on Indian lands. Thus deference is appropriate, and we will uphold the agency's interpretation provided only that it is not expressly foreclosed by congressional intent and that it is reasonable.

The result is a seeming application of the *Chevron* framework, complete with a “step-two” affirmance, but with a view of *Chevron’s* scope much narrower than the view reflected in *General Motors* and *Rettig*. Those cases did not find it necessary to conduct detailed inquiries into whether they involved the kinds of statutes for which Congress intended deference to agencies on pure law interpretation. Under pre-*Chevron* law, one could conceivably find case-specific reasons to defer to agencies in such circumstances -- de novo review was presumptive, not absolute – but they were relatively rare. Accordingly, Judge Wright, as had Judge Breyer three months earlier, fitted a narrow understanding of *Chevron* into the pre-existing legal order rather than seeing *Chevron* as mandating a significant change in legal practice.

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169 *Id.*

170 *Id.* at 746 (citations omitted).
After brief and uninformative appearances in cases involving an agency policy decision and a fairly flagrant agency misconstruction of a statute, \textit{Chevron} re-emerged in a major way in two decisions, both issued on December 5, 1984 and both again authored by Judge Wald.

\textit{Railway Labor Executives’ Ass’n v. United States Railroad Retirement Board} concerned two related statutes that provide retirement benefits to railroad workers “in the service of one or more employers,” including workers in foreign countries and non-resident and non-citizen workers, subject to the proviso that “[a]n individual, not a citizen or resident of the United States, shall not be deemed to be in the service of an employer when rendering service outside the United States to an employer who is required under the laws applicable in the place where the service is rendered to employ therein, in whole or in part, citizens or residents thereof.”

The Railroad Retirement Board understood a 1978 Canadian immigration regulation to require the hiring of Canadian workers and accordingly held that such workers were not covered by the relevant statutes. The petitioners (“RLEA”) appealed.

Everyone agreed that the Board should get no deference in the interpretation of Canadian law. But the Board argued, and the court agreed, that this case did not simply involve an interpretation of Canadian law. Rather, the RLEA insisted that the word “required” in the statute had a strict, firm meaning of “mandated by law” and that a foreign “require[ment]” that did not

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171 \textit{See} Walter O. Boswell Memorial Hospital \textit{v.} Heckler, 749 F.2d 788, 801 (D.C. Cir. 1984).


173 749 F.2d 856 (D.C. Cir. 1984).


176 749 F.2d at 860.
impose something like a hiring quota could not serve to activate the statutory exemption. Those are propositions about the meaning of American statutes administered by the Board, and they are pure, abstract legal questions that can be asked and answered outside the context of a specific controversy. So framed, the case looks like a prime candidate for the *Chevron* framework previously set forth by Judge Wald in prior opinions.

Judge Wald thought so as well; her opinion set forth and applied the *Chevron* two-step analysis.177 She found the statute ambiguous at step one: “the plain words contained in the . . . exceptions to covered service do not compel us to adopt any particular meaning . . . [and] nothing in the legislative history of these provisions gives us any clue as to the meaning Congress intended.”178 Accordingly, she wrote, “[o]ur task in determining the reasonableness of the Board’s decision is not to interpret the statutes as we think best but only to inquire as to whether the Board’s interpretation is ‘sufficiently reasonable’ to be accepted by a reviewing court.’”179 As happened in *Rettig*, however, the court found that the agency had not sufficiently considered all relevant factors or adequately explained its interpretation of the statute, and the Board’s decision was vacated and remanded.180 Nonetheless, the *Chevron* framework appeared to govern.

All of which makes all the more puzzling the court’s opinion in *Pennsylvania Public Utility Comm’n v. United States*.181 The Bus Regulatory Reform Act made it easier for bus companies to discontinue unprofitable routes – mainly serving small towns – by allowing the

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177 See id.
178 Id. at 861.
179 Id. at 862 (citation omitted).
180 See id. at 862-63.
181 749 F.2d 841 (D. C. Cir. 1984).
Interstate Commerce Commission ("ICC") to override refusals by state regulators to permit the discontinuance of routes. (In essence, under the prior law, either the state commission or the ICC could block discontinuance; under the new law, either agency could grant it.) The ICC overrode the state agency on twelve routes, and the state agency appealed. The governing statute required the ICC to consider such matters as “the public interest” and “an unreasonable burden on interstate commerce,” so most issues that arose would involve either agency policymaking or, at most, questions of law application. One important pure question of law, however, slipped through the cracks.

The ICC was statutorily required to grant a request for discontinuance of a route “unless the Commission finds, on the basis of evidence presented by the person objecting to the granting of such permission, that such discontinuance or reduction is not consistent with the public interest or that continuing the transportation, without the proposed discontinuance or reduction, will not constitute an unreasonable burden on interstate commerce.” The ICC granted a request on the ground that a balance of the public interest (in continuing service) and burdens on interstate commerce (by forcing continuation of unprofitable service) weighed in favor of granting the request. The petitioners countered that the ICC had to find that both the public interest and economic efficiency would be served by discontinuance and could not balance one against the other. That is a pure question of law, and it seemed ripe for the *Chevron* framework, which would affirm the agency unless its interpretation was contrary to the statute’s clear meaning or otherwise unreasonable.

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183 *Id.*
But while the court briefly mentioned *Chevron* at several points in its lengthy opinion, it made no mention of *Chevron* when discussing what it termed the “substantial issues of statutory interpretation” raised by the ICC’s decision. The court found the statute’s legislative history, structure, and purpose to be contrary to the agency’s decision. In theory, one could treat this as a finding under *Chevron* step one that the meaning of the statute was clear; the many references in the opinion to congressional intent -- the touchstone of step one as articulated in the *Chevron* decision -- support this reading of the case. But one might expect, by December 1984, to hear something explicit from the court that it was so finding, especially in an opinion written by Judge Wald. Instead, the discussion in *Pennsylvania Public Utility Comm’n* could have been written precisely the same way, in both substance and form, if *Chevron* (and *General Motors* and *Rettig*) had never existed. There was nothing to suggest that *Chevron* was in any way relevant to this analysis.

But perhaps the most telling indication of *Chevron’s* status (or lack thereof) as a landmark is the large number of D.C. Circuit opinions in late 1984 and early 1985 involving agency interpretations of statutes in which *Chevron* was not even mentioned. Such cases were legion, involving both pure questions of law and questions of law application. It is very

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184 *See* 749 F.2d at 847, 849.
185 *Id.* at 849.
186 *See id.* at 851-53.
187 *See* East Arkansas Legal Services v. Legal Services Corp., 742 F.2d 1472 (D.C. Cir. 1984); City of Winnfield, Louisiana v. FERC, 744 F.2d 871 (D.C. Cir. 1984); NARUC v. FCC, 745 F.2d 1492 (D.C. Cir. 1984); Center for Auto Safety v. Ruckelshaus, 747 F.2d 1 (D.C. Cir. 1984); Illinois Commerce Comm’n v. ICC, 749 F.2d 875 (D.C. Cir. 1984); American Federation of Gov’t Employees, AFL-CIO v. FLRA, 750 F.2d 143 (D.C. Cir. 1984)
188 *See* Oil, Chemical and Atomic Workers Int’l Union v. American Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984); National Treasury Employees Union v. United States Merit Systems Protection Board, 743 F.2d 895 (D.C. Cir. 1984); EEOC v. FLRA, 744 F.2d 842 (D.C. Cir. 1984); Sierra Club v. United States Dep’t of Transportation, 753 F.2d 120 (D.C. Cir. 1985); Ass’n of Civilian Technicians, Montana Air Chapter v. FLRA, 756 F.2d 172 (D.C. Cir. 1985).
hard to say how, if at all, any of those cases would have differed had Chevron supplied the analytical framework, but for our purposes the significance lies simply in the absence of that framework. It is true that almost all of those cases were argued before Chevron, and some of them long before Chevron, but we have seen that the court was quite capable of incorporating Chevron into the analysis of already-argued cases. Chevron simply was not seen as important enough to require inclusion.

Thus, by the end of 1984, the D.C. Circuit was applying the Chevron two-step episodically at best. Even the judge who birthed the Chevron doctrine was not applying it consistently.

