

Review of Agency Interpretations: The Difference Discovers Itself

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ABSTRACT:

The Supreme Court regularly reviews agency interpretations of statutes. For many years, the official dogma of the Court was one of deference to reasonable agency interpretations of ambiguous statutes – the so-called “*Chevron* doctrine.” After *Mead* and *Christensen*, the Court was open to other levels of respect for agency interpretations. Recently, cases have so emphasized the particular statutory construction methods of the individual justices that the agency interpretation of a statute is now on the level of legislative history or other aids to interpretation, such as canons, which may or may not be used at a justice’s option. The array of treatments of the agency interpretation - no deference, *Chevron* or *Skidmore* deference, or even no mention at all - makes it easier to impose judicial views that bind or will not bind in the future as a judicial declaration of “what the law is” under *Marbury v. Madison*. Agency interpretation is no longer the preferred method to resolve ambiguity in a statute.

This article traces this development by first examining what the *Christensen* and *Mead* cases theoretically did. Part III examines the status of deference to agency decisions in practice in the Supreme Court in the last two years, namely 2003 and 2004. In Part IV, the article places the debate in the context of the two theories of judicial discretion and statutory interpretation. Part V concludes that agency interpretation has become analogous to a mere canon of construction.

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“On the abstract principles which govern courts in construing legislative acts, no difference of opinion can exist. It is only in the application of those principles that the difference discovers itself.”

- United States v. Fisher, 2 Cranch 358, 386, 2 L.Ed.. 304 (1805) (Marshall, C.J.)

I. Introduction

As early as 1805, Chief Justice Marshall acknowledged that certain “abstract principles” about statutory construction appear universal, but that the “difference discovers itself” only when the principles are applied.¹ This remains true in the Supreme Court two hundred years later; however, there is also some stark disagreement about some of the abstract principles themselves. Nothing provides a better prism on this divergence than how the Court treats agency interpretation of statutes. At one point, *Chevron U.S.A., Inc. v. Natural Resources Defense*

¹ United States v. Fisher, 2 Cranch 358, 386, 2 L.Ed.. 304 (1805) (Marshall, C.J.).
Dueling *Fisher* quotes are discussed, *infra*, at

*Council, Inc.*² seemed to govern firmly at least the principles of the agency-court relationship. Pursuant to its so-called “two-step,” if a court first determined that Congress had not clearly spoken on the matter, a court must defer to the agency interpretation if the court deemed it “reasonable.”³ Recent cases, however, may have altered these principles, but the ultimate difference lies in allegiances to divergent methods of determining whether a statute is ambiguous.

The nominal difference, however, emerged when *Chevron* deference was challenged as a norm in *Christensen v. Harris County*⁴ and *United States v. Mead Corporation*.⁵ These cases posited that some agency interpretations, even of ambiguous statutes, were not due binding deference under *Chevron* if they were reasonable, but would be subject to something referred to

² 467 U.S. 837 (1984).

³ *Id.* at 842-43.

⁴ 529 U.S. 576 (2000).

⁵ 533 U.S. 218 (2001).

as “respect” in certain circumstances.⁶ The cases returned *Skidmore* deference to the active judicial repertoire.⁷ To some, this was a sudden and drastic change.⁸ However, the practical and actual impact of the cases has not been such, but the cases have contributed to a trend in which the agency interpretation of a statute is simply one interpretive tool among many other “canons” of construction, one to be employed or not at the option of the justice.

Two recent cases underscore the status of agency interpretation as simply a tool of construction that can be ignored; the Supreme Court did not acknowledge underlying agency

⁶ See, *Christensen*, 529 U.S. at 587, and *Mead*, 533 U.S. at 226-27.

⁷ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (opining that agency rulings, interpretations and opinions “while not controlling upon the courts by reason of their authority” can be informed judgments that may guide courts).

⁸ See, *Mead*, 533 U.S. at 239 (Scalia, J. dissenting) (calling the majority’s ruling “an avulsive change in judicial review of federal administrative action”). Avulsion is the rapid change of land due to rapid movement of water.

statutory interpretations in either *Doe v. Chao*⁹ or *Bedroc Limited, LLC v. United States*.¹⁰ Agency construction is therefore on the level of legislative history or other aids to interpretation, such as canons, which may or may not be used at a justice's option. The array of treatments of the agency interpretation - no deference, *Chevron* or *Skidmore* deference, or even no mention at all - makes it easier to impose judicial views that bind or will not bind in the future as a judicial declaration of "what the law is" under *Marbury v. Madison*.¹¹ The technique of ignoring agency

⁹ 124 S.Ct. 1204 (2004).

¹⁰ 124 S.Ct. 1587 (2004).

¹¹ *Marbury v. Madison*, 5 U.S. 137 (1803) (often cited for the proposition that it is the responsibility for courts to declare "what the law is"). See, Richard W. Murphy, A "New" Counter-*Marbury*: Reconciling *Skidmore* Deference and Agency Interpretive Freedom, 56 ADMIN. L. REV. 1, 2 (2004) (*Chevron* labeled as putting interpretive power in agency, while *Marbury* put it in the courts). For an informative historic review of *Marbury*, see Mark A. Graber, Establishing Judicial Review: *Marbury* and the Judicial Act of 1789, 38 TULSA L. REV. 609 (2002).

constructions when it suits a justice's purpose is not limited to either the liberal or conservative ranks of justices, although Justice Scalia is the most verbal about retaining *Chevron* deference and avoiding the "ossifying" nature of a court "declaring what the law is."¹²

Manipulation has long been a part of the judicial review of agency interpretation. Even with *Chevron* deference as the norm, justices only moved to the second step, namely ascertaining whether the agency interpretation is reasonable, if the statute is ambiguous. Justices engage their own statutory interpretation modes to determine whether the statute is ambiguous or whether Congress clearly spoke. It is perhaps a cliché to say that "clarity," like beauty, is in the eye of the beholder. Nevertheless, Justices often show their differences at this point, with two rival methods of statutory interpretation driving the disagreement. "Textualists" find the words of the statute govern interpretation, but "intentionalists" look to the intent of the legislature, probing

¹² *Mead*, 533 U.S. at 239 (Scalia, J. dissenting). Under *Chevron*, if Congress was not clear, a court merely affirms or disaffirms the "reasonableness" of the agency position; it therefore only states that the law could or could not be what the agency proposes, not that a particular meaning is "the" one possible correct interpretation of the statute.

into the purpose of the legislation and legislative history.¹³ By loosening the reins on deference to agency interpretations, the end-result has been a greater tendency to use these differing statutory methods to arrive at judicially preferred results. Agency interpretation has been relegated to the status of an aid to construction, rather than being the preferred method to resolve ambiguity in a statute.

This article in the next part will trace this development by first examining what the *Christensen* and *Mead* cases theoretically did. Part III will examine the status of deference to agency decisions in practice in the Supreme Court in the last two years, namely 2003 and 2004. In Part IV, the article places the debate in the context of the two theories of judicial discretion

¹³ For definitions, see generally, Cass R. Sunstein and Adrian Vermeule, *Interpretation and Institutions*, 101 Mich. L. Rev. 885 (2003) and Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 Hastings L.J. 255, 264-274 (2000). See also, Marla E. Mansfield, *By the Dawn's Early Light": The Administrative State Still Stands after the 2000 Supreme Court Term (Commerce Clause, Delegation, and Takings)*, 37 Tulsa. L. Rev. 205, 232-240 (2001). Alternative terms for these interpretive modes are "formalists" for the textualist tendency and "purposivists" for the those who seek intent.

and statutory interpretation. Part V concludes that agency interpretation has become analogous to a mere canon of construction.

II. *Christensen* and *Mead*: Theoretical Change to *Chevron*?

A. In the Supreme Court's Words

Beginning in 2000, the Supreme Court justices either simply restated the law of administrative deference to agency interpretation or radically altered it, depending on the individual justice's perspective. Justice Scalia argued the latter had occurred, while other justices, to differing degrees, believed that the decision in *Christensen*, as explicated in *Mead*, made no great modification in the law. The contention was over whether there was one standard of deference or several standards. Subsidiary questions would be what type of agency action would trigger which type of deference if more than one existed. A preliminary question, however, goes back to 1944, namely, what is "*Skidmore* deference?"

In *Skidmore v. Swift & Company*,¹⁴ the Court considered whether employees who have to be “on call” at a meat packing plant to respond to fire alarms qualified for overtime pay under the Fair Labor Standards Act. The Administrator did not formally adjudicate the matter, but had stated in a brief, that, given the examples put forward in its bulletins, the Administrator would count as “work” the time employees spent at the plant when they were neither sleeping nor eating, explaining that the workers might have been preferred other pursuits for leisure time rather than presence at the plant.¹⁵ The Court considered the rationale for Congress creating the Administrator in the first place; Congress “impose[d] upon him a variety of duties, endow[ed] him with powers to inform himself of conditions in industries and employments subject to the Act, and put on him the duties of bringing injunction actions to restrain violations.”¹⁶ Something, therefore, was intended to result from the Administrator’s responsibilities and actions. To reflect this, bulletins and informal releases the Administrator promulgated, while not binding a court’s

¹⁴ 323 U.S. 134 (1944).

¹⁵ *Id.*, at 139.

¹⁶ *Id.*, at 138.

decision-making, would be entitled to “respect” when a judge interpreted the Act or appraised factual situations.¹⁷ The Court elaborated:

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 in a particular case will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give the power to persuade, if lacking power to control.¹⁸

The Court adopted the reasoning of the Administrator, and lawyers and judges adopted the

¹⁷ *Id.*, at 139-140. See also, *Id.*, at 139: “The Administrator’s policies are made in pursuance of official duty, based upon specialized experience and broader investigations and information than is likely to come to a judge in a specific case.”

¹⁸*Id.*, at 140

Skidmore name to describe the persuasive, but non-binding influence of well-reasoned agency statutory interpretations.

Moving forward in time, the *Chevron* case was decided, which operated on the premise that deference to agency interpretations was necessary when a statute was ambiguous and the agency interpretation of the statute was reasonable. For sixteen years, this case provided the primary guidance for aligning agency and judicial interpretive power.¹⁹ In 2000, however, the *Christensen* case was decided. Like *Skidmore*, *Christensen* arose in a setting where there was neither rule-making nor adjudication at issue. It also involved the same Act. By this time, the Fair Labor Standards Act had been amended to allow state and local government employers to give compensatory paid time off in lieu of over time pay when workers were on the job more

¹⁹ The case was decided by only six justices and was not necessarily originally conceived as an important administrative law decision by the Court. See, Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1256 (1997) (arguing that the Justices in deciding *Chevron* did not believe it to be a leading administrative law case, but simply a routine environmental case in which only six justices participated).

than forty hours.²⁰ The particular question in *Christensen* was whether the governmental employer could use “comp time” unilaterally or must it only be used pursuant to a labor agreement. In an *amicus* brief, the Department of Labor’s Wage and Hour division took the position that an employer needed an agreement, and pointed to an opinion letter an Acting Administrator of the Wage and Hour Division signed, which letter also stated this position in response to the County’s question. Justice Thomas, writing for a majority of five, found that the statute did not forbid an employer from using compensatory time unilaterally.

In so doing, Justice Thomas considered the influence of the Department’s position. There was neither formal adjudication nor notice-and-comment rulemaking. *Chevron*, he held, does not govern an agency interpretation that “lacks the force of law.”²¹ Such interpretations could be persuasive but “we find unpersuasive the agency’s interpretation of the statute at issue

²⁰ *Christensen v. Harris County*, 529 U.S. 576 (2000).

²¹ *Id.*, at 587.

in this case.”²² To defer to the agency in this instance would allow the agency to make a new regulation in the guise of interpreting a regulation.²³ Justice Scalia concurred in part and concurred in the judgment.

Justice Scalia agreed that the FLSA did not require an agreement before use of compensatory time, but objected to the implication that “authoritative” agency interpretations could be merely “persuasive,” rather than requiring deference to them under *Chevron*.²⁴ First, he

²² *Id.*

²³ *Id.*, at 588. “Unless the FLSA *prohibits* respondents from adopting its policy, petitioners cannot show that Harris County has violated the FLSA. And the FLSA contains no such prohibition.” See concurrence by Justice Souter, in which he clarifies his judgment that the FLSA could allow the Department to issue a regulation that allows it to prohibit forced use of compensatory time.

