

Which Agency Interpretations Should Bind Citizens and the Courts?

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I. Introduction and Summary

Agencies continually interpret the statutes they administer. Their interpretations are expressed in a great variety of forms—in legislative regulations, adjudicatory opinions, manuals, court briefs, interpretive rules, policy statements, staff instructions, opinion letters, audits, correspondence, informal advice, guidelines, press releases, testimony before Congress, internal memoranda, speeches, explanatory statements in the Federal Register, and others.

This Article examines the extent to which these varied forms of agency interpretive expression, sometimes referred to as “formats,” should be accepted or accorded some sort of consideration by the courts that review them. This inquiry is part of a larger one, which forms its context: Under what circumstances should it be the agencies, rather than the courts, that place definitive interpretations upon federal statutes? Put another way, when is a reviewing court bound to accept the agency’s interpretation?

Interpretation of a statute presents a question of law, and “[i]t is emphatically the province and duty of the judicial department to say what the law is.”¹ “[O]ne of the judiciary’s characteristic roles is to interpret statutes”² But in reviewing interpretations placed upon statutes by the agencies that administer them, the courts for

1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J.).
 2. *Japan Whaling Ass’n v. Amer. Cetacean Soc’y*, 478 U.S. 221, 230 (1986).

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many decades have accorded respectful attention or even controlling effect to such agency interpretations.³

In some situations, the court deems itself bound to accept the agency's interpretation outright, thereby giving it controlling effect, provided only that it is consistent with statute and is reasonable. In other cases, the court reserves the power to arrive independently at its own interpretation; the court should give respectful consideration to the agency's construction, but may reject it, even if it seems a reasonable one.⁴

The law governing judicial acceptance of agencies' interpretations of the statutes they administer is now dominated by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*⁵ The Supreme Court has cited this case dozens of times, and the lower federal courts, hundreds. *Chevron* is understood to require a reviewing court to accept an agency interpretation that (a) is not contrary to statute or specific statutory intent and (b) is reasonable. (I shall refer to this judicial process as "*Chevron* acceptance" of the agency interpretation.)

This understanding unquestionably governs the usual case in which the agency, in pursuance of delegated authority, issues its interpretation through a legislative regulation or other agency action possessing the force of law.⁶ But what if the same interpretation—

3. "[C]ourts do not necessarily abdicate a Marshallian duty to 'say what the law is' by deferring to agencies. Courts retain the authority to control administrative abuses of power; deferential review simply recasts the question of law as whether the agency's interpretation is 'reasonable.'" Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 569 (1988), (citing Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 27-28 (1983)). See also Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 21 (1985).

4. Cases and commentary have confusingly used the term "deference" to refer to both of these approaches, even though they imply different roles for the reviewing court. Indeed, the courts often have been quite unclear about which approach they were following. For precision, this Article refers to the first approach as "acceptance", or sometimes in more specific contexts as "*Chevron* acceptance" or "*Hearst* acceptance." See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944). I shall call the second approach "special consideration," or more specifically "*Skidmore* consideration." See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Under the analysis presented in this Article, there can be a third approach. In cases of pre-enforcement review, where the court does not need to make a final and complete interpretation, it may limit its review to the question of whether the agency's interpretation is demonstrably wrong, without deciding whether it is right or acceptable. See text accompanying *infra* notes 182-83.

5. 467 U.S. 837 (1984). Justice Stevens' opinion was joined by five other members of the Court. Justices Marshall, Rehnquist, and O'Connor did not participate.

6. An agency interpretation "has the force of law", and therefore is "binding" upon the courts (as well as upon the public and upon the agency itself), when a court may not review it freely, but must accept it unless it is contrary to statute or unreasonable. See *infra* note 17 and accompanying text. A legislative regulation issued pursuant to delegated

identical in its substantive content—were expressed only in an opinion letter, a policy statement, a press release, or an amicus brief?

Agencies rarely possess congressionally delegated authority to make definitive interpretations, carrying the force of law, through such informal issuances. Nevertheless a reviewing court—under a broad and perhaps uncritical reading of *Chevron*—might feel compelled to accept the interpretation, without regard for the agency's lack of delegated authority to issue authoritative interpretations through informal formats like these. A number of courts have done so.⁷

Such a reading of *Chevron* is possible because its language suggests that, if the reviewing court cannot find specific congressional intent on the precise point at issue, but rather finds the statute to be silent or ambiguous on that point, it should presume that Congress delegated to the agency the interpretive authority to fill the gap, and must therefore accept any reasonable agency interpretation.⁸ It is then but a short step, perhaps unconsciously taken, to assume that this implied delegation requires acceptance of the interpretation without regard for the format in which it is expressed.

Should the courts under *Chevron* be bound to accept (and not merely to consider) reasonable agency interpretations expressed in informal formats? The present study addresses this question, and yields generally negative answers. Where the format is an informal one, it ordinarily does not carry the force of law, and a reviewing court is not bound by the agency interpretation, though it should give special consideration to the agency opinion.

The threshold issue for the court is always one of congressional intent: did Congress intend the agency's interpretation to bind the courts? The touchstone in every case is *whether Congress intended to delegate to the agency the power to interpret with the force of law in the particular format that was used.*

Sometimes the reviewing court will conclude that Congress has mandated or prohibited a specific substantive position. In such a case, obviously, the court cannot find that Congress intended a delegation to the agency to interpret inconsistently, and an agency

statutory authority is an example of agency action possessing these characteristics. See *Batterton v. Francis*, 432 U.S. 416, 425-26 (1977), quoted at note 17 *infra*. See also *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-04 (1979).

7. See *infra* text accompanying notes 187-96.

8. *Chevron*, 467 U.S. at 843-44. See *infra* note 61 and accompanying text.

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interpretation may enjoy the force of law if (and only if) it conforms to the substantive congressional intent. In every other case, however, an agency interpretation that claims the force of law must be grounded in an adequate delegation.

When looking for delegation, the reviewing court must of course first satisfy itself as to the agency's delegated authority to make binding interpretations with respect to the *subject matter*. Under *Chevron*, though, such a delegation may be presumed from the mere existence of a "gap"—statutory silence or ambiguity on the point at issue. Second, and more important for present purposes, the court must also identify a delegation of power to make binding interpretations through the particular *format* chosen by the agency: Did Congress authorize the agency to make law through this format?

Any difficulty in answering this question cannot justify a failure to ask it. That Congress's delegatory intent must sometimes be sought through inference and construction, rather than from direct manifestations of congressional will, does not diminish the indispensability of this inquiry. Under our system of limited government, an agency cannot announce actions that bind citizens and the courts unless Congress has delegated to it the authority to do so.

The needed delegation is unlikely to be found for agency interpretations expressed through informal formats.⁹ But, unless the courts insist upon a delegation as to format as a condition of *Chevron* acceptance, interpretations set forth in informal formats would command as much force as do legislative regulations, and agencies could freely avoid the public procedures and safeguards required for issuance of such regulations. Worse, the courts would accord binding force to actions that Congress had not authorized to have binding force.

Part II of this Article reviews pre-*Chevron* law concerning judicial consideration of agency interpretations. Part III analyzes the *Chevron* doctrine and the experience under it, with emphasis on the role of the delegation inquiry. Part IV brings a close focus upon the assortment of formats in which agency interpretations are set forth. It demonstrates how the delegated authority for the use of each

9. In the rare case, an informal interpretive format may be entitled to judicial acceptance because Congress intended that such informal interpretive expressions be authoritative and bind the courts if not irrational. See *Ford Motor Credit Co. v. Mulhollin*, 444 U.S. 555, 566-68 (1980). But this apparent exception simply proves the rule, since a congressional delegation had invested the informally expressed agency interpretation with the force of law. See *infra* notes 153-72 and accompanying text.

format should determine whether the reviewing court must accept the agency interpretation or need only give it special consideration.

II. Prior Patterns of Acceptance and Deference

No pre-*Chevron* case articulated a consistent or comprehensive statement of doctrine, like that ventured in *Chevron*, on the appropriate measure of judicial deference to agencies. Judicial attitudes reflected in the opinions range from a near-bject acceptance,¹⁰ to a skeptical consideration of agency views,¹¹ to an ignoring of them altogether.¹²

Sometimes the judicial language sweepingly called for acceptance, but at the same time identified the specific circumstances inducing acceptance, leaving doubt about the rule of acceptance where such circumstances were not present.¹³ At other times, the opinions spoke not of outright acceptance but of degrees of "deference" or "weight" to be granted the agency interpretations.¹⁴ In these instances the "decision whether to grant deference depend[ed] on various attributes of the agency's legal authority and functions and of the administrative interpretation at issue."¹⁵ But the pre-*Chevron* cases were habitually unclear in indicating the point at which the weight or deference due would compel a court to accept the agency interpretation.¹⁶

10. *E.g.*, *Bates & Guild Co. v. Payne*, 194 U.S. 106, 108-09 (1904), *quoted in* *United States v. Shimer*, 367 U.S. 374, 381-82 (1961).

11. *E.g.*, *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946).

12. *See, e.g.*, *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 492-93 (1947).

13. "[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially where Congress has refused to alter the administrative construction." *Red Lion Broadcasting, Inc. v. FCC*, 395 U.S. 367, 381 (1969) (upholding legislative regulation). A striking post-*Chevron* example of such a juxtaposition is found in *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 120 n.20 (1987) and accompanying text.

14. *E.g.*, *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 98 n.8 (1983) ("[A]n agency acting within its authority to make policy choices consistent with the congressional mandate should receive considerable deference from courts . . ."); *Zuber v. Allen*, 396 U.S. 168, 192 (1969) ("While this court has announced that it will accord great weight to a departmental construction of its own enabling legislation, . . . it is only one input in the interpretational equation").

15. *Diver*, *supra* note 3, at 562. *See also infra* notes 51-52 and accompanying text.

16. Even in an opinion that went to some pains to elucidate the issues of "deference," for example, the Court made this typical statement: "The interpretation put on the statute by the agency charged with administering it is entitled to deference, but the courts are the final authorities on issues of statutory construction." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31-32 (1981) (citation omitted). *But see, e.g.*, *Fulman v. United States*, 434 U.S. 528, 533 (1978) (contemporaneous Treasury Regulations must be sustained unless unreasonable or plainly inconsistent with the revenue statutes).

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Although no analysis can harmonize all of the pre-*Chevron* cases, some rather clear patterns are evident. These emerge when one focuses upon the formats in which the agency interpretations were expressed. Where agencies exercised delegated power to pronounce interpretations in formats bearing the force of law, reviewing courts accepted those interpretations, provided they were reasonable and consistent with statute. In other formats, the courts accorded special consideration to the agency interpretations, but approved them only if persuaded that they were correct.

A. *Legislative Regulations*

Courts have generally accepted agency interpretations set forth in legislative regulations issued pursuant to delegated authority to promulgate rules with the force of law. For example:

Congress in § 407(a) expressly *delegated* to the Secretary [of Health, Education and Welfare] the power to prescribe standards for determining what constitutes “unemployment” for purposes of AFDC-UF eligibility. In a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts regulations with legislative effect. A reviewing court is not free to set aside these regulations simply because it would have interpreted the statute in a different manner . . .

The regulation at issue in this case is therefore entitled to more than mere deference or weight. It can be set aside only if the Secretary exceeded his statutory authority or if the regulation is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁷

Congress explicitly delegated to the Secretary broad authority to promulgate regulations defining eligibility requirements for Medicaid. We find that the regulations at issue in this case are consistent with the statutory scheme and also are reasonable exercises of the delegated power. The Court of Appeals therefore was not justified in invalidating them, and we reverse.¹⁸

17. *Batterton v. Francis*, 432 U.S. 416, 425-26 (1977) (emphasis in original).

18. *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981).

Even where the statutes conferred only a general rulemaking power, rather than a specific delegation as in the quoted cases, and even where the courts did not speak expressly of delegation, the legislative regulations were accepted and upheld.¹⁹ When such regulations were struck down, it was typically because they went beyond statutory authority, rather than because they were found to be unreasonable.²⁰

B. *Interpretations Expressed in Adjudicatory Decisions*

1. *Adjudication of Mixed Questions*

The courts also have regularly accepted agency interpretations pronounced in adjudications applying statutes to specific facts.²¹ In such a determination, where the statutory law is closely mixed with detailed facts, the agency's action may be more accurately viewed as an application of the statute, rather than as an interpretation in any abstract or general sense.²² In the well-known *Hearst* case,²³ the issue was whether certain newsboys who sold newspapers on street corners, for their own account but under some control by the publishers, were in the specific circumstances "employees" within the National Labor Relations Act. The agency held that they were, and the Court accepted the agency view. It stated that the detailed determination of who was an "employee" was a task that had been assigned to the agency created by Congress to administer the Act, and that resolving that question "belongs to the usual administrative routine" of the National Labor Relations Board.²⁴ The Court held

19. *E.g.*, *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973); *Fulman v. United States*, 434 U.S. 528 (1978); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *United States v. Shimer*, 367 U.S. 374 (1961).

20. *E.g.*, *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944). *See also* *Bd. of Governors, Fed. Reserve Sys. v. Dimension Financial Corp.*, 474 U.S. 361 (1986).

21. *E.g.*, *NLRB v. Hearst Publications, Inc.* 322 U.S. 111 (1944); *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979); *Gray v. Powell*, 314 U.S. 402 (1941); *United States v. Louisville & Nashville Ry. Co.*, 235 U.S. 314 (1914). *See also* *Train v. NRDC*, 421 U.S. 60, 75, 87 (1975).

22. Professor Schotland contrasts "law-declaring, which has to do with general construction of a statute wholly independently of the controversy at bar" and "law-applying, or applying a statute or other item of law to the particular facts at bar, . . . [which is] part of the normal particularized administration of the statute and its resolution belongs mainly to the body with the first-line responsibility for that administration." Schotland, *Scope of Review of Administrative Action*, 34 *FED. B.J.* 54, 58 (1975).

23. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944).

24. *Id.* at 130 (quoting *Gray v. Powell*, 314 U.S. 402, 411 (1941)).

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that "the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law."²⁵

In these "mixed question" cases, where an agency in adjudication applies statutes to detailed and specific facts, the court accepts the agency determination, even though it implicates a legal question of interpreting the statute and even though the court might independently have reached a different result.²⁶ The agency determination must be accepted because Congress *intended* that the agency rather than the courts be vested with the authoritative responsibility to make such detailed and specific interpretations through adjudicatory decisions, and Congress thereby *intended* that judicial review be limited, not independent.²⁷ In other words, Congress expressly or impliedly delegated to the agency the primary power so to interpret, subject only to limited judicial review.²⁸

2. *Adjudication of Pure Questions and Major Interpretive Questions*

Not every type of interpretation generated in an agency adjudication has won judicial acceptance. Those involving pure rather than mixed questions, or major rather than minor issues, have usually been subjected to independent review by the courts. We may regard an interpretive question as a "pure" one if its resolution does not depend upon the specific facts of the agency adjudication.²⁹ The courts appear to have presumed that such questions were within their own traditional judicial competencies and that Congress had

25. *Id.* at 131. The "reasonable basis in law" element of this test can fairly be equated with the generalized formulation, mentioned throughout this paper, that an interpretation, to be judicially accepted, must be reasonable and not contrary to statute.

26. I shall refer to this phenomenon as "*Hearst* acceptance" of the agency interpretation.

27. See *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495-97 (1979); *INS v. Wang*, 450 U.S. 139, 144-45 (1981). See also L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 549 (1965) ("a law-applying judgment is *presumptively* within the area of the agency's discretion") (emphasis in original).

28. "Where, as here, a determination [as to whether in the specific circumstances a railroad was the 'producer' of coal it consumed] has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched." *Gray v. Powell*, 314 U.S. 402, 412 (1941).

29. See *supra* note 22. Obviously, there can be uncertainties along the borderline between "pure" and "mixed" questions, but a precise delineation is unnecessary for the present analysis.

not delegated primary interpretive authority over to the agencies.³⁰ Thus, where the issue under the labor statute was generically whether retirees could be “employees,”³¹ or managers could be “employees,”³² or foremen could be “employees,”³³ the Supreme Court considered these as pure questions and arrived independently at its own constructions.³⁴ Such pure interpretive determinations, in other words, are not assigned to the agency’s “usual administrative routine”³⁵ so as to be entitled to judicial acceptance.

Such pure questions typically are also major questions. The constructions that resolve them often shape the major anatomy of the statutes involved. Deciding whether particular newsboys in a specific setting were covered by the labor law could play only a relatively small role in the administration of the statute. The resolution of issues concerning the coverage of large generic classes like retirees or managers was fundamental.³⁶ The *Hearst* case itself illustrates a distinction between major and minor issues. Before addressing the situation of the newsboys, the Court independently resolved a bedrock interpretive question, holding that the term “employee” should not be construed by simple references to state or common law.³⁷

30. When an agency’s decision is premised on its understanding of a specific congressional intent, however, it engages in the quintessential judicial function of deciding what a statute means. In that case, the agency’s interpretation, particularly to the extent it rests on factual premises within its expertise, may be influential, but it cannot bind a court.

Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89, 98 n. 8 (1983).

31. *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 165-71 (1971).

32. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

33. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 488-90 (1947).

34. In *Allied Chemical and Bell Aerospace*, the Court overturned the Labor Board’s decision. In *Packard*, the Court upheld the Board, but clearly did so by using its own generic interpretation to decide “the naked question of law,” *Packard*, 330 U.S. at 493, earlier stated as “whether foremen are entitled as a class to the rights . . . assured to employees generally by the National Labor Relations Act.” *Id.* at 486 (emphasis added).

35. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944) (quoting *Gray v. Powell*, 314 U.S. 402, 411 (1941)).

36. “*Packard* . . . presented a legal question of great importance in the field of labor relations: ‘Does the NLRA cover shop foremen?’ This question raised political, as well as policy, concerns; it seems unlikely that Congress wished to leave so important and delicate a legal question to the Board to decide.” Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 371 (1986).

37. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 120-24 (1944). See Note, *The Chevron Legacy: Young v. Community Nutrition Institute Compounds the Confusion*, 73 CORNELL L. REV. 113, 116-18 (1987).

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Of course an interpretive question can be a pure one without also being a major one. The agency in *Social Security Board v. Nierotko*³⁸ had held in an adjudication that an NLRB back pay award did not constitute “wages” creditable to the claimant’s Social Security account. The question was a pure one, having no dependence on the specific facts of the case. The Court declined to accept the agency’s decision as “conclusive” and proceeded to interpret the statute independently, pointing out that Congress had not delegated to the agency authority to determine what compensation should be treated as wages.³⁹ *Nierotko* appears to teach that courts will not readily find a delegation to decide abstract questions through adjudication, despite the modest importance of the issue. On the other hand, it should be expected that minor questions, even if abstract, can sometimes be grist for routine agency interpretation.