D. ??

1985 was the best of times and the worst of times for supporters of a broad reading of Chevron. The year began with a series of decisions in the D.C. Circuit that seemed to treat Chevron as settled law prescribing the methodology for review of agency legal determinations, with no need for extended discussion of the point. While those brief treatments obviously raised more questions than they answered about the mechanics of Chevron, they did suggest that the Chevron framework, however unelaborated, had taken hold. To be sure, the same could not be said for decisions in other circuits, whose treatment of Chevron was far more equivocal, and

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189 Six of the cases cited in notes --, supra, were argued in 1983.
190 See Defense Logistics Agency v. FLRA, 754 F.2d 1003, 1004, 1013-14 (D.C. Cir. 1985); Atlanta Gas Light Co. v. FERC, 756 F.2d 191, 196 (D.C. Cir. 1985); Central & Southern Motor Freight, 757 F.2d 301, 314-17 (D.C. Cir. 1985); FAIC Securities, Inc. v. United States, 768 F.2d 352, 362-63 (D.C. Cir. 1985).
considerably less sophisticated, than the D.C. Circuit’s, but one could still see at least the outlines of an emerging “Chevron doctrine.”

A pair of decisions by Ken Starr, however, cast considerable doubt on this picture—which is notable, because Judge Starr is often seen as one of Chevron’s progenitors. The key decision was AFL-CIO v. Donovan. The details of the case, involving challenges to eight separate rules implementing various provisions of the Service Contract Act, are not important. For our story, the important discussion concerns scope of review principles. The Department of Labor urged, and the district court held, that the agency’s rules should be reviewed under the deferential arbitrary or capricious standard of section 706(2)(A) of the APA. Judge Starr, writing for himself, Judge Bork, and Judge Ginsburg, begged to differ at least in part:

Not all agency determinations, of course, are due an equally high degree of deference. Agencies are of necessity called upon from time to time to interpret terms in the statute they are charged with implementing or enforcing. Ordinarily, such “administrative interpretations of statutory terms are given important but not controlling significance.” Batterton v. Francis, 432 U.S. 416, 424, 97 S.Ct. 2399, 2405, 53 L.Ed.2d 448 (1977). “[A] court is not required to give effect to an interpretative regulation[, but v]arying degrees of deference are accorded . . . based on such factors as the timing and consistency of the agency’s position, and the nature of its expertise.” Id. at 425 n. 9, 97 S.Ct. at 2405 n. 9. In a word, when an agency interprets a statute, courts employ, in effect, a sliding scale of deference, taking into account a variety of deference-related factors such as those enumerated in Batterton v. Francis, supra. See, e.g., NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130–31, 64 S.Ct. 851, 860–61, 88 L.Ed. 1170 (1944); Center for Auto Safety v. Ruckelshaus, 747 F.2d 1, 5 (D.C.Cir.1984).

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191 See Philadelphia Gear Corp. v. FDIC, 751 F.2d 1131, 1135 (10th Cir. 1984) (treating Chevron as requiring deference only in the case of express delegations of interpretative authority); Mattox v. FTC, 752 F.2d 116, 123 (5th Cir. 1985) (finding, with little discussion, Chevron to be an “apt standard” for review of agency decisions); Friends of the Shawangunks, Inc. v. Clark, 754 F.2d 446, 449-50 (2d Cir. 1985) (including Chevron in a string citation for deference to agency expertise); Kamp v. Hernandez, 752 F.2d 1444, 1453 (9th Cir. 1985) (citing Chevron with no discussion while holding that the EPA “reasonably” interpreted the Clean Air Act). Perhaps the one exception was State of Washington, Dep’t of Ecology v. United States EPA, 752 F.2d 1465 (9th Cir. 1985), which read Chevron quite broadly to prescribe the framework for review of – at least – EPA legal conclusions. See id. at 1469-70.


194 Id. at 340-41.
This is an elegant statement of pre-*Chevron* scope of review doctrine. What about *Chevron*?

Circumstances do exist, of course, under settled principles of law when an agency's view of a statute is still to be reviewed under the traditional “arbitrary and capricious” standard. Where Congress delegates, explicitly or implicitly, to an administrative agency the authority to give meaning to a statutory term or to promulgate standards or classifications, the regulations adopted in the exercise of that authority enjoy “legislative effect,” *see Batterton v. Francis*, *supra*, 432 U.S. at 425, 97 S.Ct. at 2405. *See also Chevron, USA, Inc. v. Natural Resources Defense Council*, ——U.S. ———, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). As *Chevron* teaches us, “[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” *Chevron*, *supra*, 104 S.Ct. at 2782 (footnote omitted).\(^{195}\)

The key under this analysis is to figure out when Congress has implicitly delegated interpretative authority to an agency, so that a deferential approach should govern. Judge Starr addressed that crucial topic in a footnote:

Under the Supreme Court's decision last Term in *Chevron*, where Congress has delegated, either expressly or implicitly, to an agency the authority to interpret a statutory term, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” *Id.* at 2782 (footnote omitted). *See also General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1566–67 (D.C.Cir.1984) (en banc) (citing *Chevron* in granting deference to an agency interpretation of the statute it administers). An implicit delegation is more difficult to recognize than an explicit delegation. However, such implicit delegations have been recognized where an undefined statutory term, such as “extreme hardship,” constitutes the operative standard to guide Executive Branch action, *see INS v. Jong Ha Wang*, 450 U.S. 139, 144, 101 S.Ct. 1027, 1031, 67 L.Ed.2d 123 (1981), and where the standard is one “of such inherent imprecision . . . that a discretion of almost legislative scope was necessarily contemplated,” *Association of Data Processing Service Organizations, Inc. v. Board of Governors of Federal Reserve*, 745 F.2d 677, 697 (D.C.Cir.1984) (involving the statutory standard of “closely related to banking”).\(^{196}\)

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\(^{195}\) *Id.* at 341.  
\(^{196}\) *Id.* at 341 n.7.
This discussion limits *Chevron* essentially to those circumstances identified by pre-*Chevron* law as warranting deference: cases in which there are special circumstances in the statutory scheme prescribing deference, characterized (against a general background of de novo review for legal questions) by *highly* undefined or imprecise statutory language. Indeed, in the *Donovan* case, the court said that “[w]e have not divined in the matters before us an implicit delegation of authority to the Secretary,” suggesting that the court was serious when it described a narrow band of cases in which deference would be appropriate. This analysis for identifying instances in which legal deference is due agencies on pure questions of law does not differ noticeably from Judge Breyer’s discussion in *Mayburg* and Judge Wright’s discussion in *State of Montana*, both of which folded a very modest interpretation of *Chevron* into the pre-existing methodology. If anything, Judge Starr’s opinion gives a *narrower* scope to *Chevron* than did these other decisions by seemingly imposing a very strict standard for finding implicit delegations to agencies.

If Judge Starr was *Chevron*’s friend, then in Spring 1985, it needed no enemies.

Four days after *Donovan* was issued, another opinion authored by Judge Starr was released. *Community Nutrition Institute v. Young* concerned whether the Food and Drug Administration could regulate the level of aflatoxins allowed in corn through informal “action levels” rather than formal, specified “tolerances.” Under the statute, poisonous or deleterious food additives – which concededly included aflatoxin in corn – were generally deemed unsafe and were prohibited, “but when such substance is so required or cannot be so avoided, the Secretary shall promulgate regulations limiting the quantity therein or thereon to such extent as

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197 *Id.* The court added that it “need not plumb deeply into those matters inasmuch as we find in each instance, for reasons to be set forth hereafter, the Secretary's interpretation to be concordant with the statutory scheme and provisions.” *Id.* No deference was given, but no deference was needed in that case to affirm the agency.

he finds necessary for the protection of public health . . .”\footnote{21 U.S.C. § 346 (2006).} The petitioners argued that this provision mandated quantity-based regulations, while the FDA argued that it authorized but did not require them. This is a classic pure question of law which would seem to call for the \textit{Chevron} framework. The court, while briefly citing \textit{Chevron}, found that Congress had directly spoken to the precise question at issue (that is, the meaning of the statute was clear), and it held that quantitative regulations were required.\footnote{See 757 F.2d at 357.}

The case could certainly be understood as a straightforward step one decision cleanly within the \textit{Chevron} framework. As a formal matter, that is probably right – if a court really believes that the meaning of the statute is clear, there is no occasion to talk about methodology, reasonableness, deference, or anything else, because the case is over.\footnote{Such was obviously the case, for example, in \textit{Wisconsin Electric Power Co. v. Dep’t of Energy}, 778 F.2d 1 (D.C. Cir, 1985), in which the agency very neatly read out of the statute an express requirement that power be sold. No elaborate discussion of methodology was necessary to invalidate the agency decision.} Slightly more than a year later, however, the Supreme Court reversed the decision in \textit{Community Nutrition Institute} by an 8-1 vote,\footnote{See \textit{Young v. Community Nutrition Institute}, 476 U.S. 974 (1986).} finding the statute ambiguous and the FDA’s interpretation of that ambiguity reasonable. (The lone dissenter in the Supreme Court was Justice Stevens.) If the D.C. Circuit decision was an application of \textit{Chevron}, it was an uncharitable application.