²⁴ *Christensen*, 529 U.S. at 589-91 (Scalia, J., concurring in part and concurring in the judgment).

declared: “*Skidmore* deference to authoritative agency views is an anachronism.”²⁵ Second, he argued that the government’s brief established the opinion letter as authoritative, in the sense that it represented the official position of the administering agency.²⁶ Therefore, *Chevron* applied. He concurred in the judgment, however, by applying the second step of *Chevron* and finding that “the Secretary’s position does not seem to me a reasonable interpretation of the statute.”²⁷ Other Justices weighed in on the administrative law issue.

Two dissents were written, one by Justice Breyer and one by Justice Stevens. Justice Stevens gave the Departmental opinion “respect” under *Skidmore* and thus would require an agreement before the use of compensatory time.²⁸ Justice Breyer, joined by Justice Ginsburg,

²⁵ *Id.*, at 589.

²⁶ *Id.*, at 591 n__ . Justice Scalia had been of record that *Chevron* should be employed whenever authoritative agency interpretations were involved, including those within briefs to the court.

²⁷ *Id.*, at 591.

²⁸ *Christensen*, 529 U.S. at 595 (Stevens, J., dissenting).

found the opinion letter authoritative and due *Chevron* deference because it was reasonable.²⁹ Nevertheless, this dissent continued and registered disagreement with Justice Scalia’s position on the status of *Skidmore*: *Chevron* did not supercede it, but gave “an additional, separate legal reason for deferring to agency determinations, namely, that Congress had delegated to the agency the legal authority to make those determinations.”³⁰ When there has been no such delegation, judges may use *Skidmore*. Justice Breyer suggested both modes of deference were applicable in the case and both supported affirming the agency interpretation.

The following year, in *United States v. Mead Corp.*,³¹ the Court continued to insist that *Chevron* did not eliminate deference under the *Skidmore* doctrine.³² Eight Justices joined Justice Souter’s opinion, with only Justice Scalia dissenting. At issue was whether “day planners” were “bound” “diaries” subject to a 4% tariff. The Federal Circuit refused to consider the Custom

²⁹ *Christensen*, 529 U.S. at 596 (Breyer, J., dissenting). Therefore, three justices, Breyer, Ginsburg, and Scalia would have used *Chevron* to resolve the matter, *albeit* differing in result.

³⁰ *Id.* Justice Stevens did not formally join this dissent, but noted that he concurred in its reading of *Chevron*. *Christensen*, 529 U.S. at 595, n.2 (Stevens, J., dissenting).

³¹ 533 U.S. 218 (2001).

³² *Id.*, at 234.

Service’s interpretation, finding the day planners were neither bound nor diaries. The Supreme Court concurred that it was correct to not apply *Chevron* deference, but found that the lower court should have given some consideration of *Skidmore* deference.³³

Justice Souter’s opinion attempted to delineate when one or the other of the two approaches to agency interpretations would be appropriate.³⁴ In theory, *Chevron* applies only when “Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”³⁵ Whether Congress had made such a delegation could be shown in various ways, most notably “by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.”³⁶ The *Mead* decision explained:

³³ *Id.*, at 227.

³⁴ However, noting that: “It is, of course, true that the limit of *Chevron* deference is not marked by a hard-edged rule.” *Id.*, at 237 n. 218.

³⁵ *Id.*, at 226-227.

³⁶ *Id.*, at 227.

It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that *should* underlie a pronouncement of such force. . . . Thus, the overwhelming number of our cases applying *Chevron* deference has reviewed the fruits of notice-and-comment rule making or formal adjudication³⁷

Although the Customs Service had the authority to engage in rule making with the force of law, there was a second inquiry: whether it had done so in the particular interpretation.³⁸ In the current case, the type of ruling being relied upon numbered about 10,000 in a year and could be

³⁷ *Id.*, at 230.

³⁸ With a fondness for numbers matching those of mathematicians, one commentator makes these two questions 1(a) and 1(b). Eric R. Womack, *Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court's Retreat from Chevron Principles in United States v. Mead*, 107 Dick. L. Rev. 289, 309-310(2002)(distinguishing whether agency has authority to “make law” and whether it did so in the particular). See also, Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L. J. 833, 836 (2001) (adding the step of determining whether *Chevron*, *Mead*, or de novo review applies to the “*Chevron* two step,” making this determination “Step Zero.”)

generated in forty-six offices throughout the nation. To the court, these voluminous rulings could not have been intended to have the force of law.³⁹

The fact that these rulings would not be binding if reasonable in the face of an ambiguous statute did not faze the Court. Because of the diverse statutory schemes for administrative action, a court needs a variety of responses:

Justice Scalia's first priority over the years has been to limit and simplify. The Court's choice has been to tailor deference to variety. This acceptance of the range of statutory variation has led the Court to recognize more than one variety of judicial deference, just as the Court has recognized a variety of indicators that Congress would expect *Chevron* deference.⁴⁰

More than one standard to evaluate an agency's response to ambiguity is a benefit, not a cause

³⁹ *Id.*, at 233. ("In sum, classification rulings are best treated like 'interpretations contained in policy statements, agency manuals, and enforcement guidelines.'" citing, *Christensen*, 529 U.S., at 587).

⁴⁰ *Id.*, at 236-237.

of dismay.

Although the potential for multiple standards left eight justices relatively unperturbed,⁴¹ Justice Scalia was the opposite. He claimed the Court in *Mead* had essentially discarded *Chevron*,⁴² and he scorned its replacement, calling it “that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th’ol’

⁴¹ Justice Breyer, particularly, but others also may concur that the review standards do not make much of a difference. According to one count, five Justices say that there are two deference doctrines, namely *Chevron* and *Skidmore*. These include Chief Justice Rehnquist and Justices Souter, O’Connor, Thomas and Kennedy. Three justices - Stevens, Ginsburg, and Breyer - find one deference doctrine exists, of which *Chevron* and *Skidmore* are “separate manifestations.” The final Justice, Justice Scalia maintains there is simply one doctrine for review of agency statutory interpretations, and that it is *Chevron*. Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 Geo. L. J. 833, 852 (2001).

⁴² *Mead*, 533 U.S. at 239 (Scalia, J. dissenting)(“We will be sorting out the consequences of the *Mead* doctrine, which has today replaced the *Chevron* doctrine.”)

‘totality of the circumstances’ test.”⁴³ To Justice Scalia, the result was deleterious not only in practical effect, but also in principle. Justice Scalia emphasized that *Chevron* was doctrinally an alignment of power between the executive and judicial branches: “[T]he doctrine of *Chevron* - that all *authoritative* agency interpretations of statutes they are charged with administering deserve deference – was rooted in a legal presumption of congressional intent, important to the division of powers between the Second and Third Branches.”⁴⁴ Assigning an interpretive antecedence to the agency allows the executive to fill in the interstices of the law; the *Mead* approach did not so provide:

Skidmore deference gives the agency’s current position some vague and uncertain amount of respect, but it does not, like *Chevron*, leave the matter within the control of the Executive Branch for the future. Once the court has spoken, it becomes *unlawful* for the agency to take a contradictory position; the statute now *says* what the court has

⁴³ *Id.*, at 241. Justice Scalia abhorred such a holistic test. See, Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175, 1178-79 (1989) (arguing that when the Supreme Court decides a case on such a basis, it does not announce rules or resolve inconsistencies).

⁴⁴ *Id.* (emphasis in original).

prescribed.⁴⁵

To Justice Scalia, the judiciary would disrupt the current alignment of power if authoritative agency decisions were not simply deferred to when reasonable.

Beyond theory, Justice Scalia also perceived a downside of the opinion in practice. Because the *Mead* approach uses multiple factors to assess agency decision-making, agencies will not know whether their interpretations will receive deference unless they use rule-making.⁴⁶ If they do not use rule-making, the law will be decided by courts, which will remove an agency's ability to respond to either changing conditions or changing politics:

Worst of all, the majority's approach will lead to the ossification of large portions of our statutory law. Where *Chevron* applies, statutory ambiguities remain ambiguities subject to the agency's ongoing clarification. They create a space, so to speak, for the exercise of continuing agency discretion.⁴⁷

⁴⁵ *Id.*, at 247 (emphasis in original).

⁴⁶ *Id.*, at 246. He also avers that a side-effect of *Mead* would make timing important – i.e. if suit was before or after rule-making - which is “positively bizarre.” *Id.*, at 247.

⁴⁷ *Id.*, at 247.

To Justice Scalia, the majority in *Mead* was not only wrong in principle, but the decision would have a devastating impact on the development of regulatory responses. It undermined agency flexibility and Congress's ability to delegate.

Reading the Supreme Court Justices' own words in *Christensen* and *Mead* reveals two potential theoretical impacts on administrative law from the cases. The first, espoused by the majority, is that the cases mildly adjusted administrative law, clarifying that courts could review agency interpretations of statutes pursuant to different existent standards. The second, trumpeted by Justice Scalia, is that the cases would wreak havoc on the alignment of executive and judiciary power, leading to a crisis in regulation. Neither of these assessments turns out to perfectly predict how nor whether Supreme Court treatment of agency pronouncements would change.

B. In the Words of Law Review Article Authors

Since *Mead* and *Christensen*, numerous articles have considered on these cases

particularly or on judicial deference to agency statutory interpretation more generally.⁴⁸ The commentators' initial reactions vary through yawning, bemoaning, and cheering. These positions are briefly surveyed.

Some who read the decisions saw the same potential downside that Justice Scalia did: they feared a loss of agency flexibility. If courts ultimately determined "what the law is" pursuant to a *Skidmore* review, then agencies would be bound in the future to the meaning the judiciary declared.⁴⁹ The judiciary's supremacy under *Marbury v. Madison* would be secured, unless the agency proceeded by formal rule-making,⁵⁰ which would grant the present agency decision *Chevron* deference and also allow the agency to change its position with reasonable

⁴⁸ A WestLaw search on Aug. 18, 2004, revealed 15 articles with *Mead* in the title and 95 articles with Christensen, Chevron, or Skidmore in the title for the preceding three years (computed after deleting those referring to different cases by the same name). Naturally, not all articles on the topic include the case name in their title, as evidenced by the title of the present article.

⁴⁹ Timothy Zick, *Marbury Ascendant: The Rehnquist Court and the Power to "Say What the Law Is,"* 59 Wash. & Lee L. Rev. 839, 841-42 (2002) (characterizing *Mead* as representing an expansion of the *Marbury* power to say what the law is at the expense of *Chevron* deference).

⁵⁰ Or by formal adjudication, in a reversal of early hesitancy to allow

explanation. *Chevron* review alone comported with *Marbury* because the theoretical basis for *Chevron* is that Congress delegated interpretation to the agency. To change this could be detrimental to regulatory response to changing conditions or policies. For this and other reasons, some authors classified *Mead* and *Christensen* as mistakes.⁵¹

To the contrary, others found that an agency could still have flexibility if a court reviewed its interpretation with *Skidmore* respect. The agency's position and explanation would be considered in the initial review; its change would be a factor to consider and weigh in any later review.⁵² Allowing judges to consider agency interpretation as mandatorily binding in some circumstances and under a more fact-specific rubric at other times allows for the best alignment of resources.⁵³ Freeing the judiciary from the constraints of *Chevron* enhances the role of the

⁵¹ Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 *Geo. Wash. L. Rev.* 347, 361 (2003) (arguing the cases are a "failed experiment" because judges become mired in disputes on the type of deference required).

⁵² Murphy, *supra* note , at 46-48.

⁵³ Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 *Geo. L. J.* 833, 857 (2001) (arguing legal system works better with two ways to make use of agency experience, including one that is not mandatory).

judiciary as a true and honest check and balance on the executive.

In between, there were those who felt that the two cases did not necessarily make much of a practical change.⁵⁴ Within this group were those who felt that there truly could only be two possible states of mind: deference or no deference to the agency position. There would not be room for an intermediate “respect.” Therefore, the difference in terminology and citation would represent “mood points” rather than a stark differentiation of philosophy.⁵⁵

⁵⁴ Ronald Krotosynski, *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 Admin. L. Rev. 735, 752-54 (arguing that *Skidmore* review fits in to the APA as simply an “arbitrary & capricious” review for rationality), But see, Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 Tulsa L. J. 221, 244 (1996) (arguing against collapsing *Chevron* review and arbitrary and capricious analysis because *Chevron* concentrates on “statutory language, structure and purpose” and the other analysis concentrates on the “agency’s decisionmaking process and explanations”).

