Deference Revisited: Politics as a Determinant of Deference Doctrine and the End of the Apparent Chevron Consensus

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I. INTRODUCTION

At least since the 1940s, the courts have struggled to determine the proper judicial role in reviewing statutory interpretations made by administrative agencies. This struggle has been thought to reflect the tension between the judiciary's recognized duty "to say what the law is," and the reality that many considerations, including agency expertise and explicit or implicit congressional delegation, suggest that agency statutory interpretations should be given great weight even if contrary to judicial inclinations.1

For forty years, two lines of authority reflected that tension. The first, represented by NLRB v. Hearst Publications, Inc., generally took into account various factors such as agency expertise, consistency and duration of the agency position, and the need to reconcile conflicting congressional policies in determining whether to grant deference to agency statutory interpretations. Where this multifactor approach supported granting deference, the courts purported to accept agency interpretations as long as they were reasonable. Under the second line of authority, represented by Packard Motor Car Co. v. NLRB, the courts considered questions of statutory interpretation to be "naked question[s] of law" to be decided by the courts without regard to the agency's position.

With the Supreme Court's 1984 decision in Chevron U.S.A. v. Natural Resources Defense Council, it seemed that much of the tension might have been resolved. Here was a unanimous decision setting out a relatively simple, perhaps even straightforward, approach to the question of when and how much deference should be given to agency interpretations of statutes within their purview. The uncertainty of determining which line of authority to follow and the complexity of the multifactor approach had apparently been replaced with a two-step analysis. First, has Congress spoken to the point at issue? If it has, congressional intent governs. Second, if the statute is silent or

5. Id. at 493.
7. While Chevron was unanimous, Justices Marshall, O'Connor, and Rehnquist did not participate in the decision. Shortly after Chevron, all three of these Justices joined or wrote opinions adopting the Chevron approach to deference. See, e.g., Chemical Mfrs. Ass'n v. Natural Resources Defense Council, 470 U.S. 115, 117, 125, 134, 152 (1985) (Rehnquist joining the majority opinion upholding the agency under Chevron; O'Connor joining Marshall's dissenting opinion affirming Chevron as a proper approach to deference analysis).
ambiguous, the agency's construction should be accepted if it is reasonable.8

Commentators favoring heightened deference to agency interpretations hailed *Chevron* as having resolved previously conflicting Supreme Court precedents9 and having “transformed dramatically the approach taken by courts in reviewing agency interpretations of statutory provisions.”10 They urged a “strong” reading11 of *Chevron* that would, they argued, appropriately limit the judicial role in making policy decisions, thereby affirming the fundamental allocation of authority and responsibility among the branches of government.12 Other observers found *Chevron* to be more troubling, undermining the principle that agencies must be held to comply with the law,13 adopting an unrealistically simplistic approach to a complex problem,14 and creating an anomalous doctrine that would make the law of deference even more unstable than it had been before *Chevron*.15

Conclusions that *Chevron* has established a new definitive and highly deferential approach to judicial review of agency interpretations are, at best, premature. The Court's decisions following *Chevron* reveal a steady erosion of the apparent consensus favoring heightened deference.16 By 1987, only three years after *Chevron*, the Court was evenly split in its reading of the case, with Justice Scalia leading a spirited defense of the “strong” position against an unstated but clear move back to pre-*Chevron* approaches to deference.17 Since Justice

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10. Pierce, supra note 8, at 302.
11. The term “strong” reading of *Chevron* was coined by Professor Cass Sunstein. See Sunstein, supra note 8, at 367. It has become a virtual term of art referring to an application of *Chevron* that maximizes deference to agency interpretations and minimizes judicial opportunities to determine statutory meaning from any source other than the language of the statute itself. Although he coined the term, Professor Sunstein is not an exponent of this approach to *Chevron*. See Sunstein, Factions, Self-Interest, and the APA: Four Lessons Since 1946, 72 Va. L. Rev. 271, 290-91 (1986).
15. Id. at 397-98. See also Sunstein, supra note 11, at 291.
16. See infra text accompanying notes 283-357.
17. See Immigration and Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 452-55
Kennedy took his seat on February 18, 1988, he has authored one opinion indicating that he favors the "strong" reading, but his particular approach seems to be acceptable to only one of the other Justices.

Thus, the Court's approach to deference in the next few terms is likely to be highly unstable. Even assuming that Justice Kennedy will adhere to the "strong" reading of Chevron, there will be only a one-vote margin one way or the other. The debate is such that a third, or even a fourth, approach might command a few votes from either camp.

What has happened to the apparent Chevron consensus? This Article seeks to answer that question. First, it traces the deference debate from the 1940s to the Chevron decision. Second, it examines the Chevron decision itself, the post-Chevron commentary, and the Supreme Court's treatment of deference since Chevron.

This review supports the following conclusions. First, the seminal decisions, which dominated deference doctrine for forty years, do not support a strong, highly deferential application of Chevron. To the contrary, the granting of deference prior to Chevron consistently depended upon the practical, common-sense considerations reflected in multifactor analysis. Second, the four decades before Chevron saw a shift in which political conservatives turned from opposing to embracing heightened deference, while political liberals similarly reversed their positions from support to skepticism of deference. Third, Chevron itself is entirely consistent with previous deference doctrine. It does not support the "strong" reading urged by some commentators. Fourth, the multifactor or sliding scale analysis, which derives directly from the practical reasons for deferring to agency interpretations, remains important to deference doctrine in the Supreme Court. Fifth, the current split on the Supreme Court over deference doctrine reflects an ideological division between liberals and conservatives, with

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20. See infra text accompanying notes 230-33.
22. See infra text accompanying notes 84-125, 128-31.
23. See infra text accompanying notes 132-42.
24. See infra text accompanying notes 186-98.
25. See infra text accompanying notes 234-60.
liberals adhering to traditional deference analysis, while conservatives seek to impose strict limitations on judicial review of agency interpretations. The conservative effort, if successful, could have dramatic implications for the future of the administrative state.\(^\text{26}\)

II. DEFERENCE PRINCIPLES BEFORE \textit{CHEVRON}\

While the debate over judicial review of agency interpretations of statutes can be traced at least as far back as the 1880s,\(^\text{27}\) the modern era of the deference debate began in the 1940s in the wake of the agency expansion and regulatory explosion of the New Deal. In 1944, Dean Pound wrote of "a growing administrative absolutism which . . . has . . . become a serious problem."\(^\text{28}\) To him, the central question was how to assure agency compliance with the law and protection of individual rights "without detracting from the efficiency of the administrative agencies in their legitimate operations in their legitimate field."\(^\text{29}\)

A lifelong Republican and political conservative, Dean Pound branded advocates of the administrative state as Marxists and served as a leading polemicist in the unsuccessful conservative resistance to the New Deal.\(^\text{30}\) He complained that agencies tend to "weight procedure heavily in favor of the government," to ignore private interests in their zeal to achieve their missions,\(^\text{31}\) to hamper presentation of cases adverse to the agency positions, and to attempt to avoid judicial scrutiny of agency orders.\(^\text{32}\) Of particular significance to the current debate, he argued that restrictions upon judicial review were especially serious in light of the "tendency of administrative agencies to act on policies of their own devising rather than on those prescribed in the statutes, and to direct application of the statutory policies toward ultimate ideas beyond those of Congress or of the legislature."\(^\text{33}\)

These concerns remain central to the deference debate. Perhaps the most striking aspect of the current debate, however, is that these concerns are now expressed by political liberals such as Judge Abner Mikva, while political conservatives such as Judge Kenneth Starr have warmly embraced and sought to enhance deference to agency statutory interpretations.\(^\text{34}\)

\(^{26}\) See infra text accompanying notes 352-57.


\(^{28}\) \textit{Id.} at 204.

\(^{29}\) \textit{Id.} at 202.


\(^{31}\) Pound, \textit{supra} note 27, at 208.

\(^{32}\) \textit{Id.} at 215, 217.

\(^{33}\) \textit{Id.} at 219.

\(^{34}\) Contrasting Mikva, \textit{supra} note 13, with Starr, \textit{supra} note 2.
A. The Foundations of the Deference Debate

Before Chevron, NLRB v. Hearst Publications Inc.35 and Packard Motor Car Co. v. NLRB36 were commonly considered to be the leading cases on the issue of deference to agency statutory interpretations.37 Hearst has generally been held to be the leading case recognizing and granting deference to agency interpretations,38 while Packard is frequently cited as representing the proposition that courts should independently determine questions of law.39

Two other decisions are also frequently placed in this pantheon. Gray v. Powell,40 which was relied upon in Hearst in support of a deferential approach, was initially considered the leading case in the area.41 While its significance is still recognized, it has since been overshadowed by Hearst.42 Skidmore v. Swift & Co.43 differs from the others in that it does not involve direct judicial review of an agency decision. Rather, in settling a private dispute, the Court gave substantial weight to the views of an agency that frequently addressed similar issues in carrying out its responsibilities. In doing so, the Court discussed the considerations that supported deference in that case, considerations that have continued to play an important role in decisions about whether or not to defer to agency interpretations.

Of these authorities, Gray, Hearst, and Skidmore may be said to support deference to agency interpretations, or at least to establish the circumstances in which deference is appropriate. Packard, on the other hand, represents the proposition that issues of law are for the courts to decide.

1. The Deferential Position—How Much Real Deference?

Gray involved the question of whether the Seaboard Air Line Railway Company was a “producer” of coal under the Bituminous Coal

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35. 322 U.S. 111 (1944).
37. See, e.g., L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 558-64 (1965); Coffman, Judicial Review of Administrative Interpretations of Statutes, 6 W. NEW ENG. L. REV. 1, 3 n.11 (1983); Note, Perfecting the Partnership: Structuring the Judicial Control of Administrative Determinations of Questions of Law, 31 VAND. L. REV. 91, 114 (1978) (citing Hearst and Packard as “[t]he classical examples of the varied judicial responses to agency determinations of law”).
39. See, e.g., id.; Coffman, supra note 37, at 3 n.11.
40. 314 U.S. 402 (1941).
42. See, e.g., Coffman, supra note 37; Stever, Deference to Administrative Agencies in Federal Environmental, Health and Safety Litigation—Thoughts on Varying Judicial Application of the Rule, 6 W. NEW ENG. L. REV. 35, 36-37 (1983); Note, The Administrative Interpretation of Statutes, 39 GEO. L.J. 244, 247 (1951).
43. 323 U.S. 134 (1944).
Act of 1937. Seaboard, which burned large amounts of coal in its railroad operations, had leased certain coal lands. It had then arranged for an independent contractor to lease the coal mining equipment on the leased property, and provided ultimately for delivery of the coal mined on the leased property to Seaboard at a fixed price, with all risks of operation to be borne by the contractor. If, under this arrangement, Seaboard qualified as a “producer” of coal under the Bituminous Coal Act, it would have been exempt from certain excise taxes otherwise imposed by the Act. The excise taxes were part of a legislative scheme designed to stabilize coal prices and ease the economic difficulties of the soft coal industry.

In enacting the Bituminous Coal Act of 1937, Congress had not defined what coal it considered to be exempt. Instead, Congress had left it to the Bituminous Coal Commission to determine whether any particular coal was exempt from the provisions of the Act. Seaboard had applied to the Commission for an exemption on the ground that it was a “producer” of coal. The Commission had denied the exemption.

The issue, as couched by the Court, was “whether the Director’s finding that Seaboard is not the producer of this coal is to be sustained.” This very framing of the issue suggests that the Court was taking a deferential approach to review of the agency’s decision. Had the Court viewed the question solely as a matter of law for the Court to decide, the issue would presumably have been framed as whether Seaboard fell within the scope of the term “producer” under the Bituminous Coal Act. From the beginning, the Court’s focus was not on what the Act meant, but on whether to sustain the agency’s decision. The Court’s later discussion confirmed that it was taking a deferential approach.

The important question is why the Court determined that such deference was not only appropriate, but required. The answer in Gray is

45. Id. at 407-09.
46. Id. at 403 & n.1.
47. Id. at 410.
48. Indeed, while the Senate would have adopted such a definition, the conference report had eliminated it from the legislation. Id. at 410-11.
49. Id. at 411 & n.1.
50. Id. at 411.
51. The Court stated, for example, that in this case, the function of review placed upon the courts by § 6(b) is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner. Id. (emphasis added). The fact that there is “no dispute as to the evidentiary facts . . . . does not permit a court to substitute its judgment for that of the Director.” Id. at 412.
relatively straightforward. First, the Court found that the statutory provision authorizing the Commission to determine applications for exemptions from the Act constituted a specific delegation to the Commission to determine who qualified as a “producer.”52 Second, since Congress had delegated this determination to the agency, it was a matter of “the usual administrative routine.”53 Third, Congress had made the delegation because the agency had “experience in [the] particular field.” That experience “gave promise of a better informed, more equitable, adjustment of the conflicting interests of price stabilization upon the one hand and producer consumption upon the other.”54 Thus, deference in Gray hinges on (1) the fact that Congress had specifically delegated the question to the agency, (2) the nature of the question as one of “administrative routine,” particularly in light of the delegation, (3) the agency’s expertise in the field, and (4) the need to resolve conflicting interests at a level of detail not addressed by Congress.