An issue may be a major one but not a pure one. The *Highland Park*⁴⁰ case presented the question whether the Congress of Industrial Organizations (better known as the CIO) was a “national or international labor organization” whose officers were required to file noncommunist affidavits in order to use the machinery of the NLRB. Entailing as it did the application of the statutory term to a single specific labor organization, the question arguably was a mixed one of law and fact. Yet the Court reversed the Board’s adjudicative determination and held through independent interpretation that the CIO fell within the statutory ban.⁴¹ Although “the question [was] one of specific application of a broad statutory term,”⁴² the Court did not treat it as belonging to “the usual administrative routine.”⁴³ The issue of whether to apply the statute to the nation’s largest labor organization was apparently too momentous to permit an

Further examples of cases independently resolving interpretive questions that were both pure ones and major ones are *Bd. of Governors, Fed. Reserve Sys. v. Agnew*, 329 U.S. 441 (1947) and *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965) (“The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress”).

See text accompanying *infra* notes 69-89, 225-32 (discussing pure questions in context of delegation analysis).

38. 327 U.S. 358 (1946).

39. *Id.* at 369.

40. *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322 (1951).

41. The majority opinion entirely ignored the Board’s reasoning. Justices Frankfurter and Douglas dissented on the ground that the NLRB’s determination was reasonable and therefore should have been accepted. *Id.* at 326-28.

42. *NLRB v. Hearst Publications Inc.*, 322 U.S. 111, 131 (1944).

43. *Id.* at 130.

assumption that Congress had delegated the primary interpretive power to the agency.⁴⁴

3. Summary

Overall, the Supreme Court marked out a discernible pattern in the pre-*Chevron* cases involving agency adjudicative interpretations: Where the agency adjudication purported to resolve a *pure question* or a *major question* of interpretation, the reviewing court would probably interpret independently,⁴⁵ unless it clearly found that Congress had delegated the primary decision of such questions to the agency.⁴⁶ Where the adjudication decided a *mixed question* of applying broad statutory language to specific fact, the court would accept the agency view, except perhaps where large consequences carried the matter beyond the routine within which the agency was assumed to possess a delegated power.

The pivotal question in these cases was whether Congress intended the agency, in the particular circumstances, to have the primary power to construe the statute through adjudication. Such a delegatory intent is most naturally found where the issue is a mixed one. The agency has the relatively modest duty of applying the statute in the exercise of its administrative routine. Congress is much less apt to want the agencies to control the courts' determination of the grand questions or the pure ones.

C. Other Interpretative Formats

As shown, agency interpretations have been accepted where they were expressed in legislative regulations or, often, in adjudicative determinations. In other formats, where the agency action does not carry the force of law, "administrative interpretations of statutory terms [were] given important but not controlling significance"⁴⁷ by

44. "An implied delegation of a law-declaring function is especially likely where, as here, the question is interstitial, involves the everyday administration of the statute, implicates no special judicial expertise, and is unlikely to affect broad areas of the law." *St. Luke's Hosp. v. Secretary of HHS*, 810 F.2d 325, 331 (1st Cir. 1987) (Breyer, J.).

45. The court of course would give special consideration to the agency's interpretation and affirm it if it proved to be correct. See *infra* text accompanying notes 47-52 (discussing "Skidmore consideration").

46. See *Social Sec. Bd. v. Nierotko*, 327 U.S. 358, 369 (1946). A delegated power to promulgate legislative rules does not in itself confer a delegation to promulgate *binding* general propositions of law through adjudication. See Berg, *Re-Examining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 38 ADMIN. L. REV. 149, 169-78 (1986).

47. *Batterton v. Francis*, 432 U.S. 416, 424 (1977).

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courts in arriving at their own interpretations. The special consideration given the agency construction does not, of course, lead mechanically to acceptance or rejection of the agency view. Rather, as expressed in *Skidmore v. Swift & Co.*,⁴⁸ that view should be given the significance it deserves:

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 upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.⁴⁹

I shall call this process of judicial analysis "*Skidmore* consideration." Under this approach, the agency interpretation is a substantial input and counts for something, much as legislative history may count. But the authoritative act of interpretation remains with the court. The court considers the agency view, and approves it only if it is deemed correct.⁵⁰

48. 323 U.S. 134 (1944). The agency interpretations in the *Skidmore* case were set forth in an "interpretative bulletin" (interpretive rules), "informal rulings" and a brief *amicus curiae*.

49. *Id.* at 140. Professor Diver comments: "Of course, the 'weight' assigned to *any* advocate's position is presumably dependent upon 'the thoroughness evident in its consideration' and the 'validity of its reasoning.'" Diver, *supra* note 3, at 565.

50. The same approach was observed in another leading case, in which interpretive guidelines published in the Code of Federal Regulations were overturned:

In evaluating this contention [that "great deference" should be accorded the agency view] it should first be noted that Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title. [citation omitted] This does not mean that EEOC guidelines are not entitled to consideration in determining legislative intent. But it does mean that courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law, or to regulations which under the enabling statute may themselves supply the basis for imposition of liability. [citation omitted] The most comprehensive statement of the role of interpretative rulings such as the EEOC guidelines is found in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), where the Court said [quoting the passage from that case set forth above].

General Electric Co. v. Gilbert, 429 U.S. 125, 141 (1976)(citations omitted). See also *Fishgold v. Sullivan Drydock Repair & Corp.*, 328 U.S. 275, 290 (1946)(citations omitted)

Under *Skidmore*, the weight given the agency interpretation, and the ultimate determination to adopt it as correct or to overturn it, usually depend on a variety of circumstances or "factors," such as the importance of agency expertise, contemporaneity of the interpretation with enactment of the statute, longstanding application and consistency of the agency interpretation, the possibility of congressional acquiescence, and numerous others.⁵¹ These factors are often the same as those which, in other contexts, could help the court determine whether Congress delegated interpretive authority to the agency, or whether the agency interpretation was a reasonable one.⁵²

D. *Toward Clarity in the Pre-Chevron Law*

Reliance on such a process of weighing multiple and perhaps incommensurable factors can yield unpredictable results and unsure doctrine.⁵³ This is unavoidable, but tolerable, provided it is clear in each case what question the weighing process is aiming to resolve. The courts compounded the pre-*Chevron* uncertainty, however, through imprecise and inconsistent language. No Supreme Court case had set forth a comprehensive statement to guide the review of agency interpretations. The relevant pronouncements were partial and varied, scattered among the cases.

Two tendencies were especially inimical to clarity. First, the pre-*Chevron* opinions suggested that the reviewing courts through the weighing process should recognize degrees of deference,⁵⁴ even though the issues were not those of degree but were binary: Did the

resorted to for guidance" but "are not made in adversary proceedings and are not entitled to the weight which is accorded interpretations by administrative agencies entrusted with the responsibility of making *inter partes* decisions").

51. Diver, *supra* note 3, at 562 n.95 presents a "partial list" of ten such "factors." See also *General Electric v. Gilbert*, 429 U.S. 125 (1976).

52. Such factors are usefully grouped as 1) those affecting the probability that the agency's interpretation was sound (*e.g.*, that the agency had helped draft the statute or had interpreted it soon after enactment under the eye of Congress; that the agency's interpretations were consistent and of long standing; that the agency position is well-reasoned) and 2) those affecting the likelihood that Congress intended to delegate interpretive authority to the agency (*e.g.*, technical nature of the issue; complexity of the statute; need to reconcile conflicting statutory policies in administration; absence of constitutional issues). See Note, *Coring the Seedless Grape: A Reinterpretation of Chevron U.S.A. Inc. v. NRDC*, 87 COLUM. L. REV. 986, 996-99 (1987) (by Eric Braun).

53. See Anthony, *Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings*, 24 STAN. L. REV. 1, 39-45 (1971).

54. See cases cited in *supra* notes 13-14. See also *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97-98 and n.8 (1983); *Watt v. Alaska*, 451 U.S. 259, 273 (1981).

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agency possess delegated interpretive power, or not? Was the agency interpretation reasonable, or not? Was the agency interpretation correct, or not? Second, the opinions did not differentiate among these three issues by indicating which “factors” were to be heeded, and how they were to be used, in the resolution of each respective issue.⁵⁵ Instead, the opinions typically spoke in general language, as though the same approaches and the same considerations applied to all agency interpretations.⁵⁶

Such language lent itself to confusion and misunderstanding. It tended to blur the distinction between those interpretations that should be examined for reasonableness and those to be examined for correctness. It could be taken to justify a subjective judicial approach, emphasizing reasonableness. And, overall, these opinions intimated the existence of a generalized concept of “deference” for all cases, seemingly urging that *any* agency interpretation, once found reasonable and consistent with the statute, should be accepted by the reviewing court.⁵⁷

But the review of agency interpretations can be more concisely summarized, consistently with the outcomes if not always with the pronouncements of the pre-*Chevron* decisions. In each case the comprehensive inquiry was, in effect, to determine Congress’s “interpretive intent.”⁵⁸ That is, did Congress intend that such an interpretation, in the format used, should bind the courts? An agency interpretation would be upheld if it: 1) expressed a substantive congressional intent on the point; or 2) was not contrary to statute, was within authority delegated to the agency to interpret with the force of law in the format used, and was reasonable; or 3) accorded with the court’s independent construction. This broad structure continues after *Chevron*.

55. See *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566-69 (1980); *Train v. NRD*, 421 U.S. 60, 75, 87 (1975); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

56. See *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 98 n.8 (1983); *Watt v. Alaska*, 451 U.S. 259, 272-73 (1981); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566-69 (1980); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

57. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); Monaghan, *supra* note 3, at 30.

58. This useful phrase is suggested for a slightly different context by Note, *supra* note 52, defining the term as “Congress’s preference for resolution of statutory gaps by the courts or by the agency.” *Id.* at 996 n.82.

III. The *Chevron* Doctrine

The Court in *Chevron* reviewed Environmental Protection Agency legislative rules that set forth the agency's interpretation of a statutory term.⁵⁹ The Clean Air Act authorized and imposed limitations upon emissions from a "stationary source." The EPA regulations interpreted this statute by use of its "bubble concept," allowing the states to treat all pollution sources within the same plant as though they were comprised within a single "source," so that polluting emissions could be aggregated and netted out for purposes of complying with regulatory limits.

The District of Columbia Circuit found that Congress had no specific intent with respect to whether the term "stationary source" could be interpreted in accordance with the bubble concept. That court performed its own interpretation, based largely on the general purposes of the amended Clean Air Act, and set aside the regulations.⁶⁰

The Supreme Court reversed, finding the regulations to be a reasonable accommodation of conflicting statutory policies in a situation where Congress had no specific intent with respect to that precise interpretive question. For the Court, Justice Stevens stated:

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

59. For clarity, it should be borne in mind that legislative rules like those in *Chevron*—statutorily authorized and properly promulgated after notice and comment and having the force of law—often embody interpretations of statutes. But they do not thereby become "interpretative rules," which carry less force and can be promulgated more informally. See Administrative Procedure Act § 4(a), (c), 5 U.S.C. § 553(b), (d) (1982).

60. *NRDC, Inc. v. Gorsuch*, 685 F.2d 718 (D.C. Cir. 1982).

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“The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.” *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations “has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.”⁶¹

The *Chevron* opinion thus set up a three-stage analysis to be followed by a reviewing court: (1) Is there specific congressional intent on the precise question at issue? (2) If not, is there express delegation of authority to elucidate by regulation? (3) If not, is there implicit delegation of some sort of authority to fill the gap? Courts and commentators have tended to conflate the second and third stages into a single inquiry, tested by reasonableness.⁶² I will yield to the widespread usage that calls the first question “Step 1” and merges the second and third questions into a “Step 2.” Since there are important reasons for keeping the latter two inquiries distinct,

61. *Chevron*, 467 U.S. at 842-44 (quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961)).

62. See, e.g., *International Union, UMW v. FMSHRC*, 840 F.2d 77, 81 (D.C. Cir. 1988); *NRDC, Inc., v. Thomas*, 805 F.2d 410, 420 (D.C. Cir. 1986); *FAIC Securities, Inc. v. United States*, 768 F.2d 352, 361 (D.C. Cir. 1985) (“A permissible construction has been helpfully defined as ‘one that is sufficiently reasonable to be accepted by a reviewing court’”); Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 287-88 (1986).

I will sometimes refer separately to the second question as "Step 2A" and the third as "Step 2B."

Considerable ambiguity attends both Steps.⁶³ That ambiguity has impaired the development of clear doctrine about which interpretive formats bind the courts.

A. Chevron's "Step 1"

Step 1, of course, interplays with Step 2. The smaller the scope of the issue or issues to be resolved in Step 1, the larger is the ambit of Step 2. The variation will depend upon how far the *Chevron* Step 1 language is to be read literally, so as to permit the court to ask only whether "Congress has directly spoken to the precise question at issue," with an intent that is "clear."⁶⁴ A literal reading straitens the scope for independent judicial interpretation in Step 1, spilling all other judicial inquiries into the Step 2 consideration of the agency's interpretation and its reasonableness.

The next three subsections examine this version of Step 1 and two variant patterns suggested by words and deeds of the Supreme Court. Two analytical aspects of each pattern are especially significant: What is the nature of the issue as to which congressional intent is to be sought in Step 1? And how clear must congressional intent concerning that question be, to bind the agency?

1. *Interpreting for Conformity with Specific Intent*

Under the language of *Chevron*, the question to be addressed by the court is the specific one addressed by the agency's interpretation. The reviewing court should interpret the statute only so far as is necessary to determine whether there is a clear and unambiguous congressional intent toward that precise question. The court may employ the "traditional tools of statutory construction" to ascertain the existence of such an intent.⁶⁵ If it finds specific intent on the

63. See Anthony, *Which Agency Interpretations Should Get Judicial Deference?—A Preliminary Inquiry*, 40 ADMIN. L. REV. 121, 126-28, 130-33 (1988).

64. 467 U.S. at 842-43.

65. 467 U.S. at 843 n.9. See *infra* note 83 for the full quotation. According to *Chevron*, the tools of interpretation for Step 1 do not include the broad statutory purposes: imposing its own construction based on the broad purposes (where it could not find specific intent) is just what the *Chevron* Court reversed the lower court for doing. 467 U.S. at 842-44. See *Bd. of Governors, Fed. Reserve Sys. v. Dimension Fin. Corp.*, 106 S. Ct. 681, 688-89 (1986) (neither court nor agency can correct statute's inadequacies in implementing putative statutory purposes). *But see* *Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 126

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precise question, the court should affirm or vacate the agency interpretation accordingly. But if it fails to find such intent, the court should not then use the "traditional tools" to perform an independent interpretation of the ambiguous statute. Instead, it should move to Step 2 and evaluate the agency's interpretation.

Does this doctrine result in fewer occasions in which a court may interpret independently? Manifestly it does, even though exact meanings cannot be placed upon the words "precise" and "specific," which limit the issues now amenable to independent resolution. Prior cases showed a tendency for the courts to interpret independently when pure questions or major questions were involved and primary interpretive authority had not been delegated to the agencies.⁶⁶ But now such issues seem less likely to be determined independently. Obviously, specific congressional intent directed to such issues often cannot be found.⁶⁷ When it cannot, *Chevron* seems to tell the

(1985) (accept agency view "unless the legislative history or the purpose and structure of the statute clearly reveal a contrary intent on the part of Congress"); *Hall v. Lyng*, 828 F.2d 428 (8th Cir. 1987) (interpreting on basis of general purposes of statute); see also *McNabb v. Bowen*, 829 F.2d 787, 791 (9th Cir. 1987) (applying dictum from *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981), that courts "must reject administrative regulations . . . that frustrate the policies which Congress sought to implement").

The general purposes of the statute are of substantial importance when testing the reasonableness of the agency interpretation in Step 2. *Continental Air Lines v. Dep't of Transp.*, 843 F.2d 1444, 1449-50 (D.C. Cir. 1988). See *infra* text accompanying notes 115-19.

In some circumstances the agency interpretation itself can be an appropriate tool for the court's use in Step 1, as where the agency helped frame the statute, see *SEC v. Collier*, 76 F.2d 939, 941 (2d Cir. 1935), and where the interpretation continues to reflect initial agency views acquiesced in by Congress, see *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933). See also Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1125 (1987).

66. See *supra* text accompanying notes 29-46.

67. Hochberg, "Two-Step Method of Analysis: Still in Transition After *Chevron*," Nat'l L.J., May 16, 1988, at 22 n.13, cites six Supreme Court decisions in which majority and dissent divided over whether Congress had a precise intent, and over what it was. Sometimes the courts appear to strain to find congressional intent to avoid accepting the agency interpretation. See *Int'l Union, UMW v. FMSHRC*, 840 F.2d 77 (D.C. Cir. 1988); *Bracamontes v. Weyerhaeuser Co.*, 840 F.2d 271 (5th Cir. 1988).

Professor Levin suggests that the "precise question at issue" need not be a narrow issue, such as "has Congress talked about the bubble (or whatever the factual situation might be)? No? Then on to Step Two." Instead, "sometimes the precise question framed by the parties can be a fairly broad question, one that requires identifying the broad purposes or the analytical framework that the statute contemplates." Levin, *et al.*, *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 377 (1987) (transcript of panel discussion presented at Fall Meeting of ABA Admin. Law Section). Whatever the issue, he proposes that in Step 1 the court should "[extract] all the guidance that it can possibly get out of the statute" before giving up the quest for precise intent and moving to Step 2. *Id.* at 376.

reviewing court to review the agency interpretation only for reasonableness⁶⁸ rather than to decide independently, as it might have done in a similar case before *Chevron* was decided.

2. "Pure Questions" of Interpretation

But at least four Justices have put forth a variation on Step 1, concerning interpretations that present "pure question[s] of statutory construction,"⁶⁹ which may substantially diminish these effects. It was first advanced in the 1987 *Cardoza-Fonseca*⁷⁰ case by Justice Stevens, who had been the author of the *Chevron* opinion. With the concurrence of four others, he declared for the Court that pure questions "are for the courts to decide."⁷¹ He said that the "narrow legal question" is "quite different from the question of interpretation that arises in each case in which the agency is required to apply [standards from the statutes in question] to a particular set of facts,"⁷² as to the latter, a court under *Chevron* must respect the interpretation of the agency. Justice Scalia, concurring in the judgment, sharply disapproved Justice Stevens's language as gratuitously subversive of *Chevron*.⁷³

The "pure question" idea appeared again in Justice Brennan's opinion for the Court in the 1987 *United Food Workers* case.⁷⁴ He pointedly substituted *Cardoza-Fonseca* for *Chevron* in Step 1, stating:

We review the validity of the relevant regulations, promulgated pursuant to congressional authority, under the standards prescribed in *INS v. Cardoza-Fonseca* On a pure question of statutory construction, our first job is to try to determine congressional intent, using "traditional tools of statutory construction." . . . *Id.* See also *Chevron*, 467 U.S. 837, 842-43, and n. 9. However, where "the statute is silent or ambiguous with respect to the specific issue, the question for the court is

68. 467 U.S. at 842-44, 865-66.

69. *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987).