⁵⁵ Russell L. Weaver, *The Emperor Has No Clothes: Christensen, Mead and Dual Deference Standards*, 54 Admin. L. Rev. 173 (2002).

III. Supreme Court Review of Agency Statutory Interpretation in Practice

In the past two years, the Supreme Court has repeatedly reviewed agency interpretations of statutes. Without claiming to be all-inclusive, twelve decisions are reviewed in this part of the article⁵⁶ and some categorization is attempted. In some cases, the Court acknowledges different standards of reviewing agency pronouncements and in others it cites all the precedents indiscriminately. Moreover, results and methodology vary across the spectrum, from demanding to hear from agencies to not even acknowledging that agencies had already spoken. In all, there has been no systemic transformation of administrative law, but a cacophony has replaced that single-note *Chevron* citation refrain.

A. Models of Review Both Distinguished and Blurred

Some cases do seem to distinguish at least two types of review.⁵⁷ In fact, there are some

⁵⁶ See also, Part IV.

⁵⁷ Naturally, three possibilities exist: deference under *Chevron*, deference or “respect” under *Skidmore*, or *de novo* review. The latter position is subsumed in the question of whether

stabs at making principled distinctions between agency activities and the type of appropriate deference. However, no clarity emerges from the particular cases. To the contrary, some cases purposefully refuse to distinguish which review model is being applied and deny that any practical effect arises from the choice of either *Chevron* or *Skidmore* defense.

In *Washington State Department of Social and Health Services v. Guardianship Estate of Keffeler*,⁵⁸ there appeared to be a delineation of when *Chevron* deference was appropriate. Justice Souter wrote for a unanimous court, addressing a situation where a State became a “representative payee” on behalf of a child in state foster care who was eligible for Social Security benefits. The question was “whether the State’s use of Social Security benefits to reimburse itself for some of its initial expenditures violates a provision of the Social Security Act protecting benefits from ‘execution, levy, attachment, garnishment, or other legal process.’”⁵⁹ To approve the practice, the Court had to determine three subsidiary issues. In so doing, the Court found *Chevron* deference appropriate to uphold agency pronouncements on two issues. The third

the statute involved is ambiguous. If the statute is not, the court will interpret it by standard statutory construction.

⁵⁸ 537 U.S. 371 (2003).

⁵⁹ *Id.*, at 375, quoting 42 U.S.C. § 407(a).

agency interpretation garnered respect under *Skidmore* and *Mead*.

The two situations in which *Chevron* deference was employed differed. First, the Court determined whether the statute prohibited a payee from in anyway being tempted to perform “creditor-type acts.” The Court found that both the Act and the regulations implementing it allow creditors to serve as representative payees and even to satisfy old debts from payments in certain circumstances. *Chevron* was cited at this point for needed deference.⁶⁰ Because notice-and-comment regulations were involved, this was not surprising. The second use of *Chevron* was in a different setting, but first the Court needed to resolve an intermediary question, for which *Chevron* was not a suitable option.

The Court had to determine whether the state obtained the benefits in a manner that violated the statute’s prohibition of “execution, levy, attachment, garnishment, or other legal process.”⁶¹ In making the determination, the court employed the canons of *noscitor a sociis* and

⁶⁰ *Id.*, at 382.

⁶¹ 42 U.S.C. § 407(a).

ejusdem generis to read “other legal process” restrictively.⁶² The Court bolstered this conclusion by examining the Social Security’s Program Operations Manual Systems, which read the words in a similar manner:

⁶² *Washington*, 537 U.S. at 385. (“Require[s] utilization of some judicial or quasi judicial mechanism.. .by which control over property passes from one person to another in order to discharge or secure discharge of an allegedly existing or anticipated liability.”)

While these administrative interpretations are not products of formal rulemaking, they nevertheless warrant respect in closing the door on any suggestion that the usual rules of statutory construction should get short shrift for the sake of reading ‘other legal process’ in abstract breadth. See *Skidmore*, 323 U.S. 134, 139-140 (1944); see also *United States v.*

Mead Corp., 533 U.S. 218 228 (2001).⁶³

The court, therefore, referenced a specific agency pronouncement that contained a statutory analysis and employed some degree of respect for it, albeit not *Chevron* deference.

⁶³ *Id.*, at 385-86.

To answer the last question, the Court did not reference a particular regulation or ruling, but implicitly looked at the agency's actual appointment of the state as a representative payee. This final question was whether appointing a representative payee, which would make payments to itself for reimbursement, would promote the "best interests" of a beneficiary. The Court, citing

Chevron,⁶⁴ found that interpreting such “an open-ended and potentially vague term is highly susceptible to administrative interpretation subject to judicial deference.”⁶⁵ The Administrator could choose to assure beneficiaries receive basic needs rather than seeking to maximize a trust

⁶⁴ *Chevron*, 467 U.S. at 842-843.

⁶⁵ *Washington*, 537 U.S., at 390.

fund because of overlapping federal and state largesse. Although no particular regulation was cited for this premise, the Court had looked at several regulations and the end result. Although the form of the agency interpretation was not necessarily within the *Mead* safe-harbor for *Chevron* deference,⁶⁶ Justice Souter emphasized the rationale for *Chevron* deference in assigning

⁶⁶ Notice and comment rulemaking or formal adjudication,

the agency the right to make the judgment: an implicit delegation of policy-making to the agency. *Chevron*, thus, would be employed for law-making activities pursuant to rule-making and to clearly delegated policy choices. The *Mead* reference to *Skidmore* respect was used in other situations, although the Court in *Washington State* additionally used other means to interpret the statute.

A gestalt therefore would seem to be developing in *Washington State*, but other cases simply cited both cases or refused to distinguish between the standards. For example, Justice Breyer cited both *Chevron* and *Skidmore* in support of an agency interpretation in *Meyer v. Holley*.⁶⁷ This dual citation is not totally surprising; Justice Breyer in his dissent in *Christensen*

⁶⁷ 537 U.S. 280, 287-88 (2003): “For another thing, the Department of Housing and

maintained that *Chevron* did not supercede *Skidmore*, but gave “an additional, separate legal

Urban Development (HUD), the federal agency primarily charged with the implementation and administration of the statutes... has specified that ordinary vicarious liability rules apply in this area. And we ordinarily defer to an administering agency’s reasonable interpretation of a statute. *Chevron*, 467 U.S. 837, 842-45 (1984), *Skidmore*, 323 U.S. 134, 140 (1944).

reason for deferring to agency determinations, namely, that Congress had delegated to the agency the legal authority to make those determinations” and suggested both were applicable and both supported affirming agency interpretation in that case.⁶⁸ He similarly cited both decisions in

⁶⁸ *Christensen*, 529 U.S. at 596. (Breyer, J. dissenting).

Barnhart v. Walton,⁶⁹ but concluded that *Chevron* deference was appropriate in light of the entire setting of the agency interpretation.

The *Barnhart* case revolved on the meaning of the word “disability,” which is a predicate

⁶⁹ 535 U.S. 212, 218 (2002).

to establishing eligibility for certain Social Security benefits. The Social Security Administration had long-used a definition that required not only that the impairing condition last more than a year, but that a claimant’s “inability to work” also last that long. The Administration had only recently adopted the definition in notice-and- comment proceedings.⁷⁰ The recent nature of the

⁷⁰ *Id.*, at 214-215.

rule-making led the claimant, who opposed use of the definition, to claim that the rule was too new and developed in response to litigation; therefore, the rule should not be entitled to deference.

The Court, however, rejected this argument: there is no bright-line rule that only notice-

and-comment rule-making receives *Chevron* deference.⁷¹ Justice Breyer, in a discussion that all Justices signed on to except Justice Scalia, explained that whether or not an agency interpretation gets *Chevron* deference “depends in significant part upon the interpretive method used and the

⁷¹ *Id.*, at 222.

nature of the question at issue.”⁷² Applying this, the Court concluded:

In this case the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that

⁷² *Id.*

administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.⁷³

⁷³ *Id.* Justice Breyer's scholarship perhaps presaged this position. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370-73 (1986) (suggesting that to

solve the problem of finding implied delegation to agencies, courts should look for implicit intent, by judging what a reasonable legislator might have thought about delegation based on the facts and practicalities of the particular enactment; the factors would resemble, perhaps, pre-*Chevron* analysis).

The clear import is that a holistic approach is not only appropriate to decide whether to use *Skidmore* deference, but a multi-factor approach also determines whether to apply *Chevron*. Justice Scalia rebelled: “The SSA’s recently enacted regulations emerged from notice-and-comment rulemaking and merit deference. No more need be said.”⁷⁴ This reflects his disgust with

⁷⁴ *Walton*, 535 U.S. at 227 (Scalia, J. concurring).

less than definitive rules, a disgust that he had registered strongly in his *Mead* dissent.⁷⁵

Justice Scalia found other cases also required dissent,⁷⁶ even when Justice Ginsberg did

⁷⁵ *Mead*, 533 U.S. at 241 (Scalia, J. dissenting).

apply a fairly straightforward analysis of whether *Chevron* deference should be used.⁷⁷ Most

⁷⁶ *Alaska Department of Environmental Conservation v. Environmental Protection Agency*, 124 S.Ct. 983, (2003) (Kennedy, J. dissenting). Chief Justice Rehnquist and Justices Scalia and Thomas joined the dissent.

⁷⁷ 124 S.Ct. 983 (2003). Justices Stevens, O'Connor, Souter and Breyer concurred.

likely therefore, the disagreement was not on administrative law, but on where the Justices put the fulcrum of power between state and federal regulators. The setting was regulating emissions under the Clean Air Act. The Alaska Department of Environmental Quality (ADEC) had issued a permit for a zinc mine expansion, but did not employ what would be the most stringent

technology, know as SCR (selective catalytic reduction), but allowed a different technology to be used on both new generating units and existing units at the project.⁷⁸ The EPA employed

⁷⁸ According to the Clean Air Act, if a source of pollution would be intended for an area that meets the ambient air quality standards, the Prevention of Significant Deterioration program

authorities in the CAA to stop construction of the generators,⁷⁹ alleging that the ADEC did not

requires that the permitting agency issue a permit and provide that the source employ the “Best Available Control Technology.” 42 U.S.C. § 7475(a).

⁷⁹ The CAA provides in Section 113(a)(5) 42 U.S.C. § 7413(a) that the EPA, if it finds that a State generally has not complied with a “requirement” necessary to construct a polluting

source, could pursue remedial action, including issuing “an order prohibiting construction.” Additionally, the CAA empowers the EPA within the PSD program to “take such measures, including issuance of an order, ... as necessary to prevent the construction” of a major pollutant emitting facility that does not conform to the “requirements” of the program. Section 167, 42 U.S.C. .

adequately explain its choice of required technology, therefore rendering its BACT determination arbitrary and capricious and thus not fulfilling a requirement of the program. The EPA interpreted the requirement to have a BACT determination in the permits “to mandate not simply *a* BACT designation, but a determination of BACT faithful to the statute’s definition.”⁸⁰

⁸⁰ *Alaska Department of Environmental Quality*, 124 S.Ct. at 1000 (emphasis in the

In what would appear to be a straightforward review of an agency action, Justice Ginsburg upheld the EPA's decision. She cited EPA interpretive guides that had been published in 1983, 1988, and 1993, as well as other documents that contained EPA's position that it had oversight

original).

ability to ascertain whether a state had made a determination that was within the meaning of the CAA.⁸¹ Because these were not notice and comment rule-makings, but were within “internal guidance memoranda,” they were not given *Chevron* deference, but Justice Ginsberg found them

⁸¹ *Id.*, at 1001.

worthy of “respect.”⁸² She reviewed the arguments raised against the EPA’s interpretation, but found them incapable of persuading the court “to reject as impermissible EPA’s longstanding, consistently maintained interpretation.”⁸³

⁸² *Id.*

⁸³ *Id.*

The dissenting justices, however, accused Justice Ginsburg of giving *Chevron* deference to the EPA's opinion. Justice Kennedy cites the majority's description of the agency's ruling as

“not impermissible,” “permissible,” or “rational.”⁸⁴ The dissent would find no deference appropriate because the statute “clearly” required the EPA to appeal the state’s BACT

⁸⁴ *Alaska Department of Environmental Quality*, 124 S.Ct. at 1018 (Kennedy, J. dissenting).

determination through judicial review of the state's exercise of discretion in the state courts.⁸⁵ The major objection of the dissent to EPA's position was that it upset the balance of power between the state and federal government in enforcing the CAA. The dissent positioned that power in the

⁸⁵ *Id.*, at 1013.

state, with very limited room for the EPA to be proactive after a state program was approved.⁸⁶

⁸⁶ *Id.* (Finding that the EPA had “no roving commission to ferret out arbitrary and capricious conduct by state agencies under the state equivalent of the APA. That task is left to state courts.”) A similar concern with federalism led the same justices to a similarly tortured statutory interpretation in *Solid Waste Agency of Northern Cook County v. United States Army*

Conversely, federalism issues might appear to lead to deference in *Wisconsin Dept. of*

Corp. of Engineers, 531 U.S. 159 (2001) (hereinafter “*Solid Waste*”). See further discussion at notes, *infra*.