In Hearst, the Court reviewed a decision of the National Labor Relations Board that certain “newsboys” constituted “employees” of various newspapers and thus fell within the jurisdiction of the National Labor Relations Act.55 The newspapers argued that the newsboys were independent contractors under common-law standards governing employment, and that common-law standards “determine the ‘employee’ relationship under the Act.”56

By contrast to Gray, the Hearst Court characterized the issue as

52. Id. at 411, 412.
53. Id. at 411.
54. Id. at 412. Elaborating on these points, the Court later said:

Between the two extremes [where a company clearly is or is not a producer] are the innumerable variations that bring the arrangements closer to one pole or the other of the range between exemption and inclusion. To determine upon which side of the median line the particular instance falls calls for the expert, experienced judgment of those familiar with the industry. Unless we can say that a set of circumstances deemed by the Commission to bring them within the concept “producer” is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the Court’s duty to leave the Commission’s judgment undisturbed.

Id. at 413. It is worth noting that just prior to making this statement, the Court itself determined when a buyer clearly does not qualify as a producer and when it clearly does. Thus, the Court kept to itself the determination of the boundaries of the agency’s authority, leaving the agency to resolve matters within those boundaries.

55. NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944). As the Court explained, the term “newsboys” was a misnomer, suggesting youth and inviting comparison with temporary or casual distributors of newspapers. These were “generally mature men” who had worked on a regular basis, often for many years, and who were subject to supervision and various requirements imposed by the newspapers. Id. at 116-19.

56. Id. at 120.
“whether the newsboys are ‘employees,’” 57 rather than whether the Board’s determination of that issue should be sustained. While the Court later took a deferential approach similar to Gray, this characterization of the issue might have been a signal that the Court would independently determine the fundamental issues of statutory construction that guide whatever decisions may be left to the agency.

The Hearst Court proceeded to do just that. First, the Court rejected the argument that the scope of the term “employee” was to be determined by reference to common-law standards. 58 Second, the Court held that the scope of the term was to be determined in light of the purposes of the Act and the “mischief at which the Act [was] aimed.” 59 Only after independently establishing these parameters did the Court even consider what the Board had held in the particular cases, much less give any deference to the Board’s decision.

Given the Court’s holding that the term “employee” was to be defined and applied in light of the purposes of the Act, the question for the Court became whether “the Board’s determination that specified persons are ‘employees’ under this Act... has ‘warrant in the record’ and a reasonable basis in law.” 60 As in Gray, there is no doubt that the Court was now taking a deferential approach. The question, again, is why it did so.

The answer, while not as clear here, is essentially the same as it was in Gray. First, although it could not point to a specific statutory provision, the Court again found that Congress had delegated this decision to the agency. 61 Second, the Court held that the determination of whether particular relationships constitute employment under the Act requires familiarity with various employment relationships and the experience to judge whether the use of collective bargaining for particular relationships would serve the purposes of the Act. 62 Third,

57. Id.
58. Id. at 123-29. The Court based this decision upon a determination that Congress had “intended to solve a national problem on a national scale,” which would not be possible if the definition of “employee” were governed by various and conflicting state common-law approaches, and that the application of common-law tests would not be conducive to achieving the purposes of the Wagner Act. Id. at 123, 125-26.
59. Id. at 126. The Court held that “the broad language of the Act’s definitions... leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications.” Id. at 129.
60. Id. at 131.
61. “Th[e] task of definitively determining the scope of ‘employee’ has been assigned primarily to the agency created by Congress to administer the Act.” Id. at 130.
62. This knowledge and experience “must be brought... to bear on the question who is an employee under the Act.” Id. Once again, the Court independently determined the requirements of the statute before deferring to the agency’s application of the statute to the particular case.
as a result of the delegation and the need for expertise, the Court viewed such decisions as part of the Board's "usual administrative routine." Finally, summarizing its approach, the Court stated that the courts should take a deferential approach "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially."

As in *Gray*, the Court's deference in *Hearst* was justified by (1) the delegation of the issue to the agency, (2) the nature of the question as one of "administrative routine," and (3) the agency's expertise in the field. While the *Hearst* Court did not specifically rely upon the need to resolve conflicting interests at a level of detail not addressed by Congress, its reference to the need for "[e]veryday experience" to determine when a relationship should be considered to constitute employment under the Act implicitly recognizes that basis for deference. In addition, that reference may explain in part the Court's willingness to find a delegation to the agency to decide the question. After all, if that type of experience is necessary to apply the Act, Congress must have intended the agency to have primary responsibility for determining who qualifies as an "employee."

The third foundational decision representing the deferential line of authority is *Skidmore v. Swift & Co.* *Skidmore* is distinct from other decisions discussed here in that it did not involve judicial review of an agency decision. Rather, it was a private action brought by fire fighting employees to obtain overtime pay under the Fair Labor Standards Act (FLSA). While Congress had created the office of Administrator under the FLSA, it had not authorized the Administrator to make determinations in particular cases. Instead, it had required and empowered the Administrator to become familiar with employment conditions in industry and to bring injunctive actions as need be to restrain violations. Thus, unlike *Gray* and *Hearst*, there was no delegation to the agency to apply the Act to particular situations.

Nonetheless, the Court found it appropriate to grant some deference to the Administrator's views as expressed in an interpretative bulletin, in informal rulings, and in an amicus brief that the Administrator had filed in the private action. While noting that the Administrator's statements are neither conclusive nor binding on a district court in the same manner as a higher court ruling, the Court empha-

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63. *Id.*
64. *Id.* at 131.
65. *Id.* at 130.
67. The employees argued that the time that they spent on call on the company premises or within hailing distance constituted work time under the Act. *Id.* at 135-36.
sized that the Administrator's pronouncements should be considered and perhaps even given great weight in particular cases. The general respect due the Administrator's statements arises from the fact that they are made in pursuit of official duties and that they are based upon expertise not available to the courts. The weight to be given the Administrator's judgment, however, may vary depending 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." This was one of the early clear articulations of the multifactor approach to deference analysis.

Taking these three cases together, it is possible to identify several criteria for determining whether and how much deference should be given to agency decisions. First, if the Court determines that Congress has delegated a decision to an agency, the Court appears likely, under these decisions, to defer to a reasonable agency construction or application of a statutory term that might otherwise be considered a matter for the courts. Delegation appears to be the strongest basis for deference because it is rooted in a specific congressional intention to have the agency make the decision. The crucial question with respect to delegation is exactly what was delegated to the agency.

Second, while the Court will determine the boundaries of statutory terms and the principles that govern their application to specific cases, it will defer if an issue is one of "administrative routine." Third, and closely related to the second criterion, the Court may defer if the agency's expertise in the field is necessary to reach an informed decision in the particular case. Fourth, where Congress has established the boundaries and the principles governing a dispute but has not addressed the myriad possible permutations, the Court will defer to agency resolution of conflicting interests where both or all interests are to some extent protected or addressed by the statute.

The second, third, and fourth bases for deference all hinge on the proposition that a degree of practical expertise is necessary to resolve the conflicts at issue, and that the expertise resides in the agency, not with the courts. Even without a finding of delegation, these considerations could reasonably lead a court to defer to an agency's decision because the court views the agency as better able to achieve the goals of the statute.

68. Id. at 139. The Court also noted that the Administrator's statements determine the agency's enforcement policy, and that good principles of administration require that standards governing enforcement closely parallel those governing the determination of private rights. Id. at 139-40.

69. Id. at 140. Ultimately, the Court remanded the case for further consideration in light of its own ruling that waiting time could, in some circumstances, be working time, and its discussion of the role of the Administrator. Id.
Three other considerations, all of which arise in *Skidmore*, provide some basis for deferring, or at least giving substantial weight to agency decisions. These are: (1) how thoroughly the agency has examined the issue, (2) the quality of the agency’s reasoning, and (3) whether the agency’s position is consistent with its other statements. These considerations are distinct from the previous ones in that they are not necessarily peculiar to the agency. Any party can thoroughly examine an issue, reach a well-reasoned conclusion, and take consistent or inconsistent positions. These factors are simply practical considerations “which give . . . [the agency] power to persuade.”

It is important to note here that none of these three foundational decisions grants deference to an agency position simply because the agency was charged with implementing the statute in question. Even in *Gray*, where the Court recognized an explicit delegation of the issue to the agency, deference hinged on the need for the agency’s practical expertise to apply the statute to the particular situation and the need to resolve conflicting interests at a level of detail not addressed by Congress. In *Gray* and in *Hearst*, the Court deferred to the agency only after first determining for itself the boundaries of the agency’s discretion and the congressional policies that were to guide the agency’s decision. In those cases and in *Skidmore*, practical considerations such as agency expertise in the narrow area at issue and the thoroughness of the agency’s consideration of the issue appear to have been significant to the degree of deference granted by the Court. These decisions do not support the general proposition that courts should simply defer to agency statutory interpretations as long as they are reasonable.

2. The Independent Position—Was Deference Rejected?

    If, to paraphrase Dean Pound, *Gray* and *Hearst* are considered the precursors of unfettered deference and administrative absolutism, *Packard* is taken as representing the view that questions of statutory interpretation are matters of law for the courts alone to decide. In *Packard*, the Court again addressed the question of the scope of the term “employee” under the National Labor Relations Act. This time, however, the issue was whether foremen could be considered to be “employees” entitled to the various protections provided by the Act. Following normal procedures, the Board had certified a union to represent foremen at the Packard Motor Car Co. and had issued a cease-and-desist order against the company for refusing to bargain with the union. As couched by the Court, the question was “whether the or-

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70. Id.
72. See, e.g., Breyer, supra note 14, at 366-67; Coffman, supra note 37, at 16.
der of the Board is authorized by the statute.”

In contrast with *Hearst*, the *Packard* Court decided this issue as a “naked question of law.” Although, as in *Hearst*, the Court upheld the Board, it did so solely on the basis of its own reading of the statute. First, noting that the term “employee” was defined to “include any employee,” it held that “foremen are employees both in the most technical sense at common law as well as in common acceptance of the term.”

Second, it rejected the company’s argument that foremen fell within the statutory definition of “employer,” which included “any person acting in the interest of an employer, directly or indirectly.” According to the Court, the context of the Act did not allow for a construction that would exclude foremen from the definition of “employee,” and there was not even any “ambiguity in this Act to be clarified by resort to legislative history.”

The Court’s approach is striking for several reasons. First, since the effect of the Court’s decision was to uphold the Board, the Court could have relied upon the Board’s decision, and perhaps upon the Board’s reasoning. It could have given great weight to the Board’s view, as it had done in construing the same statutory term in *Hearst* only three years earlier. Yet the majority opinion did not even cite the *Hearst* decision. Second, the dissent relied upon *Hearst* for the proposition that “the term ‘employee’ must be considered in the context of the Act.” Since the majority had relied heavily on the same proposition, it too could have cited *Hearst* on the point. More important, it could have eliminated the force of the dissent’s citation by using *Hearst* to justify some degree of deference to the Board’s decision. Third, the Court rejected an argument that NLRB vacillation on the issue undermined the Board’s ruling in this case. Although the Court recognized that this vacillation showed the difficulty of the problem committed to the Board, it did not bow to the agency’s effort to resolve a difficult policy problem, nor did it suggest that the agency’s inconsistency undermined any respect that might otherwise be due to the agency’s expertise. Rather, the Court avoided any doubts arguably raised by the Board’s vacillation by resolving the issue as a “naked question of law” for the Court to decide. Thus, the

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74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* The assertion that the Act was unambiguous is baseless. As the Court itself noted, foremen fell squarely within the language of both the definition of “employee” and the definition of “employer.” *Id.* It is difficult to imagine greater ambiguity in the application of statutory language.
79. *Id.* at 495 (Douglas, J., dissenting).
80. *Id.* at 492-93.
81. *Id.*
Court appears to have said that deference is irrelevant with respect to pure questions of law, since those are reserved to the courts. While the Court did not explain when an issue becomes a pure question of law, its discussion suggests that this occurs at least when the statute is clear or unambiguous with respect to the particular issue.\(^8\)

Packard serves as a counter to the Hearst line of cases in that the Court resolved a seemingly difficult issue of statutory construction itself, without reference to the agency’s position on the issue or to the agency’s reasoning. If we accept the Court’s apparent explanation of its action, it did so because the law was clear in Packard, while it presumably had not been clear in Hearst. Thus, even after Packard there appeared to remain room for deference to an agency interpretation where the Court found the governing statute to be ambiguous on the point at issue.\(^8\)

B. The Deference Debate from the Foundation to Chevron

These cases sparked a debate that continued, focused largely on Hearst, until Chevron was decided in 1984. The question throughout has been how to reconcile the Hearst and Packard lines of cases with some coherent theory of deference, and more generally, what considerations justify granting or denying deference to agency interpretations.