70. 480 U.S. at 446. In *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986), Justice White, for the Court, viewed the issue as "a purely legal question of statutory interpretation," *id.* at 230, which he decided by accepting the agency's interpretation upon finding it reasonable.

71. 480 U.S. at 446.

72. *Id.* at 448. The interpretive issue in *Chevron* was arguably a pure question. See *supra* text accompanying notes 29, 59-60.

73. *Id.* at 452.

74. *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112 (1987).

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whether the agency's answer is based on a permissible construction of the statute." *Id.*, at 843 Under this principle, we have traditionally accorded the Board deference with regard to its interpretation of the NLRA as long as its interpretation is rational and consistent with the statute.⁷⁵

The Court found the statutory plan ambiguous as to the specific matter dealt with in the agency's construction, which it held reasonable.⁷⁶ Justice Scalia concurred specially, for himself and three others,⁷⁷ declaring that the Court's decision demonstrated the unchanged vitality of *Chevron* in the face of mistaken understandings of dicta in *Cardoza-Fonseca*:⁷⁸ If those dicta had been applied here, he said, the interpretive question at issue surely would have been a pure one, rather than one of applying a statutory standard to particular facts, and the Court could not have upheld the agency's view, as it in fact did, merely by finding it reasonable.

If *Chevron* at its strongest requires judicial acceptance of reasonable agency interpretations on all issues as to which the statutes are silent or ambiguous, its range of applicability would shrink substantially under a doctrine permitting independent judicial decision of pure questions. A reviewing court could readily identify even a minor interpretive issue as "pure," on the ground that it was general in nature and not dependent upon the specific facts of any case. Then, even if the court did not find a clear and unambiguous intent, it would not move to a Step 2 consideration of the agency's interpretation, as indicated by *Chevron*.⁷⁹ Instead, it would remain in Step 1 and employ the "traditional tools of statutory construction"⁸⁰

75. *Id.* at 421.

76. *Id.* at 422.

77. *Id.* at 426. Joining Justice Scalia were Justice O'Connor, who had joined the Stevens opinion in *Cardoza-Fonseca*, Chief Justice Rehnquist and Justice White. A vacancy on the Court existed at the time of the *United Food Workers* decision. Thus, the four justices asserting a pure question doctrine are Justices Brennan, Marshall, Blackmun, and Stevens.

78. *Id.* *Cardoza-Fonseca* had been understood in several lower court cases as permitting acceptance of a reasonable agency view only where the question was a mixed one of applying law to fact, or perhaps where the reviewing court could not discern a congressional intent by its own independent interpretive processes, using traditional tools of statutory construction. *Union of Concerned Scientists v. NRC*, 824 F.2d 108, 113 (D.C. Cir. 1987); *Regular Common Carrier Conf. v. U.S.*, 820 F.2d 1323 (D.C. Cir. 1987); *Adams House Health Care v. Heckler*, 817 F.2d 587, 593-94 (9th Cir. 1987); *International Union, UAW v. Brock*, 816 F.2d 761, 764-65 (D.C. Cir. 1987). See also *Costello v. Agency for Int'l Dev.*, 843 F.2d 540 (D.C. Cir. 1988).

79. 467 U.S. at 842-43.

80. *NLRB v. United Food & Com'l Workers Union*, 484 U.S. 112, 123 (1987) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987)).

to divine congressional intent on the pure question.⁸¹ Obviously, since such pure question cases would never leave Step 1, the occasions for acceptance of agency interpretations under Step 2 would be fewer.⁸²

Their words asserting independent interpretation for pure questions have been cryptic, and the four justices may not have intended any such large inroad into the strong *Chevron* principle. Justice Stevens's original mention of a "pure question" in the *Cardoza-Fonseca* opinion was immediately followed by quotation of a footnote from his *Chevron* opinion, which declared that a court must give effect to the clear congressional intention, if there is one, on "the precise question at issue."⁸³ He thus gives the appearance of using the term "pure question" as a synonym for the "precise question at issue." In the passage quoted above from *United Food Workers*,⁸⁴ Justice Brennan may have done the same thing: he substituted "pure question" language in Step 1, and then seemingly referred to it in Step 2 as the "specific issue." If so, the *Chevron* rules for "precise questions" would govern "pure questions."⁸⁵

81. This approach was taken in *International Union, UMW v. FMSHRC*, 840 F.2d 77 (D.C. Cir. 1988). Citing *Cardoza-Fonseca*, a different panel of the District of Columbia Circuit has asserted: "When the court faces 'a pure question of statutory construction,' the court need not defer to the agency opinion, *even if the statutory provision at issue admits of some ambiguity*. [Citations]. In such instances, the court is to *use traditional tools of statutory construction* to ascertain congressional intent." *Union of Concerned Scientists v. NRC*, 824 F.2d 108, 113 (1987)(Mikva, J.)(emphasis added). Judge Stephen Williams in concurrence objected to "unceremoniously dumping our rule of deference to reasonable agency interpretations in areas of statutory ambiguity." *Id.* at 121. See also *Huffman v. Western Nuclear, Inc.*, 486 U.S. 663, 673 n.9 (1988).

82. Courts have suggested in dictum that a "pure question case" could move to Step 2 in the limited situation "when a court is unable to discern congressional intent after employing traditional tools of statutory construction." *International Union, UAW v. Brock*, 816 F.2d 761, 765 n.5 (D.C. Cir. 1987). See also *NLRB Union v. FLRA*, 834 F.2d 191 (D.C. Cir. 1987).

83. *INS v. Cardoza-Fonseca*, 480 U.S. at 447-48, quoting the entire text of *Chevron* footnote 9, as follows: "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. [Citing cases.] If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." 467 U.S. at 843 n.9.

84. Text accompanying *supra* note 75.

85. See *American Mining Congress v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987). Judge Starr identified the issue as a "pure question," and approached it through a search for clear intent on that precise question, as called for by the language of *Chevron*. 467 U.S. at 842-43 and n.9. After extensive review of the statute and its legislative history, he found a "clear Congressional intent" contrary to the position taken in the agency's regulation. 824 F.2d at 1190. Judge Mikva, dissenting, thought the statute ambiguous enough that the court should have accepted the agency's interpretation under *Chevron*. *Id.* at 1194.

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If this latter view of the “pure question” inquiry reflects what the justices have intended, though, it is hard to see what the controversy is about, since the new language of “pure question” will have worked no real change. It would not diminish the agencies’ ability under *Chevron* to interpret statutes in ways that the courts must accept.

If the “pure question” notion means anything more expansive than this, it implicates the delegation inquiry that inheres in every agency interpretation case.⁸⁶ The four Justices seem to have been saying that, to the extent a question is a pure one, the courts will presume that Congress did not assign the primary interpretive authority to the agency. This is consistent with the analysis of pre-*Chevron* case law, above.⁸⁷ On the other hand, the pure question language has been put forward with no apparent regard for the possibility that delegations *can* occur, even where pure questions are involved.⁸⁸ In a given case a reviewing court may find that Congress did give the agency the primary power to resolve the pure question. Recognizing this possibility, at the least, seems necessary to conform to *Chevron*’s mandate that agency interpretations, if reasonable, be accepted whenever an “express” or “implicit” delegation to interpret is found.⁸⁹

Until the subject of “pure questions” is clarified, it cannot be known how much *Chevron* affects the prior practice. If *Chevron* appeared to reverse the presumption that no delegation exists in pure question cases, *Cardoza-Fonseca* and *United Food Workers* may have restored it.

3. *Interpreting for Violation of Statute*

In the *Dimension Financial* case, the Court quoted from the *Chevron* Step 1 language, and added to it the corollary that the “traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress.”⁹⁰ This obvious proposition, which would seem to reach any agency interpretation that violates any statute, calls for a more general inquiry

86. See text accompanying *supra* notes 9-16; text accompanying *infra* notes 149-52.

87. See *supra* notes 29-39 and accompanying text.

88. See *NLRB v. Coca-Cola Bottling Co.*; 350 U.S. 264, 269 (1956).

89. 467 U.S. at 843-44, 865-66.

90. *Bd. of Governors, Fed. Reserve Sys. v. Dimension Financial Corp.*, 474 U.S. 361, 368 (1986).

than does the *Chevron* text.⁹¹ Even though it speaks of the situation where the intent of the statute is "clearly expressed," it is not thereby speaking of Congress's *specific* intent on the precise point at issue. An agency interpretation could be struck down under Step 1 even where no such specific congressional focus on the precise issue could be found, so long as the agency action violated a generally stated statute whose clear intent precluded the agency's view. This view can be taken of the statutory intent used to strike down the regulations in *Dimension*, though it may be arguable that the Court found specific intent on the narrow points at issue. The use of general rather than specific statutory intent to strike down an agency interpretation seems clearer in the 1988 *K Mart*⁹² case. There individual justices, in shifting combinations of concurrences and dissents, voted to invalidate one or more of the regulations involved, although a majority struck down only one of them.⁹³ The votes to invalidate all appear to be based on the simple proposition that the regulations violated the statute, rather than on the perception that Congress harbored a specific intent which the agency failed to observe.⁹⁴

This approach makes it a part of Step 1 to ask whether the agency interpretation affronts any clearly expressed statutory

91. See *United States v. City of Fulton*, 475 U.S. 657, 666 (1986) ("We must uphold that [agency] interpretation if the statute yields up no definitive contrary command and if the agencies' approach is a reasonable one"); *Japan Whaling Ass'n v. Amer. Cetacean Soc'y.*, 478 U.S. 221, 233 (1986) ("the Secretary is not forbidden [to interpret as he did]"); *Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 125 (1985) ("if Congress has clearly expressed an intent contrary to that of the Agency, our duty is to enforce the will of Congress"); *Edwards v. McMahon*, 834 F.2d 796 (9th Cir. 1987); *Hall v. Lyng*, 828 F.2d 428 (8th Cir. 1987); *Brock v. Peabody Coal Co.*, 822 F.2d 1134, 1145 (D.C. Cir. 1987); *Barnett v. Weinberger*, 818 F.2d 953 (D.C. Cir. 1987); *Nevada ex rel. Loux v. Herrington*, 777 F.2d 529 (9th Cir. 1985); *Mesa Petroleum Co. v. U.S. Dep't of Interior*, 647 F. Supp. 1350 (W.D. La. 1986); see also Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 468-69 (1987): "Congress rarely addresses precise questions directly. . . . The question is not whether Congress had directly addressed the precise issue, but whether the statute requires or forbids the relevant administrative action."

92. *K Mart v. Cartier, Inc.*, 486 U.S. 281 (1988).

93. 108 S.Ct. at 1818. Two parts of the regulations were upheld after the Court found "statutory ambiguity" and "imprecision in the statute," so that "the agency is entitled to choose any reasonable definition."

94. Justice Kennedy, writing for himself and four others, stated: "If the agency regulation is not in conflict with the plain language [intent?] of the statute, a reviewing court must give deference to the agency's interpretation of the statute." *Id.* at 1817. He then went forward to strike down the one regulation on the ground that it could be supported "under no reasonable construction of the statutory language. . . ." *Id.* at 1818. Justice Scalia, for himself and three others, would also have stricken down two other regulations he determined to be "in conflict" with a statute he found "unambiguous." *Id.* at 1831.

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intention, general or specific. It seems eminently sensible to do so. One may cavil that the Court, in the key language of *Chevron* quoted above, seemed to assign to Step 2 the issue of whether an interpretation pursuant to delegated authority was “manifestly contrary to the statute,” or “reasonable” (with the matter of statutory compliance to be treated as part of the reasonableness question).⁹⁵ But the Court has since acted otherwise. The approach implemented by its actions embodies normal judicial behavior. And it has the merit of simplicity, placing all questions of violation of statute into Step 1.

Under this formulation of Step 1, the agency interpretation must be upheld if it is congruent with a clear congressional intent on the precise issue (or pure question).⁹⁶ But if it is contrary to that intent, or contrary to the clear intent of any statute, the court will strike it down without proceeding to Step 2.⁹⁷ If no statute so mandates or precludes the agency view, the court moves to Step 2.

B. *Chevron's "Step 2"*

In Step 2, the court evaluates the agency interpretation, and accepts it if it is reasonable. More precisely, if it finds “an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,”⁹⁸ the court must accept the agency interpretation unless it is “arbitrary, capricious, or manifestly contrary to the statute.”⁹⁹ This is Step 2A. Alternatively, if it does not find an express delegation but perceives an “implicit” “delegation to [the] agency on [the] particular question,” the court must accept a “reasonable interpretation made by the administrator of [the] agency.”¹⁰⁰ This is Step 2B.

95. 467 U.S. at 844. In a nearby footnote, the Court stated: “The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.” 467 U.S. at 843 n. 9.

96. *E.g.*, *Marchese v. Shearson Hayden Stone*, 644 F. Supp. 1381, 1391 (C.D. Cal. 1986). This is not an instance of the agency's view binding the court, however, since the governing act of interpretation is that of the court ascertaining the intent of Congress. See *Levin, supra* note 3 at 25.

97. The intent must appear “clearly” to avoid trenching upon the agencies' legitimate power, under *Chevron*, to interpret ambiguities in statutes entrusted to their administration. See Justice Stevens's use of the phrase “manifestly contrary to statute” in the second paragraph of the key passage from *Chevron* quoted above, text at note 61. *But see* *Independent Ins. Agents of Am., Inc. v. Bd. of Governors, Fed. Reserve Sys.*, 838 F.2d 627 (2d Cir. 1988); *Levin, supra* note 67.

98. 467 U.S. at 843-44.

99. *Id.* at 844.

100. *Id.* at 844.

For both branches of Step 2, the central passage of *Chevron*, just paraphrased,¹⁰¹ rather plainly calls for a reviewing court to find an appropriate delegation before the court becomes bound to accept an agency interpretation on the basis of its reasonableness. Accordingly, before assessing reasonableness the court must not only determine in Step 1 that Congress did not have a contrary intent, but it also must affirmatively answer the delegation inquiry at the threshold of Step 2. These two propositions in my opinion correctly state the law, although other language in *Chevron* indicates a special way of understanding the second one.¹⁰² The matter is central to the analysis of interpretive formats, and will be treated presently, after a brief review of how Step 2 acceptance of agency interpretations works.

1. *Judicial Acceptance of Reasonable Agency Interpretations*

Despite persistent judicial talk of weight and degrees of deference,¹⁰³ it is wholly clear that the agency interpretation, if found reasonable, must be accepted by the reviewing court.¹⁰⁴ The "court may not substitute its own construction of a statutory provision for a reasonable interpretation" by the agency.¹⁰⁵ Indeed, the mood of deference toward agency views, which permeated the *Chevron* opinion, has engendered some extravagant formulations¹⁰⁶ and some

101. The passage is set forth in full in text accompanying *supra* note 61.

102. See *infra* text accompanying notes 134-71.

103. See, e.g., *Lukhard v. Reed*, 481 U.S. 368, 381 (1987)(plurality opinion); *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 438 (1986); *Montana v. Clark*, 749 F.2d 740, 745 (D.C. Cir. 1984). Even in *Chevron*, Justice Stevens spoke of according "considerable weight" to the agency construction. 467 U.S. at 844.

104. See *FAIC Securities v. United States*, 768 F.2d 352, 361 (D.C. Cir. 1985)(Scalia, J.); *Starr*, *supra* note 62, at 296 (in contrast to some pre-*Chevron* cases, courts "must give controlling weight" to the agency interpretation).

105. *Chevron*, 467 U.S. at 844. For an illustration of a court accepting an agency interpretation that it might not prefer but found reasonable, see *Council of Commuter Orgs. v. Thomas*, 799 F.2d. 879, 886 (2nd Cir. 1986).

But where the statute is not within the agency's special competency, its ambiguities are to be resolved by the court. See *Dep't of Navy v. FLRA*, 840 F.2d 1131, 1134 (3rd Cir. 1988) (Freedom of Information and Privacy Acts); see also *Center for Science in the Public Interest v. Regan*, 802 F.2d 518 (D.C. Cir. 1986) (Equal Access to Justice Act).

106. See, e.g., *Japan Whaling Ass'n v. Amer. Cetacean Soc'y*, 478 U.S. 221, 233 (1986) (defer to agency construction "unless the legislative history of the enactment shows with sufficient clarity that the agency construction is contrary to the will of Congress"); *Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 126 (1985) ("defer to [agency] view unless the legislative history or the purpose and structure of the statute clearly reveal a contrary intent on the part of Congress"); *Todd v. Norman*, 840 F.2d 608, 612 (8th Cir. 1988) (conferral of broad authority upon agency in Social Security matters "insulates his administrative interpretations from a judicial override, unless that interpretation is

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pointed ripostes.¹⁰⁷ It seems agreed that the agencies' power has been enhanced by the requirement that their reasonable interpretations be accepted by the courts.¹⁰⁸

To be sustained as reasonable, the agency interpretation need not be the only permissible one, and if reasonable it will be upheld even though the court might have construed the statute differently.¹⁰⁹ The agency may change its view, provided the new interpretation is consistent with statute and reasonable,¹¹⁰ and the change was based on reasoned decisionmaking, adequately explained.¹¹¹ Thus, there need be no single true and enduring interpretation.¹¹² Where Congress has not definitively spoken, agency interpretation is largely a matter of discretionary policymaking, the "wisdom" of which is of

'manifestly contrary to the statute.' *Chevron* . . ."); *American Mining Congress v. EPA*, 824 F.2d 1177, 1195 (D.C. Cir. 1987) (dissenting opinion) ("EPA need demonstrate only that its definition of solid waste does not clearly contradict congressional intent"); *Humane Soc'y of U.S. v. EPA*, 790 F.2d 106, 116 (D.C. Cir. 1986) ("we perceive no inconsistency between EPA's interpretation . . . and the legislative history of the Act. We thus are obliged to accept the agency's reading"); *NLRB v. Manley Truck Line*, 779 F.2d 1327, 1331 (7th Cir. 1985).

107. See *Young v. Community Nutrition Institute*, 476 U.S. 974, 988 (1986) (Stevens, J., dissenting) ("The task of interpreting a statute requires more than merely inventing an ambiguity and invoking administrative deference"); *American Financial Serv. v. FTC*, 767 F.2d 957, 998 (D.C. Cir. 1985) (dissenting opinion) (the "court [was] anesthetized by a misplaced deference to agency authority").

108. See Sunstein, *supra* note 91, at 465-69 (1987); Mikva, *How Should Courts Treat Administrative Agencies?*, 36 AM. U.L. REV. 1, 6-8 (1986); *NRDC v. Thomas*, 805 F.2d 410, 430 (D.C. Cir. 1986) (Wald, J.) ("The agency's response is also a reasonable interpretation of congressional intent, and in that situation the agency always wins under *Chevron*").

109. *Chemical Mfrs. Ass'n v. Natural Resources Defense Council*, 470 U.S. 116, 125 (1985). See *Orloski v. FEC*, 795 F.2d 156, 167 (D.C. Cir. 1986).

110. "The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron*, 467 U.S. at 863-64.