These decisions, neither of which puts the \textit{Chevron} framework at center stage, make all the more puzzling another opinion from Judge Starr, issued on April 16, 1985, just weeks after his prior two opinions noted above. In \textit{Eagle-Picher Industries, Inc. v. United States EPA},\footnote{759 F.2d 922 (D.C. Cir. 1985).} there were several challenges to EPA’s classification of certain sites as issuers of “hazardous

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substances.” In a footnote at the outset of his analysis, Judge Starr briefly set out the *Chevron* framework. Most of the opinion was devoted to what seemed like a step-one argument in favor of the EPA’s interpretation, though the decision never declared that the meaning of the statute was clear in support of the EPA. Indeed, after considering the various arguments against the EPA’s position, the court noted that “[t]he best case to be made for petitioners, upon analysis, is that when one examines the statute and the specific part of the legislative history upon which they rely, it becomes unclear as to what Congress' intent actually was. However, when Congress' intent is unclear, settled principles of law require us to determine whether EPA's interpretation is sufficiently reasonable for us to accept that interpretation.” This was a straightforward application of the *Chevron* two-step as settled law.

Indeed, a companion case to the first *Eagle-Picher* decision – issued on the same day and decided by the same panel of Judges Starr, Edwards, and Robinson – reinforced the notion of *Chevron* as settled law. The second *Eagle-Picher Industries, Inc. v. EPA* concerned a challenge to the methodology employed by the EPA to construct its Hazardous Ranking System. The court, in an opinion by Judge Edwards, announced the *Chevron* formula, found the

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204 CITE CRCLA.

205 See 759 F.2d at 927 n.5:

In reviewing the interpretation of a statute by the agency that administers it, a court must first determine if Congress “has directly spoken to the precise question at issue,” and if Congress’ intent is clear, the court “must give effect to the unambiguously expressed intent of Congress.” *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 2781-82, 581 L.Ed.2d 694 (1984) (footnote omitted). If Congress' intent is not clear, however, the court “must conduct the ‘narrower inquiry into whether the [agency's] construction was “sufficiently reasonable” to be accepted by a reviewing court.’” *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1567 (D.C.Cir.1984) (en banc) (quoting *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39, 102 S.Ct. 38, 46, 70 L.Ed.2d 23 (1981) (footnote omitted).

206 Id. at 930.

207 759 F.2d 905 (D.C. Cir. 1985).

208 Id. at 920.
agency’s interpretation of the governing statute reasonable, and affirmed the agency in a very brief discussion. The evident message of the two *Eagle-Picher* cases was that *Chevron* was a generally applicable doctrine.

By mid- to late-1985, near *Chevron*’s first anniversary, many other decisions, across many circuits, could be cited for the proposition that the two-step *Chevron* framework -- which does not mention at all whether the relevant legal question was pure or mixed and which does not look for extremely strong statute-specific evidence of congressional intent to entrust the agency with interpretative authority over the former -- was simply settled law. This was clearly enough authority to allow one to speak of something called the “*Chevron* doctrine” if one was so inclined. To be sure, identifying the contents of this “*Chevron* doctrine” was no easy feat; the oft-recited two-step framework both raised and obscured as many questions as it answered. At a minimum, however, one could fairly say that the distinction between pure and mixed questions of law had lost much of its bite by the time that 1986 arrived. It was now routine, rather than exceptional, for courts to grant deference – legal deference not justified by case-specific factors pertaining to agency expertise – when agencies interpreted pure questions of law. There was still disagreement over the precise range of this extension of deference. Some

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209 *Id.* at 920-21.

cases continued to search for statute-specific evidence of congressional intent to delegate interpretative authority to the agency, but many proceeded to the *Chevron* framework without that inquiry. There is no rigorously empirical way to verify this claim, but there was good reason to think that the law of judicial review looked very different in 1985 than it did in 1975.

At the same time, there was still enough authority to allow one to doubt, if one so wished, whether any major change in the law had really occurred. Cases still arose with some frequency in which the *Chevron* framework appeared to play no role. For example, *Amalgamated Transit Union Int’l, AFL-CIO v. Donovan*\(^{211}\) involved section 13(c) of the Urban Mass Transportation Act (“UMTA”), which provides federal funds to public transit authorities that have taken over formerly private transit systems, but only if the Secretary of Labor certifies that the public transit authority has made “fair and equitable” labor protective arrangements, including specifically “such provisions as may be necessary for ... the continuation of collective bargaining rights.”\(^{212}\) The Secretary of Labor approved funds for an Atlanta transit authority, notwithstanding a state law removing important subjects from collective bargaining, on the ground that the authority’s overall labor package was “fair and equitable.” The unions objected that the “fair and equitable” determination had to be *in addition to* rather than *substituted for* the preservation of collective bargaining rights. The D.C. Circuit agreed with the unions. The court’s discussion of the language and legislative history of the statute is lengthy,\(^{213}\) detailed, and in all likelihood correct. One could readily imagine seeing the court declare a union victory at step one of *Chevron* because the meaning of the statute was clear. One could not in fact see that in *Amalgamated Transit Union*, however, because the court did not mention *Chevron*, deference, the clear

\(^{211}\) 767 F.2d 939 (D.C. Cir. 1985).

\(^{212}\) 49 U.S.C. App. § 1609(c) (1982).

\(^{213}\) See id. at 946-50.
meaning of the statute, step one, or any related concept in its discussion. It simply launched into an analysis of the relevant statute. The omission of *Chevron* from this discussion is particularly intriguing because *Chevron* appeared in an earlier part of the opinion rejecting the Department of Labor’s claim that the relevant inquiry was committed to agency discretion by law.\(^{214}\) The case is not literally contrary to *Chevron*, because there is no reason to think that application of the *Chevron* framework would have changed the result. But it is striking that the *Chevron* framework did not even merit a mention.

To much the same effect is *Norfolk & Western Ry. Co. v. United States*,\(^{215}\) authored by Judge Bork. The case was part of a long line of decisions, statutes, and agency rulings dealing with the shipping of recyclable materials. Railroads had previously been ordered to pay millions of dollars in refunds to shippers of recyclables based on territorial averages of variable shipping costs. In the latest iteration, the Interstate Commerce Commission ordered additional refunds to individual shippers who could show that the variable costs of shipping their specific materials were below statutory maxima. The railroads claimed that this would result in double refunds to some customers. The court agreed that the ICC ruling was contrary to section 204(e) of the Staggers Rail Act of 1980,\(^{216}\) which reads in full:

> Notwithstanding any other provision of this title or any other law, within 90 days after the effective date of the Staggers Rail Act of 1980, all rail carriers providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title shall take all actions necessary to reduce and thereafter maintain rates for the transportation of recyclable or recycled materials, other than recyclable or recycled iron or steel, at revenue-to-variable cost ratio levels that are equal to or less than the average revenue-to-variable cost ratio that rail carriers would be required to realize, under honest, economical, and efficient management, in order to cover total operating expenses, including depreciation

\(^{214}\) *See id.* at 944 n.7.

\(^{215}\) 768 F.2d 373 (D.C. Cir. 1983).