Initially, Hearst was seen as a refreshing move away from the artificial attempt to draw distinctions between questions of fact and questions of law, and a sensible recognition that “relative expertise whether of court or of agency should determine the proper sphere of each.”\(^8\) The difficulty, of course, is where to draw the line between a question for which agency expertise is essential, and one appropriate for decision by the court exercising its own expertise in statutory construction. After all, if courts are experts “in anything, it is in the field of statutory interpretation.”\(^8\)

Although Packard presented an opportunity to explain how this line might be drawn,\(^8\) the Court gave no indication that the relative

8. See id. at 488 (“context of the Act . . . leaves no room for a [contrary] construction”); id. at 492 (“no ambiguity in this Act to be clarified”).
83. Since the Packard Court apparently found clarity in the statutory language, it is not possible to discern from the language of Packard whether the Court would have considered legislative history or other traditional tools of statutory construction to have a role in determining whether or not a statute is ambiguous. As discussed in Part II(C) of this Article, infra, this is one of the central issues in the wake of Chevron.
84. Recent Cases, 57 Harv. L. Rev. 1112, 1114 (1944).
85. Note, supra note 42, at 254.
86. It seems obvious, for example, that a court is not likely to have much, if any, of the knowledge or experience necessary to judge whether treating “newsboys” as employees under the National Labor Relations Act would be consistent with, or
expertise of the agency and the Court had anything to do with its approach to the case. The language of the decision suggests that the Court found the statute clear on the point at issue, which presumably left no room for the agency to contribute anything regardless of its expertise in the area. Since that explanation is contradicted by the considerable ambiguity of the statutory provisions construed by the Court, the question remains why the Court chose to reach its own interpretation of the statute rather than to accept the agency's interpretation.

While some commentators have justifiably despaired of any guidance from the Court, others have discerned a coherent analytical approach to deference. Professor Davis, a persistent critic of the conservative Dean Pound in the earlier debates, was one of the first. Writing in 1950, he identified four considerations that appeared to govern the nature and degree of deference that should be accorded to an agency's interpretation: (1) whether the court or the agency was better qualified to decide the particular question, (2) whether and to what extent Congress intended to delegate the issue to the agency, (3) whether the case involved a "fundamental issue of law, . . . [or an]
incidental or relatively unimportant issue of law,” and (4) how what Professor Davis called “inarticulate factors” bore on the particular case. The “inarticulate factors” are matters that seem to influence the Court, but are not specifically discussed in the opinions. They include the extent of judicial confidence in the agency’s work and the extent of judicial agreement or disagreement with the agency position. Eight years later, Professor Davis added additional “inarticulate factors” to his list: the degree of thoroughness and impartiality in the agency’s performance, the court’s interest in and view of the importance of the subject matter, other demands on the court’s time and attention, the need to bolster the agency’s policy by independently agreeing with it, the need for stability in law or policy, and the manner of presentation by the agency.

In addition to these basic considerations, Professor Davis identified several others that may give weight to an agency position even when a court has decided to substitute its judgment for the agency’s. These include the consistency of the agency’s position, the length of time the agency has held the position, whether the agency construction was contemporaneous with enactment of the statute, and whether Congress has shown an intent to approve the administrative interpretation.

93. Id. at 610-11.
94. Id. at 591-93, 611.
96. Davis, supra note 41, at 594. See also Parker, Administrative Interpretations, 5 Miami L.Q. 533, 538-39 (1951) (identifying contemporaneous construction, longstanding nature of the position, and presumed congressional acceptance or reenactment as contributing to the weight of agency interpretations). Also in 1950, Professor Nathanson viewed the deference question largely as one of determining the area of agency discretion established by a congressional delegation of authority. He saw Gray and Hearst as cases in which the Court exercised independent judgment with respect to a general issue of statutory interpretation. The agency was then left to exercise discretion within the area defined by the Court’s independent judgment. In language strikingly similar to that of Chevron 34 years later, he suggested that, as a general theory of statutory interpretation, “[w]hen language is ambiguous and legislative history fragmentary and inconclusive, an administrative judgment based upon a reasoned examination of the problem in light of both the particular facts and the broad statutory objectives is likely to provide the most reliable guide to the effectuation of those objectives.” Nathanson, Administrative Discretion in the Interpretation of Statutes, 3 Vand. L. Rev. 470, 476 (1950). This principle would apply, however, only when the agency is acting within the scope of delegated authority, which is for the court to determine. In that situation, Professor Nathanson argued, the agency’s action is not properly understood as one of statutory interpretation, but of exercise of its substantive discretion under the statute. Id. at 490-92. This is virtually a reiteration of the Hearst Court’s assertion that the NLRB’s decision that newsboys constitute “employees” was not a matter of statutory interpretation, but simply the “specific application of a broad statutory term.” NLRB v. Hearst Publications, Inc., 322 U.S. 111, 131 (1944). Nonetheless, Professor Nathanson’s commentary, including some of the decisions that he discusses, (see Nathanson, supra at 476-79 (discus-
A year later, an excellent student Note sounded several warnings about the dangers of the deferential approach. First, reliance upon agency expertise or agency involvement in the legislative process may be appropriate where the agency agrees with the goals and policies of the legislation being construed, but it is not valid where the agency opposed the legislation or disagrees with it. Thus, reliance upon agency expertise or involvement in the legislative process ignores the political reality that administrations may change or may be called upon to implement legislation with which they disagree. Second, agencies are motivated by political partisanship, which is inappropriate in determining the meaning of statutes. Third, specialization causes agencies to have a narrow vision that prevents the broad understanding of the law that should be taken into account in interpreting particular statutes.

In addition, the Note characterized the reason for the increased deference to agency interpretations as "the belief that the court's ingrained conservatism is a brake on social progress and inhibits rapid adjustment of governmental activity in periods of crisis." This comment has an ironic ring in the aftermath of *Chevron*, when conservatives are arguing for even greater deference, and liberals are arguing for increased judicial independence.

A decade and a half later, Professor Jaffe rejected the proposition that *Hearst* and *Packard* can be reconciled by characterizing the former as a specific application of the statute and the latter as a general application or interpretation. Since *Hearst* itself can be characterized as involving the "general application" of the statute, he argued, the distinction lay in the nature of the legal issue. In *Packard*, according to Professor Jaffe, whether foremen could organize under the NLRA was a significant legal question, while in *Hearst* the status of newsboys had no general significance.

If this statement of the distinction fails to draw a bright line, Professor Jaffe's ultimate description of the basis for the deference decision gives even less comfort to those seeking certainty in this arena:

Where judges are themselves convinced that a certain reading, or application, of the statute is the correct—or the only faithful—reading or application,
they should intervene and so declare. Where the result of their study leaves them without a definite preference, they can and often should abstain if the agency's preference is "reasonable."\textsuperscript{104}

This does not mean that courts are to accept any reasonable interpretation. Rather, no matter how "reasonable" an agency's position may seem, the court has the responsibility to determine whether there is any other interpretation that is "correct." Professor Jaffe argued that a judge, if restricted to accepting reasonable positions even if he did not believe them to be correct, might, "if sensitive or modest . . . be finally reduced to mere deference or frustration."\textsuperscript{105}

Professor Jaffe also recognized the role of agency expertise, but he did so only cautiously. He warned that what may appear to be expert judgments are rarely based solely on technical or practical expertise, and are often "as much determined by power drives and legal attitudes as . . . by technical considerations."\textsuperscript{106} He argued, therefore, that courts must carefully evaluate the true role and value of expertise in each case.\textsuperscript{107} Here, then, as early as 1965, is an early proponent of the administrative state, and a critic of conservative complaints about administrative absolutism,\textsuperscript{108} raising concerns about excessive deference.

By the 1970s, the tone of the commentary had shifted to an even greater skepticism about agency performance and objectivity. For example, agencies were characterized by liberal commentators as "unresponsive to public concerns, . . . overly deferential to business interests, . . . [t]oo often . . . refus[ing] to allow citizens to participate in agency proceedings, and zealously guard[ing] from public view information vital to the economic interests of consumers or to the health and safety of all citizens."\textsuperscript{109} Agencies were seen as "captive" by, or at least excessively influenced by, the interests they were supposed to regulate.\textsuperscript{110}

In large part, the response was to call for more open government\textsuperscript{111} and recognition of the administrative agency as the forum for the resolution of the competing claims of various groups, rather than the set-

\textsuperscript{104} Id. at 572 (emphasis in original).
\textsuperscript{105} Id. at 576.
\textsuperscript{106} Id. at 580.
\textsuperscript{107} Id. at 579.
\textsuperscript{108} Gellhorn, supra note 30, at 223 & n.12, 230 n.34.
\textsuperscript{109} Lazarus & Onek, The Regulators and the People, 57 VA. L. REV. 1069, 1070 (1971) (footnotes omitted). As noted in the introductory footnote, the authors wrote on behalf of the Center for Law and Social Policy, which was a liberal public interest law firm and social action organization. Id. at 1069 n.1.
\textsuperscript{110} Id. at 1071; Stewart, The Reformation of American Administrative Law, 88 HARV. L. REV. 1667, 1684-87, 1713 (1975). See also Shapiro, Utility Regulation and the Political Process, 33 U. KAN. L. REV. 491 (1985)(describing the capture as the result of an imbalance of influence by industrial interests, rather than simple bias on the part of agencies).
\textsuperscript{111} Lazarus & Onek, supra note 109, at 1071, 1075.
ning for detached policymaking in the public interest.112 This gave rise
to calls for adoption of an “interest representation” model of adminis-
trative law, under which fairness would be achieved by assuring fair
representation of all interests that might be affected by an agency’s
action.113 Dissatisfaction with agency performance also gave rise to
the “hard look” doctrine in the area of judicial review of agency exer-
cise of substantive discretion.114

In light of these developments, it is hardly surprising that Congress
should seriously consider efforts to strengthen the role of the courts in
relation to the administrative agencies. Purporting to overrule the al-
legedly unduly deferential approach of Hearst, the Bumpers Amend-
ment, first introduced in 1975, would have required that courts
“independently decide all questions of law.”115 While the Bumpers
Amendment was never enacted, it symbolized the growing mood of
resistance to regulation and distrust of administrative agencies.

For the purpose of this discussion, two aspects of the effort to adopt
the Bumpers Amendment are particularly striking. First, the effort
focused, more than thirty years later, on the Hearst decision. While
the courts were developing the “hard look” doctrine in review of the
substance of agency decisions,116 and attempting to take greater con-
trol of agency procedures,117 the principles governing judicial review
of agency statutory interpretations remained dominated by Hearst and
related decisions. Second, the amendment was generally opposed by
politically liberal organizations.118 Thus, while liberal distrust of

112. Stewart, supra note 110, at 1670, 1683.
113. Id. at 1712-13.
Scrutiny, 67 GEO. L.J. 699, 704 (1979). See also Pierce & Shapiro, Political and
that criticism of agencies has led to increasing attempts to control them). At
the same time, one study found that it was not possible to determine “any clear and
consistent pattern, whether of close judicial supervision or of deference to the
agency’s responsibilities.” Gardner, supra note 89, at 820.
115. S. REP. No. 2408, 94th Cong., 1st Sess. (1975). See also 121 CONG. REC. 29,566-58
(1975)(remarks of Sen. Bumpers). For discussions of the Bumpers Amendment,
see Levin, Review of “Jurisdictional” Issues Under the Bumpers Amendment,
1983 DUKE L. J. 355; O’Reilly, Deference Makes a Difference: A Study of Impacts
seen as the seminal decision in this development.
117. This effort was ultimately thwarted by Vermont Yankee Nuclear Power Corp. v.
118. Various liberal organizations, including Public Citizen, which had been founded
by Ralph Nader, opposed the Bumpers Amendment. Administrative Procedure
Act Amendments of 1976: Hearings Before the Subcommittee on Administrative
Practice and Procedure of the Committee on the Judiciary of the United States
Senate, 94th Cong., 2d Sess., 168-69 (1976) (statement of Jacqueline Warren, At-
torney for the Environmental Defense Fund); Regulatory Procedures Act of 1981:
Hearings on H.R. 746 Before the Subcommittee on Administrative Law and Gov-
agencies seems to have been growing during the 1970s, it had not reached the point of rejecting deference.

In 1981, Professor Byse turned to *Skidmore* as the proper model for judicial review of agency statutory interpretations. Rejecting the concept of deference to the extent that it requires acceptance of agency interpretations as long as they are “not irrational or unreasonable,” he argued that administrative interpretations should serve only as “guidance” entitled to some “respect.”119 Granting greater deference, he asserted, would relieve the court of its “ultimate responsibility for determining the meaning of the statute,” and would be “an abdication of the court’s responsibility in our constitutional system.”120

Two years later, Professor Stever characterized *Hearst* as the leading case, arguing that it should be narrowly construed as involving little or no deference to the agency’s interpretation.121 He found two basic theoretical justifications for deference: (1) the fact that the agency works with the statute every day, and (2) the fact the agency was involved in the legislative process.122 He argued, however, that these reasons do not justify deference. Rather, since the agency was an actor in the legislative process and thus brings a distinctive bias to any effort to interpret the statute, courts should not defer to agencies in the interpretation of statutes.123

Professor Stever’s argument brings the debate full circle. It is a reiteration of many of the concerns expressed by Dean Pound in 1944 and in the student Note published in 1951.124 This time, however, the argument is presented by an advocate with distinctively liberal credentials, including representing the State of New Hampshire as an intervenor in the licensing proceedings for the Seabrook Nuclear Power Plant, and service in the Department of Justice under President Carter.125
C. Lessons from the Pre-Chevron Era

This brief review of the foundational authority and the deference debate prior to *Chevron* suggests three propositions. First, since the beginning of the modern administrative state, there have been persistent concerns about excessive deference to administrative agencies. Second, prior to *Chevron*, whether to grant deference and the degree of deference granted depended upon a variety of factors that were not readily distilled into a simple general rule. Moreover, the courts maintained control over fundamental questions of statutory construction. Third, criticism of, and developments in, deference doctrine seem to have been driven largely by the political interests of the participants in the deference debate.

