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**Ambiguity and Policy Making: A Cognitive
Approach to Reconciling Chevron and Mead**

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Ambiguity and Policy Making: A Cognitive Approach to Reconciling Chevron and Mead

Peter M. Shane

Abstract

When decided, both *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and *United States v. Mead*, 533 U.S. 218 (2001) were trumpeted, whether by supporters or critics, as marking substantial changes in the law governing judicial review of agency statutory interpretation. This essay argues that what the Court actually decided in each case was entirely consistent with the fabric of the law of judicial review of administrative action as woven during earlier decades. Unfortunately, however, the Court's rhetoric in both opinions is confusing and unhelpful at key points, creating impressions of substantial changes in the law when none was being made. As a result, agencies, judges, and lawyers are better served by focusing less on what *Chevron* and *Mead* say and more on what they decided, and treating both decisions as elaborating a fairly straightforward approach based on (a) judicial reaction to the clarity of the statute and (b) whether the statute at issue is intended to create an opportunity for genuine agency policy making. In particular, a reviewing judge should first determine whether the statute in question is susceptible to more than one plausible legal reading, and, if only one plausible legal reading is available, the judge should bind the agency to it. If, however, more than one plausible reading is available, the judge should then ask whether the ambiguity in the statute signals an occasion for policy making. In other words, is the agency, in filling the statutory gap at issue, intended to balance expert judgment and relevant political values in order to accommodate the competing interests that need to be taken into account in order to further Congress's objectives in enacting the statute? If so, then, so long as the agency has rationally identified any plausible statutory reading, the judge should consider herself duty-bound to defer to it. If the statute does not contemplate significant agency policy making in its interpretation, then the court should ask itself a third question: Of the plausible readings available, does any appear to the court to be

plainly more attractive than its competitors? If not, then the court should likewise defer to an agency choice of any rational interpretation because the agency is the primary policy maker, and the court has no legal ground to prefer any alternative reading to the agency's own. If, however, the court initially finds one plausible reading most compelling, then it retains the authority to impose that reading on the agency. Before doing so, however, the court should pause, open-mindedly. It should consider, if the agency has an alternative preference, whether the agency's reasoning is not in fact sufficient to make its alternative at least as attractive as the court's initial view. In such a case, notwithstanding its own initial view, the court should deem itself persuaded by the agency's statutory reading. This approach, which is guided by the judicial sense of statutory clarity and does not speak of ambiguities or certainties inherent in the statutory texts themselves, is the most straightforward reconciliation of Chevron and Mead.

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Ambiguity and Policy Making: A Cognitive Approach to Synthesizing *Chevron* and *Mead*
Peter M. Shane*

In the words of Professor Richard Pierce, the Supreme Court's unanimous¹ decision in *Chevron v. Natural Resources Defense Council*² marked "the abandonment of its traditional treatment of agency constructions of agency administered statutes."³ It was an abandonment that Professor Pierce applauded.⁴ Eighteen years later, dissenting from an otherwise unanimous Court, Justice Scalia announced that *United States v. Mead*⁵ "has replaced the *Chevron* doctrine," thus producing "an avulsive change in judicial review of federal administrative action."⁶ Justice Scalia was not applauding. He presumably wrote "avulsive change," instead of "abandonment," because "avulsive" sounds violent and thus even scarier. In any event, the responses of courts

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I am grateful to John Hyson for the invitation to participate in the *Chevron* symposium, and to my fellow panelists, whose insights greatly enriched my understanding. Their failure to disabuse me of any errors that remain in this essay is sincerely to be regretted.

¹ The Court was unanimous, but truncated. Justices Marshall and Rehnquist did not participate in the argument or decision of the case; Justice O'Connor recused herself from the decision.

² 467 U.S. 837 (1984).

³ I attribute this language to Professor Pierce because it appears more or less identically in two multi-authored volumes, of which he is the only common author. The direct quote is from I KENNETH CULP DAVIS AND RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.2 at 109 (3d ed. 1994). Accord, RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO, AND PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 383-384 (4th ed. 2004).