111. See *id.* at 863; *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43, 57 (1983); *Mobil Oil Corp. v. EPA*, 871 F.2d 149, 152 (D.C. Cir. 1989); *Continental Air Lines v. Dep't of Transp.*, 843 F.2d 1444, 1452 (D.C. Cir. 1988); *Homemakers N. Shore, Inc. v. Bowen*, 832 F.2d 408, 412 (7th Cir. 1987); *Cf. Strauss, supra* note 65, at 1129-35 (resolving tension between *Chevron* and *Motor Vehicles Mfrs. Ass'n*).

112. "An ambiguous legal rule does not have a single 'right' meaning; there is a range of possible meanings; the selection from the range is an act of policymaking. The person who fleshes out the meaning of the rule is the true law-giver in the circumstances." *Homemakers N. Shore, Inc.*, 832 F.2d at 411 (7th Cir. 1987) (Easterbrook, J.) (emphasis added). See also *infra* note 170.

no concern to a reviewing court.¹¹³ Indeed, it has been suggested that in such circumstances (that is, where the court has moved to Step 2), the scope of review for statutory interpretations should be assimilated to that for policy judgments made independently of specific statutory language or made under empty standards such as "the public interest."¹¹⁴

How is the "reasonableness" of the agency interpretation to be evaluated?¹¹⁵ Justice White has said: "[O]ur review is limited to the question whether it is reasonable, in light of the language, policies and legislative history of the Act. . . ." ¹¹⁶ Judge Starr has stated that "reasonableness in this context is to be determined by reference both to the agency's textual analysis (broadly defined, including where appropriate resort to legislative history) and to the compatibility of that inquiry with the Congressional purposes informing the measure."¹¹⁷ The latter branch of this inquiry does not warrant a judicial search for the interpretation that "best promotes" the legisla-

113. "When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail." *Chevron*, 467 U.S. at 866. See *Investment Co. Inst. v. FDIC*, 815 F.2d 1540, 1549 (D.C. Cir. 1987). There may be an uncertain line between contentions that go to wisdom and those that go to reasonableness, in light of the way the latter is to be tested. See *infra* notes 115-27 and accompanying text.

114. Pierce, *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988). But see *Continental Air Lines*, 843 F.2d at 1452; Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363 (1986) (distinguishing interpretations, which involve questions of law, from policy determinations, which do not, and recognizing (but not advocating) distinct standards for judicial review of each category). See also Levin, *supra* note 3, at 12, 25.

Justice Stevens's *Chevron* formulation (467 U.S. at 844) of the test in Step 2A, for legislative regulations interpreting statutes, uses the words "arbitrary" and "capricious" which are part of the APA standard (see 5 U.S.C. § 706 (2)(A)) used to review policy determinations (see *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983)); perhaps, therefore, these tests can be regarded as identical so far as they are not concerned with violations of statutes. (For the content of that standard, see *id.* at 41-45; *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 414 (1971)). But for Step 2B, involving interpretations pursuant to implicit delegations, Justice Stevens specified simply that the interpretation must be "reasonable." Reasonableness may establish a standard theoretically different from those of Step 2A and APA § 706(2)(A). See *infra* notes 128-31 and accompanying text.

For a decision applying *Chevron* Step 2A to the ICC's interpretation of the broad term "reasonable," see *Drug & Toilet Preparation Traffic Conf. v. United States*, 797 F.2d 1054, 1057-58 (D.C. Cir. 1986).

115. As remarked, courts and commentators almost universally merge Steps 2A and 2B into a single "reasonableness" inquiry. See, *supra* note 62.

116. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985).

117. *Continental Air Lines*, 843 F.2d at 1449. By the language "in this context" Judge Starr may be contrasting the instant case with the Step 2A "paradigm" of expressly-delegated legislative rules; if so, the quoted passage refers only to Step 2B.

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tive purpose;¹¹⁸ rather, the court should decide whether the agency reasonably explained how the interpretation serves the statutory objectives and whether the interpretation frustrates congressional policy.¹¹⁹

In their Step 2 assessments, courts often identify factors or considerations that enlarge or diminish their perceptions of agency reasonableness.¹²⁰ Excellently summarized in the recent literature,¹²¹ those that enhance reasonableness include the importance of agency expertise in a technical or complex area, detailed and reasonable consideration by the agency, the need to reconcile conflicting policies,¹²² congressional grant to the agency of explicit rulemaking authority, interpretation contemporaneous with the agency's setting the statutory machinery into motion, congressional awareness of the agency view and rejection of changes, and the consistency with which the agency interpretation has been applied.¹²³ Considerations militating against the reasonableness of an agency interpretation include concern that it may raise constitutional questions,¹²⁴ flawed

118. *Id.* at 1451.

119. *Id.* at 1452-53 (citing *Chevron*, 467 U.S. at 863, and *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981)). Judge Starr suggests that this inquiry is different from and less exacting than that under the arbitrary-and-capricious analysis articulated in *Overton Park* and *State Farm*. Starr, *supra* note 62, at 298. See, e.g., *Cablevision Co. v. Motion Picture Ass'n*, 641 F. Supp. 1154 (D.D.C. 1986) (agency interpretation unreasonable as contrary to statutory purposes); *Oliver v. Ledbetter*, 624 F. Supp. 325, 330 (N.D. Ga. 1985) (agency interpretation reasonable as consistent with statutory purposes).

The attention given to statutory objectives in Step 2 contrasts interestingly with the process in Step 1. There, even when the reviewing court cannot find specific congressional intent, it may not form its own interpretation derived from perceived statutory purposes, as it might properly do if no agency interpretation were in the picture. *Chevron*, 467 U.S. at 843. See *supra* note 65.

120. As noted, some of these factors can bear upon inquiries as to whether a delegation to interpret exists or whether an agency position is correct. See *supra* notes 51-52 and accompanying text.

121. See Diver, *supra* note 3, at 562 n.95 (1985); Woodward & Levin, *In Defense of Deference: Judicial Review of Agency Action*, 81 ADMIN. L. REV. 329, 332-36 (1979); Note, *supra* note 52, at 997-1002; Hochberg, *supra* note 67, at text accompanying nn.26-33.

122. The three factors just listed were cited in the *Chevron* opinion. 467 U.S. at 865.

123. See *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 120 n.20 (1987) (contemporaneous interpretation and consistency of interpretations); *Bowen v. Amer. Hosp. Ass'n.*, 476 U.S. 610 (1986) (consistency of interpretation); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (congressional awareness); *Massachusetts v. United States Dep't of Educ.*, 837 F.2d 536, 543 (1st Cir. 1988) (expertise); *Barnett v. Weinberger*, 818 F.2d 953, 962-63 (D.C. Cir. 1987) (detailed consideration); *Production Workers Union v. NLRB*, 793 F.2d 323 (D.C. Cir. 1986) (conflicting policies); *Massachusetts v. Secretary of HHS*, 749 F.2d 89, 96 (1st Cir. 1984) (explicit rulemaking authority). But see *supra* notes 109-10 and accompanying text.

124. See *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const.*, 485 U.S. 568 (1988); Note, *supra* note 52, at 1002-03 (1987).

agency reasoning and inadequate explanation,¹²⁵ inconsistency of agency positions,¹²⁶ and agency self-aggrandizement.¹²⁷

The *Chevron* opinion separately stated the standards of judicial scrutiny for Steps 2A and 2B respectively,¹²⁸ and a few courts have discerned an operational difference, or the possibility of one.¹²⁹ It is quite thinkable that interpretations set forth in expressly authorized legislative regulations should trigger less scrutiny than those set forth in other ways.¹³⁰ And it is at least imaginable that *Chevron's* differentiated formulations can be given differentiated practical applications.¹³¹

Whatever may be the significance of these distinctions, though, there is another far more important reason to keep Steps 2A and 2B distinct. That is to assure that reviewing courts, especially in Step 2B cases, consciously ask whether there is a delegation authorizing the agency's interpretation. All Step 2A cases involve legislative

125. See, e.g., *Homemakers N. Shore, Inc. v. Bowen*, 832 F.2d 408 (7th Cir. 1987); *Brock on behalf of Williams v. Peabody Coal Co.*, 822 F.2d 1134 (D.C. Cir. 1987); *Brock v. Louvers and Dampers, Inc.*, 817 F.2d 1255 (6th Cir. 1987); *Phillips Petroleum Co. v. FERC*, 792 F.2d 1165 (D.C. Cir. 1986).

126. *INS v. Cardoza-Fonseca*, 480 U.S. at 446 n.30. But see *supra* notes 110, 112. "The very meaning of the second stage, emphasized in *Chevron*, is that within the zone of indeterminacy, an agency is free to change its view—and the obligation of the courts to accept the changed view is not altered by the fact of the change." Strauss, *supra* note 65, at 1125. See *Hicks v. Cantrell*, 803 F.2d 789, 793 (4th Cir. 1986).

127. See Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 383; Sunstein, *supra* note 91, at 468; Note, *supra* note 52, at 1005-07; *Larinoff v. United States*, 533 F.2d 1167, 1178 (D.C. Cir. 1976), *aff'd*, 431 U.S. 864 (1977). Analytically, however, it can be asserted that the scope of an agency's authority is implicated every time it interprets its own statute. See *Addison v. Holly Hill Fruit Prod., Inc.*, 322 U.S. 607 (1944). Presumably a line might be drawn somewhere between, for example, assertion of power over new subject matter (see Winter, *The Quiche Brief*, Regulation, Sept.-Oct. 1986, at 31) or "the unauthorized assumption by an agency of major policy decisions properly made by Congress," (*Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983), (quoting *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965))) and, on the other hand, the expert filling of interstices in the everyday administration of the statute (see *St. Luke's Hosp. v. Secretary of HHS*, 810 F.2d 325, 331 (1st Cir. 1987) (Breyer, J.)).

128. See quoted text accompanying notes 61, 98-100; *supra* note 113.

129. See *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133, 151 (D.C. Cir. 1984) ("language in *Chevron* might be read to indicate that the appropriate standard of review in such a situation varies to some degree dependent on whether the statute's delegation of gap filling authority is explicit or implicit") (Wald, C.J.); *Delaware Div. of Health and Soc. Serv. v. HHS*, 665 F. Supp. 1104, 1120 (D.Del. 1987) (Step 2B standard is "less deferential than the arbitrary and capricious standard"); *Panzarino v. Heckler*, 624 F. Supp. 350, 353 (S.D.N.Y. 1985) (where rulemaking authority "is only implicit, the scope of our review is somewhat more searching than the 'arbitrary, capricious or manifestly contrary to statute' standard"); *Hochberg*, *supra* note 67, at 27 n.34. See also *supra* note 119. But see authorities cited *supra* note 60.

130. See text at *supra* note 17; *infra* text at notes 204-12.

131. But Justice Frankfurter warned of "the intractability of any formula to furnish definiteness of content for all the impalpable factors involved in judicial review." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

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regulations authorized by “express delegation,”¹³² and that delegation is usually so easy to find that it will pose no issue for the court to ponder. By contrast, the delegation issue is a vital one for other kinds of agency interpretations, reviewed by means of Step 2B, in which the court must actively seek an “implicit” delegation. But in their practice of merging Steps 2A and 2B into a single reasonableness inquiry, many courts apparently follow the simpler Step 2A and consequently forget about the delegation issue entirely, even in Step 2B cases where it should be indispensable.

2. *The Place of the Delegation Inquiry in Step 2*

In review of agency interpretations, the sequence of inquiry is (1) substantive statutory questions (Step 1),¹³³ (2) the question of delegation of authority for the interpretation (threshold of Step 2), and, if there is a sufficient delegation, (3) the question of reasonableness (Step 2).

An affirmative finding of specific substantive intent will usually decide the case and in any event will clearly preclude any delegation to the agency to interpret as it has done. A finding that the agency's interpretation violates a statute will do the same. If the answer to both of these questions is negative—that is, if statutes do not supply substantive norms by which the agency interpretation can be dispositively judged—the reviewing court moves to Step 2. It should not, however, plunge directly into evaluating the agency interpretation for reasonableness. The prior and vital inquiry at this point is whether Congress has delegated to the agency authority for its interpretation. The Step 2 inquiry is framed thus: First, is issuance of the interpretation within a delegation of primary authority to interpret in this fashion? Then, is the interpretation reasonable? If the answer to either question is negative, the court is not bound to accept the agency's interpretation.

To bind a court to accept an agency's reasonable construction, there must certainly be a delegation;¹³⁴ what is not certain is whether such a delegation, where not made expressly, will be presumed to

132. *Chevron*, 467 U.S. at 843-44.

133. See text accompanying *supra* notes 96-97.

134. See text accompanying *supra* notes 98-102; *Montana v. Clark*, 749 F.2d 740, 745 (D.C. Cir. 1984), *citing* *Monaghan*, *supra* note 3, at 25-28 (“[D]eference to an agency's interpretation constitutes a *judicial* determination that Congress has delegated the norm-elaboration function to the agency and that the interpretation falls within the scope of that delegation”).

have been made implicitly. This may be the most vexing of the many uncertainties left by *Chevron*.¹³⁵ Obviously, this question cannot arise in Step 2A, where only express delegations are involved. But for Step 2B cases, as to which the *Chevron* text calls for an "implicit" delegation, certain passages in *Chevron* and elsewhere suggest that a sufficient delegation must be presumed to exist whenever there is a "gap" in the statute—that is, whenever the statute is silent or ambiguous on the specific issue, such that the matter cannot be resolved by judicial interpretation in Step 1.

The formulary paragraphs of *Chevron*¹³⁶ offer no guidance about how the requisite implicit delegation is to be detected.¹³⁷ But in provocative language near the close of his opinion, Justice Stevens declared that "it matters not" whether Congress consciously wished the agency to interpret or simply did not consider the specific question.¹³⁸ This suggests that, by its very silence or ambiguity, Congress implicitly delegates adequate interpretive authority on the issue. Justice Stevens reinforced this suggestion by speaking approvingly in the next paragraph of an agency "resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency. . .," although he was there referring to "an agency to which Congress had delegated

135. See Anthony, *supra* note 63, at 126-27, 130-31.

136. See text accompanying *supra* note 61.

137. The quotation from *Morton v. Ruiz*, set forth in text accompanying *supra* note 61, may misleadingly color judicial understanding of the later words about implicit delegation. *Morton* was not concerned with delegation of interpretive authority in the absence of rulemaking authority. Rather, the Court stressed the agency's obligation to formulate gap-filling policy rules where required to establish eligibility among needy Indians in the face of an inadequate appropriation. Although the quotation in *Chevron* seems to be taken that way, *Morton* does not in any fashion support the notion that a "gap" creates or delegates any rulemaking or other interpretive power that did not already exist. To the contrary, it disapproved failure to use existing rulemaking powers sufficiently to meet program needs. See text accompanying *infra* notes 154-61. On the significance of *Morton v. Ruiz*, see Fuchs, *Development and Diversification in Administrative Rulemaking*, 72 NW. U.L. REV. 83, 101-02 (1977).

138. Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by [this case]. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

Chevron, 467 U.S. at 865.

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policymaking responsibilities. . . , [acting] within the limits of that delegation."¹³⁹

The idea that a "gap" in congressional intention or statutory language *ipso facto* delegates all needed interpretive authority, or something like it, has several times won eminent expression.¹⁴⁰ In effect these formulations conclusively presume a delegation from the statutory silence or ambiguity; they omit any search for evidence or inference about Congress's delegatory intentions.

One may hesitate to accept this proposition, and its suggestion that delegation has no significant role in *Chevron* analysis. The omission of a delegation inquiry would contradict express language¹⁴¹ and an apparent premise of *Chevron*: that agency interpretations will bind the courts when Congress wants them to. Unless the courts will at least inquire into the delegatory wishes of Congress in particular cases, they risk thwarting those wishes. A capital judicial respon-

139. Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Chevron, 467 U.S. at 865-66.

140. See *National Wildlife Fed'n v. Hodel*, 839 F.2d 694, 741 (D.C. Cir. 1988) (clear evidence of congressional intent to preclude agency's interpretation is "a necessary prerequisite here to rebut the inference that Congress meant to delegate to the Secretary the authority to interpret the general and ambiguous terms") (Wald, C.J.); *Nat'l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1569 (D.C. Cir. 1988) ("When Congress leaves gaps . . . implicitly by enacting an ambiguously worded provision that the agency must interpret, it has . . . implicitly delegated to the agency the power to fill those gaps. That delegation requires the courts to defer to an agency's decision") (Bork, J.); *Drunmond Coal Co. v. Hodel*, 796 F.2d 503, 507 (D.C. Cir. 1986) ("Since Congress did not explicitly address the proper meaning of the words . . . Congress has left a gap in the regulatory regime for the agency to fill. . . . We have no warrant to set aside the agency's interpretation, if reasonable") (Silberman, J.); *Investment Co. Inst. v. Conover*, 790 F.2d 925, 935 (D.C. Cir. 1986) ("*Chevron* teaches that Congress may delegate interpretative authority implicitly—by failing to legislate in sufficient detail as to resolve a particular question of interpretation") (Starr, J.). See also *Lukhard v. Reed*, 481 U.S. 368, 376 n.3 (1987) (Scalia, J.); *Delaware Div. of Health & Soc. Serv. v. HHS*, 665 F. Supp. 1104, 1119 (D. Del. 1987) (Wright, J.).

141. See *supra* text accompanying notes 61, 98-100.

sibility here is to determine what authority has been conferred upon the agency.¹⁴² To forswear the delegation inquiry is to abdicate this pivotal task, which makes up the bulk of the *Marbury* duty to say what the law is in these cases.¹⁴³ Elision of the delegation issue surrenders all opportunity to discriminatingly identify and honor Congress's interpretive intent in any given case. Moreover, it would undercut the benefit of national uniformity justly claimed for agency interpretations.¹⁴⁴ If those interpretations are rightfully to displace the powers of courts nationwide to say what the law is, they should possess the warrant for doing so that only congressional delegation of appropriate powers can confer.

But these objections mainly beset only one of the *two kinds of delegation* that must exist if the agency's interpretation is to bind the courts. The Stevens language, like that of the judges just cited,¹⁴⁵ refers to delegation (the first kind) to interpret authoritatively *with respect to the subject matter* of the statutory gap. The doctrine that a gap automatically creates such a delegation is not ordinarily open to the objections that have just been canvassed, *provided* the agency's interpretation is adequately covered by a delegation (the second kind) to pronounce authoritative interpretations *in the format chosen by the agency*. The objections reviewed above go to this second kind of delegation, and demonstrate the infirmity of any notion that a gap can automatically provide the requisite delegation as to format.