If it is not obvious to the reader how the ICC’s interpretation contravenes the clear meaning of this statute, it is because it is not obvious how the ICC’s interpretation contravenes the clear meaning of the statute. To be sure, there is a plausible argument that the ICC’s reading renders the second sentence of the statute irrelevant, as that sentence assumes that at least some rates might exceed the average revenue-to-variable cost ratio but still be lawful (though frozen), while the ICC’s actions in this case suggested that all rates above that ratio were necessarily unlawful. But to foreclose the ICC’s reading on that basis seems strongly contrary to *Chevron*; after all, as the ICC argued, perhaps the first sentence merely authorizes the ICC to declare all such rates unlawful without requiring it to do so, so that the second sentence would have plenty of work to do if the ICC chose not to make such a declaration.

In any event, the court never explained how its decision fit into the *Chevron* framework, because the court never cited or mentioned *Chevron*. Unlike *Amalgamated Transit Union*, this is a case in which it may well have changed the outcome to employ the *Chevron* framework, with its explicit focus on deferring to the agency absent a clear meaning of the relevant statute. Judge Starr in dissent certainly thought so.218


218 See id. at 382 (“I think even the railroads would admit that Congress did not appear to have an intent as to whether only average rates, or some other rate methodology, should be employed. Under elementary principles, adequately obvious so as to require little elaboration, when Congress does not express an intent, the court's sole duty is to determine whether the agency's action in the context of its mission is reasonable; if so, then the agency's view must be upheld.”) (citing *Chevron*).
One more example will make the point.\textsuperscript{219} In \textit{American Cyanamid v. Young},\textsuperscript{220} the petitioner argued that upon the filing of a \textit{supplemental} new animal drug application, the FDA could consider only the safety and effectiveness of the marginal changes effected by the supplemental application and could not revisit the safety and effectiveness of the drug as shown by the original application. The court rejected this challenge and affirmed the agency, largely by reference to canons of construction.\textsuperscript{221} \textit{Chevron} did not provide the framework for analysis and warranted only an unelaborated “\textit{see also}” citation.\textsuperscript{222}

Thus, by the end of 1985, \textit{Chevron} was clearly taking root, but with serious room for debate about its vitality and ability to survive.

One more thought: \textit{Chevron} was decided by the Supreme Court in the middle of 1984, and the story thus far has taken us through 1985. What did the Supreme Court have to say about \textit{Chevron} during this time period?

Fortunately, the answer to that question (“spectacularly little”) is well known and well documented, thanks again to Tom Merrill. Professor Merrill famously tracked the use – or non-use – of \textit{Chevron} in the Supreme Court in the half-dozen years after \textit{Chevron} and showed that through 1990 \textit{Chevron} was not consistently used by the Court as a framework for reviewing agency legal determinations.\textsuperscript{223} Far from it. The October 1984 term was particularly uninformative for lower courts looking for guidance about the scope and impact of \textit{Chevron}.

\textsuperscript{219} A few more could be added. \textit{See}, e.g., General Medical Co. v. FDA, 770 F.2d 214 (D.C. Cir. 1985) (offering only a throwaway reference to \textit{Chevron}).

\textsuperscript{220} 770 F.2d 1213 (D.C. Cir. 1985).

\textsuperscript{221} \textit{See id.} at 1217-18.

\textsuperscript{222} \textit{See id.} at 1217.

\textsuperscript{223} \textit{See} Thomas W. Merrill, \textit{Judicial Deference to Executive Precedent}, 101 \textit{Yale L.J.} 969, 980-83 (1992).
There were two decisions that arguably, if briefly and without discussion, at least suggested that *Chevron* might prescribe a generally applicable framework, but it is fair to say that no case elaborated seriously on the *Chevron* framework – or even expressly identified something resembling a “*Chevron* framework” as a distinct legal entity. *Chevron* simply was not a major presence on the Supreme Court in the October 1984 term.

This is not an altogether surprising result. *Chevron*’s broad impact, if any, was on administrative law, and the Supreme Court circa 1985 was neither much interested nor well versed in the subject. Of the nine Justices at that time, none could be said to have any special expertise or interest in administrative law. Only one Justice – Warren Burger – had prior experience on the D.C. Circuit, with regular exposure to administrative law issues, and it is no great slap at Chief Justice Burger to note that he has never been regarded as a giant in the field. The impact of *Chevron* on scope of review doctrine simply is not something to which one would expect the Supreme Court of 1985 to give much thought.

Through 1985, whatever was happening with *Chevron* was happening entirely in the lower courts. And something, however hard to define, was happening.

IV. *Coconuts Don’t Migrate . . . But Doctrines Might*

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225 In order of seniority, they were William Brennan, Byron White, Thurgood Marshall, Warren Burger, Harry Blackmun, Lewis Powell, William Rehnquist, John Paul Stevens, and Sandra Day O’Connor.

226 This is in stark contrast with the current Court, which includes three former administrative law professors (Justices Breyer, Kagan, and Scalia) and a former chairman of a federal administrative agency (Justice Thomas).

227 The current Court has four former D.C. Circuit judges (Justices Ginsburg, Roberts, Scalia, and Thomas).
In a series of (unconnected) law review articles in 1986, judges on the D.C. Circuit described *Chevron* as a “landmark,”

\[228\] a “far-reaching development,”

\[229\] and a “watershed.”

\[230\] Whatever *Chevron* stood for, by this time it had reached some noteworthy level of ascendancy in the lower courts. One could still find cases that downplayed its significance,

\[231\] but they were becoming harder to find. It was much easier to find decisions reciting the “familiar two-step framework set forth in *Chevron,”

\[232\] *Chevron*’s “now familiar framework for analyzing interpretations of statutes by agencies charged with their administration,”

\[233\] and the “now familiar dictates of *Chevron.”

\[234\] We are unable to identify a precise point at which the dam burst, but by *Chevron*’s two year anniversary, it had become the dominant methodology in the lower courts for review of agency legal determinations.

\[235\] If the *Chevron* framework really was supplanting the old regime for judicial review of agency legal determinations, there would be consequences. The extent of those consequences, of course, depended on exactly what the “*Chevron framework” really prescribed, and that was


\[231\] See, e.g., American Federation of Gov’t Employees, AFL-CIO, Local 1738 v. FLRA, 806 F.2d 1105, 1108 (D.C.Cir, 1986) (concluding, seemingly grudgingly, that *Chevron* entitles agency decisions to “some deference,” but otherwise ignoring the decision).


\[235\] A full string citation of cases from this period that treat *Chevron* as settled law would get tedious even by the standards of string citations. See, e.g., Railway Labor Executives’ Ass’n v. ICC, 784 F.2d 959, 963-64 (9th Cir. 1986); Reckitt & Colman, Ltd. v. Administrator, DEA, 788 F.2d 22,25-26 (D.C. Cir. 1986); Humane Society of the United States v. EPA, 790 F.2d 106, 115-16 (D.C. Cir. 1986); Coalition to Preserve the Integrity of American Trademarks v. United States, 790 F.2d 903, 907-08 (D.C. Cir. 1986); Transbrasil S.A. Linhas Aereas v. Dep’t of Transportation, 791 F.2d 202, 205 (D.C. Cir. 1986); Production Workers Union of Chicago and Vicinity, Local 707 v. NLRB, 793 F.2d 323, 328 (D.C. Cir. 1986); Kean v. Heckler, 799 F.2d 895, 899 (3d Cir. 1986).
profoundly unclear in 1986. The *Chevron* framework has an air of simplicity. No need to think about whether the question of law is pure or mixed, whether the statute clearly delegates authority to the agency, or (perhaps) how to apply the “sliding scale of deference, taking into account a variety of deference-related factors,”\(^{236}\) that dominated pre-*Chevron* law. One need only (or so one could believe) ask whether the agency administers the statute, and a measure of legal deference flowed automatically. That deference was not absolute, of course – step one made that much very clear. But *Chevron* did potentially hold out the promise of a simpler, easier to administer scope of review doctrine. For lower courts that had openly complained for years in the pages of the United States Reports that the Supreme Court had not given them a clear scope of review doctrine, *Chevron* offered a possible way out of the darkness.