As to the first proposition, the agency's perception of its mission, undue influence from special interests, and other likely political considerations, have consistently been said to create the danger that the agency will pursue its own or its clients' interests, rather than those protected by the statute. When courts defer to agencies in such situations, they fail to fulfill their constitutional role of checking arbitrary executive power.

On the second point, three general considerations appear to have dominated the deference decision. They are delegation, agency expertise, and the nature or significance of the legal issue. Each of these considerations provides a basis for actually shifting decisional authority from the court to the agency. In addition, various essentially practical considerations have been suggested as bases for deference. These range from judicial perception of the quality of the agency, to agency involvement in the legislative process, to whether the agency has consistently held the position or has held it for a long time.

126. See supra text accompanying notes 28-33, 97-102, 109-10.
127. Byse, supra note 119, at 192.
128. See supra notes 69, 90-96, 103 and accompanying text.
129. Delegation is the clearest basis for shifting the decisional authority. In large part, the court's role in reviewing agency decisions is to protect the position of Congress in the separation of powers. If Congress has given the authority to the agency, the court would be usurping, rather than protecting Congress if it refused to defer. The only apparent limit to this proposition is the nondelegation doctrine. See Byse, supra note 119, at 191 (quoting Judge Leventhal on this point). Expertise justifies shifting decisional authority on the ground that the agency is competent to decide the issue, while the court is not. The importance criterion would allow deference where the issue is relatively unimportant. This is less a justification of deference than a recognition that in unimportant cases deference will not adversely affect the fundamental structure of government, so we might as well allow it since it may enhance agency efficiency.
130. See supra text accompanying notes 66-70.
Although these may be reasons to "respect" the agency's interpretation, as Justice Jackson indicated in Skidmore, they do not justify actually shifting the decisional authority from the judicial branch to the agency.

There seems to have been some consensus in the commentary that among all these criteria, the decision whether or not to defer to the agency depended heavily upon the importance of the legal issue. While this principle does not appear in the opinions, it serves to reconcile the apparent inconsistency of the Hearst and Packard lines of cases. It is also consistent with both the delegation and expertise considerations. The more important an issue, the less likely it is that Congress delegated it to the agency for decision rather than intending the decision to be derived by a court from the statute and legislative history. Similarly, the more important an issue as a matter of law, the less likely it is that agency expertise in technical matters or daily implementation of the statute will be crucial to understanding the statute. Finally, the proposition that the courts should decide the more important legal issues shifts the focus from the practical benefits of deferring to agency interpretations to the role of the courts under the constitutional separation of powers.

The third proposition is the most interesting. There are political lessons to be drawn from this history. Deference and the enhancement of agency authority were initially seen as benefiting interests that favored regulation, which would today be considered the liberal interests aligned with the Democratic party. Hearst, Gray, and Skidmore were decided during Democratic administrations and may be seen as part of the ultimate acceptance of the regulatory efforts of the New Deal. Indeed, the only dissenting votes in both Gray and Hearst were cast by Justice Roberts, a Republican who had been appointed to the Court by President Hoover in 1930.

Interest in the issue appears to have waned from the early 1950s until the 1960s, when the Democrats were back in power and government was becoming more active. Since the Democrats controlled both Congress and the White House from 1960 to 1968, deference during that period tended to favor Democratic and liberal programs.

By contrast, the regulatory explosion of the 1970s, which centered largely on efforts to regulate business to protect health, safety, and the environment, occurred primarily during Republican administrations,

131. See supra text accompanying notes 93, 103.
133. Professor Davis' treatise appeared in 1958, but it relied heavily upon the analysis that he had done in 1950. Professor Jaffe's analysis, largely favorable to deference although recognizing its limits, appeared in 1965.
but the regulatory statutes had been enacted by a Democratically controlled Congress. Essentially the same political split between the administration and Congress has also existed since 1980. Thus, during these periods, deference to agency decisions could be expected to favor relatively conservative or Republican positions whose interests were often inconsistent with the interests of the more liberal and Democratic Congress. Not surprisingly, liberal interests began to become more critical of agencies during this period, arguing for a "harder look," for example, and urging the courts not to defer to agency interpretations.

When viewed in this political context, the developments in the deference debate suggest that two closely related forces play central, if not readily apparent, roles in the evolution of deference theory. First, as Judge McGowan suggested in 1977, our system of separation of powers tends to "generate[] an ebb and flow" as relations change and tensions rise and fall among the branches of government. Thus, with Democrats in control of Congress and the White House in the 1940s and the 1960s, there was relatively little tension among the branches on matters of agency administration, so deference flourished as a means of achieving congressionally determined policies. With the executive and the legislature in separate hands for most of the last twenty years, however, deference has come under attack as a failure to control executive authority.

Should the next twenty years see a continuation of this split between the political branches, these developments suggest that courts will give less deference to the executive in order to protect the position of the legislature in the separation of powers. This projection depends, of course, upon whether the courts are concerned about maintaining the balance among the branches, or whether they are concerned with achieving some political agenda. If, after sixteen years of Republican appointments to the federal courts, the dominant forces in the judiciary are interested in pursuing the conservative political agenda, deference is likely to increase if the executive remains in conservative hands.

135. While the Democrats controlled the White House from 1976 to 1980, this brief period appears, with hindsight, as only a brief hiatus in two decades of conservative Republican administrations. Similarly, while the Republican party controlled the Senate from 1981 to 1986, the Democrats have controlled the House throughout the past three decades, and they have also controlled the Senate during most of the last 20 years.
136. See Rodgers, supra note 114, at 704.
137. See, e.g., Stever, supra note 42, at 37-41.
This leads to the identification of a second force driving deference doctrine. While the first force involves the structure of government and the relationships of the three branches, the second force is more clearly political. In essence, if a particular political group tends to control the executive branch, members of that group will tend, eventually, to support enhanced deference, while the opposing group will become concerned about unchecked administrative power.

The result of developments from the 1940s to *Chevron* was an apparent reversal of liberal and conservative positions with respect to agency authority. While conservatives initially opposed the increase in agency power and decried the threat to individual liberties, by the 1970s a leading conservative argued that the courts were improperly interfering with agency operations. Liberals, who had benefited from deference in the 1940s, now sought judicial mechanisms for controlling agencies. After four years of judicial appointments by a Democratic President, Professor O'Reilly wrote in 1980 that, "it is not easy to characterize a provision that encourages judicial activism as a long-term, conservative measure." This comment seems to assume that Democratically appointed judges will pursue liberal agendas. This suggests, however, that while these judges may be deferential where the executive is pursuing the generally liberal policies of a Democratically controlled Congress, they may not defer to a Republican administration's efforts to impose conservative policies on programs adopted by a Democratic Congress.

On the eve of *Chevron*, therefore, roles seem to have become reversed. Liberals, who had thrown off the yoke of a stifling judiciary during the New Deal, were seeking greater judicial control over federal agencies, while conservatives, traditionally horrified by the prospect of increased bureaucratic power, were seeking to unleash the bureaucracy.

The shift is striking. It suggests that trends in the deference doctrine are more related to the politics of the time and of the judges than they are to any pursuit of proper constitutional balance. At a minimum, one must view with skepticism claims that developments in deference doctrine somehow protect or threaten the constitutional structure. While strongly and presumably honestly asserted, such claims are at least as likely to reflect the underlying political views of their proponents as they are to constitute an objective attempt to pursue pure constitutional theory.

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139. See, e.g., Dean Pound's arguments, supra text accompanying notes 28-33.
141. See supra text accompanying notes 109-14, 121-25.
142. O'Reilly, supra note 115, at 790.
III. DEFERENCE PRINCIPLES FOLLOWING CHEVRON

The Chevron decision in 1984 has been said to reconcile the conflicting lines of deference authority and to establish a new framework for deference analysis. According to one conservative commentator, it serves to minimize judicial activism and interference with agency activities, while a liberal commentator castigates it as a violation of constitutional principles. It very rapidly became the leading case on deference. It has sparked extensive and contentious commentary, and has become the focus of a lively debate within the Supreme Court on the role of the judiciary in reviewing agency interpretations. The following discussion examines the decision itself, the commentary that followed, and the Court's handling of deference through the 1987 term.

A. The Chevron Decision

The Clean Air Act is an extraordinarily complex statute. The 1977 amendments contributed to that complexity by requiring the Environmental Protection Agency (EPA) to identify those areas of the country that comply with air pollution standards and those areas that do not. In areas that do not comply, so-called “nonattainment” areas, states must implement a permit program for all “new or modified stationary sources” of air pollution. In order to obtain a permit for a new or modified stationary source in a nonattainment area, a company must meet various strict requirements that are intended to reduce existing levels of air pollution. The ultimate goal of imposing these requirements in a nonattainment area is to bring the area into compliance with national air pollution standards. If a company is required to obtain a permit in a nonattainment area, it will be required, among other things, to implement the costly technology required to achieve the “Lowest Achievable Emission Rate” (LAER), as

145. Starr, supra note 2, at 307-08.
146. Mikva, supra note 13, at 3, 7.
147. Judicial Review Debate, supra note 8, at 356.
148. See, e.g., Judicial Review Debate, supra note 8; Mikva, supra note 13; Starr, supra note 2.
151. Id. § 7502(b)(6).
152. Id. § 7503.
153. Id. § 7502(a).
defined by the EPA.\textsuperscript{154}

In 1980, after several years of considering and proposing various approaches to implementing the 1977 amendments, the EPA issued a rule that effectively defined the term “stationary source” in nonattainment areas to mean any individual smokestack, piece of equipment, or other particular source of air pollution.\textsuperscript{155} Thus, a company that wished to add a new pollution source to an existing plant, or to modify an existing source, was required to obtain a permit and to comply with the strict pollution reduction requirements of the nonattainment program. In adopting this definition, the EPA rejected the so-called “bubble concept,” under which the term “stationary source” could be read to refer to an entire industrial plant, so that nonattainment permit requirements would not apply as long as there was no increase in the amount of pollution produced by the plant as a whole.\textsuperscript{156}

In 1981, the newly elected Reagan administration revoked the approach that had been adopted by the EPA under President Carter and authorized states to adopt the bubble concept for nonattainment areas.\textsuperscript{157} Under this application of the term “stationary source,” permits were not required for the addition or modification of individual smokestacks or other emission sources as long as there was no increase in the pollution from the hypothetical bubble that surrounded an industrial plant. Since the company was not required to obtain a permit, it also was not required to adopt strict pollution reduction measures, such as LAER technology, which are designed to bring the area into compliance with air pollution standards.\textsuperscript{158}

The Court of Appeals for the District of Columbia Circuit struck down the EPA’s use of the bubble concept under the nonattainment program. While it found no specific guidance in the statute or legislative history with respect to the meaning of the term “stationary source” in this context, it reasoned that the bubble concept was “inappropriate” because it violated the purpose of the nonattainment program by allowing avoidance of the program’s stringent pollution reduction requirements.\textsuperscript{159}

In reversing the D.C. Circuit, the Supreme Court characterized the issue as “whether EPA’s decision . . . is based on a reasonable construction of the statutory term ‘stationary source.’ ”\textsuperscript{160} This characterization of the issue left little doubt that the Court would take a

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\textsuperscript{154} Id. § 7502(b).
\textsuperscript{155} 45 Fed. Reg. 52,697 (1980).
\textsuperscript{157} Id. at 857-59.
\textsuperscript{158} See supra text accompanying note 155.
\textsuperscript{160} Id. at 840.
\end{flushleft}
deferential approach to its review of the EPA regulation. The question, however, is why it took this approach, and what justified deference in this particular case.

Before addressing the substance of the case, the Court described what has come to be known as the "Chevron two-step" as the proper approach for a court to take in reviewing an agency construction of a statute administered by the agency. The first step is to decide whether the intent of Congress on "the precise question at issue" can be clearly determined using the statute and "traditional tools of statutory construction." If it is not possible to discern congressional intent on "the precise question at issue," the second step for the court is to determine whether the agency's construction is permissible under the statute, not whether it is the construction the court would have adopted.

After setting out these two steps, the Court went on to explain the basis for this approach. First, where Congress has explicitly or implicitly left a gap in establishing a regulatory program, it may have explicitly or implicitly delegated authority to the agency to "elucidate a specific provision of the statute by regulation." If the delegation is explicit, the agency's regulation is controlling "unless [it is] arbitrary, capricious, or manifestly contrary to the statute." If the delegation is implicit, the court must accept the agency's interpretation if it is reasonable.

Second, the court must defer to the agency where the agency's decision "involved reconciling conflicting policies," and where "a full understanding of the force of the statutory policy in the given situation . . . depend[s] upon more than ordinary knowledge respecting the matters subjected to agency regulation." In these circumstances, the court must uphold the agency unless "it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."