As to the first kind: Except possibly where they confront "pure questions," and unless a contrary congressional intent appears, reviewing courts may properly treat the existence of a gap as a sufficient delegation of the power to establish interpretations carrying the force of law on subject matter lying within that gap. When acting within the gap, the agency is realistically viewed as making policy, rather than interpreting for a single best meaning, as a court might do.¹⁴⁶ For reasons that are well stated elsewhere,¹⁴⁷ it is both

142. See Monaghan, *supra* note 3, at 27, citing *Addison v. Holly Hill Fruit Prods., Inc.* 322 U.S. 607, 616 (1944).

143. Since the courts retain the capacity independently to adjudge specific statutory intent in Step 1 and reasonableness in Step 2, the abdication of this task probably would not be an unconstitutional abridgement of the court's independence.

144. See Strauss, *supra* note 65, at 1121-24, 1129-33.

145. See *supra* note 140.

146. See *Pierce*, *supra* note 114; *Homemakers N. Shore, Inc. v. Bowen*, 832 F.2d 408, 411 (7th Cir. 1987) (Easterbrook, J.) ("An ambiguous legal rule does not have a single 'right' meaning; there is a range of possible meanings; the selection from the range is an act of policymaking. The person who fleshes out the meaning of the rule is the true law-giver in the circumstances").

147. *Pierce*, *supra* note 114; Strauss, *supra* note 65, at 1117-26, 1129-33.

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sound and sensible to look to the agency that exercises related policymaking responsibilities,¹⁴⁸ and not to the court system, as the competent organ to fill the substantive interstices.

So far as authority over the subject matter is concerned, then, the gap can satisfy the requirement, identified above,¹⁴⁹ that a sufficient delegation be found at the threshold of Step 2. But to grant this proposition is not to abandon that threshold requirement, for two reasons. The more important consideration is the need to find a delegation as to the format, which has been alluded to above and will be discussed presently. Even keeping within the realm of subject-matter powers, though, there is reason to retain the delegation inquiry as an essential part of the analytical structure. So long as the Supreme Court holds open the possibility that “pure questions of statutory construction” will be treated differently from other interpretive issues,¹⁵⁰ the reviewing courts must pursue a delegation analysis: did Congress intend the agency’s resolution of the “pure question” at issue to bind the courts?

There probably should be no single rule for all pure question cases regardless of the statutes and formats involved. Again, the question should be one of legislative intent, addressed in terms of relevant evidence and inferences of intent. Even if most “pure questions” were subjected to independent judicial review, Congress in some statutes may nevertheless have endowed particular agencies with interpretive powers meant to be subjected only to limited review.¹⁵¹ And it can well be imagined that the courts, while exercising independent review when the agency resolves the pure question by adjudication, might nonetheless impose only limited review when the question is resolved in legislative regulations, as to which the delegatory intent might appear stronger.¹⁵²

148. There is no delegation to an agency that lacks policymaking powers. See *Potomac Elec. Power Co. v. Director, Office of Workers' Compensation Programs*, 449 U.S. 268, 278 n.18 (1980) (Stevens, J.); *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 49 (2d Cir. 1976).

149. See *supra* note 133 and accompanying text.

150. See *supra* notes 69-89 and accompanying text.

151. See *supra* text accompanying notes 88-89. See also the concurring opinion of Justice Scalia in the *United Food* case, paraphrased *supra* in text accompanying notes 77-78, arguing that the Court there gave only limited “reasonableness” review to the NLRB’s determination of a pure question.

152. Compare *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (pure question resolved in adjudicatory decision) with *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984) (pure question resolved in legislative regulations).

3. *The Key Inquiry: Is the Interpretation in This Form Binding?*

The delegation implied from a statutory gap authorizes binding interpretive action with respect to the subject matter, as just described, but not with respect to the format in which the interpretation is set forth. Even when possessed of the subject matter delegation created by such a gap, the agency cannot express its interpretation in any format it pleases and expect to command the courts' acceptance. To act with such binding effect, it must enjoy a separate delegation of power to pronounce interpretations with the force of law *in the format it uses*.

To hold otherwise would sacrifice any chance to assure that the interpretation is one that Congress deems worthy of binding effect in the courts. If an agency head has filled a gap with an opinion expressed in a letter or in a speech or in an amendment to the manuals, for example, should not the reviewing court at least ask whether Congress wants it to be bound by that kind of pronouncement? If such informal gap-fillers must always be presumed binding, subject only to reasonableness review, they would have as much force as legislative regulations do. An agency would then have little need for regulations, or for the statutory delegations and public procedures that safeguard them.¹⁵³

Morton v. Ruiz,¹⁵⁴ whose widely-noted "gap-filling" passage¹⁵⁵ was quoted in *Chevron's* key paragraph,¹⁵⁶ is illustrative. Plaintiffs, who had left their Indian reservation to live in an Indian community nearby, were denied general assistance benefits because of a provision in the Bureau of Indian Affairs Manual limiting eligibility to Indians living "on reservations." In the light of appropriations provisions and other legislative history, the Court construed the statutory words "on reservations" to mean "on or near reservations."¹⁵⁷ But, in view of the insufficiency of appropriated funds to cover all of those near as well as on reservations, the Court declared that it was incumbent upon the agency to develop an eligibility standard which, if rational and proper, might leave some of the class without benefits.¹⁵⁸ In an analysis parallel to a *Chevron* Step 2

153. See *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976); 5 U.S.C. § 553; 2 K. Davis, *ADMINISTRATIVE LAW TREATISE* 54-60 (2d ed. 1979).

154. 415 U.S. 199 (1974).

155. *Id.* at 231.

156. See *supra* text accompanying note 61.

157. *Morton*, 415 U.S. at 230.

158. *Id.* at 230-31.

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determination of reasonableness, the Court assumed *arguendo* that the agency could rationally limit eligibility to those living directly on the reservations. But it held that this had not been validly accomplished by the Manual. Expressly noting that the agency had “long been empowered to promulgate rules and policies,”¹⁵⁹ the Court held that “the determination of eligibility cannot be made on an *ad hoc* basis,”¹⁶⁰ and that the longstanding provisions of the Manual did not cure the failure to establish the standard by a legislative rule published in the Federal Register:

The only official manifestation of this alleged policy of restricting general assistance to those directly on the reservations is the material in the Manual which, by BIA's own admission, is solely an internal operations brochure intended to cover policies that “do not relate to the public.” Indeed, at oral argument the Government conceded that for this to be a “real legislative rule,” itself endowed with the force of law, it should be published in the Federal Register.¹⁶¹

The agency *did* interpret the statute to fill the subject-matter gap, in a way the Court was willing to assume was substantively reasonable. But the format it chose was insufficient. Although it possessed delegated rulemaking authority, the agency chose to establish its standard only in the Manual, through which it had no delegated power to speak with the force of law.

Similarly in *Chevron*, once the Court determined that the issue about the bubble lay within a gap in congressional intent,¹⁶² the controlling question became one of whether such an interpretation issued as a *legislative regulation* should be binding. The Court answered affirmatively. Congress did not have substantive intent about the bubble as such, but it had an interpretive intent about the force to be given EPA's gap-filling interpretations set forth in legislative regulations.

The delegation as to format must be tested, as always, by assessing interpretive intent: Did Congress intend that interpretations

159. *Id.* at 231.

160. *Id.* at 232.

161. *Id.* at 234-35.

162. Professor Strauss usefully refers to such issues as falling within a “zone of indeterminacy.” Strauss, *supra* note 65, at 1125 (1987).

issued *in this format* be binding?¹⁶³ The answer often will be readily found.¹⁶⁴ In other situations, Congress's interpretive intent respecting the agency's format will have to be derived by inference or construction. Again, in many instances, this should not be difficult.¹⁶⁵ Consider the adjudications in which the NLRB applies the National Labor Relations Act to specific labor-management situations. Can there be any doubt that Congress expects the resulting interpretations, if reasonable and consistent with the Act, to bind the courts? That conclusion can be confidently drawn from inferences about Congress having in mind such things as the large numbers of these cases, the relative level of detail involved, the potential waste of requiring reinterpretation by the courts,¹⁶⁶ and the lodgement of direct review in the courts of appeals rather than the district courts—not to mention the antiquity of the *Hearst* case so holding.¹⁶⁷

By contrast, consider an NLRB interpretation set forth only in a press release, or in testimony presented to a congressional committee. The delegation inquiry is particularly critical in such a case. Can it be thought that Congress would wish interpretations so expressed to bind the courts? One would have to canvass the specific circumstances of the National Labor Relations Act and its amendments, but it is very doubtful that an intent to delegate authority to interpret *in that format* would be found. And it seems doubtful that such an intent would be inferred or presumed, since the format is not one ordinarily used for pronouncements intended to carry the force of law.

163. To repeat, the usage of the terms "bind" and "binding" here includes the understanding that the interpretation is subject only to limited review, for reasonableness and consistency with the statute.

164. It will be self-evident, for example, whenever legislative rules pursuant to an "express delegation", see *Chevron*, 467 U.S. at 843, are involved. And for certain formats there may occasionally exist express statutory language enabling a court to conclude that Congress specifically intended agency interpretations so issued to be binding. A vivid example is *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 567-68 (1980) (statutory provision of a defense for reliance upon agency and staff interpretations "signals an unmistakable congressional decision to treat administrative rulemaking and interpretation under TILA as authoritative").

165. "[I]f Congress is silent, courts may still infer from the particular statutory circumstances an *implicit* congressional instruction about the degree of respect or deference they owe the agency on a question of law. See *Chevron* They might do so by asking what a sensible legislator would have expected given the statutory circumstances." *Maybury v. Secretary of HHS*, 740 F.2d 100, 106 (1st Cir. 1984) (Breyer, J.) "Factors" bearing upon delegation of interpretive authority can be relevant. See generally Note, *supra* note 52.

166. See *United States v. Louisville & Nashville R.*, 235 U.S. 314, 320-21 (1914).

167. See *supra* notes 23-25 and accompanying text; *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236-37 (1963).

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How does the “force of law” of a format bear upon the delegation inquiry? It would be circular to say that the needed delegation can be found whenever the format carries the force of law, since force of law is simply the *result* of the delegation. An interpretation will have the force of law when the agency has exercised delegated power, as to both subject matter and format, reflecting congressional intent that such an interpretation is to bind. “Force of law” as used here merely connotes the binding effect given the kinds of agency interpretations that Congress through its delegations *intends* to bind the courts.¹⁶⁸ And that binding effect (force of law) means simply that the courts may not subject the interpretations to independent judicial review, but rather must accept them subject only to limited review for reasonableness and consistency with the statute.¹⁶⁹ Thus, an interpretation carrying the force of law gets only limited review because by definition it is covered by delegation that contemplates only limited review.

Chevron's own language suggests that “implicit” delegation should be inferred only for formats that usually carry the force of law. For Step 2A, the express delegation it spoke of conferred power “to elucidate a specific provision of the statute by regulation”¹⁷⁰—that is, to act with the force of law. By direct analogy, a similarly potent delegation should be required in Step 2B: The reviewing court should not be bound unless it can find that the implicitly delegated power authorizes issuance of interpretations possessing the force of law in the format used.¹⁷¹

Concededly, in practice the delegation inquiry will be easily and affirmatively answered in the large majority of cases.¹⁷² But although this inquiry may become a routine one, the reviewing court should not accept an agency interpretation under Step 2B unless it first

168. See 2 K. Davis, *supra* note 153, §27:9, at 53-54. Force of law, of course, also connotes binding effect upon the public and upon the agency itself. See *supra* note 6.

169. See *Joseph v. United States Civil Serv. Comm'n*, 554 F.2d 1140, 1154 n.26 (D.C. Cir. 1977).

170. 467 U.S. at 843.

171. Both cases in *Chevron's* supporting footnote, 467 U.S. at 844 n.13, involved dispositive adjudicative actions supported by clear congressional authority. See *INS v. Jong Ha Wang*, 450 U.S. 139, 144 (1981) (Board of Immigration Appeals's denial of motion to reopen deportation proceeding on basis of its interpretation of statutory “extreme hardship” standard); *Train v. National Resources Defense Council*, 421 U.S. 60, 87 (1975) (EPA's approval of state implementation plan on basis of its interpretation of provision concerning “revision” of such plans).

172. The finality, exhaustion, and ripeness rules will block judicial review of many agency interpretations expressed in formats of less dignity than completed adjudications or regulations. See R. PIERCE, S. SHAPIRO & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 180-206 (1985) [hereinafter *ADMINISTRATIVE LAW AND PROCESS*].

seeks and affirmatively finds an appropriate delegation. When the delegation question is answered negatively—as for example where the format expressing the agency interpretation is too informal—the court should not go forward to the reasonableness stage of Step 2.

As a matter of practical judicial psychology, it may often make little operational difference whether an interpretation is reviewed independently but given *Skidmore* consideration or is reviewed for reasonableness under *Chevron* Step 2. But the conceptual difference is large. An interpretation subject to the limited review of *Chevron*'s Step 2 binds the court—and therefore is law—unless it can be found unreasonable. The agency thus makes law. But “no agency has the power to legislate unless Congress has delegated legislative power to it.”¹⁷³ A delegation, express or implied, must be the foundation for any interpretation that can bind the courts in this fashion. “The principle is nothing less than the principle that distinguishes democratic government from dictatorship.”¹⁷⁴

4. *A Suitable Standard for Review*

How, then, should the reviewing court act upon a case in which it has concluded (in Step 1) that the agency interpretation is not contrary to statute but (at the threshold of Step 2) that because of inadequate delegation it does not possess the force of law?

As a general rule, the court should undertake an independent review of the statute, extending to the agency's view such special consideration as it finds helpful.¹⁷⁵ This approach should be observed in all cases where the nature of the litigation obliges the court to arrive at a definitive interpretation in order to resolve the case. Thus, reviewing courts should refrain from extending *Chevron* acceptance to informal agency interpretations in settings such as judicial enforcement proceedings,¹⁷⁶ private litigation,¹⁷⁷ review of

173. 2 K. DAVIS, *supra* note 153 §27:9, at 54. “The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to the limitations which that body imposes.” *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979).

174. 2 K. DAVIS, *supra* note 153, § 27:9, at 55.

175. See *supra* notes 47-52 and accompanying text. This approach is well illustrated by *Malloy v. Eichler*, 628 F. Supp. 582, 592-98 (D.Del. 1986), *aff'd*, 860 F.2d 1179 (3rd Cir. 1988).

176. See, e.g., *Bond v. United States*, 872 F.2d 898, 901 (9th Cir. 1989); *D & W Food Centers, Inc. v. Block*, 786 F.2d 751, 758 (6th Cir. 1986).

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agency actions that rest upon interpretations not having the force of law,¹⁷⁸ review of the actions of agencies that exercise no policymaking powers and are therefore unequipped to interpret with the force of law,¹⁷⁹ and challenges to state actions that implicate federal agency interpretations of federal statutes.¹⁸⁰ Since the agency's views cannot bind it in such cases, the court must arrive at its interpretation independently, subject only to *Skidmore* consideration.¹⁸¹

An exception to this rule should apply where an agency, though possessing authority to interpret with the force of law, has to date expressed its interpretation only informally.¹⁸² If that informal interpretation becomes the subject of direct review before the agency has taken concrete action based upon it, a different judicial response is appropriate. The nonbinding aspect of the informal interpretation should not entitle the court to tell the agency what definitive view to adopt. The agency should remain untrammelled in its freedom

177. See, e.g., *Mead Corp. v. Tilley*, 109 S.Ct. 2156, 2161-64 (1989); *Patel v. Quality Inn South*, 846 F.2d 700, 703 (11th Cir. 1988); *Dove v. Coupe*, 759 F.2d 167 (D.C. Cir. 1985).

178. See, e.g., *Conley v. Brewer*, 652 F. Supp. 106 (W.D.Wis. 1986); *White v. Bowen*, 636 F. Supp. 1235, 1239-41 (S.D.N.Y. 1986).

179. See, e.g., *Sanders v. Alabama Dry Dock & Shipbldg. Co.*, 841 F.2d 1085, 1087 (11th Cir. 1988); *William Bros., Inc. v. Pate*, 833 F.2d 261, 264-65 (5th Cir. 1987).

180. See, e.g., *Hicks v. Cantrell*, 803 F.2d 789, 791 (4th Cir. 1986); *Leigl v. Webb*, 802 F.2d 623, 625-27 (2nd Cir. 1986) (rejecting interpretation set forth in manual but accepting interpretation set forth in notice of proposed rulemaking); *Reed v. Blinzinger*, 639 F. Supp. 130, 132 (S.D.Ind. 1986)

181. After *Chevron*, may a reviewing court adopt the posture that, as a matter of judicial comity toward the executive, it will accept any reasonable agency interpretation even if informally expressed? *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980), is the salient pre-*Chevron* case in which the court accepted an informally-expressed agency interpretation. Justice Brennan's opinion seems to hold that Congress had expressly delegated to the Federal Reserve staff the authority to issue binding interpretations, which the courts therefore *must* accept if reasonable. See 444 U.S. at 566-68; *supra* notes 9, 164. But the Court might also be understood as having *chosen* in the circumstances to accord comity to the expert agency, by accepting its interpretations even where they were informally expressed. On this view, a delegation would not be essential where the court chose to accept the informal interpretation rather than to interpret independently. If this is a sound understanding of at least an alternative holding in *Milhollin*, it arguably survives *Chevron*, which, despite its insistence on delegation before the court *must* accept the agency view, said nothing expressly to preclude the *option* of accepting an informal interpretation where there is no delegation. See *supra* text of *Chevron* quoted at note 61; text accompanying notes 98-100, 133-61. But the option should not survive. By accepting an agency interpretation, a court necessarily holds that that interpretation binds the public. In our system of government, an agency should bind the public (as well as the courts) only where Congress by delegation has authorized it to do so. Without the requisite delegation, the court should go no further than to extend *Skidmore* consideration. The dispositive act of interpretation should be the court's.

182. I am indebted to Peter Strauss for sharing his insights on this aspect of the informal formats problem.

to choose a position anywhere within the zone of indeterminacy.¹⁸³ The reviewing court therefore should decide only whether the informally expressed interpretation is invalid on its face, and should reserve its detailed scrutiny for later agency actions that enforce or otherwise execute the interpretation. Meanwhile, the court's determination not to strike down the informal interpretation would not invest that interpretation with the force of law, and would not itself have the same force as would a full judicial interpretation of the statute. In this situation, the agency does not bind the court, and the court does not bind the agency.

IV. Which Interpretive Formats Should Bind?

Which interpretations, then, should be recognized as carrying the force of law,¹⁸⁴ and as therefore binding on the courts and the public?¹⁸⁵ The answer is simple: only those that Congress intended to have the force of law. As explained,¹⁸⁶ the key question in each case is whether Congress delegated the authority to issue interpretations with the force of law *in this format*.

But, in the name of *Chevron*, courts have occasionally thought themselves obliged to accept agency interpretations set forth in informal formats, as to which it is exceedingly unlikely that the needed delegations could be found or inferred. The opinions either ignored the delegation inquiry entirely, or assumed that a statutory gap¹⁸⁷ created a delegation sufficient to authorize the format as well as the precise substantive topic of the interpretation.