Health & Family Services v. Blumer,⁸⁷ but the alignment of the justices makes it more likely a difference of statutory interpretation.⁸⁸ The issue was whether Wisconsin could use the “income-

⁸⁷ 543 U.S. 473 (2002).

⁸⁸ Justice Scalia, often aligned with proponents of state initiative, was in the dissent in this case.

first” method of computing eligibility for Medicaid.⁸⁹ Justice Ginsberg cites departmental

⁸⁹ Under the “income first” method, the “community spouse” (the spouse outside an institution) retains his/her own income and statutory share of the assets, but if the income is too low, then the institutionalized spouse gives some income to the community spouse. This differs from the “resources first” method, which would give more assets to the community spouse to

precedent, such as a Chicago Regional State Letter, the Petition for Certiorari, and a proposed rule that would allow either income -first or resources-first methods “in the spirit of Federalism.”⁹⁰

allow more income to be generated for that spouse. The “income first” method delays eligibility for Medicaid assistance and requires more of a spend down of assets before eligibility is met.

⁹⁰ *Wisconsin Dept.*, 543 U.S. at 497.

She held that the “Secretary’s position warrants respectful consideration.”⁹¹ The dissent, also citing *Mead*, held that the inconsistent positions and lack of analysis made deference

⁹¹ *Id.* (citing *U.S. v. Mead*) Chief Justice Rehnquist and Justices Kennedy, Souter, Thomas and Breyer concurred.

inappropriate. It also held that “[t]he statute is not ambiguous,”⁹² but did not therefore dismiss all possibilities of any deference by citation to the first step of *Chevron*. Therefore, all the Justices were seemingly using *Mead* as the designated standard of review, but one set of Justices found it

⁹² *Wisconsin Dept.*, 543 U.S. at 505 (Stevens, J, dissenting) Justices O’Connor and Scalia joined the dissent.

easier to glean Congressional intent from the wording of the statute and therefore ignore an agency interpretation.

In other situations, however, the clarity of the statute being construed led Justices to directly refuse to distinguish which form of deference was appropriate. Either no deference was

due because the agency was clearly wrong⁹³ or no deference was needed because the agency was

⁹³ *General Dynamics Land Systems, Inc. v. Cline*, 124 S.Ct. 1236, 1248 (2004) (Souter, J.) (“... we neither defer nor settle on any degree of deference because the Commission is clearly wrong”) (ADEA protects only older workers from preferences for younger workers, and does not protect younger workers from benefits given older workers). Justice Scalia would defer to the

agency entrusted with the statute, which had stated in a regulation that age could not be the basis of a hiring decision between two parties over 40, even if the elder was chosen. *General Dynamics*, 124 S.Ct. at 1249 (Scalia, J. dissenting).

clearly right.⁹⁴ This last position, namely that it is immaterial to determine what type of deference is needed when affirming the agency, was challenged by the concurrence in *Edelman v.*

⁹⁴ *General Dynamics*, 124 S.Ct. at 1251 (Thomas, J. dissenting)(agreeing that Court does not have to determine type of deference due to agency but “because the EEOC’s interpretation is consistent with the best reading of the statute....”).

Lynchburg College.⁹⁵ Justice O'Connor, joined by Justice Scalia, raised the philosophical question of whether or not the judiciary had "declared what the law is" with finality:

The Court reserved the question of whether the EEOC's regulation is entitled to *Chevron*

⁹⁵ 535 U.S. 106, 122 (2002) (O'Connor, J. concurring in the judgment).

deference. I doubt that it is possible to reserve this question while simultaneously maintaining, as the Court does, that the agency is free to change its interpretation. To say that the matter is ambiguous enough to permit agency choice and to suggest that the Court could countenance a different choice is to say that the Court would (because it must) defer

to a reasonable agency choice.⁹⁶

To these two Justices, the legal call must reside either in the court or the agency, and *Skidmore*

⁹⁶ *Id.*

and *Chevron* point to different branches having primacy. The remaining justices,⁹⁷ however, felt

⁹⁷ Justice Thomas joined the majority and also wrote a short concurrence in which he offered that he read the majority opinion to find the regulation “reasonable” and “not proscribed by the statute.” *Edelman*, 535 U.S. at 119 (Thomas, J. concurring). He therefore might not have found the statute to read “clearly” in one direction.

that if the meaning of the statute was clear, it need not delineate which type of deference was at issue and also opined that this position would not foreclose the agency from later changing its interpretation.⁹⁸

⁹⁸ Justice Souter wrote the majority opinion in *Edelman*, in which all the remaining Justices joined. *Edelman*, 535 U.S. 106, 114 (2002) A regulation of the EEOC was at issue, but

The theoretical differences between *Skidmore* and *Chevron*, therefore, do not seem to have

not one adopted with notice and comment procedures. Notice and comment are not required for EEOC regulations. Therefore, the *Mead* safe-haven rules could not resolve whether *Chevron* deference was appropriate. *Edelman*, 535 U.S. at 114, n7.

mattered much. Although the *Washington State* case and some other cases distinguished the two forms of deference, other than assuming *Chevron* applies to notice-and-comment rulemaking and formal adjudication, there has been little line-drawing. The majority of the Court also shows little concern on the matter which so greatly disturbed Justice Scalia, namely that under *Skidmore* deference the judiciary determines “what the law is,” which could bind the agency in the future. Under *Chevron*, the agency could determine and re-determine the meaning of an ambiguous

statute. Most Justices either ignored the conundrum, or, when deciding a case and employing *Skidmore*, used respect for the agency opinion to “bolster” interpretations of the statute that were arrived at through other means.⁹⁹

⁹⁹ *See, Washington*, 537 U.S. at 385-86.

B. Quests for Agency Input

Sometimes, however, the opportunity for an agency to make at least a preliminary call on the legal question of statutory meaning appears significant to some Justices. Cases that were not reviews of agency action brought this need to the fore. In these cases, the tension between judicial and agency roles in statutory interpretation is illuminated. Purportedly, as in the typical

review of agency action, the agency is nominally the policy maker.

For example, in a convoluted ruling the Justices held that a preliminary injunction was inappropriate when based on the premise that Medicaid pre-empted Maine's "Rx Program"

because of obstacle pre-emption.¹⁰⁰ This was not a review of an agency decision and the United

¹⁰⁰ *Pharmaceutical Research and Manufacturers of America v. Walsh*, 538 U.S. 644 (2003). The state program requires drug manufacturers to give all consumers a negotiated price; the state would require pre-approval for the manufacturer's drugs under Medicaid if a manufacturer refused. *Id.*, at 653-54. The Court also found that the program, on its face, did not

unduly burden interstate commerce. It noted that on all issues, facts could be developed on remand. Three Justices, however, dissented, upholding the district court's preliminary injunction on the basis of the facts then before it, which revealed no benefit to Medicaid from the prior authorization requirement. *Pharmaceutical Research*, 538 U.S. at 684 (O'Connor, J. concurring in part and dissenting in part; joined by Chief Justice Rehnquist and Justice Kennedy).

States was not a party to the case. The plurality therefore emphasized that this situation differed from a judicial review, which would follow if the Secretary of Health and Human Services would find Maine's plan invalid after the agency examined it for conformity with Medicaid. In that case, the Secretary's view would be "presumptively valid," rather than beginning a pre-emption

analysis with the presumption that the state law is valid.¹⁰¹ Three members of the plurality emphasized that the opinion did not decide whether Maine had to seek the Secretary's approval of

¹⁰¹ *Pharmaceutical Research*, 538 U.S. at 661 (Stevens, J., writing for self and Justices Souter, Ginsburg, and Breyer).

the Program, but noted the issue may arise in the future.¹⁰² Therefore, they registered some degree of desire for agency input. Three other justices insisted more strongly on agency involvement.

One such justice was the fourth member of the plurality, Justice Breyer. In addition to

¹⁰² *Id.*, at 668.(Stevens, J. writing for self and Justices Souter and Ginsburg).

noting the possible need for Secretarial approval of Maine’s program, he suggested that, on remand, the doctrine of primary jurisdiction would enable the court to refer the question of whether Maine’s program interferes with Medicaid to the agency.¹⁰³ This would allow the court to

¹⁰³*Pharmaceutical Research*, 538 U.S. at 673 (Breyer, J. concurring in part and concurring in judgment).

retain jurisdiction while obtaining the agency's views. Two additional justices only concurred in the judgment and would have not only have dissolved the preliminary injunction, but also would have dismissed the case.

These two justices had differing rationales for their objections, both encompassing the need for agency action. Justice Scalia maintained that the objecting industry group's sole remedy

was to petition the Secretary to enforce the Medicaid provisions by terminating the state's funding for Medicaid as a sanction for the State violating its obligations. Court action could only be invoked to review the Secretary's decision to not so enforce the Medicaid Act.¹⁰⁴ This comports

¹⁰⁴*Pharmaceutical Research*, 538 U.S. at 675 (Scalia, J. concurring in the judgment) (citing 42 U.S.C. § 1396c and 5 U.S.C. § 706(2)(A)).

with Justice Scalia's theoretical enthusiasm for *Chevron*: the agency has the primary role in interpreting ambiguous statutes. Justice Thomas also maintained that judicial review of a Secretary's decision would be the only appropriate route into court, but for a different reason, which also centered on agency prerogatives.

Justice Thomas argued that it would be impossible for the industry group to forward an obstacle preemption claim directly in court, without agency input at the threshold. He referred to

familiar concepts in judicial review of agency statutory interpretation in his analysis of obstacle preemption decision-making. Justice Thomas defined “obstacle pre-emption as “turn[ing] on whether the goals of the federal statute are frustrated by the effect of the state law.”¹⁰⁵ To Justice Thomas, to go directly to the Court is actually an allegation that the statute is unambiguous and

¹⁰⁵ *Pharmaceutical Research*, 538 U.S. at 679 (Thomas, J. concurring in judgment).

precludes approval of Maine's Rx Program.¹⁰⁶ He fits this into the *Chevron* agency review paradigm: if the Secretary had approved the program, then his decision would be overturned at

¹⁰⁶ *Id.*, at 680.

step one of *Chevron*.¹⁰⁷ In addition to Justice Thomas’s belief that Congress had not clearly spoken on the issue, he found that an allegation of obstacle pre-emption is inconsistent with an allegation that a statute is unambiguous:

¹⁰⁷ *Id.* (*Chevron* requires rejection of agency interpretation if Congress has “directly spoken” in a contrary manner).

Obstacle pre-emption's very premise is that Congress has not expressly displaced state law, and thus not 'directly spoken' to the pre-emption question. Therefore, when an agency is charged with administering a federal statute as the Secretary is here, *Chevron*

imposes a perhaps-insurmountable barrier to a claim of obstacle pre-emption.¹⁰⁸

It is the agency that must consider the differing goals and purposes of the Medicaid Act to ascertain whether the Maine Rx Program disrupts the balance struck by Congress; the delegation

¹⁰⁸ *Id.*, at 681.

of this task to the agency “precludes federal court intervention on the basis of obstacle pre-emption.”¹⁰⁹ Naturally, if either the state or the industry group dislikes the agency’s decision, the displeased may seek judicial review.