Before undertaking its own application of these principles, the Court criticized the D.C. Circuit as having "misconceived the nature of its role" in reviewing these particular regulations. Since the D.C. Circuit had been unable to discern a congressional intent with respect to "the applicability of the bubble concept to the permit program," it

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163. Id. at 843.
164. Id.
165. Id. at 843.
166. Id. at 844.
167. Id.
168. Id. at 845 (quoting United States v. Shimer, 367 U.S. 374, 382 (1961)).
169. Id.
should not have considered whether the concept was "'inappropriate' in the general context of a program designed to improve air quality." Rather, the D.C. Circuit should have limited itself to the question of whether the Administrator had acted reasonably in determining that the bubble concept is appropriate in the context of this particular program.170

In applying these principles, the Court reviewed the history of the Clean Air Act and the development of the nonattainment program, noting that the issue at hand involved only "one phrase" in a small portion of "lengthy, detailed, technical, [and] complex" amendments to the Clean Air Act.171 It determined that the 1977 amendments did not refer specifically to the "bubble concept," that they did not contain a specific definition of the term "stationary source," that the relevant statutory terms were overlapping and imprecise, and that nothing in the language of the statute dictated rejection of the bubble concept.172 The Court held that the statutory language appeared to reveal an intent "to enlarge, rather than to confine, the scope of the Agency's power to regulate particular sources in order to effectuate the policies of the Act."173

The Court also found that the legislative history did not provide specific guidance on the question of whether the bubble concept would be permissible for the nonattainment program.174 The Court emphasized, however, that the legislative history revealed a congressional effort to accommodate conflicting interests in economic growth and environmental protection.175

Turning to the case at hand, the Court determined that the EPA's adoption of the bubble concept was clearly consistent with interests in economic growth, and that the EPA had stated a reasonable explanation for the agency's conclusion that the bubble concept also served environmental interests.176 The Court concluded that "the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves

170. Id.
171. Id. at 848-49.
172. Id. at 851, 859-61.
173. Id. at 862.
174. Id. at 851, 862.
175. Id. at 851.
176. Id. at 863. While it may not be self-evident that allowing avoidance of the stringent requirements of the nonattainment program will help reduce air pollution, the EPA relied upon studies suggesting that giving polluting facilities flexibility in managing their operations tends to allow response to market forces, and thus to encourage facilities to achieve pollution control more quickly and cheaply than if they are bound by inflexible requirements. Id. at 863 & nn.36-37.
reconciling conflicting policies."\textsuperscript{177} The Court found that while Congress had intended to accommodate both economic and environmental interests in adopting the nonattainment program, it had not done so "on the level of specificity" at issue in the particular litigation.\textsuperscript{178} Thus, the Administrator's interpretation was entitled to deference in this situation.

In reaching this conclusion, the Court rejected the argument that the EPA should not be granted deference because its interpretation of the term "source" had varied both before and after the adoption of the 1977 amendments and for different programs under the Clean Air Act. According to the Court, these developments demonstrated that the definition was flexible, particularly because Congress had not indicated any disapproval of the flexible approach.\textsuperscript{179} Thus, in this case, the court of appeals had erred in adopting "a static judicial definition of the term 'stationary source'" where Congress had not indicated any intent to require such a definition.\textsuperscript{180}

Finally, the Court emphasized that, within the limits of the authority delegated by Congress, an agency may implement the views of the incumbent administration on the policy choice that Congress has left to the agency. Indeed, it emphasized that where Congress has not resolved an issue, it is appropriate for the executive, as a political branch of government, to make the choice, rather than the courts.\textsuperscript{181}

B. The Reaction to \textit{Chevron}

Reactions to \textit{Chevron} have tended to be sharply critical or strongly supportive. Judges Breyer and Mikva and Professor Sunstein have led the attack,\textsuperscript{182} while Judge Starr and Professor Pierce have undertaken \textit{Chevron}'s defense.\textsuperscript{183} Professor Strauss has also weighed in on behalf of \textit{Chevron}, although less as an advocate for the decision than an analyst of its place in the Supreme Court's management of the judiciary.\textsuperscript{184}

Two aspects of the reaction to \textit{Chevron} are particularly striking in light of the status of deference before \textit{Chevron}. First, the major commentators have consistently viewed \textit{Chevron} as an extremely impor-

\begin{itemize}
\item \textsuperscript{177} Id. at 865 (footnotes omitted).
\item \textsuperscript{178} Id.
\item \textsuperscript{179} Id. at 863-64.
\item \textsuperscript{180} Id. at 841-42.
\item \textsuperscript{181} Id. at 865-66.
\item \textsuperscript{182} Breyer, supra note 14; Judicial Review Debate, supra note 8, at 366; Mikva, supra note 13; Sunstein, supra note 11, at 288-92.
\item \textsuperscript{183} Judicial Review Debate, supra note 8, at 358; Pierce, supra note 8, at 393-04; Starr, supra note 2, at 283-84.
\end{itemize}
tant decision. Second, although the deference debate is an abstract, almost academic exercise, there is a clear correlation between apparent political ideology and positions favoring or criticizing Chevron. As to the first point, the language of Chevron, particularly when considered in light of the facts of the case, does not require or even strongly support the proposition that Chevron was written or intended as a major change in deference doctrine. This raises the question of why Chevron is seen as so important, which leads to the second point, that politics may be a driving force in the evolution of deference doctrine.

1. Does Chevron Change Deferece Doctrine?

Characterizing Chevron as both “evolutionary and revolutionary,” Judge Starr has argued that it removed the ambiguity from the Hearst and Packard lines of cases, eliminated judicial interference with agency actions based upon personal judicial predilections, cast doubt upon the role of the multifactor “sliding scale” analysis that has long had a central place in deference doctrine, and affirmed the fundamental allocation of responsibility between agencies and courts. Judge Starr reads Chevron as dictating that a court’s view of how a statute should be interpreted is irrelevant as long as Congress has not explicitly indicated its intent on the subject, and the agency interpretation is reasonable. Similarly, Judge Mikva has characterized Chevron as indicating a new willingness to defer to agencies in the interpretation of their organic statutes, while Judge Breyer sees a new and disturbing “abdication of judicial responsibility.” When Chevron is read in light of preceding deference authority, however, it is entirely consistent with the Hearst line of cases. It means that the Court is to determine the boundaries of agency discretion and the principles that govern the agency’s choice. If, in undertaking that analysis, the Court determines that Congress had a specific intent with respect to the precise question at issue, that intent governs. However, as is usually the case, if Congress has not spoken to the precise circumstances, the choice is left to the agency, just as the application of the term “employee” was left to the NLRB in Hearst forty years before Chevron.

In Hearst, the Court held that “the purpose of the Act and the facts involved in the economic relationship,” rather than common-law doctrine, govern the agency’s determination of the scope of the term “employee.” Similarly, in Chevron, the Court identified two important

185. See, e.g., Judicial Review Debate, supra note 8, at 356; Pierce, supra note 8, at 303; Starr, supra note 2, at 284.
186. Starr, supra note 2, at 284, 285, 297.
187. Id. at 296.
188. Mikva, supra note 13, at 3.
189. Breyer, supra note 14, at 381.
but conflicting interests (clean air and economic growth), so that the agency's decision must be consistent with and seek to resolve those interests in applying the statute. Just as the NLRB in *Hearst* could not have based its decision on common-law principles governing employment relationships, so the EPA in *Chevron* could not have ignored either of the two interests identified by the Court as the goals of the Clean Air Act Amendments of 1977.

Surely *Chevron* is the classic application of *Hearst*. While the Court's initial statement of the first step in deference analysis\(^{191}\) is arguably broader than previous doctrine, the Court ultimately relied upon the same familiar principles. The Court found that Congress had implicitly delegated to the EPA the authority to formulate policy on the question of how to define stationary sources.\(^{192}\) The Court emphasized that *Chevron* concerns the application of the statute "in the context of this particular program," not in the more general context of a program to improve air quality.\(^{193}\) It also determined that the decision was governed by two conflicting congressional policies, rather than the more general policy of achieving cleaner air on which the D.C. Circuit had relied.\(^{194}\) Finally, the Court relied upon the need for EPA's expertise to make the judgment necessary to resolve the conflicting congressional policies, in this instance a judgment that market forces and company behavior are such that a bubble concept would serve the environmental interests that Congress intended to protect.\(^{195}\)

Thus, *Chevron* is no commission authorizing agencies to mold regulatory statutes to the desires of newly elected administrations. It is little more than a reiteration of principles established years before.

Indeed, *Chevron* does not go as far as *Hearst* in that it defers to agency action on a matter clearly within the agency's jurisdiction, while *Hearst* deferred to a decision that effectively expanded the agency's jurisdiction. Moreover, in reaching its decision in *Chevron*, the Court emphasized that the case involved the application of but "one phrase" in a technical and complex statute, that the EPA had considered the matter in a detailed and reasoned fashion, and that Congress had not objected to the flexible approach the EPA had taken.

192. The bases for the Court's finding of a delegation on this point were (1) the fact that Congress had adopted conflicting policies that needed to be resolved in individual cases, and (2) the fact that the ability to resolve those policies depended upon expert knowledge of the field. Here, the conflicting policies were economic growth and environmental protection. *See supra* text accompanying notes 165-67, 172-74.
194. *See supra* text accompanying notes 175-76.
to the issue throughout. These are the very sorts of factors that were important to deference doctrine before *Chevron*. They appear to have retained their vitality after the decision.

Despite the Court’s reliance on these sorts of factors, Judge Starr argues that *Chevron* has at least shed doubt upon their place in future deference doctrine.\(^\text{196}\) He bases this proposition on the fact that the *Chevron* Court rejected an argument that the EPA’s view was not entitled to deference because the EPA had adopted this interpretation only recently and had previously adopted varying interpretations of the statute for different programs and at different times. According to Judge Starr, this suggests that the Court no longer considers either the longstanding nature of an agency interpretation nor the consistency of an agency’s position to be a factor in determining whether or how much deference to give to an agency’s decision.\(^\text{197}\)

Judge Starr’s position is illogical. In *Chevron*, the Court deferred to a recently adopted agency reversal of a prior position. It does not follow from this decision that the Court will not consider a longstanding, consistent position to be worthy of deference in some other case. Rather, in *Chevron*, matters such as the complexity of the statute, the need to resolve conflicting statutory policies in the particular program, and apparent congressional intent to delegate the matter to the agency were sufficient to justify deference even where deference might not have been supported by other factors.

*Chevron* can fairly be said to break ground in a related area, however. The Court has now made it clear that when an agency, acting within its delegated scope of authority, adopts a particular application or interpretation of a statutory term, that interpretation of the term does not constitute the meaning of the statute in any absolute sense. Rather, it constitutes the agency’s policy choice within its range of discretion. Thus, the court of appeals erred in adopting “a static judicial definition of the term ‘stationary source’ ” that would be binding upon the agency in the absence of congressional action.\(^\text{198}\) A new administration might well make a different policy choice.

While clearly stated for the first time, this proposition is not new. It has been implicit at least since *Hearst*. It necessarily follows from the logic of *Hearst* that the NLRB should be sustained if, after applying its expertise to the matter in light of the purposes of the statute, it were to reach a different conclusion about the application of the term “employee” to workers similar to newsboys.

When *Chevron* is judged on its own language and its own facts, it is consistent with previous deference doctrine. While there is little

\(^{196}\) Starr, supra note 2, at 297-99.

\(^{197}\) Id. at 297.

doubt that the Court took pains to emphasize the proper standard of review of agency interpretations, it did not change that standard. Rather, perhaps to bring the D.C. Circuit and other lower courts back into line, it reiterated the principles that had governed deference since the 1940s.

2. Politics and Deference in the 1980s

Since *Chevron* itself does not support arguments by either proponents or opponents that it constitutes a dramatic departure from previous doctrine, why have commentators reacted as they have? One possible answer is suggested by the clear ideological split among some proponents and critics of a strong reading of *Chevron*. Judge Starr, who was appointed by President Reagan, and Richard K. Willard, Assistant Attorney General for the Civil Division in the Justice Department under President Reagan, have staunchly defended the decision. Not only has Judge Starr forcefully advocated a strong reading, but he has urged restricting the judicial role even more than the strong reading of *Chevron* would require. By contrast, Judges Breyer and Mikva, both appointed by President Carter, and Alan Morrison, director of Public Citizen Litigation Group, a major liberal public interest law firm, have criticized the strong reading of *Chevron* and have urged adherence to more traditional, less deferential, approaches to review of agency statutory interpretations. Indeed, Alan Morrison has gone so far as to suggest that the Bumpers Amendment, which he had previously opposed, is a necessary antidote to excessive deference. This position contrasts sharply with the pre-*Chevron* position of Public Citizen, his major client, which had opposed the Bumpers Amendment in 1981.

202. Starr, supra note 2, at 308-09. Judge Starr has urged that in addition to deferring to an agency once a statute is found to be ambiguous, the court should even refrain from examining legislative history in order to determine congressional intent where the statutory language itself is unclear. Starr, Observations About the Use of Legislative History, 1987 Duke L.J. 371, 375-79.
204. Judicial Review Debate, supra note 8, at 373.
205. Breyer, supra note 14; Judicial Review Debate, supra note 8, at 373-76; Mikva, A Reply to Judge Starr's Observations, 1987 Duke L.J. 380, 385-86 [hereinafter Reply]; Mikva, supra note 13. This is not to suggest that all commentators are motivated by political considerations. It simply reflects the positions of those commentators whose personal politics are clearly established.
206. Judicial Review Debate, supra note 8, at 375, 393.
207. See supra note 118.
While this hardly constitutes a statistical sample of conservative and liberal viewpoints, it is striking in that it seems to represent a reversal of positions from the beginning of the deference debate in the 1940s, and even since the debate on the Bumpers Amendment, which began in 1975.208 Thus, it may be instructive to consider *Chevron* in its political as well as its legal context.