Thus, courts have accorded *Chevron* acceptance to interpretations set forth in an affidavit as to prior practice,¹⁸⁸ in manuals and guidelines,¹⁸⁹ in memoranda and informational bulletins,¹⁹⁰ in opinion

183. See *supra* note 162 and text accompanying notes 109-14.

184. See text accompanying *supra* notes 168-69.

185. See *supra* note 6.

186. See text accompanying *supra* notes 162-77.

187. See text accompanying *supra* notes 134-40.

188. *Mattox v. FTC*, 752 F.2d 116, 119 n.6 (5th Cir. 1985).

189. *Friends of the Shawangunks, Inc. v. Clark*, 754 F.2d 446, 450 (2d Cir. 1985) (Department of Interior's Bureau of Outdoor Recreation Manual relied on to set aside inconsistent decision made in name of Secretary of Interior); *White v. Bowen*, 636 F. Supp. 1235, 1241 (S.D.N.Y. 1986) (Program Operations Manual System relied on, treated as interpretive rules exempt from notice-and-comment requirements of 5 U.S.C. §553). See also *Nevada ex rel. Loux v. Herrington*, 777 F.2d 529 (9th Cir. 1985) (internal general guidelines).

190. *Lukhard v. Reed*, 481 U.S. 368, 377-78 (1987); *Cook Inlet Native Ass'n v. Bowen*, 810 F.2d 1471, 1474, 1476 (9th Cir. 1987).

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letters,¹⁹¹ in proposed regulations not yet adopted,¹⁹² in explanatory comments accompanying publication of regulations,¹⁹³ in policy statements,¹⁹⁴ in interpretive regulations,¹⁹⁵ and in interpretations developed for purposes of the litigation itself.¹⁹⁶

On the other hand, courts have recognized that an interpretation lacks power to command *Chevron* acceptance if it has been expressed only in an informal format—such as in interpretive rules and policy statements,¹⁹⁷ in letters and circulars,¹⁹⁸ in manuals,¹⁹⁹ or in argument during litigation²⁰⁰—though it may merit respectful consideration as appropriate under the *Skidmore* doctrine.²⁰¹

As has been recited, the key inquiry in each case should be the delegation inquiry: whether Congress intended an interpretation in

191. *Almendarez v. Barrett-Fisher Co.*, 762 F.2d 1275, 1281-82 (5th Cir. 1985); *Techworld Dev. v. D.C. Preservation League*, 648 F. Supp. 106 (D.D.C. 1986).

192. *Liegl v. Webb*, 802 F.2d 623, 627 (2d Cir. 1986). *See also* *Watkins v. Blinzinger*, 789 F.2d 474, 475 n.2 (7th Cir. 1986).

193. *Lukhard v. Reed*, 481 U.S. 368, 377-78 (1987); *Kean v. Heckler*, 799 F.2d 895, 902 (3d Cir. 1986). *See also* *Chapman v. U.S. Dep't of HHS*, 821 F.2d 523, 526-27 (10th Cir. 1987).

194. *American Fed'n of Gov't Employees v. FLRA*, 778 F.2d 850, 861 (D.C. Cir. 1985) ("Interpretation and Guidance").

195. *Wisconsin Dep't of Health and Soc. Servs. v. Bowen*, 797 F.2d 391, 397-98 (7th Cir. 1986); *Prater v. U.S. Parole Comm'n*, 802 F.2d 948, 954-55 (7th Cir. 1986); *American Medical Ass'n v. Heckler*, 606 F. Supp. 1422, 1441 (S.D. Ind. 1985). *See also* *Montana v. Clark*, 749 F.2d 740, 745 (D.C. Cir. 1984) (Steps 2A and 2B under *Chevron* roughly parallel legislative and interpretive rules respectively); *Griffon v. U.S. Dep't of HHS*, 802 F.2d 146, 148 n.3 (5th Cir. 1986).

196. *FTC v. Evans Products Co.*, 775 F.2d 1084 (9th Cir. 1985); *Todd v. Norman*, 840 F.2d 608 (8th Cir. 1988); *see also* *Church of Scientology of Cal. v. IRS*, 792 F.2d 153, 165-66 (D.C. Cir. 1986) (concurring opinion); *Wayside Farms, Inc. v. U.S. Dep't of HHS*, 663 F. Supp. 945 (N.D. Ohio 1987).

197. *Vietnam Veterans v. Secretary of Navy*, 843 F.2d 528, 537-38 (D.C. Cir. 1988); *National Latino Media Coalition v. FCC*, 816 F.2d 785, 788 (D.C. Cir. 1987). *See also* *Samaritan Health Serv. v. Bowen*, 811 F.2d 1524, 1531 (D.C. Cir. 1987); *Brock v. Louvers & Dampers, Inc.*, 817 F.2d 1255, 1257-58 (6th Cir. 1987); *Griffon v. U.S. Dep't of HHS*, 802 F.2d 146, 148 n.3 (5th Cir. 1986).

198. *Reed v. Blinzinger*, 639 F. Supp. 130, 132 (S.D. Ind. 1986); *Malloy v. Eichler*, 628 F. Supp. 582, 593 (D. Del. 1986) (distinguishing HCFA interpretive letter from legislative regulations in *Chevron* and other limited review cases), *aff'd*, 860 F.2d 1179 (3d Cir. 1988); *Bank of New York v. Hoyt*, 617 F. Supp. 1304, 1313 (D. R.I. 1985).

199. *See* *Leigl v. Webb*, 802 F.2d 623, 625-26 (2nd Cir. 1986). *See also* *National Medical Center. v. Bowen*, 851 F.2d 291 (9th Cir. 1988).

200. *Huffman v. Western Nuclear, Inc.*, 486 U.S. --, 108 S.Ct. 2087, 2092 n. 9 (1988); *Bresgal v. Brock*, 843 F.2d 1163, 1168 (9th Cir. 1988); *William Bros., Inc. v. Pate*, 833 F.2d 261, 265 (11th Cir. 1987); *Brock on behalf of Williams v. Peabody Coal Co.*, 822 F.2d 1134, 1146 (D.C. Cir. 1987).

201. *See, e.g.*, *Brock v. Louvers & Dampers, Inc.*, 817 F.2d 1255, 1258 (6th Cir. 1987); *Dove v. Coupe*, 759 F.2d 167, 172 (D.C. Cir. 1985); *Malloy v. Eichler*, 628 F. Supp. 582, 592 (D.Del. 1986); and *Bank of New York v. Hoyt*, 617 F. Supp. 1304, 1313 (D. R.I. 1985).

this format to have the force of law.²⁰² Where Congress's delegatory intent can be discerned it should, of course, govern.

For the critical situation in which Congress has not indicated its delegatory intent, the court cannot simply assume that a "gap" in the substantive meaning of a statute automatically establishes a delegation whereunder any reasonable agency interpretation will bind the courts.²⁰³ This approach wrongly throws the armor of limited review around all interpretations, regardless of the formats in which they are expressed. A more principled and discriminating approach is needed.

Some interpretive formats will consistently possess the force of law because the delegations respecting those formats consistently convey that binding force. Similarly, other formats will consistently be found to lack such force because such delegations are absent. These patterns can furnish the source for presumptions about the delegatory intent of Congress, to be applied where no specific basis exists to find or construct that intent. This approach will form part of the analysis that follows. It does not aim for fixed rules to govern the formats, because a variant Congressional intent in a particular case may call for a variant result. The aim, though, is to fashion a coherent and workable method of applying *Chevron*, recognizing that the binding effect of an interpretation depends in principal part on its format.

A. *Legislative Rules*

Interpretations are often expressed through the exercise of the agency's statutorily-delegated authority to make law in the form of rules.²⁰⁴ Interpretations set forth in this format possess the fullest credentials to command judicial acceptance. They are reviewed under Step 2A, and are "given controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute."²⁰⁵

202. See *supra* notes 153-71 and accompanying text.

203. See *supra* notes 134-40 and accompanying text.

204. The technical term of the APA is "rules," 5 U.S.C. §§ 551(4),(5), 553, but this paper often uses the common term "regulations," to signify those "rules" that are called "regulations," as in the Code of Federal Regulations. Ordinarily, a policy statement or opinion letter would not be called a "regulation," though it might be a "rule" within the APA. See *National Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 698 (D.C. Cir. 1971).

205. *Chevron*, 467 U.S. at 844. See also *Batterton v. Francis*, 432 U.S. 416, 425 n.9, 426 (1977).

By embodying statutory interpretations, legislative rules do not become "interpretative rules," 5 U.S.C. § 553(b)(3)(A), (d)(2), which carry less force and can be promulgated more

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The question may arise whether the "express delegation"²⁰⁶ requisite for Step 2A treatment must be a delegation specific to the portion of the statute at issue. The answer must be "no"; interpretations authorized under general conferrals of rulemaking authority should qualify as well. The regulation involved in *Chevron* was itself authorized under a general delegation.²⁰⁷ It is true that such general authorizations have sometimes been construed to confer only housekeeping or other limited powers, so that any substantive expressions under them would be treated as interpretive rather than legislative regulations.²⁰⁸ But the more general tendency seems to accord legislative effect to rules issued under such general authorizations.²⁰⁹ Obviously, their effect depends upon the delegatory intent of Congress in each case. But in those situations where the courts find that such general provisions do authorize legislative rulemaking, regulations under them should have force equal to those promulgated under specific grants.²¹⁰ *Chevron* has eliminated degrees of

informally. See 2 K. DAVIS, *supra* note 153, § 7:12, at 57. "When Congress delegates authority to make rules, the reviewing court lacks power to determine the content of the rules, even if the rules are an interpretation of the statute." 5 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 279 (2d ed. 1984).

And of course not all legislative rules involve interpretations of statutes. Many simply legislate policy, as did the rules reviewed in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); these rules are subject to a somewhat different standard of judicial review. *Id.*; see Breyer, *Judicial Review of Questions of Law and Policy*, 38 *ADMIN. L. REV.* 363 (1986); *In Defense of Deference: Judicial Review of Agency Action*, 31 *ADMIN. L. REV.* 329, 339 (1979). *But see* Pierce, *supra* note 114.

206. 467 U.S. at 843.

207. See 46 Fed. Reg. 50766 (Oct. 14, 1981), relying upon 42 U.S.C. § 7601(a) ("The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this Chapter").

208. See *e.g.*, *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1981) (quoting *Rowan Companies, Inc. v. United States*, 452 U.S. 247, 253 (1982)) (for a regulation relying only on general authority to "prescribe all needful rules," 26 U.S.C. § 7805(a), "we owe the interpretation less deference than a regulation issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision"); *Chrysler Corp. v. Brown*, 441 U.S. 281, 309 (1979).

209. See Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 *DUKE L. J.* 381, 395 n.69 and accompanying text. See also *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973): "Where the empowering provision of a statute states simply that the agency may 'make . . . such rules and regulations as may be necessary to carry out the provisions of this Act,' we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" See also *Chrysler Corp. v. Brown*, 441 U.S. 281, 308 (1979); *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973); *National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688 (2nd Cir. 1975), *cert. den.* 423 U.S. 827 (1975); K. DAVIS, *supra* note 153, § 7:8 at 175 (Supp. 1982).

210. See, *e.g.*, *National Ass'n for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988) (applying Step 2A review to a regulation apparently authorized only under 47 U.S.C. § 303(r)).

deference, except to the extent any exists between Step 2A and 2B;²¹¹ it would seem profitless to recognize them as between two classes of concededly authorized legislative rules.²¹²

It is manifestly too late in the day to suggest that *Chevron* acceptance should apply only to interpretations embodied in legislative rules, although, interestingly, it is perfectly possible to read the opinion that way.²¹³ More expressive of *Chevron's* overall tone, and of its key language stressing delegation, is the analysis put forward here: that *Chevron* acceptance extends to all interpretations expressed in formats that Congress intended to be used to implement delegated law-making authority. We now turn to some of those formats.

For these formats, as always, the delegation must be sought. Where none is found or inferred, none should be presumed in any case unless, at a minimum, the agency has expressed its interpretation with finality and some formality, in a dispositive action—an action that specifies immediate legal results or that definitively ordains results for the future. The informal, or tentative,²¹⁴ or advisory, or internal, or unpublicized interpretive expression will not ordinarily be a tool that Congress intends to implement its delegation of law-making authority. Additionally, an interpretation put forth in such a format ordinarily will not have been arrived at through a process that encompassed public or adversarial participation. Although the agency cannot bind the reviewing court by such an interpretation, its expertise is not lost to the court, which accords the interpretation the special consideration called for by *Skidmore*.

211. See *supra* notes 128-31 and accompanying text.

212. See Diver, *supra* note 3, at 594 (“A broad rulemaking power is no less an indication of policymaking responsibility than is a narrow one”).

213. Indeed, if read literally, this would be its purport. Its central passage speaks first of an express delegation of authority to elucidate the statute by regulation, and then of a legislative delegation that is only implicit, but still presumably a delegation of the same authority “to elucidate . . . the statute by regulation.” *Chevron*, 467 U.S. at 844. Only legislative rules would be covered in either case. *Morton v. Ruiz*, 415 U.S. 199 (1974), quoted at the beginning of the paragraph, dealt with delegation of legislative rulemaking authority. And the whole of the *Chevron* opinion makes perfect sense if read with the assumption that the Court was speaking only of deference to legislative rules.

214. See *Concuh-Monroe Community Action Agency v. Bowen*, 852 F.2d 581, 586-87 (D.C. Cir. 1988).

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B. *Agency Adjudications*

The concept of adjudication used here is that of the APA.²¹⁵ Generally, it refers to a final disposition of a specific matter directed to an individual or to a closed identifiable class. It includes formal trial-type proceedings, like those by which are determined such matters as denials or revocations of transportation and utility and securities licenses, eligibility for federal disability benefits, and violations of trade, election, labor and occupational safety laws.²¹⁶ It also includes less formal agency actions, often of a bureaucratic rather than a forensic nature, passing upon grants, reimbursements, state implementation plans, international trade matters, some sorts of welfare-type benefits, many environmental, health and safety matters, and numerous others. Often matters that are initially passed upon at a staff level can be carried into hearing proceedings, which sometimes are of a trial type and sometimes are not.

The mere possession of adjudicatory powers is not in itself sufficient to establish a delegation to interpret authoritatively, even within the agency's usual routine. A purely adjudicative agency, holding no rulemaking or other policymaking powers, "is not entitled to any special deference from the courts" for its interpretations.²¹⁷ But the adjudicatory interpretation of an agency with

215. 5 U.S.C §§ 551(6), (7).

216. See listings of agencies and of the formal proceedings they administer in Office of the Chairman, Admin. Conf. of the U.S., Federal Administrative Law Judge Hearings, Statistical Report for 1976-1978 (1980) (by Jeffrey Lubbers).

217. *Potomac Elec. Power Co. v. Director, Office of Workers' Compensation Programs*, 449 U.S. 268, 278 n.18 (1980)(Stevens, J.). This is "axiomatic." *United Steelworkers of Am. v. Schuylkill Metals Corp.*, 828 F.2d 314, 319 (5th Cir. 1987) (Occu. Safety & Health Regulatory Comm'n). See also *William Bros., Inc. v. Pate*, 833 F.2d 261, 264 (11th Cir. 1987) (Benefits Review Bd. of Dep't of Labor); *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 49 (2nd Cir. 1976) (Benefits Review Bd. is "entirely an umpiring agency") (Friendly, J.).

policymaking powers, like that of the NLRB in *Hearst*,²¹⁸ is capable of binding the courts under *Chevron*.²¹⁹

In inquiring whether an agency possesses delegated authority to act with the force of law through adjudicatory proceedings, a useful touchstone is the idea of "the usual administrative routine" of the agency.²²⁰ Did Congress contemplate not only that the agency will act in the prescribed adjudicative fashion, but also that it should have the primary power to resolve the interpretive issues it thus encounters?²²¹

1. *Mixed Questions*

For "mixed" questions of interpretation, where statutory terms are applied to detailed and specific facts, *Hearst* and the innumerable cases following it establish the existence of a delegation that places those interpretive questions in the usual administrative routine.²²² It is conceded on all hands that such mixed interpretive rulings are entitled to acceptance under *Chevron*,²²³ and there seems no imaginable reason that *Chevron* acceptance should differ in any practical way from *Hearst* acceptance. Thus, on direct judicial review of the agency's mixed-question decision, its interpretation/application must be accepted by the court if it is reasonable.²²⁴

218. *NLRB v. Hearst Publications, Inc.* 322 U.S. 111 (1944).

219. *See, e.g., DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568 (1988) (unfair labor practice); *New York v. EPA*, 852 F.2d 574 (D.C. Cir. 1988) (denying petitions for review under Clean Air Act); *Securities Indus. Ass'n v. Bd. of Governors Fed. Reserve Sys.*, 847 F.2d 890, 893 (D.C. Cir. 1988) (approving of bank underwriting commercial paper); *Common Cause v. Fed. Election Comm'n.*, 842 F.2d 436 (D.C. Cir. 1988) (determining not to take enforcement action); *Alaska v. Lyng*, 797 F.2d 1479, 1481 (9th Cir. 1986) (selecting of grant lands from national forest); *Population Inst. v. McPherson*, 797 F.2d 1062, 1069 (D.C. Cir. 1986) (grant of funds by Agency for Int'l Development); *Humane Soc'y. of U.S. v. EPA*, 790 F.2d 106, 116 (D.C. Cir. 1986) (permitting experimental use of pesticide); *Massachusetts v. Secretary of HHS*, 749 F.2d 89, 96 n.3 (1st Cir. 1984).

220. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944) (quoting *Gray v. Powell*, 314 U.S. 402, 411 (1941)). *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987).

221. *See Massachusetts v. Secretary of HHS*, 749 F.2d 89, 96 (1st Cir. 1984) (interpretation was the kind of matter "Congress would have intended . . . to be given significant weight").

222. *See supra* notes 21-28 and accompanying text.

223. Even those who have suggested that pure questions of interpretation get no deference stress the binding effect of mixed interpretations. *E.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987); *International Union, UAW v. Brock*, 816 F.2d 761, 765 n.5 (D.C. Cir. 1987).

224. *See supra* note 219. *See also Nielsen Lithographing Co. v. NLRB*, 854 F.2d 1063 (7th Cir. 1988).

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But must the mixed-question interpretation be similarly honored when it is drawn into litigation collaterally, as in review of other agency actions or in proceedings to which the agency is not party? This probably should depend upon what resolution is given the controversy about whether "pure questions of interpretation" may be accorded *Chevron* acceptance.²²⁵ In a mixed-question determination, the statutory interpretation is embedded in and dependent upon detailed facts, as was the NLRB's determination in *Hearst* that the newsboys were "employees" within the Act. If a court can derive from it a conclusion of sufficient generality to be applied elsewhere, that proposition perforce has been unsprung from the facts in which it was enmeshed, and becomes an abstraction or generality in the nature of a pure question (in *Hearst*, for example, whether a person can be an "employee" without being on the employer's payroll). It would seem, at the same time, to have escaped the delegation that gave authority to the mixed interpretation as a part of the administrative routine.