¹⁰⁹ *Id.*, at 682.

In all, six Justices in *Pharmaceutical Research* had some degree of discomfort with deciding whether Maine's Program comported with the Medicaid statute without the input of the administering agency. The remaining three were content to make some statutory interpretation and to find the trial judge had not abused his discretion in granting a preliminary injunction.¹¹⁰

¹¹⁰ *Pharmaceutical Research*, 538 U.S. at 684 (O'Connor, J. concurring in part and

Although the case does not directly deal with how to review agency interpretations, it does highlight that the Justices at least give lip service to the goal of receiving agency input.

dissenting in part) (statute forecloses prior authorization requirements for Medicaid beneficiaries with no Medicaid related goals). Chief Justice Rehnquist and Justice Kennedy joined the opinion.

In another, more typical setting for judicial review, there was a disagreement as to what, if anything, an agency had actually decided. The case was *New York v. FERC*,¹¹¹ in which two questions were resolved. The first was whether FERC correctly assumed jurisdiction over

¹¹¹ *New York v. FERC*, 535 U.S. 1 (2002).

unbundled transmission connected with interstate retail sales of electricity.¹¹² The Court

¹¹² At least two things must be purchased if someone wants electricity to be used at a particular location: the actual megawatts of electricity and the transportation of the electricity (referred to as transmission) to the specific locale of use. In the past, most transactions were

completed with one provider, often an integrated utility, giving both the commodity and the transmission. These would be “bundled” sales. With the advent of independent power generators and more open access to the transmission grid, some consumers could purchase their electricity separately, and then seek transmission to their locale in a separate transaction. This would be an “unbundled” retail sale, so-described because the electricity and the transmission were contracted

unanimously answered this question affirmatively, upholding jurisdiction over interstate transmission. The second question was whether FERC correctly abstained from jurisdiction over interstate transmission “bundled” with retail interstate sales. The Court split six-to-three on the latter question. The dispute centered on what decision, if any, the agency might have made on the

for separately.

question and to what extent such decision could be subject to deference.

In an opinion by Justice Stevens, the entire court found clear statutory language in the Federal Power Act on federal jurisdiction over interstate transmission: “There is no language in the statute limiting FERC’s *transmission* jurisdiction to the wholesale market, although the statute

does limit FERC's *sale* jurisdiction to that at wholesale."¹¹³ Therefore, FERC could assert

¹¹³ *New York*, 535 U.S. at 17 (emphasis in original). See, Section 201(b) of the Federal Power Act: "The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce ant to the sale of electric energy at wholesale in interstate commerce" 16

jurisdiction over unbundled retail transmission in interstate commerce. The majority of the Court also found that FERC had not disclaimed jurisdiction over transmission bundled with retail sales, but simply found it unnecessary to address the issue in a rulemaking concerned primarily with the wholesale market. Concurring with the Court of Appeals, the majority called FERC's decision "a

U.S.C. § 824 (b).

statutorily permissible policy choice.”¹¹⁴ The majority cited neither *Chevron* nor *Mead*. The language, however, was reminiscent of *Chevron*.

¹¹⁴ *New York*, 535 U.S. at 28, quoting case below, *Transmission Access Policy Group v. FERC*, 225 F. 3d 667, 694-95 (C.A.D.C. 2000).

Although the majority upheld the agency without citation, the dissent on this issue, which Justice Thomas wrote and Justices Scalia and Kennedy joined, questioned whether FERC had

actually answered the second question in the manner the majority described.¹¹⁵ Therefore, it discussed the scope of cases that support deference. The dissent examined two issues: 1) whether FERC properly found no need to regulate transmission in bundled retail sales, and 2) whether

¹¹⁵ *New York*, 535 U.S. at (Thomas, J. concurring in part and dissenting in part).

FERC had jurisdiction over retail jurisdiction should it later determine a need to regulate. On both issues, more was needed than the FERC's current record.

The dissent first noted that FERC failed to explain why regulating bundled transmission

was not “necessary” to correct “undue discrimination.”¹¹⁶ This omission required remand.¹¹⁷

¹¹⁶ *Id.*, at 30-31. See also, *Id.*, at 34-35: “The fact that FERC found undue discrimination with respect to transmission used in connection with both bundled and unbundled wholesale sales and unbundled retail sales indicates that such discrimination exists regardless of whether the

transmission is used in bundled or unbundled sales. Without more, FERC’s conclusory statement that ‘unbundling of retail transmission’ is not ‘necessary’ lends little support to its decision not to regulate such transmission. And it simply cannot be the case that the nature of the commercial transaction controls the scope of FERC’s jurisdiction.”

Moreover, the dissenters read the statute as unambiguously granting FERC jurisdiction over

¹¹⁷ *Id.*, at 42.

interstate transmission of electricity.¹¹⁸ Even if the statute was ambiguous, *Chevron* would not be applicable because FERC never truly resolved the jurisdictional issue, but refused to resolve it: “the Court will defer to an agency’s reasonable *interpretation* of an ambiguous statute, this

¹¹⁸ *Id.*, at 37.

passage [in FERC’s rule-making] does not provide an interpretation to which the Court can defer.”¹¹⁹ Additionally, the dissent found FERC’s statements on whether or not it had such jurisdiction to be contradictory and inconsistent: “These inconsistencies alone, however, convince

¹¹⁹ *Id.*, at 38.

me that the Court should [not] defer. . . .”¹²⁰ The dissent noted that the majority did not weigh the fact that the agency altered its opinion in determining whether the Court should defer. According to the cited case, namely *United States v. Mead Corp.*, the changing appraisal of

¹²⁰ *Id.*

jurisdiction should have been a factor in deciding what deference might be due FERC's decision.¹²¹

¹²¹ *Id.* at , citing 533 U.S. 218, 228 (2001).

These instances of the Justice seeking agency input show that at some level there is still respect for the rationales for the existence of agencies, which parallel arguments for deference. Congress often creates agencies to make policy choices that could not be stated clearly in legislation. Reasons for the ambiguity reflect the numerous deficiencies inherent in the legislature: it often lacks the time, the expertise, and the political will to solve complex regulatory issues. Therefore, as *Chevron* notes, there is some degree of delegation to the agency of the

decisional power. Additionally, it would be foolish to dismiss off-handedly any wisdom the agency could have accumulated, which is the heart of *Skidmore*'s justification for deference.

C. Reviews That Do Not Acknowledge Agency Interpretation

More intriguing than the times that the Supreme Court seeks agency views are the times that it fails to even explicitly acknowledge the existence of these views as the Justices present their analyses. This is not simply that they declare that Congress has clearly spoken on a matter,

which would be a reason to grant no deference to a contrary agency opinion.¹²² In the subject

¹²² See notes, *supra*.

cases, there is no mention of the agency interpretation as a starting point.¹²³

¹²³ This situation also differs from one in which the agency argues a position in a brief, but cannot reference a pre-existing departmental position. Although at one point such interpretations might have garnered deference, Justice O'Connor, speaking for all Justices except Justice Scalia,

questioned such deferential treatment, noting “the Government does not identify any administrative documents in which EPA has espoused that position.” *South Florida Water Management District v. Miccosukee Tribe of Indians*, 124 S.Ct. 1537, 1544 (2004) (refusing to decide whether no permit was needed to discharge water from one navigable water to another because of the unitary nature of navigable waters). The majority in the case suggested that the

issue of the unitary nature of the waters could be addressed on remand; Justice Scalia would not have addressed the issue at all nor remanded the case. *South Florida Water Management District*, 124 S.Ct. at 1547 (Scalia, J., concurring in part and dissenting in part). The brief for the government had not cited either *Chevron* or *Mead* as requiring deference for its position. See, *Brief for the United States as Amicus Curiae Supporting Petitioner*, 2003 WL 22137034 (Sept.

For example, the opinion for the Court in *Doe v. Chao*¹²⁴ does not discuss the Office of

10, 2003).

¹²⁴ 124 S.Ct. 1204 (2004). The Department of Labor had revealed the petitioner's Social

Security number as it adjudicated Black Lung Benefits in violation of the Privacy Act's restrictions on promulgation of the number. The Department agreed that the disclosure was intentional and willful. *Id.*, at 1206. Moreover, the government agreed that the plaintiff was "adversely affected" by the disclosure of his number for fear of identity theft or credit injury *Doe v. Chao*, 124 S.Ct. at 1212 (Ginsburg, J. dissenting).

Management and Budget Guideline that interpreted the Privacy Act.¹²⁵ This is not because the parties ignored the Guideline; the petitioner cited *Mead* and argued that the opinion of the OMB

¹²⁵ See, *Doe v. Chao*, 124 S.Ct. at 1215-16 (Ginsburg, J. dissenting) Justices Breyer and Stevens joined the dissent.

was entitled to respect because it was contemporaneous, longstanding, and comported with the Act's language, structure, purpose, and context.¹²⁶ The government response acknowledged the

¹²⁶ Brief for Petitioner, 2003 WL 22038406.

Guideline, but obviously concluded the opposite about its correctness.¹²⁷ The question in the case

¹²⁷ Brief for Respondent, 2003 WL 2248 9257 at page 47-48 (alleging that the OMB disavowed the position because OMB belatedly understood that a waiver of sovereign immunity was involved).

was whether a claimant who had proven an adverse effect from the Department of Labor's willful and intentional violation of the Privacy Act would be entitled to a minimum amount of \$1000 damages, even if he could not prove actual monetary damages from the illegal disclosure of his

Social Security number.¹²⁸

¹²⁸ Under the Privacy Act of 1974, a person must proving “adverse” effect from a failure to comply with the act. See, 5 U.S.C.A. § 552a(g)(1). Moreover, if “the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the

individual in an amount equal to the sum of - (A) actual damages sustained by the individual as a result of the refusal or failure [to comply], but in no case shall a person entitled to recovery receive less than the sum of \$1,000; and (B) the cost of the action together with reasonable attorney fees as determined by the court.” 5 U.S.C.A. § 552a(g)(4)(g)(1)(D).

Justice Souter, writing for the majority, did not mention the OMB interpretation and held that the clear reading of the statute required an “actual damage” before there was any ability to get the minimum payment based on a “straight-forward textual analysis.”¹²⁹ The dissent’s textual

¹²⁹ *Doe v. Chao*, 124 S.Ct. at 1208. Justice Souter was joined by Chief Justice Rehnquist

analysis, however, reached the opposite conclusion.¹³⁰ More importantly, the dissenting opinion

and Justices Scalia, Thomas, Kennedy, and O'Connor. Justice Scalia did not join in certain aspects of the opinion, namely those that examined legislative history.

¹³⁰ *Doe v. Chao*, 124 S.Ct. at 1214 (Ginsburg, J. dissenting) (arguing that the different

notes that Congress charged OMB to interpret the Act, which it did almost contemporaneously. Its Guidelines, amended several times since, always required payment of “actual damages or

words “actual damages sustained by the individual”” and “person entitled to recovery” should not be equated).

\$1,000, whichever is greater.”¹³¹ No mention of either *Chevron* or *Mead* was made; the

¹³¹ *Id.*, at 1215-16. The opinion also noted that the brief of the government argued that an OMB official stated that OMB no longer interpreted the Guideline to require paying a party without actual damages \$1000. The response was that “[s]uch an informal communication cannot

interpretation simply seemed to bolster her reading of the statute, as did the purpose of the statute

override OMB's contemporaneous, long-published construction of § 552a(g)(4).” *Id.*, at 1216, n. 2. This treatment is in accord with a *Mead*-like review.

and its legislative history.¹³² The agency interpretation had no special status.

Examination of the briefs and oral argument may illuminate why it was decided the way it

¹³² *Id.*, at 1216.

was. The government's brief argued that the true issue was whether the government's sovereign immunity was waived, an issue on which an agency purportedly had no special expertise.¹³³ The government and Justices also expressed concern that the public fisc would be too greatly

¹³³ Brief for Respondent, 2003 WL 2248 9257, at 48.

challenged if minimum damages were awarded to all parties adversely affected.¹³⁴ Therefore, the

¹³⁴ Brief for Respondent, 2003 WL 2248 9257, at pg. 22, fn 5 (delineating parade of terribles about the amount of liability possible). See also, Justice Breyer, who in his dissent notes that there is no danger to the public fisc because “intentional or willful” has been narrowly

agenda against interpreting the Privacy Act in the manner the agency once did was perhaps

construed by the courts so as to require some degree of bad faith on the part of the responsible officer. *Doe v. Chao*, 124 S.Ct. at 1221 (Breyer, J. dissenting) and the questions to the petitioner about the costs to the government if class actions were allowed with his theory, Oral Argument, 2003 WL , at 10-11.

obvious.