⁴ DAVIS AND PIERCE, *supra* note 3, at 112.

⁵ 533 U.S. 218 (2001).

⁶ 533 U.S. 218, 239 (2001) (Scalia, J., dissenting).

and scholars to both decisions confirm a clear verdict: Each case was and remains a very big deal.

In this commentary, however, I would like to make three points: The first is that, to the extent these cases are "big deals," it is really not because of anything they actually decided. What they decided was consistent with the fabric of the law of judicial review of administrative action as woven during earlier decades, which presumably explains why the Justices' votes were so lopsided in their favor.⁷ The second is that the Court's rhetoric in both opinions is confusing and unhelpful at key points, and, because confusing and unhelpful, perhaps creates impressions of substantial changes in the law when none was being made. The third is that it would now be helpful to agencies, judges, and lawyers to focus less on what *Chevron* and *Mead* say and more on what they decided, and to treat both decisions as following what I will elaborate, I hope, as a fairly straightforward set of propositions regarding the review of agency interpretations of law.

I. *Chevron* as a Paradigm Non-Shift

Chevron, as is well known, focused on the scope of review to be indulged by federal courts in reviewing agency interpretations of the statutes they administer. Scope-of-review doctrine, necessarily, is an instrument for modulating the relationships among the law and policy making bodies of our national government. As the scope of judicial review widens – or, to put it another way, as the intensity of judicial review becomes more stringent – the voices of judges (and of lawyers within agencies whose job is to anticipate judicial review) become more pronounced in the elaboration of administrative law. As the scope narrows, which is to say, as the intensity of review becomes more lenient, agency discretion expands, and the power of courts

⁷ *Chevron* was decided 6-0, and *Mead*, 8-1.

and agency lawyers diminishes.⁸ Thus, in deciding the appropriate deference to afford agency interpretations of statutory law, the Court is inevitably making a statement about where authority lies for resolving ambiguities in the texts that Congress enacts.

The ambiguity at issue in *Chevron* pertained to implementation of the Clean Air Act Amendments of 1977.⁹ Those amendments required certain states to establish permit programs regulating what the statute called “new or modified major stationary sources” of air pollution.¹⁰ EPA, charged with issuing rules to govern the program adoption process, promulgated a plant-wide definition of the statutory term, “stationary source.” That is, a single stationary source was taken to comprise “*all* of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel.”¹¹ If only some subset of pollutant-emitting activity within such a grouping were modified, and if that modification did not increase the overall pollution emitted from the plant as a whole, then the modification would not require a permit. The purpose behind this approach was to permit polluters to make improvements within existing plants even if the improved facilities would not

⁸ The expansion of agency discretion also expands the potential authority of central policy makers within the executive branch who oversee agency regulatory activity on behalf of the president. See generally Elana Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

⁹ Pub.L. 95-95, 91 Stat. 685.

¹⁰ 42 U.S.C. § 7502(b)(6).

¹¹ 40 C.F.R. §§ 51.18(j)(1)(i) and (ii) (1983) (emphasis supplied).

provide the “lowest achievable emission rate”¹² with regard to regulated pollutants, and could thus not qualify for state permits under the Clean Air Act Amendments.¹³

Let us put off for a moment the Court’s description of its scope-of-review doctrine in *Chevron*, and look only at what it actually decided. The Court decided that the EPA could adopt the plant-wide interpretation of “stationary source” because Congress had not precluded that approach,¹⁴ and because EPA’s interpretation was “reasonable,” in the specific sense of representing a rational policy choice for implementing the Clean Air Act.¹⁵ This holding was entirely consistent with the sizeable body of preexisting law mandating judicial deference to agency policy choices.¹⁶ The only thing unusual about *Chevron* is that the EPA’s policy choice was necessarily embedded in its reading of a particular statutory provision. Given the structure of the statute, the question, “What is sound policy?” became conflated with the question, “What do the words ‘major stationary source,’ in 42 U.S.C. § 7502(b)(6), mean?”