Whether *Chevron* actually delivered, or could deliver, on that promise of simplification is another question altogether. That depends on just how simple one makes the *Chevron* framework. If application of *Chevron* continued to require, as at least some cases held, a detailed, statute-by-statute analysis of whether Congress intended the agency to have primary interpretative authority, *Chevron* would be of little consequence. If figuring out whether a statute’s meaning is “clear” was no easier (and perhaps harder) than figuring out whether a question of law was pure or mixed, *Chevron* could make the courts’ job harder rather than easier. And if the degree of deference afforded an agency continued to slide along many factors with or without *Chevron*, the marginal gain from the *Chevron* framework could be very small. None of these questions had answers in 1986. More to the point, courts were not even openly asking those questions. They would typically recite the *Chevron* framework and then proceed without much inquiry into the foundations or mechanics of the methodology. Indeed, by far the fullest

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\(^{236}\) 757 F.2d at 341.
treatment of the *Chevron* methodology came in a case in which *Chevron* probably made no
difference because the case involved a mixed question of law application.\(^\text{237}\) The *Chevron* two-
step was something of a black box – which perhaps helps to explain its success, as judges could
pour into the still skeletal framework a wide range of preferences and predilections.

At least two other important consequences of *Chevron* were difficult to avoid and too
plain to ignore. One was pointed out as early as 1984 by Judge Breyer:\(^\text{238}\) To the extent that
*Chevron* increases the range of circumstances in which judges defer to agencies on pure legal
questions, it seems to reverse the common-sense view of comparative institutional competence in
which courts are generally better than agencies at determining the law and agencies are generally
better than courts at finding facts and making policy. Anyone who subscribes to the “legal
process” approach, in which decisional authority should be allocated where it can best be
applied, will find a broad reading of *Chevron* troublesome at best and absurd at worst. Given the
number of judges (and law clerks) trained either at Harvard Law School or by professors who
were trained at Harvard Law School, where the legal process approached grew and flourished, it
would not be surprising to find some serious resistance to the *Chevron* revolution.

A second consequence was noted by Judge Wald in a 1987 article: “A broad reading of
*Chevron*, of course, tilts strongly in the direction of the executive . . . .”\(^\text{239}\) The more that
*Chevron* mandates deference, the more that power flows from the judiciary to the executive. For
those who place faith in the courts as the primary engine of justice, that is an unwelcome
development. And in the mid- to late-1980’s, the executive to whom power was flowing under

\(^{237}\) See Investment Co. Inst. v. Conover, 790 F.2d 925, 931-36 (D.C. Cir. 1986) (involving whether collective IRA
trusts are “securities”).

\(^{238}\) See supra p. --.

Chevron was, and was widely expected to be in the future, a Republican executive. To be absolutely clear, the pro and con Chevron forces most certainly did not align along classic party lines. It is a fair guess that Pat Wald did not vote for Ronald Reagan, and it would be difficult to find a D.C. Circuit judge whose opinions showed less enthusiasm for Chevron than Robert Bork. One of Chevron’s earliest academic champions was Richard Pierce, who no one would mistake for a conservative shill, and one of the most trenchant critiques of Chevron came from Tom Merrill. But one need not have been a Right-leaning law clerk in Chevron’s formative era (though, as one of this article’s authors can attest, it certainly does not hurt for this purpose) to appreciate how difficult it is to overestimate the importance of that particular partisan perception, especially among the behind-the-scenes law clerks who often drafted the opinions. This was still the era of the “electoral lock,” when California was a reliably Republican state and the Carter presidency was seen as a post-Watergate blip. President Clinton was not even a gleam in a pollster’s eye. Battles over Chevron were battles over power, and it seemed perfectly obvious at the time to whom the power was going. Some kind of face-off about the future of Chevron was almost inevitable.

A. Enter the Dragon


See Merrill, supra note --.

The “electoral lock” was a colloquial phrase for the supposed advantage of Republicans in the electoral college as a result of their wide geographical dominance. See Thomas Brunell & Bernard Grofman, The 1992 and 1996 Presidential Elections: Whatever Happened to the Republican Electoral College Lock?, 27 PRESIDENTIAL STUD. Q. 134, 134 (1997). The facts did not necessarily fit the theory, see id. at 135; I. M. Destler, The Myth of the “Electoral Lock,” 29 POLITICAL SCI. & POLITICS 491 (1996), but the theory was widely held.
To this point, the story of *Chevron* has been almost exclusively the story of the D.C. Circuit. But as the *Chevron* doctrine gained steam, and its consequences for the allocation of decision-making power became more and more apparent, opposition began to build – and with good reasons that did not at all have to involve the relative virtues and vices of enhancing the power of Reagan Administration agencies. One need not be a strong devotee of the legal process school to recognize that there is something more than faintly odd about courts routinely deferring to agencies on legal interpretation – what exactly were the appellate judges getting paid to do if not decide questions of law, at which they, rather than the agencies, are supposedly the experts?\(^{243}\) Moreover, although there is little evidence of this in the reported judicial decisions, as courts acquired more experience with the *Chevron* framework, the many unanswered questions about its mechanics (how clear is clear? how reasonable is reasonable? is deference now an all-or-nothing proposition?) were bound to loom larger. The more one thinks about those questions, the more complex the facially simple *Chevron* two-step framework becomes. Maybe pre-*Chevron* law, for all of its uncertainty and fluidity, was not so bad after all.

Professor Lawson believes that he can say, without breaching any confidences, that these issues loomed much larger in the D.C. Circuit at that time than the reported decisions indicate. Law clerks who dealt with *Chevron* on a daily, if not hourly, basis were awash in these controversies. And as many of those law clerks moved to the Supreme Court, they took those controversies – as unresolved in 1987 as they were in 1985 -- with them.

They also had some company: On September 26, 1986, Antonin Scalia became an Associate Justice of the United States Supreme Court. While Justice Scalia actually (and probably to many people surprisingly) had very little to do with the genesis of the *Chevron*

\(^{243}\) See Mikva, *supra* note --, at 8.
doctrine while he was on the D.C. Circuit, he brought to the Supreme Court interest and expertise in administrative law, along with a first-hand understanding of the significance of the various possible readings of *Chevron*. The combination of Justice Scalia and a crop of law clerks with *Chevron* on the brain all but assured that the Supreme Court of 1987 would have something to say about *Chevron*.244

The initial battle was fought in a perhaps unlikely context. Section 243(h) of the Immigration and Nationality Act provided, as of 1987, that “[t]he Attorney General shall not deport any alien . . . [with some exceptions not relevant here] to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.”245 If the otherwise-deportable alien could show that he or she “would be threatened” in their country of return, which the Supreme Court had construed to mean that it was “more likely than not that the alien would be subject to persecution”246 upon return, then the Attorney General – typically acting through the Immigration and Naturalization Service (“INS”) -- was required to withhold deportation (“shall not deport”). Alternatively, the Refugee Act allowed the Attorney General, in his or her discretion, to grant asylum to a refugee,247 defined as a person “who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that [person’s home] country because of persecution or a well-founded fear of

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244 Tom Merrill has termed this explanation for the rise of awareness of *Chevron* in the Supreme Court the “reverse-migration hypothesis.” Merrill, supra note --, at 188.


persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” 248

In INS v. Cardoza-Fonseca, 249 the government argued that the standard of proof for establishing refugee status, via a showing of a “well-founded fear of persecution,” was the same “more likely than not” standard that governs proof of entitlement to withholding of deportation under the Immigration and Nationality Act. The respondent argued that one could have a “well-founded fear of persecution” even if it was not “more likely than not” to occur – a forty-nine percent chance of imprisonment or execution upon return to one’s home country, in other words, is enough to ground a “well-founded fear.” Thus, the case revolved around as pure a question of law as one will ever find: whether the legislatively-prescribed standards of proof under two different statutes are the same.

The Ninth Circuit had agreed with respondent that the standard for proving a “well-founded fear” was different, and more generous to the alien, than was the standard for showing that life or freedom “would be threatened” 250 upon return. The court made no reference to Chevron or any kind of deference to the INS, as the case was seemingly controlled by prior circuit precedent. 251

In its brief to the Supreme Court, the government briefly but forcefully urged deference to the views of the INS, though Chevron was simply one of many cases cited for that proposition

248 Id. § 1101(a)(42)(A) (emphasis added).
250 Cardozo-Fonseca v. U.S. INS, 767 F.2d 1448 (9th Cir. 1985).
251 See id. at 1451-52.
and received no special attention. The brief concentrated on statutory analysis and administrative policy. The respondent’s brief argued, citing *Chevron* in a footnote, that deference to the INS was appropriate only when Congress had specifically delegated interpretative authority to the agency, as had arguably occurred in some prior immigration cases, and that section 208(a) of the Refugee Act delegated no such authority. The discussion of deference was brief, and *Chevron* was decidedly in the background. The government’s reply brief did not cite *Chevron*.