There also was an obvious undercurrent in another decision that failed to analyze an agency decision: some Justices disagreed with the outcome of an earlier case. In 1983, a divided court found the reservation of “coal and all other minerals” in patents issued under the 1916

Stock-raising Homestead Act included sand and gravel.¹³⁵ In *Bedroc Limited, LLC v. United*

¹³⁵ *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 55-60 (1983).

States,¹³⁶ another fractured court determined that sand and gravel were not reserved to the United States under the Pittman Underground Water Act of 1919, which reserved all “valuable

¹³⁶ 124 S.Ct. 1587 (2004).

minerals.”¹³⁷ The BLM had started the ball rolling with a trespass claim against the surface owners. There was, therefore, an agency decision confirmed by the Interior Board of Land Appeals.¹³⁸ None of the opinions discuss the Department’s rationale or decision at any length.

¹³⁷

¹³⁸ See, *Bedroc*, 124 S.Ct. at 1591. The case, however, was not decided on direct appeal.

Nor do they consider levels of deference appropriate to agency interpretations in any detail. All of the opinions proceeded to independent judicial statutory interpretation.

The three opinions in the case revolved around the Justices's attitudes toward the earlier case, namely, *Western Nuclear* and its interpretation of the Stock-raising Homestead Act. The plurality opinion distinguished the Pittman Act from the Stockraising Homestead Act and held

that, under the unambiguous ordinary meaning of the term “valuable minerals,” sand and gravel were not included in Nevada in 1919.¹³⁹ The concurrence, rather than distinguishing the two statutes, would have found *Western Nuclear* to be wrongly decided, but would not overturn it

¹³⁹ *Id.*, at 1593. Chief Justice Rehnquist wrote the opinion, with Justices O’Connor, Scalia and Kennedy joining.

because of reliance issues. The justices therefore simply concurred in the judgement rather than extend the error to this Act, which dealt with limited land in Nevada.¹⁴⁰

The dissenting justices, however, had less difficulty with the *Western Nuclear* decision.

¹⁴⁰ *Bedroc*, 124 S.Ct. at 1597 (Thomas, J. with Breyer, J. concurring in judgement).

More importantly, they found no reason to distinguish Congress's intent in reserving minerals in the two statutes and would have interpreted their breadth similarly.¹⁴¹ One rationale for treating the reservations similarly was that the agency charged with construing the Acts had consistently

¹⁴¹ *Bedroc*, 124 S.Ct. at 1598 (Stevens, J. dissenting) Justices Souter and Ginsburg joined.

treated them in the same manner; deference was therefore due to the agency interpretation. ¹⁴²

¹⁴² “The policy choice at issue in this case is surely one that should be made either by Congress itself or by the executive agency administering the Pittman Act. Congress’ acceptance of the holding in *Western Nuclear* for the past two decades should control our decision, and any residual doubt should be eliminated by the deference owed to the executive agency that has

Beyond whether or not the Justices mention or rely on an agency pronouncement, another distinction between the different rulings in *Bedroc* is in their authors' approaches to statutory

consistently construed the mineral reservations in land grant statutes as including sand and gravel." *Id.*

interpretation, that is, the split between textualism and intentionalism, which are two schools of statutory construction.¹⁴³ To a textualist, the words of the statute take precedent over any

¹⁴³ See generally, Lars Noah, *Divining Regulatory Intent: The Place for a “Legislative History” of Agency Rules,* 51 *Hastings L.J.* 255, 264-74 (2000) and Cass R. Sunstein and Adrian

legislative history or other indications of intent.¹⁴⁴ An intentionalist might also find a clear

Vermeule, *Interpretation and Institutions*, 101 Mich. L. Rev. 885, 891-913 (2003) (delineating arguments of various commentators for differing modes of statutory interpretation).

¹⁴⁴ *Pennsylvania v. Union Gas Co.* 491 U.S. 1, 29 () (Scalia J, concurring in part and dissenting part) (“Congress enacts texts, not intentions.”)

meaning in a statute. However, the relevant information such a judge would consider is broader.

III. Judicial Statutory Interpretation: The Textualists v. the Intentionalists

Some Justices, most notably Justices Scalia and Chief Justice Rehnquist, fall into the textualist camp. Justices Stevens and Breyer, however, are the most consistent users of an intentionalist framework. One avenue into the sometimes stark divergence in judicial statutory interpretation models is to explore some “dueling quotations,” in which Justice Stevens and Chief

Justice Rehnquist each seemingly quoted Chief Justice Marshall in support of their own interpretive model. The quotations from *United States v. Fisher*¹⁴⁵ do not bear up under scrutiny to the weight the opinion writers put upon them, but the divergence in the writers' approaches to statutory interpretation is real.

¹⁴⁵ 2 Cranch 358, 2 L.Ed.. 304, 6 U.S. 358 (1805).

The quotations from *Fisher* at first glance do appear to support the interpretive mode of the quoting Justices. Justice Stevens's quotation came in his concurrence in a case seeking to determine whether a scrivener's error in the 1994 Bankruptcy code amendments was what made it

impossible for a Chapter 7 debtor's attorney to be paid from the bankruptcy estate.¹⁴⁶ Justice Stevens opined that because a leading bankruptcy treatise found the deletion of debtors' attorneys from the list of those to be allowed fees out of the estate was a scrivener's error, "we have a duty

¹⁴⁶ *Lame v. United States Trustee*, 124 S.Ct. 1023 (2004).

to examine legislative history.”¹⁴⁷ His footnote to this comment was: “As Chief Justice Marshall

¹⁴⁷ *Lame v. United States Trustee*, 124 S.Ct. at 1035 (Stevens, J. concurring) Looking at the history, the error was brought to the attention of Congress by a group of bankruptcy attorneys who thought the error was not worth objecting about. Therefore, the court’s reading being more

stated, ‘Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived ...’¹⁴⁸ The quotation apparently is meant to bolster reliance on

natural than that of the attorney, Justice Stevens concurred. He was joined by Justices Souter and Breyer.

¹⁴⁸ *Id.*, 124 S.Ct. at 1035, n.1, citing, *United States v. Fisher*, 6 U.S. at 386.

legislative history. In the actual case, however, this comment preceded Justice Marshall's words: "Where the intent is plain, nothing is left to construction."¹⁴⁹ It is, therefore, less clear that Justice Marshall was calling for across-the-board use of extrinsic evidence. Chief Justice Rehnquist's purported reliance on Chief Justice Marshall was even more misplaced.

¹⁴⁹ *Fisher*, 6 U.S. at 386.

In *Bedroc Limited, LLC v. United States*,¹⁵⁰ Chief Justice Rehnquist read the text of the interpreted statute to exclude sand and gravel from the mineral reservation made pursuant to it. He maintained that to look at legislative history when a statute is clear would be to disaffirm

¹⁵⁰ 124 S.Ct. 1587 (2004).

precedent from Chief Justice Marshall dating to 1805: “Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.”¹⁵¹ The quotation, however, is not from Justice Marshall’s opinion in the case; it is from Justice

¹⁵¹ *Bedroc*, 124 S.Ct. at 1595, ft. 8 quoting *United States v. Fisher*, 6 U.S. at 399.

Washington, who did not participate in the case, but stated how he would have ruled if he had participated.¹⁵² Moreover, the quotation continues: “But if, from a view of the whole law, or from

¹⁵² The case concerned whether all debts to United States, even one emerging from the normal course of business, would have priority under the bankruptcy laws. Chief Justice Marshall answered the question affirmatively. Using the language of the title of the Act, Justice

Washington, however, would have disagreed with Marshall if he had participated in the case. The provision would not be interpreted as encompassing the defendant's debt, but would be limited to bankrupts indebted to the United States who were "revenue officers or other persons accountable for public money." He would find it inequitable and wrong to include a preference for all other debts to the federal government. *United States v. Fisher*, 6 U.S. at 400 (Washington, J.).

other laws in *pari materia*, the evident intention is different from the literal import of the terms employed to express it in a particular part of the law, that intention should prevail, for that in fact is the will of the legislature.”¹⁵³ Justice Washington also states that “...if the literal expressions of the law would lead to absurd, unjustified, inconvenient consequences, such a construction should

¹⁵³ *Id.*, at 399.

be given as to avoid such consequences, if, from the whole purview of the law, and giving effect to the words used, it may fairly be done.”¹⁵⁴ The opinion quoted did not limit consideration to the literal words of a statute, but looked at the broader setting of the words, although not necessarily legislative history.

¹⁵⁴ *Id.*, at 400.

The faulty attribution aside, Justice Rehnquist's opinion in *Bedroc* does pay strict heed to the particular words the legislature chose. He emphasized that the Pittman Act, as opposed to the act construed in *Western Nuclear*, referred to "valuable minerals," which to Justice Rehnquist

meant that “Congress has textually narrowed the scope of the term,”¹⁵⁵ foreclosing examination of intent:

The preeminent canon of statutory interpretation requires us to ‘presume that [the]

¹⁵⁵ *Bedroc*, 124 S.Ct. at 1593.

legislature says in a statute what it means and means in a statute what it says there.’ Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous. We think the term ‘valuable’ makes clear that Congress did not intend to include sand and gravel in the Pittman Act’s mineral reservation.¹⁵⁶

¹⁵⁶ *Id.*

Justice Stevens, in the dissent, argued that the distinction in wording between the two statutes was not as great as it seems; the Pittman Act used the phrase “valuable mineral” only twice; there were six uses of just “mineral.”¹⁵⁷ Hence, even picking words to interpret is discretionary.

¹⁵⁷ *Bedroc*, 124 S.Ct. at 1597 (Stevens, J. dissenting)

Nevertheless, Justice Rehnquist insisted that his mode of textual interpretation eschews discretion: “We fail to see, moreover, how a court exercises unconstrained discretion when it carries out its ‘sole function’ with respect to an unambiguous statute, namely, to ‘enforce it

according to its terms.”¹⁵⁸ This comment responded to Justice Stevens, who had accused the majority of embarking on a path of judicial usurpation of legislative prerogative. Justice Stevens bemoaned the failure to use legislative history as an interpretative guide: “A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, increases the risk that the

¹⁵⁸ *Bedroc*, 124 S.Ct. at 1595, ft. 8. Compare a Scalia quote

judge's own policy preferences will affect the decisional process.”¹⁵⁹ The two justices cannot

¹⁵⁹ *Bedroc*, 124 S.Ct. at 1598 (Stevens, J. dissenting). He elaborated: “In refusing to examine the legislative history that provides a clear answer to the question whether Congress intended the scope of the mineral reservations in these two statutes to be identical, the plurality abandons one of the most valuable tools of judicial decisionmaking. As Justice Aharon Barak of

agree on fundamental premises. Justice Stevens acknowledged that words are tricky and, if

the Israel Supreme Court has explained, the ‘minimalist’ judge ‘who holds that the purpose of the statute may be learned only from its language’ retains greater discretion than the judge who ‘will seek guidance from every reliable source.’” *Id.*, citing *Judicial Discretion* 62 (Y. Kaufmann trans, 1989).

interpreted in a vacuum, would allow for judicial policy-making. On the other hand, Justice Rehnquist believes that adherence to the seeming clarity of the English language avoids any judicial maneuvering. Nevertheless, Justice Rehnquist is not a total purist and, on occasion, joins in opinions using legislative history.¹⁶⁰ Justice Scalia, however, goes out of his way to dissociate

¹⁶⁰ E.g., In one case opinion that he joined, Justice Breyer covered all bases as he stated

that “[f]or those who find legislative history useful, the House Report’s account should end the matter,” but continued on to examine the words of the statute and its only “plausible purpose.” F. Hoffman -La Roche Ltd. v. Empagran S.A., 124 S.Ct. 2359, 2366 (2004).

himself with any and all mention of legislative history.¹⁶¹

¹⁶¹ *See, e.g.*, *Lame v. United States Trustee*, 124 S.Ct. 1023 (2004) (Justice Scalia does not join Section 3 of the opinion, which examines legislative history and finds it ambiguous); *Doe v. Chao*, 124 S.Ct. 1204, 1210, n. 7 (2004) (Justice Scalia does not join text or footnote discussing legislative history); and *F. Hoffman -La Roche Ltd. v. Empagran S.A.*, 124 S.Ct. 2359, 2373

(2004) (Scalia, J. concurring) (“ I concur in the judgment of the Court because the language of the statute is readily susceptible of the interpretation the Court provides and because only that interpretation is consistent with the principle that statutes should be read in accord with the customary deference to the application of foreign countries’ laws within their own territories.”)