Whether a delegation exists sufficient to bind the courts on a pure question would, of course, be a matter for inquiry in each case.²²⁶ That inquiry would be powerfully influenced by evidence that the Supreme Court had become hospitable to *Chevron* acceptance for pure-question interpretations, or *per contra*, that it had declared that class of interpretations ineligible for such acceptance.

2. Pure Questions

The same analysis, of course, would govern both direct and collateral review of pure-question interpretations announced in adjudications. Perhaps in any event minor issues could be eligible for *Chevron* acceptance as part of the administrative routine contemplated by delegation, even if they were abstract and general and therefore "pure."²²⁷ The tone of *Chevron* pervasively suggests as much, and that suggestion does not seem disturbed by the later opinions questioning *Chevron's* applicability to pure issues.²²⁸ And if

225. See *supra* notes 69-89 and accompanying text.

226. See *supra* notes 83-89 and accompanying text.

227. Arguably, the issue resolved by the agency in *Chevron* (through rulemaking) fits this description.

228. See *supra* note 78. The courts in numerous cases have accepted, under *Chevron*, agency adjudicative interpretations on apparently pure questions: *E.g.*, *Clark-Cowlitz Jt. Oper. Agency v. FERC*, 826 F.2d 1074 (D.C. Cir. 1987); *Georgetown Steel Corp. v. U.S.*, 801 F.2d 1308 (Fed. Cir. 1986); *Kean v. Heckler*, 799 F.2d 895 (3rd Cir. 1986); *Alaska v. Lyng*, 797 F.2d 1479 (9th Cir. 1986); *Wyckoff v. EPA*, 796 F.2d 1197 (9th Cir. 1986);

we are to realize *Chevron's* benefits of national uniformity,²²⁹ at least some classes of pure-question interpretations must be deemed acceptable. Otherwise, a nationwide wilderness of specific instances would result.

On the other hand, even if the binding force of pure-question interpretations were affirmed by the Supreme Court, issues would remain for which the essential delegation would not be found. An example may be the issue in the *Highland Park* case²³⁰ as to whether the CIO had to file a noncommunist affidavit, which Congress probably did not entrust to the NLRB because of its large import or because the Board lacked expertise in national security legislation.²³¹ In other words, there are doubtless some issues that Congress would want the generalist courts to resolve independently, without being controlled by particular agency perspectives.

To warrant acceptance, a pure-question interpretation should be pivotal to the agency's adjudicative decision. Disembodied propositions spoken *obiter* in adjudicative opinions should have no weight in the courts.²³²

3. Reasoned Decisions

It seems plain that agency interpretations, like other agency actions, must be the product of reasoned decisionmaking in order to be deemed sufficiently reasonable to command *Chevron* acceptance.²³³ If the decision announces a change in the agency's interpretive views, a reasoned analysis is especially vital. The agency in effect

Railway Labor Exec. Assn. v. United States, 791 F.2d 994 (2nd Cir. 1986); Ohio v. Ruckelshaus, 776 F.2d 1333 (6th Cir. 1985); Mattox v. FTC, 752 F.2d 116 (5th Cir. 1985); Al Tech Specialty Steel v. United States, 651 F. Supp. 1421 (Ct. Int'l Trade 1986); Bayonne School Bd. v. United States Dep't of Educ., 640 F. Supp. 470 (D.D.C. 1986).

229. See Strauss, *supra* note 65, at 1121-24, 1129-33 (1981).

230. Cited and discussed *supra* notes 40-43 and accompanying text.

231. One may also wonder whether the courts would consider that resolution of the interpretive issues had been delegated to the agencies in, for example, NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974); Packard Motor Car Co. v. NLRB, 330 U.S. 267 (1974); or Industrial Union Dep't, AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980).

232. See NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969).

233. See Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 42-43, 57 (1983); SEC v. Chenery Corp., 318 U.S. 80 (1943); Colorado Interstate Gas Co. v. FERC, 850 F.2d 769, 774-75 (D.C. Cir. 1988); Democratic Cong. Campaign Comm. v. FEC, 831 F.2d 1131, 1135 (D.C. Cir. 1987).

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is bound by its interpretation until it acts in a reasoned way to depart from it.²³⁴

Thus, either the adjudicatory decision itself or the document upon which it relies should explain the agency's reasoning. Where it applies an adequately-reasoned legislative rule²³⁵ or prior adjudicatory decision,²³⁶ the new adjudicatory interpretation incorporates that reasoning even if it tenders none of its own. A rather different analysis obtains where reliance is placed upon a lesser instrument—such as a manual or a policy statement²³⁷—that would not itself command *Chevron* acceptance. It is the nature of such a document that, in a later adjudicatory proceeding, the agency is neither bound to follow it nor entitled to treat others as bound by it; the agency must at that time entertain challenges to the interpretation previously expressed, and decide whether to adopt it.²³⁸ However, if the agency *then* consciously chooses the prior interpretation and ratifies the reasoning there expressed, its decision should bind, at least on direct review. The agency's adjudicative action within its usual administrative routine will give force of law to the interpretation expressed in the earlier action, whose reasoning in turn can support the otherwise-unexplained adjudicatory application.²³⁹ But if the earlier informal interpretation is just mechanically applied, a court should have no obligation to accept it.

4. Lower-Level Decisions

Clearly, the reasoned adjudicatory interpretations of agency heads and their immediate delegates should qualify for the judicial

234. See *Bowen v. Georgetown Univ. Hosp.*, 109 S.Ct. 468, 476 (1988) (Scalia, J., concurring) (“[T]he principles announced in an adjudication cannot be departed from in future adjudications without reason”); *Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983); *Colorado Interstate Gas Co. v. FERC*, 850 F.2d 769, 774-75 (D.C. Cir. 1988).

235. See, e.g., *Aliceville Hydro Assocs. v. FERC*, 800 F.2d 1147, 1150 (D.C. Cir. 1986); *Capitol Technical Services v. FAA*, 791 F.2d 964, 970-71 (D.C. Cir. 1986).

236. See, e.g., *United Retail Workers Union Local 881 v. NLRB*, 774 F.2d 752, 762-63 (7th Cir. 1985).

237. See, e.g., *Knutzen v. Eben Ezer Lutheran Housing Center*, 815 F.2d 1343, 1349-51 (10th Cir. 1987) (manual); *Regular Common Carrier Conf. v. United States*, 803 F.2d 1186, 1194-95 (D.C. Cir. 1986) (policy statement).

238. *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33 (D.C. Cir. 1974). See *Morton v. Ruiz*, 415 U.S. 199 (1974), discussed *supra* note 137 and *supra* text accompanying notes 154-61.

239. See *N.Y. State Dep't of Soc. Serv. v. Bowen*, 648 F. Supp. 850 (D.D.C. 1986). Only that portion of the earlier document that was determinative of the adjudicatory outcome should be treated as binding.

acceptance called for by *Chevron*. But should the interpretive decisions of lower-level officials so qualify? The few cases found are unhelpful.²⁴⁰ Again, the question should be one of delegation: would Congress intend the low-level decision to bind?²⁴¹ The matter may turn also upon the completeness with which the agency heads themselves may have delegated their powers to the decision maker, and upon whether all levels of appeal within the agency were exhausted.²⁴² In most cases prudence would probably dictate that *Chevron* acceptance be extended, if at all, only on direct review and not in collateral proceedings. Of course *Skidmore* consideration would be appropriate.

C. Procedural Rules and Actions

An interesting group of cases has applied *Chevron's* Step 2 to uphold interpretations expressed in agencies' procedural rules and in other determinations of how they will proceed in the exercise of their powers.

The binding effect of procedural regulations issued pursuant to statutory authority is clear enough,²⁴³ and the courts uphold these if they are reasonable and consistent with statute, citing *Chevron* where there is a statutory procedural scheme to interpret.²⁴⁴

240. See *Caiola v. Carroll*, 851 F.2d 395, 399 (D.C. Cir. 1988)(lower level official's interpretation of agency's regulations denied *Chevron* acceptance, partly because official was not head of agency); *Gatson v. Bowen*, 838 F.2d 442, 447, 449 (10th Cir. 1988)(SSA Administrative Law Judge's interpretation treated as that of SSA, but was rejected as incorrect, with no citation of *Chevron*); *U.S. v. Lockheed*, 817 F.2d 1565, 1567 (Fed. Cir. 1987)(Armed Services Board of Contract Appeals' Interpretation is "freely reviewable" under review statute, 41 U.S.C. § 609); *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 437 (D.C. Cir. 1986)("no reason why the letter from the head of the EPA's Pesticide Division . . . would not be entitled to deference"); *Aliceville Hydro Assoc. v. FERC*, 800 F.2d 1147, 1152 (D.C. Cir. 1986)("informal practice among relatively low-level staff members" allowing exceptions to rule did not undercut *Chevron* acceptance of rule). See also *AFGE v. FLRA*, 840 F.2d 947, 952 (D.C. Cir. 1988).

241. One pre-*Chevron* instance where Congress had such an intention is *Ford Motor Co. v. Milhollin*, 444 U.S. 555, 566-67 (1980). See also 47 U.S.C. § 155(c)(3), providing that FCC bureau actions, if not reviewed by the full Commission, "have the same force and effect" as actions of the Commission.

242. See *Kixmiller v. SEC*, 492 F.2d 641 (D.C. Cir. 1974).

243. See *Boske v. Comingore*, 177 U.S. 459, 467-70 (1900); *Service v. Dulles*, 354 U.S. 363, 372 (1957) ("regulations validly prescribed by a government administrator are binding upon him as well as the citizen"); *Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

244. See, e.g., *Committee to Save WEAM v. FCC*, 808 F.2d 113, 119 (D.C. Cir. 1986); *Tillet v. Carlin*, 637 F. Supp. 251, 253 (D. Conn. 1986); *Tillett v. Carlin*, 637 F. Supp. 245, 250, 253 (D. Conn. 1985).

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By apparent analogy to these cases, a number of decisions have applied *Chevron* analysis to interpretations upon which the agencies rested other sorts of decisions about how they would proceed. In *Japan Whaling Association v. American Cetacean Society*,²⁴⁵ the Secretary of Commerce determined that it better served the legislation implementing the International Convention for the Regulation of Whaling to accept Japan's offer of an agreement to phase out its whaling, rather than to certify Japan's whaling activities to the President for possible sanctions. Following straightforwardly through the *Chevron* steps, Justice White for the majority found that the statute did not forbid the Secretary's procedure, and that withholding certification in the circumstances reflected a reasonable construction of ambiguous statutory language.²⁴⁶ In *Young v. Community Nutrition Institute*,²⁴⁷ the Food and Drug Administration chose not to promulgate a tolerance regulation with respect to a certain carcinogenic mold, but instead proceeded by a less formal process to set an "action level." Justice O'Connor found the statutory language potentially mandating regulations to be ambiguous, and held the FDA's interpretation to be sufficiently rational to require judicial acceptance under *Chevron*.²⁴⁸ In *United States v. City of Fulton*,²⁴⁹ ambiguous statutory language was construed reasonably by the Secretary of Energy to permit interim increases in the rates charged by regional power marketing administrations.²⁵⁰ And in *Chemical Mfrs. Ass'n v. NRDC*,²⁵¹ the majority upheld EPA's practice of granting "fundamentally different factor" variances, pursuant to regulations, as both reasonable and consistent with the Clean Water Act.²⁵²

In all four of these cases, the Court reviewed the statutory authority for the agencies' actions and, though it did not expressly speak of "delegation" to interpret in those ways, viewed the statutes as contemplating such interpretive powers.²⁵³ Much the same thing

245. 478 U.S. 221 (1986) (5-4).

246. *Id.* at 2867-68.

247. 476 U.S. 974 (1986).

248. *Id.* at 2364-65.

249. 475 U.S. 657 (1986).

250. *Id.* at 666-72.

251. 470 U.S. 116 (1985).

252. *Id.* at 125-26.

253. *See* *Japan Whaling*, 478 U.S. at 241 ("Congress granted the Secretary the authority to determine whether a foreign nation's whaling in excess of quotas diminishes the effectiveness of the IWC, and we find no reason to impose a mandatory obligation upon the Secretary to certify that every quota violation fails that standard."); *Young*, 476 U.S. at 981-82 ("To interpret Congress's statutory language to give the FDA discretion to decide whether tolerance levels are necessary to protect the public health is therefore sensible");

has occurred in several lower court cases.²⁵⁴ These cases show a substantial sense of upholding the agencies' procedural determinations because Congress had given them appropriate authority so to interpret.

In the same pattern, but stronger, is *United States v. Riverside Bayview Homes, Inc.*²⁵⁵ The cases just discussed entailed issues affecting the procedural powers of the agencies within their respective substantive spheres. But *Riverside Bayview* also concerned "a problem of defining the bounds of [the agency's] regulatory authority,"²⁵⁶ as to which, citing *Chevron* and *CMA*, Justice White for a unanimous Court held that "our review is limited to the question whether . . . [the agency's construction] is reasonable."²⁵⁷ On this basis the Corps of Engineers acted permissibly in redefining the term "waters of the United States" in the Clean Water Act to enable it to require permits to discharge fill material into freshwater wetlands. The case seems to hold that, even when an agency interprets its enabling legislation to enlarge its jurisdiction, its interpretation will be deemed suitable to receive *Chevron* acceptance.²⁵⁸ Although the issue is beyond the scope of this Article, one may wonder whether *Chevron* will enduringly displace the deeply-rooted doctrine that an "agency may not finally decide the limits of its statutory power. That is a judicial

Fulton, 475 U.S. at 670 ("Congress, in declining to set out a detailed mandatory procedural scheme, apparently intended to leave the agency substantial discretion"); *Chemical Mfrs.*, 470 U.S. at 131 ("Since the dispute is therefore reduced to an argument over the means used by EPA to define subcategories of indirect dischargers in order to achieve the goals of the Act, [this is] a particularly persuasive case for deference to the Agency's interpretation").

254. See, e.g., *Fernandez v. Brock*, 840 F.2d 622 (9th Cir. 1988) (determination that authorized action is discretionary); *NRDC v. EPA*, 804 F.2d 710 (D.C. Cir. 1986) (withdrawal of proposed regulations); *Railway Labor Executives Ass'n v. ICC*, 784 F.2d 959, 969 (9th Cir. 1986) (determination that power is discretionary). See also *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 366-67 (D.C. Cir. 1989) (agency regulation allocating burden of proof).

Sometimes agency interpretations of this type are rejected under *Chevron* Step 1 analysis. See, e.g., *Bethesda Hosp. Ass'n v. Bowen*, 485 U.S. 399 (1988); *International Bhd. of Teamsters v. ICC*, 801 F.2d 1423 (D.C. Cir. 1986); *United States Army Eng'r Center v. FLRA*, 762 F.2d 409 (4th Cir. 1985); *American Methyl Corp. v. EPA*, 749 F.2d 826 (D.C. Cir. 1984).

255. 474 U.S. 121 (1985).

256. *Id.* at 132.

257. *Id.* at 132.

258. The Court found that "Congress acquiesced" in the administrative construction. 474 U.S. at 138. The key significance given this factor may mitigate any inappropriateness of employing *Chevron* Step 2 analysis rather than independent interpretation in these circumstances.

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function.”²⁵⁹ Compromising this precept would create the possibility that autocratic actions must be ratified by the courts. Despite such concerns, the courts seem disposed to presume that they will be bound by reasonable interpretations embodied in an agency’s procedural regulations or other dispositive determinations of how it will carry on its work.

D. *Interpretive Rules and Policy Statements*

No such presumption should be tolerated for interpretive rules or policy statements,²⁶⁰ or similar formats. Their precisely relevant quality is that they lack the force of law—that is, they cannot bind the courts even if they are consistent with statute and reasonable.²⁶¹ This circumstance is not changed by *Chevron*:

Thus an interpretative rule does not have the force of law and is not binding on anyone, including the courts, though the status conferred on an agency as the delegate of Congress and by its expertise often leads courts to defer to the agency’s interpretation of its governing statute. See *Joseph v. United States Civil Serv. Comm’n*, 554 F.2d 1140, 1154 n. 26 (D.C. Cir. 1977) (“Legislative rules have the full force of law and are binding on a court subject only to review under an arbitrary and capricious standard. Interpretive rules do not have the force of law and even though courts often defer to an agency’s interpretive rule they are always free to choose otherwise”).²⁶²

259. *Social Sec. Bd. v. Nierotko*, 327 U.S. 358, 369 (1946). See also *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 (3d Cir. 1981) (“government agencies have a tendency to swell, not shrink, and are likely to have an expansive view of their mission” and “therefore, an agency ruling that broadens its own jurisdiction is examined carefully”); *Independent Ins. Agents of Amer. v. Bd. of Gov. Federal Reserve Sys.*, 838 F.2d 627, 632 (2d Cir. 1988); *Morrison*, *supra* note 67, 374-75.

260. For definitions of interpretive rules and policy statements, see *Attorney General’s Manual on the Administrative Procedure Act* 30 n.3 (1947); 2 K. DAVIS, *supra* note 153, §§ 7.5, 7.8, 7.10, 7.12. See also *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-04 (1979); *Board of Educ. of New York v. Harris*, 622 F.2d 599, 613 (2d Cir. 1979).

261. See *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1977); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *General Motors Corp. v. Ruckelshaus*, 724 F.2d 979, 984-85 (D.C. Cir. 1983); 2 K. DAVIS, *supra* note 153, §§ 7.9, 7.13, 7.15; ADMINISTRATIVE LAW AND PROCESS, *supra* note 172, §§ 6.4.4a, 6.4.4b.

“[A] court is not required to give effect to an interpretive regulation. Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency’s position, and the nature of its expertise.” *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977).

262. *National Latino Media Coalition v. FCC*, 816 F.2d 785, 788 (D.C. Cir. 1987).

And: "A binding policy is an oxymoron."²⁶³

Where the reviewing court has found no delegation of power to interpret authoritatively in such a format, then, its proper approach is not that of *Chevron* Step 2 but rather that of *Skidmore*.²⁶⁴ A useful model has been presented by Judge Starr who, after pointing out the "legislative effect" that interpretations have under *Chevron* where Congress has explicitly or implicitly delegated authority to the agency, applied the law in this way:

Determining the extent of deference in the case at hand therefore requires an examination of the authority conferred by Congress on the Secretary with respect to each regulation in question

We turn first to the Secretary's mandated two-step process for determining the prevailing wage in a locality.

. . . [T]he language of the statute seems best read as granting the authority to make the prescribed wage determination but not to define "locality" with near finality shielded by high deference. Under our approach, the Secretary's regulation interpreting "locality" as the location of each individual potential contractor constitutes an interpretive ruling that carries some weight and attracts some deference, but does not enjoy the highest degree of deference available under "arbitrary and capricious" review.