The Carter administration placed great emphasis on environmental protection.209 Many of the environmental officials of the Carter administration came from the ranks of liberal environmental advocacy organizations. Two prominent examples were former employees of the National Resources Defense Council (NRDC), the respondent in *Chevron*. One, James Gustave Speth, who had been a founder of NRDC and is now president of the World Resources Institute, served as a member and as chairman of the Council on Environmental Quality.210 The other, David Hawkins, was responsible for the EPA’s air pollution programs and played a major role in the Carter administration’s rejection of the bubble concept in 1980.211 Moreover, Congress enacted the nonattainment program, with its stricter environmental controls, under President Carter.212

In 1980, Ronald Reagan campaigned in part in opposition to strict environmental controls.213 He also campaigned as the conservative alternative to the liberalism of the Carter years. Indeed, the 1980 election followed what was probably the most ideological campaign since at least 1964, when Barry Goldwater unsuccessfully sought to unseat the liberal Lyndon Johnson.214 It is reasonable to expect, therefore, that those who opposed President Reagan’s ideology were aghast at the prospect of the ideological shift he would bring to government policy. It is not difficult to imagine that liberal judges appointed by President Carter might view the actions of the Reagan administration with considerable skepticism, even to the point of altering, consciously or unconsciously, their approach to review of agency decisions.

The history of the *Chevron* case is consistent with this proposition. After President Reagan took office, *Chevron* was one of the first of

208. *See supra* notes 116-18 and accompanying text.
210. Telephone conversation with Patty Adams, Secretary to Mr. Speth (Nov. 2, 1988).
211. Telephone conversation with Mr. Hawkins, who is now back at NRDC (Nov. 16, 1988)(Mr. Hawkins also confirmed that many other environmental activists from organizations such as NRDC, the Audubon Society, and Sierra Club Legal Defense Fund joined the Carter administration.).
many major battles between his administration and the environmental advocacy organizations that had held so much influence under President Carter. Moreover, since the bubble policy had been rejected by the Carter EPA in 1980, its adoption the next year may have appeared both hasty and blatantly political. In addition, Reagan administration environmental policies in general, particularly as personified by EPA Administrator Ann Gorsuch and Secretary of the Interior James Watt, were under sharp attack.\footnote{Pope, supra note 213, at 50-51. See also N.Y. Times, Dec. 23, 1980, at A12, col. 1; A13, col. 1; A14, col. 1.}

This was the context in 1982 when three judges of the D.C. Circuit heard NRDC's attack on the EPA's adoption of the bubble concept.\footnote{Natural Resources Defense Council v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982).} Two of those judges, Abner Mikva and Ruth Bader Ginsburg, had been appointed by President Carter in 1979 and 1980, respectively.\footnote{Regarding Judge Mikva, see Judicial Review Debate, supra note 8, at 373. As to Judge Ginsburg, see ALMANAC, supra note 199, at 140.} Moreover, Judge Mikva had, for several years before, been a liberal Democratic congressman.\footnote{WHO'S WHO IN AMERICAN LAW 480 (3d Ed. 1983).} It would hardly be surprising if these judges were highly skeptical of the claims of an administration that had practically run against the Clean Air Act. Indeed, it would be only human to react that way to the greatest ideological shift in modern times.\footnote{The third member of the panel was William L. Jameson, a Senior United States District Judge from Montana, who had been appointed in 1957 by President Eisenhower. While Judge Jameson was not appointed by a liberal Democratic President, he was appointed during a much less ideological era and might be expected to be skeptical of the actions of an administration with such a strong ideological agenda. ALMANAC, supra note 199, at 632.}

This is not to say that the D.C. Circuit acted for blatantly political reasons, or that any of the judges were consciously pursuing a personal political agenda.\footnote{Indeed, Judge Mikva has asserted that in deciding the case overruled in Chevron, he simply acted on the principle that "[i]f the statute is silent about something, then the agency's power should be limited." Mikva, Reply, supra note 205, at 383. This reflects the basic principle that an agency may do no more than it is authorized to do by Congress, a proposition that is fundamental to the concept of separation of powers. There is little reason to doubt that Judge Mikva and other participants in the deference debate, particularly the judges making individual decisions, intend to and believe they act on neutral principles. This does not mean that politics has no influence, but that it has a long-term or pervasive influence. Judge Mikva has also asserted: "My own feeling is that judicial restraint starts with the proposition that a judge is not supposed to be making policy decisions." Id. at 385. While this may seem the ideal role of the judiciary, it ignores the inevitable influences of political experience and judgment on anyone's ability to make neutral decisions. It is a policy decision to hold that general congressional guidance requires or prohibits a particular action by the agency, just as it is a
to protect what they viewed as the policies of the Clean Air Act against what they knew to be an effort to weaken environmental controls. Thus, consistent with the "hard look" doctrine applicable to review of agency substantive decisions, but inconsistent with 

Hearst, they examined the purposes of the Clean Air Act and the nonattainment program in detail and reached their own conclusion concerning the application of the term "stationary source" to the bubble concept, even where they found no specific congressional intent on the point.

If these judges might in some way have been influenced by their own politics or by the political tenor of the time, they were not alone. Judge Starr, the most prominent advocate of the strong reading of Chevron, clerked for Chief Justice Burger and later served as Counselor to the Attorney General under the Reagan administration. He was appointed by President Reagan in 1983. Similarly, Mr. Willard, who joined Judge Starr in the debate, served as Assistant Attorney General for the Civil Division in the Reagan administration Department of Justice. These men, and other conservatives, might well also be influenced by political considerations, consciously or subconsciously, in embracing heightened deference to agency decisions. First, they were or had been members of the Reagan administration itself, so they could be expected to support administration policies. Second, by contrast with Justice Roberts when he dissented in Hearst, these political conservatives view deference through a lens of almost two decades of Republican political control in the White House. Third, by the 1980s conservatives viewed what they considered to be "judicial activism" as a major threat to conservative political positions. Thus, while conservatives might still be wary of government control, it is not surprising that they would now be willing to give greater authority to agencies, over which they seem to be able to

221. See, e.g., Rodgers, supra note 114.
223. ALMANAC, supra note 199, at 141-42. He has since been appointed Solicitor General by President Bush.
224. See supra text accompanying notes 200-02.
225. See supra text accompanying note 132.
maintain political control most of the time, as opposed to courts, which are only beginning to be dominated by conservative appointments.

Again, this is not necessarily a question of conservatives consciously pursuing individual political agendas. Rather, it suggests that attitudes toward judicial review depend in part upon the relationship between one's political views and the political context in which one develops attitudes toward judicial review. Thus, as Professor Sunstein has warned, "there is only a contingent historical association between the current deference to administrative agencies and conservatism. And opposing deference to administrative agencies and being liberal is a contingent position."227

Although the question of what deference doctrine should be is beyond the scope of this Article, these conclusions have important ramifications for those considering that issue. Assuming that deference doctrine should assist the courts in their theoretically politically neutral role of assuring agency compliance with congressional enactments,228 Professor Sunstein is correct in urging that, "the institutional judgment [about deference] ought to be decided... on some ground other than the political one."229 The problem is that the choice between a traditional multifactor approach and a strong reading of *Chevron* is itself a political decision. The former arguably tends to limit agencies, thereby favoring the political interests that do not control the executive. The latter gives the agencies free rein, which, in recent years, has favored conservative Republican political interests. The challenge will be how to develop and adopt deference principles that properly balance executive and judicial authority without regard to political considerations.

For this Article, however, the next question is how deference doctrine has evolved in the Supreme Court since the *Chevron* decision. That is the subject of the following and final section.

C. Deference in the Supreme Court After *Chevron*

Examination of the Supreme Court's handling of deference since *Chevron* establishes that the decision did not resolve or simplify the deference debate. Rather, as Judge Breyer predicted, it signaled a


228. Some may consider this to be an incorrect description of the judicial role in reviewing agency decisions. Concurring and dissenting in Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 59 (1983), for example, Justice Rehnquist argued that the Court should have taken into account a change of administrations as a reasonable basis for an agency's rejecting a position that had been taken under a previous President. This suggests a formal role for political considerations in judicial decisions.

new era of instability in the Court's approach to deference.230

The Court's post-Chevron decisions fall into three major categories. The largest group includes cases in which the Court uses the language or approach of Chevron, but in which the actual handling of deference either fits well within traditional deference analysis, or at least does not depend upon a strong reading of Chevron. Several of these decisions rely upon the traditional multifactor analysis of the pre-Chevron era.231 The second group, clearly the smallest, is composed of those cases in which the Court appears to have relied upon a strong reading of Chevron in order to defer to the agency position.232 Finally, the third and most important group of decisions reveals a major dispute within the Court concerning the role of the judiciary in reviewing agency decisions. One wing of the Court is now clearly rejecting the strong reading of Chevron, while the other would go beyond the strong reading to restrict judicial authority still further.233

230. Breyer, supra note 14, at 397-98.

In addition to the decisions discussed under these three categories, there are four decisions in which deference is discussed, but that have little bearing on the deference debate. In three, the Court simply denied deference on the ground that the statute and legislative history clearly revealed a congressional intent contrary to the position taken by the agency. Bethesda Hosp. Ass'n v. Bowen, 108 S. Ct. 1255, 1258 (1988); ETSI Pipeline Project v. Missouri, 108 S. Ct. 805, 817 (1988); Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 367-68, 373-75 (1986). In the fourth, the Court held that deference was inappropriate where the agency's interpretation raised serious problems under the first amendment. In that circumstance, the Court "must independently inquire whether there is another interpretation... that may fairly be ascribed" to the statute. Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 108 S. Ct. 1392, 1398 (1988).
1. Traditional Deference Decisions

Perhaps the most prominent of the post-Chevron decisions employing traditional deference analysis is *Chemical Manufacturers Association v. Natural Resources Defense Council*, which begins with a recitation of the *Chevron* approach. Judge Starr has cited the decision as confirming the influence of *Chevron*, which he views as having strengthened the principle of judicial deference. In fact, however, the Court’s approach to deference is consistent with pre-*Chevron* analysis.

In *Chemical Manufacturers*, the Court upheld an EPA regulation that provided for the granting of variances from water pollution effluent limitations otherwise applicable to a pollution source under the Clean Water Act. Normally, the EPA promulgates effluent limitations for categories of polluting facilities. All facilities that fall within a given category must comply with the effluent limitations for that category. Under the regulation at issue, a polluting facility could obtain a variance from the limitations for its category if it could show that the facility was fundamentally different in terms of relevant statutory factors from the facilities upon which the effluent limitation had been based. The issue in *Chemical Manufacturers* was whether the EPA could grant such “fundamentally different factor” variances for toxic pollutants. The Natural Resources Defense Council argued that such variances were barred by a 1977 amendment to the Clean Water Act that prohibited the EPA from “modify[ing] any requirement of this section as it applies to any” toxic pollutant.

In granting deference to the agency’s position and upholding the regulation, the Court noted the complex nature of the Clean Water Act. It also identified two conflicting policies that must be considered in construing the statutory provision: on the one hand, Congress intended uniformity among polluting sources in the same category of polluters, but on the other hand the legislative history required the

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235. *Starr*, *supra* note 2, at 288-91. *See also* *Note, supra* note 144, at 487, which argues that *Chemical Manufacturers* eliminated any doubts that Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361 (1986), might have raised about the continued vitality of *Chevron*. The latter argument reflects a misunderstanding of *Dimension*, in which the Court simply held that the statute in question was sufficiently clear to resolve the matter without reference to the agency’s position. *See supra* note 233. Thus, *Dimension* is merely an application of the first step of the *Chevron* analysis. It in no way suggests any movement away from *Chevron*, nor does it shed any light upon whether *Chevron* represents a change in traditional deference doctrine.
237. *Id.* at 123.
238. *Id.* at 125.
EPA to “take into account the diversity within each industry.”\textsuperscript{239} The Court viewed the variance as a “laudable corrective measure” whose purpose was to account for unavoidable diversity within the same category, while theoretically still achieving an essentially uniform degree of pollution control within the category.\textsuperscript{240} Further, the Court emphasized that the dispute was essentially a question about the details of how the EPA should implement the Act to achieve its goals, and that the variance procedure allowed the EPA to “make[] bearable the enormous burden” of implementing this complex statute.\textsuperscript{241} Indeed, the Court seems almost to have considered this case to involve the type of administrative detail that is clearly left to the agency under \textit{Vermont Yankee Nuclear Power Corp. v. NRDC}\textsuperscript{242} and similar authorities with no direct bearing on deference.\textsuperscript{243}

Thus, as in \textit{Hearst}, the Court determined the binding and conflicting statutory principles and simply left it to the agency to implement a complex statute within the boundaries thus established. The Court also found that the agency’s action was not inconsistent with congressional policy, and that, in any event, this was a matter that could best be handled by the agency familiar with the difficulties and complexities of administering the program. It is not necessary to apply a strong reading of \textit{Chevron} in order to defer to the agency in this situation. While the deference language may be broad, the facts and circumstances of the case support deference under traditional analysis.