The oral argument, held on October 7, 1986, raised the stakes a bit. The government (through long-time Deputy Solicitor General Larry Wallace) opened its argument with a call for deference to the INS, but intriguingly did not cite, invoke, or otherwise mention *Chevron*. Instead, the deference argument focused on the expertise of the INS, its “as an active participant in the legislation as it developed,” and its opportunity to “study the legislative background against the experience that it has had in applying the standards.” This was consistent with the position in the government’s brief, which could easily have been written without any mention of *Chevron*.

*Chevron* was introduced into the oral argument by a question addressed to Dana Marks Keener, counsel for the respondent, who (perhaps ironically) later became an immigration judge. The first words out of Ms. Keener’s mouth after “may it please the Court” were:

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252 See Brief for the Petitioner, No. 85-782, at 8-9. The string citation on page 9 was the brief’s only mention of *Chevron*.


254 See Brief of Respondent, No. 85-782, at 39 n.32.

255 See Reply Brief for the Petitioner, No. 85-782.


257 Id.
Understandably, the Government is putting considerable emphasis on their deference argument. That's because it's the only argument that it has. Unfortunately, there are some -- or fortunately for our side -- there are some considerable problems with deference to the agency in this particular context.

By reviewing the statutory canons that apply to deference, the first place you start is with the fact that a court is the expert in terms of statutory construction. The meaning of the "well-founded fear" standard is an issue of law. It's clearly within the traditional function of this Court to interpret. It is not an area --

At that point, Ms. Keener was interrupted by a question from the bench: “Are you suggesting that the INS in this case should be given no deference simply because it is construing a term of the statute?” Her response included the argument’s first mention of *Chevron*: “No. Of course the Court also looks at other factors, and deference cases talk about the fact, *Chevron* for example, that first always is Congress' intent.” That narrow view of *Chevron* incited an exchange that, for the first time in the *Cardoza-Fonseca* litigation, and indeed for the first time in quite a while in the federal courts, brought to the fore the traditional, pre-*Chevron* distinction between pure and mixed questions of law:

**QUESTION:** Well, my question to you was, which I don't think you've yet answered, is is the agency entitled to no deference because what it is construing is a term of the statute?

**MS. KEENER:** I think that answer is probably correct. But in arriving at whether deference is considered or not, the courts usually look at several factors, which include the legislative history, the plain language of the statute.

**QUESTION:** Well, is deference one of those factors or not?

**MS. KEENER:** Well, it can be if a standard is not a question of pure law, if it is an application of the law to a specific set of facts. And courts often look to the agency's expertise to decide whether or not that's the kind of situation presented. However, that's not the case here.

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258 *Id.* at *18.

259 *Id.* at 19.

260 *Id.*
QUESTION: What was *Chevron*? Wasn't that a question of pure law? And didn't we say there that we, and in other cases, that we will accept the expert agency's interpretation of its governing statute where it's a reasonable one?

MS. KEENER: There was a technical gap in *Chevron*, and it was involved in the implementation. So it was construing a term involved in implementing a standard.261

And with that the game was on.

By a vote of 6-3 (with Justices Powell, Rehnquist, and White dissenting), the Court agreed with respondent and the Ninth Circuit that the agency could not permissibly read the “well-founded fear” criterion in the discretionary withholding-of-deportation provision of the Refugee Act to require the same “more likely than not” standard of proof required by the “would be threatened” criterion in the mandatory withholding-of-deportation provision of the Immigration and Nationality Act. So framed, the decision’s holding is an unexceptional (and, at least to Professor Lawson’s eyes, plainly correct) bit of statutory interpretation. The fireworks were in the dicta.

As Justice Scalia pointed out in his concurring opinion, once one concluded – as had the Court – that the plain meaning of the statute clearly foreclosed the government’s interpretation, there was no occasion to discuss deference, *Chevron*, or anything else. No amount of deference can justify an agency position contrary to the clear meaning of a statute. Nonetheless, in an opinion authored by Justice Stevens – who not at all coincidentally authored *Chevron* – a clean majority of five Justices took the occasion to make some explicit and pointed comments about the *Chevron* framework:

The INS’s second principal argument in support of the proposition that the “well founded fear” and “clear probability” standard are equivalent is that the BIA so construes the two standards. The INS argues that the BIA’s construction of the

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261 Id. at 19-20.
Refugee Act of 1980 is entitled to substantial deference, even if we conclude that the Court of Appeals' reading of the statutes is more in keeping with Congress' intent. This argument is unpersuasive.

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. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), we explained:

"The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. [Citing cases.] 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." *Id.*, at 843, n. 9, 104 S.Ct., at 2782, n. 9 (citations omitted).

The narrow legal question whether the two standards are the same is, of course, quite different from the question of interpretation that arises in each case in which the agency is required to apply either or both standards to a particular set of facts. There is obviously some ambiguity in a term like "well-founded fear" which can only be given concrete meaning through a process of case-by-case adjudication. In that process of filling "any gap left, implicitly or explicitly, by Congress," the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program. See *Chevron*, supra, at 843, 104 S.Ct., at 2781–2782, quoting *Morton v. Ruiz*, 415 U.S. 199, 231, 94 S.Ct. 1055, 1072, 39 L.Ed.2d 270 (1974). But our task today is much narrower, and is well within the province of the judiciary. We do not attempt to set forth a detailed description of how the "well-founded fear" test should be applied. Instead, we merely hold that the Immigration Judge and the BIA were incorrect in holding that the two standards are identical.262

The implications of this passage in 1987 were potentially enormous. Justice Stevens, writing for five Justices all of whom were part of the *Chevron* majority, effectively announced that the pre-*Chevron* distinction between pure and mixed questions of law still governed, which essentially adopted the position of Cardoza-Fonseca's counsel that the interpretation in *Chevron* partook more of law application than of law interpretation. The issue in *Cardoza-Fonseca* itself

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262 480 U.S. at 445-48 (footnotes omitted) (brackets in original).
was characterized as “a pure question of statutory construction for the courts to decide.” Any doubt that Justice Stevens was taking specific aim at the emergent *Chevron* doctrine evaporates with a long footnote that we omitted from the quoted passage. Justice Stevens pointedly introduced the footnote by observing, “In view of the INS's heavy reliance on the principle of deference as described in *Chevron* . . . , we set forth the relevant text in its entirety”263 – followed by four full paragraphs from the *Chevron* decision.264 The wording of this sentence could not have been accidental. The INS did not rely on *Chevron* itself, as we have seen and as Justice Stevens surely knew. The footnote refers to the “principle of deference as described in *Chevron*” (emphasis added), meaning that Justice Stevens was clarifying the “principle of deference” that he, speaking for a unanimous Court, intended to prescribe in 1984. The fourth of the full paragraphs quoted from the *Chevron* opinion begins with the words, “[i]n light of these well-settled principles,” indicating that *Chevron* was merely applying settled law rather than setting forth any new conception of deference. The message to the lower courts that had fashioned – however sketchily -- their own distinctive “*Chevron* doctrine” was clear: there is no “*Chevron* doctrine” beyond the principles that were “well-settled” in the Summer of 1984, which required careful distinction between pure questions of law and mixed questions of law application.

The message was not lost on Justice Scalia. He agreed with the majority that the government’s interpretation of the statute was unsustainable and therefore concurred in the result, but he strenuously objected to the majority’s characterization of *Chevron*:

This Court has consistently interpreted *Chevron*—which has been an extremely important and frequently cited opinion, not only in this Court but in the Courts of

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263 480 U.S. at 445 n.29.

264 *See id.*
Appeals—as holding that courts must give effect to a reasonable agency interpretation of a statute unless that interpretation is inconsistent with a clearly expressed congressional intent . . . . The Court's discussion is flatly inconsistent with this well-established interpretation . . . .