Justice Scalia, therefore, is the purest textualist on the bench. One such example is his opinion in *Federal Communications Commission v. NextWave Personal Communications*

This last example was not technically illustrative of Justice Scalia rejecting legislative history, but was an example of resistance to trying to construe a statute consistent with the act's intent.

Incorporated.¹⁶² The FCC had revoked NextWave's communication licenses for failure to make

¹⁶² 537 U.S. 293 (2003). NextWave purchased licenses for personal communications services through auctions. It was to pay pursuant to an installment contract, but it initiated a Chapter 11 bankruptcy. The FCC claimed that the licenses were terminated pursuant to their terms for failure to make payments.

payments after NextWave entered bankruptcy. Justice Scalia looked to the statute forbidding certain governmental revocations: “[A] governmental unit may not... revoke . . . a license ... to ... a person that is ... a debtor under this title . . . solely because such debtor . . . has not paid a debt that is dischargeable under this title. . . .”¹⁶³ He concluded that because the statute does not have

¹⁶³ *NextWave*, 537 U.S. at 300 (summarizing Bankruptcy Code § 525(a)).

an exception for revocations for valid regulatory purposes, even if that might have been preferable, the FCC's motive in revoking the license was not material. Justice Scalia then defended his insistence on simply looking at the text of the statute for four pages of the opinion.¹⁶⁴ Justice Breyer carried the intentionalist banner in the case.¹⁶⁵

¹⁶⁴ *Id.*, at 304-08.

¹⁶⁵ Justice Stevens concurred in the case, but not for the Justice Scalia’s textualist reasoning: “In sum, even though I agree with Justice Breyer’s view that the literal text of a statute is not always a sufficient basis for determining the actual intent of Congress, in these cases I believe it does produce the correct answer.” *NextWave*, 537 U.S. at 310 (Stevens, J. concurring).

Justice Breyer warned that strict textualism could lead to error if the literal wording of a statute is considered apart from the purpose of the statute. Linguistics caution against such an approach:

General terms as used on particular occasions often carry with them implied restrictions as to scope. 'Tell all customers that ...' does not refer to every customer of every business in

the world. That is also so for a legal reason. Law as expressed in statutes seeks to regulate human activities in particular ways. Law is tied to life. And a failure to understand how a statutory rule is so tied can undermine the very human activity that the law seeks to

benefit. ‘No vehicles in the park’ does not refer to baby strollers or even to tanks used as part of a war memorial.¹⁶⁶

¹⁶⁶ *NextWave*, 537 U.S. at 311 (Breyer, J. dissenting) (citing Fuller, Positivism and Fidelity to Law – A Reply to Professor Hart, 71 Harv. L. Rev. 630, 663 (1958)). See also, *Id.* at

To Justice Breyer, the purpose of the statute could be derived from its title, language, and its

317, where Justice Breyer further invokes the absurdity doctrine, if not by name.

history. This purpose was to protect debtors from discrimination against them simply because

they have become bankrupt and to allow them to get a “fresh start,” not to prevent the government

from securing a security interest in a license.¹⁶⁷ Although the purpose-driven interpretation did

¹⁶⁷ *Id.*, at 313.

not command a majority in *NextWave*, on the same day that *NextWave* was decided, a second case

was handed down in which the purpose of the statute governed the interpretation of it.¹⁶⁸

¹⁶⁸ The two cases were decided on January 15, 2003. Furthering the coincidence, both

were argued on October 8, 2002.

In *Barnhart v. Peabody Coal Co.*,¹⁶⁹ the intentionalists were in the majority. The Coal

¹⁶⁹ 537 U.S. 149 (2003).

Industry Retiree Health Benefit Act of 1992 included a provision that the Commissioner of Social

Security “shall, before October 1, 1993” assign coal industry retirees to an existing operator or

other entity pursuant to a statutory preference system.¹⁷⁰ Each company would pay premiums for

¹⁷⁰ 26 U.S.C. § 9706(a).

assigned retirees. Unassigned retirees (and their survivors) would have benefits funded out of

specified funds, the expense of which would be partially born by companies in proportion to the

number of retirees assigned to them. In the case, a company objected to the validity of an initial

assignment of a retiree that was made after October 1, 1993.¹⁷¹

¹⁷¹ *Barnhart*, 537 U.S. at 152. The majority included Chief Justice Rehnquist, and Justices

Justice Souter, for the majority, found the assignment valid despite its tardiness. When

Stevens, Kennedy, Ginsburg, and Breyer.

Congress was not clear on stating what was the impact of failing to meet a deadline, the court would not infer that authority would terminate:

[A] statute directing official action needs more than a mandatory “shall” before the grant

of power can sensibly be read to expire when the job is supposed to be done. Nothing so

limiting, however, is to be found in the Coal Act: no express language supports the

companies, while structure, purpose and legislative history go against them.¹⁷²

¹⁷² *Id.*, at 161. *See also*, F. Hoffman -La Roche Ltd. v. Empagran S.A., 124 S.Ct. 2359,

2372 (2004), where Justice Breyer acknowledges that the plaintiffs might have the “most natural” linguistic argument, but then rejects it: “At most, respondents’ linguistic arguments might show that respondents’ reading is the more natural reading of the statutory language. But those

arguments do not show that we *must* accept that reading. And that is the critical point. The considerations previously mentioned - those of comity and history - make clear that the respondents' reading is not consistent with the FTAIA's basic intent. If the statute's language

reasonably permits an interpretation consistent with that intent, we should adopt it.”

The objective was to assign as many retirees as possible to a responsible operator; if the date for

action was jurisdictional, rather than a spur to action, the Commission would end up assigning a

smaller amount of retirees.¹⁷³

¹⁷³ *Id.*, at 171.

To Justice Scalia, however, there was no easy read of Congress's objectives; the Act was

riddled with compromise and lengthy debate.¹⁷⁴ Therefore, faithful adherence to the text is in

¹⁷⁴ *Peabody Coal Co.*, 537 U.S. at 183 (Scalia, J. dissenting). Justices O'Connor and

Thomas joined the dissent. Justice Thomas separately dissented to emphasize that judges must construe statutes in accord with their “ordinary and natural meaning;” “shall” means a mandatory requirement. *Peabody Coal Co.*, 537 U.S. at 184 (Thomas, J. dissenting).

order:¹⁷⁵ “When an agency exercises a power that so tests constitutional limits, we have all the

¹⁷⁵ *Id.*, at 174.

more obligation to assure that it is rooted in the text of a statute. . . . When a power is conferred

for a limited time the *automatic* consequence of the expiration of that time is the expiration of the

power”¹⁷⁶ Additionally, other provisions of the Coal Act would be “rendered incoherent” if this

¹⁷⁶ *Id.*, at 174-175. He argues that the assignment power could violate the Constitution if

it imposes severe retroactive liability on some coal companies, citing *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). To Justice Scalia, this increases the need to strictly construe the statute.

reading was not adopted.¹⁷⁷ The majority, however, found the textual maneuvering ungraceful:

¹⁷⁷ *Id.*, at 179.

“There is a basic lesson to be learned from Justice Scalia’s contortions to avoid the untoward

results flowing from his formalistic theory that time limits on mandatory official action are

always jurisdictional when they occur in an authorizing provision. The lesson is that something is

very wrong with the theory.”¹⁷⁸ The textualist justice was accused of a formal rigidity that lost

¹⁷⁸ *Peabody Coal Co.*, 537 U.S. at 162, ft.8

sight of the larger picture.

In other instances, however, Justice Scalia gathered colleagues to the textualist fold. In

Barnhart v. Thomas,¹⁷⁹ Justice Scalia, for a unanimous Court, decided that the Social Security

¹⁷⁹ 540 U.S. 20 (2003).

Administration, without additional inquiry, could classify a person as not disabled, and thus ineligible for Supplemental Security Income, if the person could still do her previous work, even if such work no longer exists in significant numbers in the national economy. The worker in question had been an elevator operator, and the relevant statute defined disability in material part

as follows:

An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that *he is not only unable to do his*

previous work but cannot, considering his age, education, and work experience, engage in

*any other kind of substantial gainful work which exists in the national economy.*¹⁸⁰

¹⁸⁰ 42 U.S. C. § 423 (d)(2)(A) as quoted in *Barnhart*, 540 U.S. at 379 (emphasis by Justice

The Third Circuit had applied the modifying “which exists in the national economy” to both “any

Scalia).

other kind of substantial gainful work” and “previous work.”¹⁸¹ Justice Scalia cited rules of

¹⁸¹ Thomas v. Apfel, 294 F.3d 568, 572 (2002).

grammar that would counter this and require the modifier to only attach to the latter situation.¹⁸²

¹⁸² *Barnhart*, 540 U.S. at 380-81.

He also provided the example of whether a parent would tolerate a child claiming immunity if a

party the child threw did not damage the family home when the son was told, before his parents

left for a weekend: “You will be punished if you throw a party or engage in any other activity that

damages the house.”¹⁸³ To Justice Scalia, the parents clearly were prescribing two activities,

¹⁸³ *Id.*, at 381.

namely, no parties *and* no damage to the home, and the proscriptions were potentially motivated

by different concerns.¹⁸⁴

¹⁸⁴ *Id.*

The remaining Justices, however, did not have to totally subscribe to Justice Scalia's textualist explication. The Social Security Administration regulations clearly held that a person who could still perform his or her previous employment would not be considered disabled,

without regard to whether such jobs remained available. The opinion held that *Chevron* required

deference if the statute did not “unambiguously require a different interpretation” and the SSA’s

interpretation was “reasonable.”¹⁸⁵ Justice Scalia did not decide whether the statute “compels the

¹⁸⁵ “The proper *Chevron* inquiry is not whether the agency construction can give rise to

undesirable results in some instances (as here *both* constructions can), but rather whether, in light of the alternatives, the agency construction is reasonable.” *Id.*, at 382.

interpretation given it by the SSA.”¹⁸⁶ Therefore, Justice Scalia provided more than one rationale

¹⁸⁶ *Id.*

in his opinion.

Justice Scalia's inclination to give an agency interpretation dispositive weight revealed

itself again in *General Dynamics Land Systems, Inc. v. Cline*, this time in dissent.¹⁸⁷ Justice

¹⁸⁷ *General Dynamics Land Systems, Inc. v. Cline*, 124 S.Ct. 1236, 249 (2004) (Scalia, J.,

dissenting) (deferring to the agency entrusted with interpretation of the statute because it “is neither foreclosed by the statute nor unreasonable.”)

Scalia objected to the majority's opinion,¹⁸⁸ which relied on both legislative history and "social

¹⁸⁸ 124 S.Ct. 1236 (2004). The opinion was written by Justice Souter and joined by Chief

Justice Rehnquist and Justices Stevens, O'Connor, Ginsburg and Breyer. Justice Scalia also did not directly join Justice Thomas's dissent, arguably because Justice Thomas felt it was wrong for the majority to ignore the comments by Senator Yarborough in the Act's legislative history.

General Dynamics, 124 S.Ct at 1252 (Thomas, J. dissenting).

history.”¹⁸⁹ Justice Souter held that the Equal Employment Opportunity Commission erred in

¹⁸⁹ *General Dynamics*, 124 S.Ct at 1246. In a dissent, which Justice Scalia referenced,

Justice Thomas noted that “social history” was an undefined term and maintained that to rely on it was an “unprecedented step.” *General Dynamics*, 124 S.Ct at 1252 (Thomas, J. dissenting). Despite the linguistic coincidence, it is possible that the importation of social history into

statutory interpretation reflects a third mode, namely “dynamic interpretation.” Proponents of such a method urge that judges may “update” statutes by interpreting them not only in light of intentions and purpose when passed, but also in view of current needs, social trends, and beliefs.