That the core exercise at issue here was one of policy making and not linguistic

¹² 42 U.S.C. § 7501(3).

¹³ 42 U.S.C. § 7503(a)(2).

¹⁴ *Chevron*, 467 U.S. at 848-64.

¹⁵ *Id.* at 865.

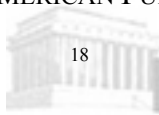
¹⁶ “The court is first required to decide whether the [administrator] acted within the scope of his authority. . . . Section 706(2)(A) [further] requires a finding that the actual choice made was not ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’ 5 U.S.C. § 706(2)(A) (1964 ed., Supp. V). To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Citizens for Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971).

interpretation is perhaps most evident if one conducts a simple thought experiment.¹⁷ Imagine that Congress explicitly provided in the 42 U.S.C. § 7502(b)(6) that “major stationary source” could be defined by EPA on a plant-wide or isolated basis, as appropriate. In making that choice, EPA would, of course, still have to be prepared to defend its policy against a subsequent charge of being “arbitrary” or “capricious” under the Administrative Procedure Act.¹⁸ In anticipation of judicial review, it would assemble certain evidence and arguments on behalf of its policy. And, under well-established law, its evidence and arguments would be reviewable, but only with deference. My suggestion, however, is that the evidence and arguments EPA would adduce in my hypothetical case would turn out to be exactly the same evidence and arguments offered in *Chevron* in support of its statutory interpretation. Moreover, the decision in *Chevron* that Congress had not legally precluded the plant-wide approach was tantamount to situating EPA legally just exactly as I have hypothesized – giving it discretion to adopt the plant-wide approach or not. Thus, the Court acted consistently with prior law in realizing that the conflation of a policy question with an interpretive question should not entitle the agency to less deference than it would otherwise enjoy.

There are points in *Chevron* where the Court seems to say fairly clearly what I just said – that the exercise at issue was one of policy making, not one of textual exegesis. As Justice Stevens states: “[T]he Administrator’s interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical

¹⁷ This paragraph reiterates the basic points of an analysis that appears also at JERRY L. MASHAW, RICHARD A. MERRILL, AND PETER M. SHANE, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 800-02 (5th ed. 2003).

¹⁸ 5 U.S.C. § 706(2)(A).



and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies.”¹⁹ Unfortunately, the Stevens opinion prefaced its analysis of the Clean Air Act with a statement of interpretive method for judges that took a fairly straightforward proposition and made it seem rather more revolutionary. In a now all-but-ubiquitously cited passage, he wrote:

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.²⁰

What makes this language so startling is the seeming ease with which administrators can now find themselves enjoying a level of deference on questions of statutory interpretation that is as great as the deference they enjoy on matters of policy. Read literally, what is commonly called “*Chevron* Step One” requires a reviewing court first to determine if Congress had spoken on “the precise question at issue,” has done so “directly,” and has done so with enough specificity so that the resolution is not “ambiguous.” Only if the answer is affirmative may the court decline to defer to the agency. Whenever the answer to *Chevron* Step One is negative – whenever Congress has addressed the general subject in question, but not the precise issue, or has spoken only indirectly, or has left its command ambiguous – then a court is to defer to the agency reading of

¹⁹ *Chevron*, 467 U.S. at 865.

²⁰ *Id.* at 842-43 (emphasis added).



the law. Naively, one might thus regard *Chevron* as mandating deference under every question of statutory interpretation ever likely to arise in litigation.