Finally, it is significant that the vigorous dissent by four of the Justices did not disagree with the deference principles stated by the majority. Rather, noting that \textit{Chevron} “was explicitly limited to cases in which congressional intent cannot be discerned through the use of the traditional techniques of statutory interpretation,” the dissent argued that the statute and legislative history clearly established that Congress did not intend to allow this sort of variance.\textsuperscript{244} Thus, nearly half the Court had no difficulty reaching its own interpretation even of this complex statute. Their approach hardly suggests strong deference to the agency when a statute is arguably ambiguous.

In \textit{United States v. Riverside Bayview Homes, Inc.}\textsuperscript{245} the language of the Court’s opinion suggests a highly deferential approach, but again the Court’s actual analysis was virtually the same as it had been in \textit{Hearst} in 1944. The case involved review of a decision by the Corps of Engineers that certain wetlands near a large lake constituted “wa-

\textsuperscript{239} Id. at 130.
\textsuperscript{240} Id. at 130.
\textsuperscript{241} Id. at 131-32.
\textsuperscript{242} 435 U.S. 519 (1978).
\textsuperscript{244} Id. at 152 (Marshall, J., dissenting).
\textsuperscript{245} 474 U.S. 121 (1985).
ters of the United States” under the Clean Water Act. If they did, they were subject to a permit program administered by the Corps to help achieve the Act’s goal of “restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation’s waters.” The status of these wetlands depended upon the answer to the question of where “water ends and land begins.”

In describing its review of the Corps’ decision, the Court appears to have collapsed the two-step analysis of Chevron into a single question of whether the agency’s construction of the statute “is reasonable and not in conflict with the expressed intent of Congress.” Perhaps the ambiguity of the statute was so obvious that the Court simply neglected to address the first step in the Chevron analysis, the determination of whether or not Congress had indicated a clear intent on the issue at hand. Nonetheless, if taken literally, the Court’s description of deference in Riverside Bayview Homes would focus entirely upon the reasonableness of the agency’s decision, without initially seeking to determine the intent of Congress.

While this seems a highly deferential approach, the decision itself was actually reached under the pre-Chevron approach to deference. As in Hearst, the Court made it clear that the determination of where to draw the line between water and land must be based upon the purposes of the statute. It then held that Congress had “intended to define the waters covered by the Act broadly,” “to repudiate limits” that had previously been placed upon federal regulation of water pollution, and to achieve broad protection “of water quality and aquatic ecosystems.” Finally, since the Corps had determined that wetlands play a key role in water quality, the Court deferred to the Corps’ “technical expertise” and its “ecological judgment about the relationship between waters and their adjacent wetlands” as “an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.” The Court then buttressed this conclusion with the observation that the issue had been raised in Congress, but that Congress had ultimately acquiesced in the Corps’ program.

This analysis is entirely consistent with pre-Chevron doctrine. The Court, not the agency, determined that the statute constituted the source of law governing the decision. It also determined that the application of the statute must be guided by Congress’ intent to broaden the definition of waters from previous approaches and to achieve broad protection of water quality. Finally, it relied upon the agency’s

246. Id. at 132.
247. Id.
248. Id. at 131.
249. Id. at 133.
250. Id. at 134.
251. Id. at 137.
expert technical judgment about where to draw the line given the legal boundaries determined by the Court. This is not simply a decision to defer to an agency's interpretation of its organic statute where the statute is ambiguous.

Finally, Federal Deposit Insurance Corp. v. Philadelphia Gear Co. involved the question of whether a letter of credit issued by a bank, together with a promissory note to the bank that was contingent upon initial presentation of the letter of credit, constituted a "deposit" insured by the Federal Deposit Insurance Corporation. After the bank became insolvent, the holder of the letter of credit presented it to the FDIC, which did not consider the arrangement to constitute an insured deposit and refused to make any payments on the letter of credit.

The Court upheld the FDIC based upon the agency's "longstanding interpretation" that such a letter of credit did not constitute a deposit and based upon the fact that this was not the sort of financial arrangement that Congress had intended to protect when it had adopted the insurance program. In developing its analysis, the Court first examined the statutory language itself, and then noted that both "letter of credit" and "promissory note" had federal definitions, and that the FDIC "had developed and interpreted those definitions for many years within the framework of the complex statutory scheme." After holding that the agency's position was consistent with congressional intent, the Court proceeded to a traditional multifactor analysis. The Court noted that the FDIC had originally promulgated its definition of "deposit" less than two months after the enactment of the statute, and that the FDIC had consistently held this position since that time. Moreover, Congress had never rejected the FDIC position, and it had reenacted the statute without changing it. Indeed, Congress had expressly incorporated the FDIC regulations into the statutory scheme.

Only after reciting this litany did the Court state that, "[u]nder these circumstances, we must obviously give a great deal of deference to the FDIC's interpretation." While the Court later, almost as an afterthought, cited Chevron, it still emphasized that the FDIC was interpreting a statutory definition that had been "adopted wholesale from the FDIC's own regulation" and that the FDIC's position was "consistent with the congressional purpose."

253. Id. at 427-29.
254. Id. at 427, 431-33.
255. Id. at 431.
256. Id. at 431-35.
257. Id. at 437-38.
258. Id. at 438.
259. Id. at 439.
This is the most striking example of the Court's reliance upon traditional multifactor analysis. Here, those factors include the contemporaneous nature of the original FDIC position, the fact that it was both longstanding and consistent, and the fact that the case involved the implementation of a complex statutory scheme. Moreover, the Court itself delved deeply into the legislative history, ultimately deciding that congressional intent would not be served by considering this arrangement to constitute a "deposit." Thus, not only did the Court rely upon a multifactor analysis and identify the congressional concerns that would govern agency choice, it ultimately held that the outcome was the only one acceptable under the statute. This is a far cry from simply accepting the agency's interpretation as long as it was reasonable. Once again, the decision could have been reached under pre-Chevron doctrine.

These decisions establish, at a minimum, that traditional deference analysis, and particularly the multifactor approach, remain influential after Chevron. Chevron does not seem to have made any particular difference to the consideration or outcome of these decisions. All of them could easily have been decided under Hearst and its progeny. Accordingly, any deference argument at this point should clearly develop all of the possible factors that had a bearing on deference prior to Chevron, and should not be limited to using the Chevron "two-step."

2. Strong Deference Decisions

Two of the Court's post-Chevron decisions seem to depend upon a strong approach to deference in the sense that the Court neither cited nor relied upon the various factors present in the cases discussed in the previous section. As discussed below, however, both of these decisions might have been reached for unarticulated reasons unrelated to deference doctrine.

The first of these decisions, Young v. Community Nutrition Institute, involved review of a decision by the Food and Drug Administration (FDA) not to take regulatory action with respect to certain corn from the 1980 crop as long as the corn contained no more than 100 parts per billion of the poisonous substance aflatoxin. Two public interest groups and a consumer challenged the FDA's refusal to act as a violation of the following statutory provision: "[T]he Secretary shall promulgate regulations limiting the quantity [of poisons in food] to such extent as he finds necessary for the protection of public health." The Court of Appeals for the District of Columbia Circuit held that by not setting a limit for aflatoxin, the FDA had violated the statutory

260. Id. at 439-40.
mandate that he “shall promulgate” such limits.\(^{262}\)

Most of the Court’s decision in *Young* is devoted to arguing that the seemingly clear statutory language is, in fact, ambiguous, and that the legislative history provides no further guidance.\(^{263}\) Having reached those conclusions, the Court simply left the matter to the agency, noting that “the FDA has been delegated broad discretion by Congress in any number of areas,” and that to interpret the statute as giving the FDA the discretion to decide whether regulatory action was necessary to protect the public health was at least “sensible.”\(^{264}\)

As one commentator has argued, *Young* seems to go well beyond *Chevron*.\(^{265}\) The *Young* court neither relied upon traditional factors,\(^{266}\) nor identified the boundaries to the agency’s discretion.\(^{267}\) It left what could be a significant public health policy choice entirely to the agency.

If the outcome of *Young* was determined by its approach to deference, the strong reading seems to have prevailed. *Young* can be explained, however, on a theory unrelated to deference to agency interpretation. Stepping back from the narrow question of statutory interpretation, this is essentially a case of prosecutorial discretion. The Court has consistently been reluctant to require agencies to devote their limited resources to particular enforcement actions. Indeed, the Court has rendered such agency decisions unreviewable.\(^{268}\) *Young* is also much like *Chemical Manufacturers*\(^{269}\) in that the Court is unlikely to interfere with an agency’s approach to administering its program as long as the agency seems to be seeking to achieve the goals of the statute. While the Court did not emphasize the statutory goals in its discussion, it was clear that the FDA had not ignored aflatoxin, but had previously taken some regulatory action and had acted deliberately with respect to the 1980 corn crops at issue in the case.

If a strong reading of *Chevron* was important to the majority’s decision in *Young*, Justice Stevens’ dissent reveals that any such strong

\(^{262}\) *Id.* at 979.

\(^{263}\) *Id.* at 979-81.

\(^{264}\) *Id.* at 981-82.


\(^{266}\) In its introductory discussion, the Court noted that the FDA had consistently interpreted the statute in the same manner since 1938. *Young* v. Community Nutrition Inst., 476 U.S. 974, 977 (1986). The Court also noted that Congress had never acted to change this interpretation, although it had addressed related aspects of the statute. *Id.* at 983. These two statements could bring *Young* back within the traditional fold, but the Court seems to have placed no reliance on the first, and used the second only to support a conclusion that the legislative history is not unambiguous, not to support upholding the agency position.

\(^{267}\) See Note, *supra* note 265, at 131-32.


\(^{269}\) See *supra* text accompanying notes 235-44.
reading was a misinterpretation of *Chevron*. Justice Stevens, the author of *Chevron*, dissented in *Young* on the ground that the intent of Congress was clear from the language and structure of the statute, so that there was no room for deference to the agency. In so doing, he rejected the argument that the FDA's longstanding position in applying the statute justified deference to its position. He rejected reliance upon this traditional deference factor because “the FDA had never actually addressed in any detail the statutory authorization under which it took” this position. Thus, Justice Stevens did not appear to view agencies as entitled to deference as a matter of course, and certainly did not view *Chevron* as rendering traditional deference factors irrelevant. The language of his dissent suggests, indeed, that he would base deference on such common sense considerations as agency expertise and thorough agency consideration of the issue over time.

The other decision that seems to apply a strong reading of *Chevron* is *Japan Whaling Association v. American Cetacean Society*. The United States is a participant in the International Convention for the Regulation of Whaling, under which the International Whaling Commission sets limits on the numbers of whales that may be harvested by member countries. These limits are binding upon members of the convention unless they file a timely objection to the adoption of a particular limit. A country that files a timely objection exempts itself from the obligation to comply with the limit set for that country. Under a statutory provision enacted in 1971 related to international fisheries, the Secretary of Commerce was required to certify to the President if another country was acting so as to “diminish the effectiveness” of the Convention. The President was then authorized, but not required, to impose sanctions on that country. Dissatisfied with the President's failure to impose sanctions, Congress enacted a further provision under which the Secretary of Commerce was required to expedite investigation and decision about possible certifications. If the Secretary certified that another country was acting to “diminish the effectiveness” of the Convention, the President was required to impose various sanctions.

In *Japan Whaling*, Japan had filed timely objections to a harvest quota of zero for 1981 and 1982. The Secretary of Commerce had not, as a result of Japan's action, certified to the President that Japan was diminishing the effectiveness of the Convention. Rather, the Secre-

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271. *Id.* at 987, n.3 (Stevens, J., dissenting).
273. *Id.* at 224-25.
274. *Id.* at 225.
275. *Id.* at 226.
Deference had entered into negotiations as a result of which Japan agreed to limit its whaling initially, and to cease all commercial whaling by 1988. The Secretary had informed Japan that if it complied with these agreements, he would not certify Japan to the President so as to trigger mandatory sanctions. Various organizations challenged the Secretary’s failure to act as a violation of the applicable statutory provisions, arguing that any harvest in excess of the Convention limits diminished the effectiveness of the convention.

The Court upheld the Secretary based upon the Secretary’s conclusion that the statutes did not require certification in this situation. While agreeing that the statutes “might reasonably be construed” to require certification to the President based upon any harvest in excess of Convention limits, the Court found the statute to be ambiguous and upheld the Secretary’s construction as reasonable.

As in Young, the Court did not rely upon traditional factors in deferring to the agency. It simply found ambiguity in the statute and then accepted the agency’s view upon determining that it was reasonable. Justice Marshall’s dissenting opinion, joined by Justices Brennan, Blackmun, and Rehnquist, disagreed that the statutes and their history were ambiguous on the point at issue, but it did not dispute the majority’s approach to deference given the majority’s finding of ambiguity.

It is possible that Japan Whaling Association represents a triumph of the strong, highly deferential reading of Chevron. It seems likely, however, that two aspects of the case may have influenced the outcome, although they are not reflected in the opinion. First, as with Young, the case involved what was essentially a question of prosecutorial discretion. Moreover, on the facts of the case, the Secretary had quite successfully exercised that discretion to obtain an agreement that Japan would stop commercial whaling by 1988. Thus, the fundamental purpose of the statutes had arguably been achieved. The prosecutorial nature of the Secretary’s role and his apparent success did not mark the case as one requiring judicial intervention. Second, although the Court rejected an argument that the case was nonjusticiable because it involved foreign affairs, the Court was surely loathe to issue an order that would effectively require the President to impose sanctions upon another country. As Judge Starr has suggested, the Court may well be more deferential in cases involv-

276. Id. at 227-28.
277. Id. at 228.
278. Id. at 228-29.
279. Id. at 233.
280. Id. at 241-50 (Marshall, J., dissenting).
281. Id. at 230.
282. See Starr, supra note 2, at 299.
ing foreign relations.