See, e.g. G. Calabresi, *A Common Law for the Age of Statutes* (1982) (arguing that judges could invalidate outdated statutes as they interpret them dynamically); Eskridge, *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479 (1987) (statutory interpretation should not be limited to

finding that the Equal Employment Act protected workers who were over forty from actions that

text and historical context, but should also consider present societal, political, and legal context).

benefitted those over fifty.¹⁹⁰ The majority found such action did not “discriminate ... with

¹⁹⁰ *General Dynamics*, 124 S.Ct at . General Dynamics and the United Auto Workers in

1997 had modified their contract, essentially deleting the requirement to give medical benefits to future retirees, unless the workers were at least fifty years old in 1997. The Equal Employment Act protects workers forty and above. The relatively younger - but still protected class - were thus

arguing that they were being denied benefits that those older were receiving.

respect to ... compensation, terms, conditions, or privileges of employment, because of age.”¹⁹¹

¹⁹¹ 29 U.S.C. § 623 (a)(1).

Despite an agency regulation to the contrary,¹⁹² the court used the “context” of the statute to limit

¹⁹² 29 CFR 1625.2(a) (2003) (“[I]f two people apply for the same position, and one is 42

the Act's scope:

and the other 52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor”).

[P] refatory provisions and their legislative history make a case that we think is beyond reasonable doubt, that the ADEA was concerned to protect a relatively old worker from

discrimination that works to the advantage of the relatively young.¹⁹³

¹⁹³ *General Dynamics*, 124 S.Ct. at 1243. See also, *Id.* at 1240:

In the abstract, the phrase [because of age] is open to an argument for a broader construction, since reference to “age” carries no express modifier and the word could be read to look two ways. This more expansive possible understanding does

not, however, square with the natural reading of the whole provision prohibiting discrimination, and in fact Congress's interpretive clues speak almost unanimously to an understanding of discrimination as directed against workers who are older

than the ones getting treated better.

As Justice Souter noted, there were two possible meanings of age¹⁹⁴ and Congress used the “term

in a commonly understood, narrow sense (‘age’ as ‘relatively old age’).”¹⁹⁵ A judge who looks at Congressional intent, therefore, is not caged into one dictionary meaning of a word, even when looking at the use of a word more than once in one statute. The presumption that a word means the same thing in different parts of a statute is not rigid, but yields to the “cardinal rule,” namely that

statutory language must be read in context.¹⁹⁶

To a textualist, legislative history is of less importance, primarily because the statements contained in reports are not enacted into legislation and legislators may not have been read

reports.¹⁹⁷ Additionally, because Congress is a collective body, it cannot have any true “intent” behind its actions; with “logrolling” and compromises, many different rationales may color an individual legislator’s vote and hence make it impossible to come up with one true Congressional “intent.”¹⁹⁸ Therefore, if a textualist needs to “interpret” a statute to get to its “clear meaning,” the

judge will often employ dictionaries and lay definitions of words.¹⁹⁹ Also of import would be judicial canons of construction.²⁰⁰ The use of particular words have particular meanings.²⁰¹

The multitude of interpretive devices allow Justices to pick and choose rationales that

comport with their judicial temperament and, more cynically, with their substantive predilection. Although *Chevron*'s demand for deference always could be circumvented by finding a "clear meaning" of a statute,²⁰² the resurrection of a second level of agency deference can increase the judicial tendency to exercise discretion. The first act of discretion is choosing the justice's

preferred mode, be it intentionalism or textualism.

IV. Agency Statutory Interpretation: A “Canon” in the “Text” of Judicial Activism

The term “canon” refers to a rule or principle, and also could be viewed as a shorthand for “canons of construction.”²⁰³ The relationship of the *Chevron* doctrine to these principles of

statutory construction has evolved. At one point, the *Chevron* doctrine placed the primary responsibility for interpreting an ambiguous law on the administering agency, based on a theory of delegation and separation of powers. The agency, rather than the court, arbitrated the policy choice within the bounds Congress set down.²⁰⁴ Therefore, *Chevron*'s dictate was not an optional

construction aid for the courts, but a firm dictate.²⁰⁵ The *Chevron* doctrine required deference to the agency if a statute was ambiguous. In essence, the agency's interpretation of the statute would then govern. With the impact of *Mead* and *Christensen* working their way into the Supreme Court's jurisprudence, to consider or not to consider an agency's statutory construction is much more a

judicial choice. The actual agency opinion, rather than providing a decisional framework, may now be used as a mere canon of construction: an aid to judicial interpretation that can be used or discarded pursuant to a judge's inclination. This differs from past explicit rationales to ignore an agency pronouncement.

A. Extraordinary Circumstances and Other Avoidance Mechanisms

In the past, the Supreme Court has explicitly ignored an agency opinion in “extraordinary

situations, ” arguing that such situations negate the underlying rationale of *Chevron*: Congress would not have “implicitly” delegated to the agency the authority to decide such an issue.²⁰⁶ Similarly, the “significance” of an issue, such as whether the EPA could consider costs in one aspect of the Clean Air Act, tended to negate a conclusion that Congress left it unaddressed and

therefore, through ambiguity, delegated the question to the agency. Eight justices joined this decision.²⁰⁷ Despite this case's near unanimity, however, defining what situations are "extraordinary" is debatable and cases have not always been unanimous in finding this prerequisite to negating implied delegation. In one case, five Justices found "economical and political"

ramifications could trigger the exception from *Chevron*.²⁰⁸ This justified the holding that the Food and Drug Administration could not assert jurisdiction over tobacco without an express delegation.²⁰⁹ The dissent, however, doubted that a “background canon of interpretation” existed that required issues of “enormous social consequences” to be “made by Members of Congress

rather than by unelected agency administrators.”²¹⁰ Even if the canon existed, those in the dissent would not have applied it in the particular instance, emphasizing that the President and Vice-President are the only officials the entire nation elects.²¹¹ Therefore, the executive branch could appropriately make this decision.

In addition to this purported canon displacing delegation to an agency, the Court has expressly used some other canons to avoid looking at agency interpretations. The *Solid Waste*²¹² case is a good example. At issue was a Corp of Engineers regulation that asserted jurisdiction over

wetlands that were used by migratory birds. Justice Rehnquist used the canon that agencies cannot construe statutes in a way that raises serious constitutional questions unless Congress gave a clear direction.²¹³ This interpretative mode employs the “avoidance canon.”²¹⁴ In this situation, a court does not determine whether a regulation under a statute violates constitutional norms, but

delineates the reasons why the regulation raises constitutional concerns.

A case challenging the 1990 census results, under which Utah lost one representative and North Carolina gained one, provides particular insight on how this purported canon works. The

Census Bureau used “hot-deck imputation” to fill in gaps about how many people lived in a dwelling unit after all other attempts to determine size failed.²¹⁵ The Constitution talks of an “actual enumeration” of population and the statute governing the apportionment of representatives prohibits the “statistical method known as ‘sampling.’”²¹⁶ The case therefore had two prongs:

whether the Bureau could use the method under the statute and whether the method could be part of a constitutional result. Most of the Justices found the practice conformed with both the statute and the constitution.²¹⁷ Justice O'Connor concurred on the constitutional issue, but dissented and would rule that imputation is actually sampling, which the statute prohibited. She would not read

the prohibition on “sampling” narrowly, even if the Bureau had done so:

The majority also notes the possibility of *Chevron* deference with respect to the term ‘sampling.’ But the majority ultimately does not rely on this form of deference, nor does it

indicate where the Bureau has provided an interpretation of § 195 that would have the force of ‘law’ on this issue ... Additionally, based on Justice Thomas’s partial dissent, I would find that the Bureau’s use of imputation to calculate state population for apportionment purposes at least raises a difficult constitutional issue. This provides a basis to construe §

195 as precluding imputation, regardless of whether the Bureau is entitled to any form of deference.²¹⁸

Justice O'Connor is truly "avoiding" deferring to agency regulations if they simply raise

constitutional issues; she would substantively disagree and find no Constitutional violation, but would not defer to the agency because two other Justices found a violation of the Constitution.

B. Agency Interpretation Relegated to Canon Status

What has occurred with the advent of *Mead* and *Christensen*, however, goes beyond the express use of canons to avoid agency interpretations. The ultimate result is different: the agency

interpretation is itself a “canon” of interpretation. The substantive conclusion that the agency has made about the meaning of the statute may be used as an aid to clarify the meaning of a statute, just as the doctrine of *ejusdem generis* or any other interpretive tool may be employed. And, like other statutory canons, to use or not use them is up to the judges.²¹⁹ Canon employment is perhaps

of more import to textualists than intentionalists, due to their position that legislators are cognizant of them and draft with canons in mind.

An example of this byplay is in *Barnhart v. Peabody Coal Company*.²²⁰ The Coal Industry

Retirement Health Benefit Act only directly lists two ways in which a company's percentage liability for unassigned beneficiaries would be modified.²²¹ To Justice Scalia, the question of whether the listing of two exceptions excludes any other way of modifying the percentage was not crucial; he found that there was no authority granted to the agency to make late assignments of

responsibility to companies.²²² Nevertheless, Justice Souter, writing for the majority, took pains to explain that the canon *expressio unius est exclusio alterius* did not apply:

[T]he canon ...does not apply to every statutory listing or grouping; it has force only when

the items expressed are members of an "associated group or series," justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.²²³

Justice Scalia responded viscerally: "The most enduring consequence of today's opinion may

well be its gutting of the ancient canon of construction.”²²⁴ Referring to the Court’s comment that there could be an unprovided for case rather than an excluded exception “unless there is reason to think the third was at least considered,” he responded: “This is an unheard-of limitation upon the accepted principle of construction *inclusio unius, exclusio alterius*. It is also an absurd limitation,

since it means that the more *unimaginable* an unlisted item is, the more *likely* it is *not* to be excluded.²²⁵ Canons of construction, when tied to textual interpretations, are more cherished by a textualist.²²⁶

Nevertheless, because canons of construction guide rather than bind judges,²²⁷ the existence of an agency interpretation would not require deference from a court if such an interpretation is simply another canon to be used in statutory interpretation. The meaning that an agency supplies for a statute would be used or not used by the judge in the same manner other aids

to interpretation are used.

V. Conclusion

With *Mead* and *Christensen* increasing the flexibility in regard to agency interpretations, the divide between Justices who follow the a textualist bend and those who follow an intentionalist mode of statutory interpretation simply grows more vivid. There is, however, some

correlation between at least nominal respect for agency pronouncements and interpretive stance.

Justice Scalia, the strict textualist, was the most irate Justice about the purported *Mead* change to *Chevron*: to him, deference to “authoritative” agency pronouncements was at least a

verbal article of faith, even if regularly disregarded in practice.²²⁸ This comports with positioning the legislature above the judiciary in policy-making because the *Chevron* principle theoretically derives from Congressional delegation of authority to agencies and hence away from the courts.²²⁹ Textualists, in addition to expressing a desire for bright rules on when to defer to agencies, also are

more open to rules of construction. Rules, and their concomitant predictability, are more valued to reign in judges, who to Justice Scalia are the least democratic of branches.²³⁰ Judges also are institutionally less able to freely garner information, viewpoints, and expertise than either agencies or legislatures.²³¹ Therefore, judges should not be looking at the “totality of the circumstances,”

which Justice Scalia has called “that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th’ol’ ‘totality of the circumstances’ test.”²³²

Intentionalists, however, are much more comfortable with judges making such judgment calls from all available evidence.²³³ In fact, to not look at all possible indications of Congressional intent would be to allow a judge's discretion to run unchecked; language without context can be made to fit almost any interpretation. As Justice Stevens phrased it: "A method of statutory

interpretation that is deliberately uninformed, and hence unconstrained, increases the risk that the judge's own policy preferences will affect the decisional process.”²³⁴

The end result of the change from *Chevron* being the sole guide to review of agency

statutory interpretation is that, more vividly than before, the Justices' theories of statutory interpretation governs their statutory interpretation. Justices fall into textualist and intentionalist camps. Even within these divisions, however, interpretations can be outcome-based because there is the "fallback" of being able to use the various deference provisions if they suited the Justice's

desired interpretation. Both the Justices conventionally-labeled “conservative” and those labeled “liberal” are activists. In telling what the law is, judges can and do create law.