The Court . . . implies that courts may substitute their interpretation of a statute for that of an agency whenever they face "a pure question of statutory construction for the courts to decide," rather than a "question of interpretation [in which] the agency is required to apply [a legal standard] to a particular set of facts." No support is adduced for this proposition, which is contradicted by the case the Court purports to be interpreting, since in Chevron the Court deferred to the Environmental Protection Agency's abstract interpretation of the phrase "stationary source."

In my view, the Court badly misinterprets Chevron. More fundamentally, however, I neither share nor understand the Court's eagerness to refashion important principles of administrative law in a case in which such questions are completely unnecessary to the decision and have not been fully briefed by the parties.265

Presumably, Justice Scalia was not telling Justice Stevens that the latter misunderstood his own opinion. Rather, as the reference to Chevron’s prevalence in the lower courts illustrates, Justice Scalia was no doubt pointing out that Chevron had taken on a life of its own, whether or not Justice Stevens so intended it in 1984; and to seek casually to alter or undo that structure -- especially in a case in which no party was calling for a reconsideration or clarification of Chevron -- could have serious doctrinal consequences.

No Justice joined Justice Scalia’s concurring opinion. The three dissenting Justices found the agency’s interpretation of the statute reasonable, but they did not engage in debate over the proper meaning of Chevron.

Was the Chevron revolution over before it actually began?

A substantial number of lower courts, quite reasonably given the strong dictum of Cardoza-Fonseca, thought the answer was yes. There was a surge of decision in the courts of

265 480 U.S. at 454-55 (Scalia, J., concurring).
appeals announcing that deference – or at least legal deference -- would no longer be given to agency decisions involving pure questions of law but only to agency applications of law to particular facts.\footnote{See, e.g., Int’l Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock, 816 F.2d 761, 764-65 (D.C. Cir. 1987); Adams House Health Care v. Heckler, 817 F.2d 587 (9th Cir. 1987); Regular Common Carrier Conference v. United States, 820 F.2d 1323, 1330 (D.C. Cir. 1987); Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm’n, 824 F.2d 108, 113 (D.C. Cir. 1987); FEC v. Sailors’ Union of the Pacific Political Fund, 828 F.2d 502, 505-06 (9th Cir. 1987); NLRB Union v. FLRA, 834 F.2d 191, 198 (D.C. Cir. 1987).} To be sure, not every case understood Cardoza-Fonseca to cut short the Chevron revolution,\footnote{See, e.g., Grinspoon v. DEA, 828 F.2d 881, 884-85 (1st Cir. 1987).} and given that the discussion in Cardoza-Fonseca was plainly dictum, there was no requirement that it be so understood, but there were enough decisions cutting down on Chevron to bring Chevron’s future, at least as anything other than part of a string citation, into serious question.

B. Exit the Dragon, Enter the Tiger

The stage was set for what promised to be one of the most profound battles over administrative law doctrine in American legal history. The lower courts, on their own accord, had constructed a method for reviewing agency legal conclusions that, however uncertain at the margins and in the mechanics, was materially different from what came before it. That method flew in the face of strongly and widely held precepts about sound allocation of institutional authority, but it offered some promise of a cleaner, simpler, and less intrusive judicial role in administrative review. There was ample room, and strong ammunition, on both sides of that divide. Once the issues raised by Chevron had migrated to the Supreme Court – and it was patently clear by the time Cardoza-Fonseca was decided that there had been a mass migration –
it seemed inevitable that those issues would come to a head in something other than an exchange of dictum.

It certainly did not look good for Justice Scalia and other defenders of at least some version of the Chevron revolution. For one thing, there was still, as of 1987, no clear, universally held conception about what Chevron entailed. Justice Scalia, in his concurrence in Cardoza-Fonseca, thought that it was an “evisceration of Chevron”\textsuperscript{268} to say that courts should rule against agencies whenever “traditional tools of statutory construction”\textsuperscript{269} yield an answer. This reflects an implicit view of some kind about the meaning of Chevron’s first step, in which courts do not defer when the meaning of the statute is clear, but not necessarily a view that all other proponents of some version of Chevron would share. What does it mean to say that a statute’s meaning is “clear”? There was no answer to be found in the case law in 1987, and Justice Scalia did not offer one. Nor had the lower courts made much progress on the many other issues surrounding Chevron’s application. There were a great many cases applying the Chevron framework, but no cases explaining clearly and crisply exactly what was being applied. It is hard to rally the troops around something as ephemeral as the Chevron doctrine. For another thing, there did not appear to be very many troops to rally. No Justice joined Justice Scalia in Cardoza-Fonseca. For all that the world could see, he was the only person on the Supreme Court who was at all worried about revival of the distinction between pure and mixed questions of law in administrative review.

As it happened, however, there were some important things that the world could not see.

\footnotesize{\textsuperscript{268} 480 U.S. at – (Scalia, J., concurring).

\textsuperscript{269} 480 U.S. at --.}
In 1987, Justice Scalia was the only vote on the Supreme Court for the proposition that courts should routinely give some measure of legal deference to agencies even on pure questions of law interpretation. By 1988, the number had risen to four, with no change in the Court’s membership other than the retirement of Justice Powell, who had not taken sides in the *Cardoza-Fonseca* controversy. *NLRB v. United Food & Commercial Workers Union, Local 23, AFL-CIO*270 concerned “whether a federal court has authority to review a decision of the National Labor Relations Board’s General Counsel dismissing an unfair labor practice complaint pursuant to an informal settlement in which the charging party refused to join.”271 A unanimous Court of eight Justices – this was during the interregnum before Justice Kennedy became an active member – found that the courts had no such authority. The case came down to whether the proceeding at issue was prosecutorial (not reviewable) or adjudicatory (reviewable). Intriguingly, the Court’s discussion of scope of review for this question invoked *Cardoza-Fonseca* but made no specific mention of the distinction between pure and mixed questions of law. The Court’s disposition on the merits observed:

[T]he general congressional framework, dividing the final authority of the General Counsel and the Board along a prosecutorial and adjudicatory line, is easy to discern. Some agency decisions can be said with certainty to fall on one side or the other of this line. For example, as already discussed, decisions whether to file a complaint are prosecutorial. In contrast, the resolution of contested unfair labor practice cases is adjudicatory. But between these extremes are cases that might fairly be said to fall on either side of the division. Our task, under *Cardoza-Fonseca* and *Chevron*, is not judicially to categorize each agency determination, but rather to decide whether the agency’s regulatory placement is permissible.272

271 *Id.* at 114.
272 *Id.* at 125.
Justice Scalia highlighted the Court’s deferential posture in a concurring opinion, this
time joined by Justices Rehnquist, White, and O’Connor:

I join the Court's opinion, and write separately only to note that our
decision demonstrates the continuing and unchanged vitality of the test for
judicial review of agency determinations of law set forth in *Chevron* . . . . Some
applied here, surely the question whether dismissal of complaints requires board
approval and thus qualifies for judicial review . . . would be "a pure question of
statutory construction" rather than the application of a "standar[d] to a particular
set of facts," as to which "the courts must respect the interpretation of the
agency," 480 U.S., at 446, 448, 107 S.Ct., at 1221. Were we to follow those dicta,
therefore, we would be deciding this issue conclusively and authoritatively, rather
than merely "decid[ing] whether the agency's regulatory placement is
permissible." The same would be true, moreover, of the many other decisions
alluded to by the court in which "we have traditionally accorded the board
defere[nce] with regard to its interpretation of the NLRA." Those cases, and this,
are decided correctly only because "the statute is silent or ambiguous" with
respect to an issue relevant to the agency's administration of the law committed to
its charge—which is the test for deference set forth in *Chevron*. 273

The Court’s opinion made no response to this concurrence. A response was certainly available:
by describing the decision in terms of line drawing, the Court left open an ability to challenge
Justice Scalia’s characterization of the case as involving a pure question of law. Line drawing
smacks of law application, so it would be possible to try to slot *United Foods* into the
circumstances in which deference was permitted by *Cardoza-Fonseca*. The Court made no such
effort.