But it is more sensible not to give *Chevron* this literal a reading. The categorical quality of Justice Stevens' prose probably reflected more than anything the intensity of his intended rebuke to the U.S. Court of Appeals for the District of Columbia, which the Court has occasionally thought a little too ready to impose its views of the law on the agencies it reviews.²¹ Under a more pragmatic reading of *Chevron*, the first question facing a judge upon judicial review of a question of statutory interpretation should not be whether Congress has spoken "directly" and without ambiguity to the precise question at issue. The question should be whether, reviewing the language in dispute, the judge finds herself believing that the statute is susceptible to only a single *legally persuasive* interpretation. The judge may answer this question with recourse to all the usual tools of statutory reading.²² And, if the answer is affirmative, then she may – indeed, must – bind the agency to that interpretation. If not, she should move to *Chevron* Step Two.

Shifting the focus of *Chevron* Step One from an inquiry into some inherent quality of the statutory text to the judicial understanding of that text may seem like taking liberties, but there is

²¹ See, e.g., *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) (denying lower courts authority to constrain agency decision making based on judicially crafted procedural requirements that exceed the mandates of applicable constitutional, statutory, or regulatory provisions); *Baltimore Gas & Electric Co. v. Natural Resources Defense Council* (1983) (setting aside, as unjustifiable interference with agency policy making, D.C. Circuit invalidation of Nuclear Regulatory Commission regulations).

²² *Accord*, *Immigration and Naturalization Service v. Cardoza-Fonseca*, 408 U.S. 421, 446 (affirming appropriateness of using "traditional tools of statutory construction" in interpreting the Immigration and Naturalization Act).

ample evidence that this is how *Chevron* is, in fact, implemented. A Supreme Court has more than once bound an agency to a statutory interpretation under *Chevron* Step One over a dissent that reaches the opposite conclusion, also allegedly based on the clear meaning of the statute.²³ If both the majority and dissent were really asking the question whether the text at issue was inherently ambiguous, the very existence of the two contending positions would demand an affirmative answer. What the disputing Justices are actually in saying in these cases is that, read in the way that lawyers and judges read statutes, there is only one reading of the statute that is persuasive as a matter of law. That is something about which judges may sensibly disagree; whether or not a statute is unambiguous as a purely linguistic matter usually is not.

II. The Exaggerated Ferment of *Mead*

In addition to the disarray that the wording of *Chevron* Step One made more or less inevitable, *Chevron* actually gave birth to a less-noticed confusion – an uncertainty whether what

²³ See, e.g., *General Dynamics Land Systems v. Cline*, 124 S.Ct. 1236 (2004). The majority determined, contrary to the Equal Employment Opportunity Commission, that the Age Discrimination in Employment Act does not prohibit discrimination against younger workers. Interpreting the ADEA as precluding the EEOC interpretation, the Court said: “Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent. . . . Here, regular interpretive method leaves no serious question, not even about purely textual ambiguity in the ADEA.” *Id.* at 1248. In contrast, siding with the EEOC, Justice Thomas, dissenting for himself and Justice Kennedy wrote: “This should have been an easy case. The plain language of 29 U.S.C. § 623(a)(1) mandates a particular outcome: that the respondents are able to sue for discrimination against them in favor of older workers.” *Id.* at 1249 (Thomas, J., dissenting). Only Justice Scalia, writing also in dissent, would have reached the stage of judicial deference and upheld the agency on grounds of reasonableness. *Id.* at 1249 (Scalia, J., dissenting). To the same effect, see *Sullivan v. Stroop*, 496 U.S. 478 (1990) (upholding, 5-4, an administrative interpretation of the Aid to Families with Dependent Children Act, based on the statute’s unambiguous meaning, in the face of a dissent that would overturn the agency, also based on the assertedly unambiguous – but opposite – meaning of the act).

Justice Stevens called the “first” question under *Chevron* was itself actually the second. In explaining the Court’s rationale for deference, Justice Stevens wrote:

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.²⁴

The apparent link between *Chevron*’s approach to scope of review and a theory of legislative delegation led some to question whether the *Chevron* doctrine was applicable only where Congress had actually delegated authority to an agency, whether explicitly or implicitly, to interpret the statute in question.²⁵ If so, then an inquiry into the presence of such a delegation would represent an antecedent step before the so-called *Chevron* Step One.