An even clearer case of an interpretive ruling is the Secretary's determination [concerning successor contracts]. There is no language in the statute indicating a delegation to the Secretary of the authority to make such a determination, and we therefore accord the Secretary's decision only some deference and weight.²⁶⁵

The lower federal courts have occasionally applied *Chevron* Step 2 to interpretive rules, policy statements and their functional equivalents. Sometimes a court accepts the interpretation without

263. *Vietnam Veterans v. Secretary of the Navy*, 843 F.2d 528, 537 (D.C. Cir. 1988).

264. For an alternate standard for pre-enforcement review in some circumstances, see text accompanying *supra* notes 182-83.

265. *AFL-CIO v. Donovan*, 757 F.2d 330, 341-42 (D.C. Cir. 1985) (footnote omitted).

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apparent heed to its format, as was done in *Conley v. Brewer*²⁶⁶ with respect to an interpretive regulation, and in *American Federation of Government Employees v. Federal Labor Relations Authority*²⁶⁷ where a policy statement was involved.

Even where they recognize that these formats are somehow less potent than legislative rules, courts on occasion have felt bound to accord them *Chevron* acceptance. In *Prater v. United States Parole Commission*,²⁶⁸ for example, the court said that the agency's guidelines were "interpretive rather than legislative" but accepted them under *Chevron* Step 2.²⁶⁹ *Chevron* acceptance was similarly extended to a "Dear Doctor letter" (concerning Medicare) from the Secretary of HHS, which the court treated as an interpretive rule.²⁷⁰ In a case where the interpretation of the HHS Secretary was set forth in a Medicaid Action Transmittal, the court said:

The district court was correct in refusing to give the Secretary's interpretation here "legislative effect"—this case . . . does not involve regulations promulgated upon an express delegation from Congress, by formal rulemaking. But the district court was still bound to defer to his interpretation if reasonable and statutorily permissible.²⁷¹

As discussed above, a practice of routine acceptance for interpretations expressed in these formats would, in abdication of judicial duties under *Marbury*,²⁷² endow them with force of law where Congress did not intend them to have such force. By this process, the agency would bind the public without itself being bound by interpretations in these formats.²⁷³ And since these formats are

266. 652 F. Supp. 106, 109-10 (W.D. Wis. 1986) (accepting Parole Commission's interpretive regulation and explanatory statement that "good time" credits expire when prisoner is released on parole).

267. 778 F.2d 850, 852, 856, 861 (D.C. Cir. 1985)(accepting FLRA "Interpretation and Guidance" holding that agency head may disapprove contract containing a provision ordered by Federal Service Impasses Panel but contrary to law).

268. 802 F.2d 948 (7th Cir. 1986).

269. *Id.* at 954. The opinion might be read as using the interpretation as an aid to finding clear intent in *Chevron* Step 1, but this seems doubtful.

270. *American Medical Ass'n v. Heckler*, 606 F. Supp. 1422, 1440-41 (S.D. Ind. 1985).

271. *Wisconsin Dep't of Health v. Bowen*, 797 F.2d 391, 397 (7th Cir. 1986), *cert. granted*, 479 U.S. 1053 (1987), *cert. dismissed*, 108 S.Ct. 1495 (1988). See also *Samaritan Health Servs. v. Bowen*, 811 F.2d 1524, 1529-31 (D.C. Cir. 1987) (manual treated as interpretive rule rejected as unreasonable).

272. See text accompanying *supra* notes 142-43.

273. See *Pacific Gas & Elec. v. Federal Power Comm'n.*, 506 F.2d 33 (D.C. Cir. 1974).

exempt from APA public participation requirements,²⁷⁴ an especially odious frustration is visited upon the affected private parties: they are bound by a proposition they had no opportunity to help shape and will have no meaningful opportunity to challenge when it is applied to them.²⁷⁵

E. *Manuals, Guidelines, Staff Instructions, Opinion Letters*

The rules that apply to interpretative rules and policy statements should apply to this category.²⁷⁶ Interpretations presented in these formats does not have the force of law.²⁷⁷

274. 5 U.S.C. § 553(b)(3)(A), (d)(2) (1988).

275. In a slightly different context, Judge Starr has observed: "Agencies may yield to temptation and seek to shield their regulations from the scrutiny occasioned by notice-and-comment procedures, choosing instead to cast would-be regulations as interpretative rules. The rule would still, of course, be subject to scrutiny in a subsequent proceeding, but this fact may be of little comfort to prospective commentators, given the deference accorded agency views in any such proceedings." *Community Nutrition Inst. v. Young*, 818 F.2d 943, 953 (D.C. Cir. 1987) (concurring and dissenting opinion). The courts would seldom have occasion to pass upon an agency's failure to consider alternate interpretations which commentators might have put forward had § 553(c) procedures been followed.

276. Included in this category are manuals, handbooks, guidelines, staff instructions, opinion letters, explanatory statements, testimony presented to Congress, speeches, releases and other similar materials. Indeed, interpretations presented in these formats are sometimes deemed to be "interpretative rules" or "general statements of policy" and therefore exempted from the procedural rulemaking requirements of the APA under 5 U.S.C. § 553 (b)(A), (d)(2). *E.g.*, *Prater v. United States Parole Comm'n*, 802 F.2d 948, 954-55 (7th Cir. 1986); *White v. Bowen*, 636 F. Supp. 1235, 1240-41 (S.D.N.Y. 1986); *American Medical Ass'n v. Heckler*, 606 F. Supp. 1422, 1440-41 (S.D. Ind. 1985).

277. Thus, the court in *Leigl v. Webb*, 802 F.2d 623 (2d Cir. 1986), rejected the interpretation set forth in an HEW Action Transmittal, incorporated into the agency's Medical Assistance Manual, stating that "a manual does not comprise regulations . . . [but] [r]ather, a manual contains interpretive guidelines that the court may disregard after due consideration." *Id.* at 626. (However, the court accepted an interpretation set forth in a notice of proposed rulemaking.) Similarly, the Sixth Circuit did not accept a Wage and Hour Opinion Letter's interpretation, whose authority it deemed to be only "persuasive and not precedential." *Brock v. Louvers & Dampers, Inc.*, 817 F.2d 1255, 1258 (6th Cir. 1987). In *Malloy v. Eichler*, 628 F. Supp. 582 (D. Del. 1986), *aff'd*, 860 F.2d 1179 (3d Cir. 1988), the Secretary of HHS insisted that her views embodied in Health Care financing Administration Letter 85-10 were "entitled to a 'legislative effect' that can be overturned only if she has exceeded her authority or acted in an arbitrary or capricious manner." *Id.* at 592. But the court stated that "letter 85-10 is *not* a legislative or substantive regulation . . . [but] is more closely akin to the statutory interpretation traditionally left to the courts than it is to the statutory definition delegated to the Secretary." *Id.* at 593 (emphasis in original). *Accord*, *Reed v. Blinzinger*, 639 F. Supp. 130 (S.D. Ind. 1986). *See* *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981) (13-volume SSA Claims Manual "has no legal force"). Of course, an interpretation expressed in one of these informal formats may be based upon documents carrying the force of law; *see e.g.*, the letter of the Commissioner of Customs, based on regulations, discussed by Justice Scalia in *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 321-22 (1988) (Scalia, J., concurring in part and dissenting in part).

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Nevertheless, courts have sometimes shown a readiness to extend *Chevron's* style of acceptance to interpretations expressed in these informal ways. In *Hicks v. Cantrell*,²⁷⁸ for example, the Fourth Circuit gave controlling effect to a letter from a Department of Labor regional administrator to the Virginia Employment Commissioner, stating that the Secretary of Labor interpreted the Federal Supplemental Compensation Act as allowing states the option of refusing to waive overpayments. "Lacking a clear Congressional intent to the contrary, we must conclude that the Secretary's interpretation is both reasonable and permissible, although it may be inconsistent with prior interpretations."²⁷⁹

In *White v. Bowen*,²⁸⁰ the court accepted an HHS Program Operations Manual System memorandum which, as the court pointed out, was not published in the Federal Register.²⁸¹ The court in *Almendarez v. Barrett-Fisher Co.*²⁸² reached its own interpretation of the Farm Labor Contractor Registration Act, but added that it was "obliged to defer to reasonable interpretation of a statute" as set forth in a Department of Labor Wage-Hour Administrator's opinion letter.²⁸³

In *Cook Inlet Native Association v. Bowen*²⁸⁴ the interpretation subsisted initially in a memorandum of the Assistant Solicitor for Indian Affairs, which was adopted through a letter by the Indian Health Service; the same interpretation also appeared in the periodical *Nature News and B.I.A. Bulletin*, in the Village Self-Determination Workbook, and in the Alaska Native Village Self-Determination Briefing Book, all evidently BIA publications.²⁸⁵ Finding

278. 803 F.2d 789 (4th Cir. 1986).

279. *Id.* at 794. In another part of the opinion, the court indicated that the same result might be required by the plain meaning of the statute. *Id.* at 792. See also *Mead Corp. v. Tilley*, 109 S.Ct. 2156, 2161-64 (1989)(opinion letters and guidelines).

280. 636 F. Supp. 1235 (S.D.N.Y. 1986).

281. *Id.* at 1239. See also *Friends of Shawangunks v. Clark*, 754 F.2d 446, 450 (2d Cir. 1985) (DOI Bureau of Outdoor Recreation Manual).

282. 762 F.2d 1275 (5th Cir. 1985).

283. *Id.* at 1281-82. See also *American Medical Ass'n v. Heckler*, 606 F. Supp. 1422 1441-42 (S.D. Ind. 1985) (letter to doctors from HHS secretary accepted under *Chevron* Step 2); *Holcomb v. United Automotive Ass'n of St. Louis*, 658 F. Supp. 84, 86 (E.D. Mo. 1987) (court appeared prepared to accord "considerable deference" to opinion letter, but concluded it did not support plaintiff's claim). But see *Skidmore v. Swift & Co.*, 323 U.S. 134 (1940).

284. 810 F.2d 1471 (9th Cir. 1987).

285. *Id.* at 1474.

that the legislative history showed no contrary intent, the court said that it "must, therefore, defer to that interpretation."²⁸⁶

Again, the standard for review of interpretations in these formats should not be the acceptance of *Chevron* Step 2, but rather an independent scrutiny that includes the respectful consideration *Skidmore* requires.²⁸⁷

F. *Litigating Positions*

Judge Learned Hand has said:

[A] public officer, charged with the enforcement of a law, is different from one who must decide a dispute. If there is a fair doubt, his duty is to present the case for the side which he represents, and leave decision to the court, or the administrative tribunal, upon which lies the responsibility of decision. If he surrenders a plausible construction, it will, at least it may, be surrendered forever; and yet it may be right. Since such rulings need not have the detachment of a judicial, or semi-judicial decision, and may properly carry a bias, it would seem that they should not be as authoritative²⁸⁸

It is hard to conceive that an interpretation put forward in argument, without previously having been laid down in a form bearing the force of law, could bind the court to which it is presented. An agency may not simply declaim, "this is our interpretation—under *Chevron* you must accept it," and prevail. It would exceed the bounds of fair play to allow an institutionally self-interested advocacy position, which "may properly carry a bias," to control the judicial outcome. Even the cynical should balk at

286. *Id.* at 1476. See also *Lukhard v. Reed*, 481 U.S. 368, 377-79 (1987) (reference to Handbook Supplement for Administrative Use, a brief amicus curiae, letters and a memorandum).

287. "A finding that her views lack legislative effect will not foreclose the issue because an administrative interpretation is entitled to substantial weight when it satisfies the conditions enumerated in *Skidmore v. Swift & Co.* . . ." *Malloy v. Eichler*, 628 F. Supp. 582, 592 (D. Del. 1986), *aff'd*, 860 F.2d 1179 (3d Cir. 1988). See also *Dove v. Coupe*, 759 F.2d 167, 171-72 (D.C. Cir. 1985) (Wage & Hour Release, reprinted in Wage Hour Manual, given "respectful consideration" and upheld); *Tony & Susan Alamo Found.*, 471 U.S. 290, 297 (1985). For an alternate standard for pre-enforcement review in some circumstances, see *supra* text accompanying notes 182-83.

288. *Fishgold v. Sullivan Drydock & Repair Corp.*, 154 F.2d 785, 789 (2d Cir.) *aff'd* 328 U.S. 275 (1946).

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assuming that Congress has delegated such a power to judge one's own cause.

It is one thing to extend special consideration to the agency view, even when it is expressed only in a litigation position with no dispositive rule or adjudicative action to back it up. *Skidmore* counsels no less, as part of the court's independent review.²⁸⁹ It is quite something else for a court to deem itself bound by such an interpretation. Despite words of caution,²⁹⁰ courts occasionally have shown some disposition to do the latter, citing *Chevron*.²⁹¹ Those courts may have confused their obligations under *Chevron* with those under *Skidmore*. Independent deliberation of the interpretive issue, joined with special consideration of the agency's views, is the proper judicial posture.²⁹²

289. See text at *supra* notes 47-52.

290. See, e.g., *Church of Scientology of Calif. v. IRS*, 792 F.2d 153, 162 n.4 (D.C. Cir. 1986)(en banc)(Scalia, J.) ("There is some question to begin with, whether an interpretive theory put forth only by agency counsel in litigation, which explains agency action that could be explained on different theories, constitutes an 'an agency position' for purposes of *Chevron*"); *William Bros., Inc. v. Pate*, 833 F.2d 261, 265 (11th Cir. 1987) ("[W]e do not agree that the Director's mere litigating position is due to be given deference. Common sense tells us that if deference were always to be given to the Director's litigating position, then the claimant would be effectively denied the right to appellate review. . . . If the Secretary has a position he wishes to express, he can do it through the proper forum, i.e., the implementation of new clarifying regulations"); *Bregal v. Brock*, 844 F.2d 1163, 1168 (9th Cir. 1987) ("The Department did not construe § 1802(3) in its amended form until the onset of this litigation. The Secretary's construction is entitled to no more deference than is the interpretation of any party to the suit"). See also *Huffman v. Western Nuclear, Inc.*, 486 U.S. 663, 673 n.9 (1988); *Securities Indus. Ass'n. v. Bd. of Governors, Fed. Reserve Sys.*, 468 U.S. 137, 143-44 (1984); *Todd v. Norman*, 840 F.2d 608, 614 (8th Cir. 1988) (Lay, J., dissenting); *Brock ex rel. Williams v. Peabody Coal Co.*, 822 F.2d 1134, 1146 n.41 (D.C. Cir. 1987). But see *Church of Scientology*, 792 F.2d at 165-66 (Silberman, J., concurring).

291. See, e.g., *Duggan v. Board of Educ. of East Chicago Heights*, 818 F.2d 1291, 1296 (7th Cir. 1987); *FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1086 (9th Cir. 1985); *Techworld Dev. v. D.C. Preservation League*, 648 F.2d 106, 121 (D.D.C. 1986); *Todd v. Norman*, 840 F.2d 608, 612 (8th Cir. 1988); *Ciba-Geigy v. EPA*, 801 F.2d 430, 437 (D.C. Cir. 1986); *D & W Food Centers v. Block*, 786 F.2d 751, 757 (6th Cir. 1986); *Wayside Farms v. Department of HHS*, 663 F. Supp. 945, 951-52 (N.D. Ohio 1987); *Church of Scientology of Cal. v. IRS*, 792 F.2d 153 165-66 (D.C. 1986) (concurring opinion); but see *Getty v. FSLIC*, 805 F.2d 1050, 106 at nn. 17-18 (D.C. Cir. 1986).

292. E.g., *Patel v. Quality Inn South*, 846 F.2d 700, 703 (11th Cir. 1988); *FEC v. Sailors' Union of the Pacific Political Fund*, 828 F.2d 502, 505-06 (9th Cir. 1987); *Rybicki v. Hartley*, 792 F.2d 260, 262 (1st Cir. 1986). *Bowen v. Georgetown Univ. Hosp.*, 109 S.Ct. 468, 473 (1988) ("We have never applied the principle of [*Chevron*] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice").

G. *Miscellaneous Formats*

A variety of other forms of interpretive expression can be found in the case reports. Some can fairly be seen as having issued pursuant to an implied delegatory intent that they bind the courts. Thus, the Supreme Court cited *Chevron* and accepted as dispositive an FDA statement, published with new regulations in the Federal Register, that it did not intend to pre-empt state regulation of the subject matter.²⁹³ Where the Farm Credit Administration had statutory power to approve and adopt bylaws for its regional production credit associations, FCA action to vest in its intermediate credit banks the power of removal under the bylaws was held a "reasonable policy decision" under *Chevron*.²⁹⁴ The District of Columbia Circuit held ripe and reviewable (in the face of *Heckler v. Chaney*)²⁹⁵ an interpretation pronounced in the Statement of Reasons for a decision not to take enforcement action, and remanded to the district court for review of the interpretation's reasonableness under *Chevron*.²⁹⁶

Other formats treated with *Chevron* Step 2 respect cannot so readily be viewed as resting upon an implied delegated power to bind. An Antitrust Division affidavit was the object of *Chevron* acceptance in *Mattox v. FTC*,²⁹⁷ although the court also relied upon an identical interpretation in a decision of the FTC. Another case referred to regulations that had been published in proposed form but not yet adopted; the Second Circuit "deferr[ed]" to the notice of proposed rulemaking, which it chose to treat as clarification of a prior policy.²⁹⁸ A close case is *Chapman v. Department of HHS*,²⁹⁹ where the regulations did not cover the specific point but explanatory material published with the final regulations did. The court accepted the explanatory interpretation.³⁰⁰ The matter at issue concerned the authorized amount of civil penalties; when construing a penalty statute, it is arguably inappropriate to rely upon the explanatory

293. *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 714-15 (1985).

294. *Bailey v. Fed. Intermediate Credit Bank*, 788 F.2d 498, 504 (8th Cir. 1986). The intermediate bank had statutory powers of supervision over the production credit association. *Id.* at 502.

295. 470 U.S. 821 (1985).

296. *International Union, UAW v. Brock*, 783 F.2d 237, 251 (D.C. Cir. 1986).

297. 752 F.2d 116 (5th Cir. 1986).

298. *Liegl v. Webb*, 802 F.2d 623, 627 (2d Cir. 1986) (rejecting interpretation set forth in a manual).

299. 821 F.2d 523 (10th Cir. 1987).

300. *Id.* at 527.

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gloss where the regulation itself is not clearly dispositive. A more precise approach in all three of these cases would have been to treat the agency interpretation as information entitled to special consideration as the court deliberates its own best estimate of the statute's meaning.

With these, as with all formats, the inquiry at the threshold of *Chevron* Step 2 should be whether Congress has expressly or impliedly delegated the authority to issue interpretations having the force of law in the format used by the agency. If it has, the court should proceed with the reasonableness inquiry of Step 2. If Congress has not so delegated, the court generally should undertake an independent interpretation of the statute, granting the agency's views the special consideration called for by *Skidmore*. For informal formats not carrying force of law, *Chevron* Step 2 should not be used at all.³⁰¹

301. An exception, for pre-enforcement review, is sketched in text at *supra* notes 182-87.