If one was into reading tea leaves, by 1988 it looked as though there might be a four-to-
four split on the Court concerning the application of deference to pure questions of law, awaiting

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273 484 U.S. at 133-34 (Scalia, J., concurring).
resolution by Justice Kennedy when he joined the Court. One needed only to assume that
Justices Stevens, Brennan (who authored the opinion in United Foods), Marshall, and Blackmun
continued to adhere to the strong dictum of Cardoza-Fonseca, which seemed a reasonable
assumption. It remained only for the fully-staffed Court to decide a case that squarely, neatly,
and cleanly settled the status of Justice Stevens’ dictum in Cardoza-Fonseca.

It never happened. No such decision came – or has come since. Through a process that
we can observe but do not purport to explain, the 4-4 split in United Foods was almost
universally taken by the lower courts as a vindication of the position taken by Justice Scalia in
his concurrence, and therefore of a view of Chevron that would extend deference to agency
determinations involving pure legal questions.\textsuperscript{274} To be sure, litigants were still pushing, albeit
unsuccessfully, the distinction between pure and mixed legal questions as late as 1991\textsuperscript{275} -- and
Justice Stevens, joined by Justice Breyer, continued to fight the fight well into the 21st century.\textsuperscript{276}
But at least some form of the Chevron revolution has dominated the lower courts for more than
two decades now. As for the Supreme Court: Following United Foods, the law-application/law-
determination dichotomy essentially vanished from the scene, to be oddly resurrected by Justice
Stevens – perhaps as something of a swan song – in 2009.\textsuperscript{277} Over the past quarter-century,

\textsuperscript{274} See, e.g., Cablevision Systems Development Co. v. Motion Picture Ass’n of America, Inc., 836 F.2d 599, 607-
08 (D.C. Cir. 1988); Mead Johnson Pharmaceutical Group, Mead Johnson & Co. v. Bowen, 838 F.2d 1332, 1335-36
(D.C. Cir. 1988); Fernandez v. Brock, 840 F.2d 622, 631-32 (9th Cir. 1988); Railway Labor Executives’ Ass’n v.
U.S. Railroad Retirement Board, 842 F.2d 466, 471-72 (D.C. Cir. 1988); Theodus v. McLaughlin, 852 F.2d 1380,
1382-84 (D.C. Cir. 1988); CSX Transportation v. United States, 867 F.2d 1439, 1444-45 (D.C. Cir. 1989) (Edwards,
J., dissenting) (expressing dislike for Chevron but conceding that it governs); City of Boston v. U.S. Dep’t of
Housing and Urban Development, 898 F.2d 828, 831 (1st Cir. 1990).

\textsuperscript{275} See Central States Motor Freight Bureau, Inc. v. ICC, 924 F.2d 1099, 1110 (D.C. Cir 1991); Wagner Seed Co.,

\textsuperscript{276} See Negusie v. Holder, 555 U.S. 511, 531, 534, 538 (2009) (Stevens, J., joined by Breyer, J., concurring in part
dissenting in part).

\textsuperscript{277} See id.
Cardoza-Fonseca has been cited by the Court almost entirely in immigration cases or for very broad principles of statutory interpretation, aside from one backhanded reference intimating a potential distinction between pure and mixed legal question.\(^{278}\) The great debate over the soul of Chevron thus ended with nary a whimper, much less a bang.

V. So What?

While the debate whether deference is generally due to agency legal interpretations even with respect to pure or abstract legal questions has effectively been settled, Chevron continues to be a contentious subject across a wide range of other issues, for which the resolutions are much less likely, clear, or both. To this day, we still do not have consensus on what it means for the meaning of a statute to be “clear.”\(^{279}\) (That is not altogether surprising, for we still do not have consensus on what it means to talk about the meaning of a statute, clear or otherwise.) Step two of Chevron remains a mystery, beyond the observation that agencies usually win when they get to it. Reconciling Chevron deference with prior judicial interpretations of statutes has plagued Chevron from an early time,\(^{280}\) and it continues to splinter the Court today.\(^{281}\) And figuring out to which agency interpretations the Chevron framework applies has produced a doctrine so

\(^{278}\) See INS v. Aguirre-Aguirre, 526 U.S. 415, 424-25 (1999) (“we recognized in Cardoza-Fonseca . . . that the BIA should be accorded Chevron deference as it gives ambiguous statutory terms ‘concrete meaning through a process of case-by-case adjudication’”).

\(^{279}\) Compare Dole v. United Steelworkers of America, 494 U.S. 26 (1990) (suggesting that the meaning is clear when a particular interpretation is supported by very strong evidence) with Pailey v. Bethenergy Mines, Inc., 501 U.S. 680 (1991) (suggesting that the meaning is clear when such meaning emerges fairly obviously). On the continuing current controversy, see LAWSON, supra note --, at --.

\(^{280}\) See Mesa Verde Construction Co. v. Northern Cal. Dist. Council of Laborers, 861 F.2d 1124 (9th Cir. 1988) (en banc).

perplexing that lower courts labor hard to find ways to avoid having to deal with it.\textsuperscript{282} One could easily fill an entire article simply listing, much less trying to resolve, the many important operational questions that still swirl about \textit{Chevron}.

The history that we have spun yields two potentially important consequences for modern attempts to wrestle with these questions. First, and most obviously, parsing the prose of the \textit{Chevron} decision for answers is a terrible idea. The \textit{Chevron} decision did not spawn the \textit{Chevron} doctrine, so there is no particular reason to expect it to shed light on that doctrine. To the contrary, one is likely to be taken down very unproductive paths – as arguably has happened with the formulation of the \textit{Chevron} inquiry as a two-step approach (because that is how Justice Stevens wrote it in \textit{Chevron}) rather than as a unitary, one-step inquiry into the reasonableness of the agency’s interpretation (as common sense would dictate).\textsuperscript{283} The fewer references to \textit{Chevron U.S.A., Inc. v. NRDC}, the better.

So if one should not read the \textit{Chevron} decision to figure out the proper mechanics of the \textit{Chevron} doctrine, then what decision should one read? The answer is that there is no answer. The \textit{Chevron} doctrine grew – and continues to grow – organically over a series of decisions, no one of which systematically addresses the fundamental issues that lie at the core of the doctrine. Indeed, even read as the whole, the corpus of decisions fails to come to grips with, much less definitively answer, many important questions. Professor Lawson has been waiting for almost thirty years for a court openly to acknowledge that there is some uncertainty about how to determine the “clear” meaning, as opposed to the meaning, of a statute – and he is still waiting patiently. Perhaps if the post-\textit{Cardoza-Fonseca} battle had come to a real head, we would have

\begin{quote}
\textsuperscript{283} See supra note --.
\end{quote}
seen some decisions that clarify – for good or ill\textsuperscript{284} – some of the fundamental issues surrounding \textit{Chevron}. But the process by which the \textit{Chevron} framework insinuated itself into the law effectively guaranteed that a search for canonical decisions would fail.

So what about reference to the underlying goals and purposes of \textit{Chevron}? That would be effective if there was consensus about those goals and purposes. There is not. What exactly is the \textit{Chevron} doctrine trying to accomplish? Is it trying to make the best guess about congressional intent regarding allocation of interpretative authority?\textsuperscript{285} Is it reflecting the reality that, in a post-delegation-doctrine world, most inquiries that look like statutory interpretation are really determinations of policy?\textsuperscript{286} Is it really about making judicial review simpler, even though courts did not ever say that openly? All of the above? The underlying rationale(s) for \textit{Chevron} remain somewhat obscure, again perhaps partly because of its origins.

We do not propose here (or anywhere else) any particular method for resolving questions about \textit{Chevron} methodology. We simply point out that the \textit{Chevron} decision itself is a dead end. We think it ought to be a dead letter as well.

\textsuperscript{284} \textit{Mead}, for example, “clarified” when agency interpretations fit within the \textit{Chevron} framework. Not everyone thinks that this was a step forward. \textit{See} 533 U.S. at \textemdash{} (Scalia, J., dissenting). Not everyone even agrees that much was clarified. \textit{See} Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, 557 U.S. \textemdash{}, \textemdash{} 129 S.Ct. 2458, 2479-80 (Scalia, J., concurring in part and concurring in the judgment).

\textsuperscript{285} \textit{See}, e.g., Scalia, \textit{supra} note \textemdash{}.

\textsuperscript{286} \textit{See}, e.g., Pierce, \textit{supra} note \textemdash{}. 