I would have thought such a reading of *Chevron* was fanciful,²⁶ except, 17 years later, it

²⁴ *Chevron*, 467 U.S. at 843-44.

²⁵ See, e.g., Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 872 (2001) (“[I]f *Chevron* rests on a presumption about congressional intent, then *Chevron* should apply only where Congress would want *Chevron* to apply. In delineating the types of delegations of agency authority that trigger *Chevron* deference, it is therefore important to determine whether a plausible case can be made that Congress would want such a delegation to mean that agencies enjoy primary interpretational authority”).

²⁶ I would have doubted such a reading because Justice Stevens is explicit that the EPA was entitled to deference regardless of the circumstances that resulted in the ambiguity of the Clean Air Act Amendments: “Congress intended to accommodate [the competing policy] interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it

was expressly adopted by the Supreme Court in *United States v. Mead*. That case considered whether the Customs Service acted permissibly in reclassifying the Mead Corporation's imported "day planners," three-ring binders with pages having room for notes of daily schedules and phone numbers and addresses, together with a calendar and suchlike,"²⁷ under the Harmonized Tariff Schedule of the United States (HTSUS).²⁸ That statute provides that "[d]iaries, notebooks and address books, bound; memorandum pads, letter pads and similar articles," are subject to tariff, while "other" items that might also be deemed "[r]egisters, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles," enter free of duty. The Customs Service, after many years of placing day planners within the "other" category, had changed its mind and interpreted the HTSUS as encompassing day planners within the phrase, "Diaries, notebooks and address books, bound." This ruling was set forth in one of the agency's so-called "ruling letters," through which the agency sets tariff classifications for particular imports.²⁹

The eight-Justice majority in *Mead* declined to apply *Chevron*. As construed in *Mead*, *Chevron* applies only in limited circumstances:

[I]t can . . . be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted

matters not which of these things occurred." 467 U.S. at 865. If Congress "did not consider the question at this level," it would be odd to consider the resulting ambiguity a "delegation," except by pure judicial imputation.

²⁷ *Mead*, 533 U.S. at 224.

²⁸ 19 U.S.C. § 1202.

²⁹ See *Mead*, 533 U.S. at 224



law, even one about which “Congress did not actually have an intent” as to a particular result. *When circumstances implying such an expectation exist*, a reviewing court has no business rejecting an agency’s exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency’s chosen resolution seems unwise, but is obliged to accept the agency’s position if Congress has not previously spoken to the point at issue and the agency’s interpretation is reasonable.³⁰

Because the *Mead* Court discerned no congressional “expectation” that the Customs Service would “be able to speak with the force of law when it addresses ambiguity in the” HTSUS, it found *Chevron* inapposite. It nonetheless found that the lower court erred in refusing to accord any deference at all to the Customs Service’s ruling on day timers.

The lower court’s mistake, according to *Mead*, was its failure to recognize that, even in cases falling outside the purview of *Chevron*, agency interpretations of agency-administered statutes are still entitled to some deference. As the Court explained, “[A]n agency’s interpretation may merit some deference whatever its form, given the ‘specialized experience and broader investigations and information’ available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires.”³¹ In other words, even if Congress did not delegate interpretive authority to an agency, there may still be reasons, all things being equal, to prefer administrative readings of statutes to the preferred readings of judges. Based on these reasons, an agency interpreting its statute, but outside the purview of a *Chevron* delegation, is entitled to a kind of deference described by Justice Jackson in his opinion in *Skidmore v. Swift & Co.*: “The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of

³⁰ Id. at 229 (emphasis added).

³¹ Id. at 234.



its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”³² In other words, depending on the “totality of the circumstances,”³³ a judge should defer to an agency reading if she is persuaded that it is worthy of deference.

In recognition of the surface doctrinal complexity of all this, one can be excused a long moment to let it all sink in. As in *Chevron*, the Court in *Mead* has expressed its rationale for a fairly straightforward holding with head-scratch-worthy maladroitness. First, again taking the Court literally, judges may be forgiven a little puzzlement for wondering what it means to defer to a statutory interpretation to the extent one finds it persuasive. If a proffered reading is persuasive, then it requires no deference to adopt it. If I take your view of something because I think you are right, I am not deferring to you; I am agreeing with you. Moreover, it is not clear what the Court means when it says there are occasions when “Congress would expect the agency to be able to speak with the force of law” in implementing a statute. That is to say, when Congress empowers an agency to compel public compliance with a statute, is it not always empowering the agency to “speak with the force of law?” The Customs directive to *Mead* to pay duty on its imported day timers was not merely hortatory.

Yet, once again, the Court’s puzzling prose should not obscure what seems an utterly straightforward result. In deciding whether or not a day timer is a bound diary, the Customs Service was not engaged in anything that we can recognize as actual policy making. The arguments it faced were as follows: On one hand, day timers fit a common definition of diary,

³² 323 U.S. 134, 140 (1944).

³³ *Mead*, 533 U.S. at 241 (Scalia, J., dissenting).

which “reflects commercial usage,” and the three-ringer binder does, in fact, bind the book together.³⁴ On the other hand, day timers contain “no space for ‘relatively extensive notations about events, observations, feelings, or thoughts’ in the past,” and, if ring-fastening counts as “binding,” it is hard to imagine what an “unbound” diary would look like.³⁵ The terminology of the HTSUS does require Customs to make a choice about this, but the competition of values and potential impacts on society that are the hallmarks of a genuine policy question hardly lurk here. The agency is just trying to give the tariff schedule a plausible reading. It makes sense to say that the views of the agency, which does this kind of thing for a living, ought not to be dismissed without due consideration. On the other hand, this does not appear to be the kind of question that would require, in the words of *Chevron*, “a reasonable accommodation of manifestly competing interests,” through a decision that “involves reconciling conflicting policies.”³⁶ On the contrary, the agency determination at issue would seemingly come as close as possible to a case of straightforwardly applying a policy determination that another body, Congress, has already made.

This is evident also in the procedure by which Customs announced its determination. Tariff classifications for particular imports are announced through so-called “ruling letters.” Ruling letters apply only to the specific items on which they rule, and to such other items as may be identical to them. They are issued without notice and comment, and are not published except insofar as they must be made available for public inspection. Customs Headquarters and all port-of-entry Customs offices are equally empowered to issue ruling letters, and they typically

³⁴ Id. at 225.

³⁵ Id. at 226.

³⁶ *Chevron*, 467 U.S. at 865.



“contain little or no reasoning, but simply describe goods and state the appropriate category and tariff.”³⁷ Of course, the relatively summary nature of this process does not render the result necessarily arbitrary, and a court should think twice before insisting that the agency did not know a diary when it saw one. On the other hand, a judicial conviction that the agency had confused a hawk with a handsaw would hardly disturb the deployment of some nuanced policy judgment essential to effecting a congressional regulatory scheme. Overturning a Customs HTSUS interpretation would not be unsettling the kind of deliberate expert judgment, resting on a measured and exacting account of competing interests and contending positions, that went into the agency judgment at issue in *Chevron*. That is why, on the *Mead* facts, full *Chevron* deference would seem so misplaced.

III. A Cognitive Approach to *Chevron* and *Mead*

Abstracted from the unsurprising holdings of *Chevron* and *Mead*, the two decisions seem to articulate two approaches to judicial deference in the face of agency statutory interpretation, and two corresponding rationales explaining why each mode of deference is appropriate to its context. According to *Mead*, *Chevron* deference is owed whenever “[i]t is apparent from the agency’s generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law.”³⁸ In such a case, “If . . . Congress has not directly addressed the precise question at issue, [but] the statute is silent or ambiguous . . . the question”

³⁷ *Mead*, 533 U.S. at 221-24

³⁸ *Id.* at 229.



is whether “the Administrator’s view . . . is a reasonable one.”³⁹ On the other hand, *Mead/Skidmore* deference is appropriate, outside the *Chevron* context, whenever there is value to acknowledging the “specialized experience and broader investigations and information”⁴⁰ available to the agency, and the importance of uniformity in administrative and judicial understandings of what a national law requires. In those cases, “The weight of [agency] judgment . . . 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.”⁴¹

All of this strikes me, however, as rather more complicated than is necessary. Indeed, it may be easier for all concerned to look at the judicial review of statutory interpretation not, as the Court seems to say, in terms of qualities embodied in the statutes being interpreted, but instead from the cognitive position of the judge conducting a review of the agency reading. At the risk of simply projecting my own mind-set, I hypothesize that judges, asked to read statutes (in the first instance or on judicial review of agency action) always form one of three conclusions upon conducting the exercise. In one set of cases, judges form the conclusion – taking into account the statutory text, Congress’s evident purposes, and all other legally relevant interpretive material – that the statute is susceptible to only one legally plausible reading. That is, the statute may be ambiguous to a linguist, but not to a lawyer. In such cases, it does not matter whether one is drinking from *Mead* or breathing in the fumes of *Chevron*. The Court’s stance will, in both

³⁹ *Chevron*, 467 U.S. at 843, 845.

⁴⁰ *Mead*, 533 U.S. at 234.

⁴¹ *Id.* at 219 (quoting *Skidmore*, 232 U.S. at 140).



cases, be the same: Did the agency adopt the only plausible reading of the statute? If so, uphold. If not, vacate and remand.

In a second set of cases, judges are likely to conclude that they cannot tell what the statute means, or, rather, that there are available a set of readings, each of which is plausible and none much more plausible than the others, so that the judge really has no conviction as to the appropriate statutory interpretation. In this category, too, the choice between *Mead* and *Chevron* is irrelevant. Courts should defer in both cases to any reasonable agency reading because agencies, not courts, are the institutions primarily tasked with the implementation of administrative programs. If a court has no conviction as to a statute's certain or even most appealing meaning, then it ought to defer to the agency not only for the reasons adduced in *Mead*, but also out of respect for a foundational aspect of the separation of powers – the priority of agencies over courts in making administrative policy.

That brings us to the third set of cases, cases in which a judge believes a statute susceptible to multiple plausible readings, but in which one of those readings seems to the judge to be most attractive or compelling. It is in this category, and only in this category, that the *Chevron - Mead* differentiation truly makes an actual difference. If we are “at the *Chevron* station,” to invoke the classic Schuck and Elliot pun,⁴² then, so long as the judge agrees the agency has found a reasonable reading, she is duty-bound to defer to the agency. The fact that the judge thinks the agency would have done better pursuing a different policy is not relevant. If we're in *Mead* territory, however, then the judge may insist on her preferred reading. It becomes

⁴² Peter H. Schuck and E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984.

the judicial duty in such cases to say what the law is. Understandably, before determining that a judicial reading is truly the more attractive, *Mead* instructs the judge to attend conscientiously to everything the agency says in defense of its view and to acknowledge whatever care was taken procedurally to insure a thorough airing within the agency of all the competing possibilities and counter-arguments. Fair enough. After all, Justice Frankfurter once wisely spoke of the legislative specification of a standard of review as chiefly expressing a “mood.” A judge imbibing *Mead* will still be sober, not heady with authority, but unpersuaded where agency reasoning falls short. That’s the *Mead* mood.

Of course, at this point, the obvious question is, when is *Chevron* the guiding standard and when *Mead*? On this point, the *Mead* formulation is not optimal. Rather than ask, is it “apparent from the agency’s generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses”⁴³ the ambiguity in issue, I would ask whether it is “apparent from the agency’s generally conferred authority and other statutory circumstances” that the ambiguity in question signals an appropriate occasion for the agency to fill the statutory hole by making policy. I would ask, that is, echoing *Chevron*, whether, in interpreting the statute in question, the agency was required to apply its expert judgment and public policy acumen in order to “accommodate . . . manifestly competing interests,” and reconcile potentially conflicting values and goals. If that is what at stake, then courts should defer; if not, then not. This is not because, in cases of genuine administrative policy making, administrators are anticipated lawmakers. Rather, it is because they are hired to make policy. For example, the ambiguity in *Chevron* regarding “stationary sources” was clearly

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Mead, 533 U.S. at 229.

an occasion for administrative policy making in just this sense. The ambiguity in *Mead* regarding types of stationery was not.

My suggested synthesis of the Court's leading cases on reviewing agency statutory interpretation would thus replace the *Chevron* Two-Step with a more elaborate *Chevron - Mead* waltz. First, the reviewing judge should determine whether the statute in question is susceptible to more than one plausible legal reading. If only one plausible legal reading is available, the judge should bind the agency to it.

If more than one plausible reading is available, the judge should then ask whether the ambiguity in the statute signals an occasion for genuine agency policy making. In other words, the court should determine whether the function of the agency, in filling the statutory gap at issue, entails balancing expert judgment and relevant political values in order to accommodate the competing interests that need to be taken into account in order to further Congress's objectives in enacting the statute. If so, then, so long as the agency has rationally identified any plausible statutory reading, the judge should consider herself duty-bound to defer to it.

If not, then the court must ask itself a third question: Of the plausible readings available, does any appear to the court to be plainly more attractive than its competitors? If not, then the court should likewise defer to an agency choice of any rational interpretation because the agency is the primary policy maker, and the court has no legal ground to prefer any alternative reading to the agency's own. If, however, the court initially finds one plausible reading most compelling, then it retains the authority to impose that reading on the agency. Before doing so, however, the court should pause, open-mindedly. It should consider, if the agency has an alternative preference, whether the agency's reasoning is not in fact sufficient to make its alternative at least

as attractive as the court's initial view. In such a case, notwithstanding that view, the court should deem itself persuaded by the agency's statutory reading.

Two objections to this approach may be readily anticipated. The first is that, because my approach foregrounds the role of the judge as reader, rather than congressional intention in framing a disputed statute, my reformulation runs the risk of resuscitating the judicial overstepping that provoked Justice Stevens's *Chevron* two-step rhetoric in the first place. The Supreme Court, were it to adopt my prose, could meet this objection by appending the following: "In reviewing agency interpretations of law, judges should think of themselves as readers of last resort in a three-way collaboration. Where Congress has manifested a legislative purpose, that purpose controls court and agency. Where it has left room for policy making, the agency is the constitutionally appropriate policy maker."

The second is that my approach may seem to invite a less predictable course of implementation than does *Chevron*. That is, judges may differ subjectively about when statutory ambiguity signals moments for significant agency policy making in a way that judges would not differ about when to apply *Chevron* Step One or Step Two. My reply to that is three-fold. First, there is ample room for subjectivity in the application of *Chevron*, as that decision's checkered career in the Supreme Court amply demonstrates.⁴⁴ Second, even if lower courts were reasonably consistent about applying *Chevron* before 2001, the resurrection of *Skidmore* deference via *Mead* is likely to induce the same lower court fluctuations in statutory interpretation that have always been evident in the Supreme Court itself. But my third response is really the most important: Conceding that my approach may be more conspicuous than the *Chevron* formulation in inviting

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Davis AND PIERCE, *supra* note 3, § 3.6.

judges actually to exercise judgment, it at least invites judgment on the right thing – namely, the proper scope for agency policy making in interpreting administrative statutes. I do not believe I am pointing judges towards any destination different from the direction of *Chevron* and *Mead*, read together. I am just being clearer about the nature of the journey. In an area of doctrine now fraught with rhetorical confusion, some new measure of clarity would be a virtue.