These two decisions suggest either that the Court may simply follow a strong reading of *Chevron* in some cases, regardless of the absence of traditional deference factors, or that it will do so in cases in which some consideration not articulated in its opinions, such as involvement of foreign relations, leads the Court to leave the matter in the hands of the administration. Judge Stevens' dissent in *Young* suggests that he, at least, may refuse to defer if convinced that traditional factors do not support deference. At best, the law remains unclear, although it behooves the litigator to couch arguments in terms consistent with a strong reading of *Chevron* as well as to support arguments with traditional deference analysis.

3. **Determining Statutory Ambiguity—The New Deference Battleground**

The third group of post-*Chevron* deference decisions demonstrates that the Court has become deeply split on the question of judicial review of agency statutory interpretations. Indeed, it may well be that *Chevron* itself, by clearly articulating the determination of statutory ambiguity as the initial step in deference analysis, has revealed a clear ideological split on the scope of judicial review of agency statutes. The conservative wing of the Court is now seeking to impose new and more stringent limits on the courts' authority to interpret administrative statutes. The focus of the post-*Chevron* debate, and even of *Chevron* itself, was largely on whether the agency, by virtue of its expertise, was entitled to deference. By contrast, the new conservative strategy is to limit the authority of the courts to use legislative history and other tools of statutory construction in determining whether a statute is ambiguous. The result is likely to be an increase in findings of statutory ambiguity and, accordingly, an increase in agency power under step two of the *Chevron* analysis. The more liberal wing of the Court, on the other hand, appears to be taking an approach very similar to the traditional interpretation of *Hearst*. These developments are consistent with the proposition that political considerations play a major role in determining deference doctrine.

The curtain rose on this drama in *Immigration and Naturalization Service v. Cardoza-Fonseca*, which involved an alien's attempt to obtain political asylum under sections 243(h) and 208(a) of the Immigration and Nationality Act. To obtain asylum under section 243(h), she was required to show that her life or freedom would be threatened as a result of her political views if she were returned to Nicaragua.
Were she to have made such a showing, she would have been entitled to political asylum. By contrast, under section 208(a), she was required to show that she had a "well founded fear of persecution" if she were sent home. Were she to make the showing required by section 208(a), she would not be entitled to asylum as under section 243(h), but she would be eligible for asylum at the discretion of the Attorney General.

The immigration judge, later upheld by the Board of Immigration Appeals, denied her application for asylum, ruling that she had failed to show "a clear probability of persecution," and thus was not entitled to relief under either statutory provision. The alien appealed the ruling with respect to the application of section 208(a) on the ground that the agency had erred in applying to her section 208(a) claim the "more likely than not" standard of proof applicable to claims under section 243(h). She argued that a more generous standard applied to the consideration of asylum as a matter of discretion, as opposed to the mandatory asylum provisions of section 243(h).

The Court agreed with the alien. Writing for the majority, Justice Stevens first examined the statutory language. He found that "the plain language ... appears to settle the question before us" and that "[t]he different emphasis of the two standards is ... clear on the face of the statute." He then turned to the legislative history, which, he wrote, confirmed his reading of the plain language.

Relying heavily upon *Chevron*, the agency argued that its interpretation was entitled to substantial deference. Justice Stevens characterized the agency's argument as "misconstru[ing] the federal courts' role in reviewing an agency's statutory construction." Justice Stevens' subsequent articulation of his approach to deference, together with Justice Scalia's response in his concurring opinion, constitute the first skirmish in what has since become a major battle over judicial review of agency statutory interpretations.

In an opinion joined by Justices Brennan, Marshall, Blackmun, and O'Connor, Justice Stevens wrote:

The question whether Congress intended the two standards to be identical

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286. *Id.* at 429.
287. *Id.* at 427.
288. *Id.* at 425.
289. *Id.*
290. *Id.* at 499.
291. *Id.* at 432 & n.12.
292. *Id.* Since the plain language of the statute resolved the matter, Justice Stevens explained that he turned to the legislative history only to determine whether it revealed a clear legislative intent contrary to the apparent meaning of the statutory language.
293. *Id.* at 445 & n.29.
294. *Id.* at 443.
is a pure question of statutory construction for the courts to decide. Employing traditional tools of statutory construction, we have concluded that Congress did not intend the two standards to be identical.295

The narrow legal question whether the two standards are the same is, of course, quite different from the question of interpretation that arises in each case in which the agency is required to apply either or both standards to a particular set of facts. There is obviously some ambiguity in a term like "well-founded fear" which can only be given concrete meaning through a process of case-by-case adjudication. In that process of filling "any gap left, implicitly or explicitly, by Congress," the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program.296

Justice Stevens added in a footnote that the inconsistency of the agency's positions over the years was an additional reason for denying deference to the agency's decision.297

This discussion of deference principles is almost breathtaking in its rejection of the strong reading of Chevron. These paragraphs, written by the author of Chevron, constitute the first detailed explanation of the meaning of the first step of the Chevron analysis. They can be read in at least three ways, any of which emphasizes the judicial role in construing agency statutes.

The first, and most simplistic of the three readings, focuses on the first sentence, which appears to resurrect the "naked question of law" principle of the Packard decision. This sentence suggests that the first question is not simply whether Congress has clearly indicated its intent on the matter, as Chevron describes the first step in the analysis, but whether the nature of the issue is such that it is for the courts, not the agency to decide. Thus, it may be that Justice Stevens returned to the ancient law-fact distinction.

The second and more likely reading of this discussion is that Justice Stevens and four other members of the Court298 viewed clear

295. *Id.* at 446 (emphasis added).
297. *Id.* at 446 n.30.
298. Professor Pierce questions whether Justice Blackmun fully accepted this deference analysis since he filed a concurring opinion in which he emphasized the clarity of the plain language and legislative history. Pierce, supra note 8, at 303 n.15. Since Justice Blackmun explicitly joined the majority opinion, however, there is little reason to doubt his agreement with the deference discussion. His acceptance of Justice Stevens' approach seems to have been confirmed by his later failure to join Justice Scalia's concurring opinion in NLRB v. United Food & Commercial Workers Union, Local 23, 108 S. Ct. 413 (1987), which attacked the Cardoza-Fonseca deference analysis. This conclusion is clouded somewhat by the fact that he also, still later, joined Justice Scalia's concurring and dissenting opinion in K-Mart Corp. v. Cartier, Inc., 108 S. Ct. 1811 (1988). See infra text accompanying notes 347-49. Even more recently, however, Justice Blackmun joined Justices Brennan and Marshall in dissent in Mississippi Power & Light Co. v.
questions of law as the province of the courts, while the application of law to particular facts is initially the province of the agencies since this is where ambiguity is most likely to arise. This approach reflects the traditional analysis of Hearst and its progeny. It seems inconsistent, however, with the language of Chevron, which states that the first question is “[w]hether Congress has directly spoken to the precise question at issue.” The Chevron language suggests that the nature of the question as one of law or application of law to fact is irrelevant, and that the courts must defer to the agency whenever the intent of Congress cannot be clearly determined.

As discussed earlier, however, when Chevron is read in the context of preceding deference analysis, the first step as articulated by Justice Stevens in Chevron is consistent with the distinction between questions of law and application of law to fact apparent in Cardoza-Fonseca. In Chevron, Justice Stevens wrote of whether Congress had “directly spoken to the precise question at issue.” The “precise question” to be considered by the agency may be distinguished from the questions of law or statutory construction that govern how the agency is to decide the “precise question.” Even under Chevron, the more general questions of law or statutory construction were for the courts to decide.

Since this interpretation of Chevron is consistent with preceding authority and with the facts of Chevron, and since Justice Stevens wrote both Chevron and the majority opinion in Cardoza-Fonseca, this seems the most likely reading of both decisions. This reading is also consistent with Justice Stevens’ assertion that agency inconsistency di-

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299. See supra text accompanying notes 55-65.
301. This seeming inconsistency, and the obvious inconsistency between Chevron and the first, but least plausible reading of Justice Stevens’ opinion, are presumably what led Professor Pierce, for example, to suggest that “Cardoza-Fonseca may limit the applicability of Chevron.” Pierce, supra note 8, at 303 n.15. As discussed below, however, Justice Stevens’ approach in Cardoza-Fonseca can easily be read as consistent with Chevron. The alleged inconsistency arises not from unduly narrow language in Cardoza-Fonseca, but from an unduly broad reading of Chevron.
minishes any entitlement to deference. This explicit reference to one of the prominent considerations in traditional multifactor analysis further suggests that Justice Stevens did not view *Chevron* as a departure from previous doctrine.

Finally, this reading also provides the context for Justice Stevens' explanation in *Cardoza-Fonseca* that he had employed "traditional tools of statutory construction" to determine congressional intent. Having identified the issue in the case as one of law or statutory construction, rather than application of law to fact, Justice Stevens naturally turned to the available tools of statutory construction to resolve the issue that the Court was responsible for deciding.

This reference to employing the traditional tools of statutory construction suggests a third possible reading of the opinion. It could be that Justice Stevens was simply emphasizing that the use of legislative history and similar traditional tools is essential to the Court's effort to determine congressional intent under the first step in the *Chevron* analysis. While this reading is inconsistent with other language in Justice Stevens' discussion of deference, it is plausible in light of his conservative colleagues' increasing attempts to denigrate the role of legislative history in review of agency statutory interpretations.

Whichever of these readings may be a correct understanding of what Justice Stevens intended, all of them maintain a major role for the judiciary in interpreting agency statutes. While they may go so far as to reserve pure issues of law for the courts to decide, at a minimum they would authorize the courts to consider legislative history and similar "traditional tools of statutory construction" in determining whether Congress has clearly expressed its intent on the point at issue.

Concurring in the judgment in *Cardoza-Fonseca*, Justice Scalia fired the opening shots in the current battle over the scope of judicial authority to determine the meaning of statutes administered by federal agencies. First, he criticized the majority for even discussing the question of deference when the clarity of the statutory language

306. See infra text accompanying notes 308-12, 331-34, 351-54.
307. Professor Pierce describes the three dissenting Justices in *Cardoza-Fonseca* as "obviously reject[ing] the majority's position," implying that they disagreed with Justice Stevens' discussion of deference. Pierce, supra note 8, at 303 n.15. This implication is incorrect. The dissent disagreed about the interpretation of the statute. It did not take a position on the propriety of Justice Stevens' approach to deference. Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 450-69 (1987). Since Justice Powell left the Court before the deference debate was resumed, we cannot determine his view of the matter. Justices Rehnquist and White, who joined the dissent, have since clearly sided with Justice Scalia.
rendered any such discussion unnecessary. Second, he argued that Justice Stevens' articulation of deference doctrine was contrary to Chevron's admonition that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Justice Scalia argued, in particular, that the majority was incorrect in asserting that a court may reach its own judgment about the meaning of a statute based upon "traditional tools of statutory construction." Allowing the courts to rely upon the traditional tools of statutory construction would, he said, "make deference a doctrine of desperation, authorizing courts to defer only if they would otherwise be unable to construe the enactment at issue." He considered this result to be "an evisceration of Chevron." Finally, Justice Scalia rejected the majority's apparent approval of the distinction between questions of law and questions involving the application of law to particular facts. He asserted that this position was contradicted by Chevron itself, in which the Court had deferred to the EPA's "abstract interpretation of the phrase 'stationary source.'"

The battle was fully joined in NLRB v. United Food & Commercial Workers Union, Local 23, in which a union challenged the decision of an NLRB Regional Administrator to accept an informal settlement of a complaint that had originally been issued at the instigation of the union. An NLRB regulation authorized the Regional Director to enter into either a formal or an informal settlement after the filing of an unfair labor practice complaint. The regulations further allowed a nonconsenting party to appeal a formal settlement to the General Counsel and then to the Board itself. Any decision of the Board would then be judicially reviewable. By contrast, the regulations allowed a nonconsenting party to appeal an informal settlement only to the General Counsel, whose decision was then final and unreviewable. The union challenged the regulation, arguing that all settlements reached after the filing of a complaint must be approved by the Board.

Writing for an eight-member Court after the resignation of Justice Powell, Justice Brennan upheld the NLRB regulation and sustained the agency's position that the informal settlement was unreviewable. In so doing, he relied heavily upon the principles of statutory interpretation discussed by Justice Stevens in Cardoza-Fonseca. First, he wrote, "[o]n a pure question of statutory construction," the Court must

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309. Id. at 454 (citing Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984)).
310. Id.
311. Id.
312. Id. at 455.
314. Id. at 417.
seek to determine the intent of Congress, "using 'traditional tools of statutory construction.'" If the Court can determine congressional intent, then "that interpretation must be given effect." Second, if the statute is "silent or ambiguous," then the question becomes whether the agency's construction is permissible.315 Third, in reviewing the agency's construction, the Court will consider "the consistency with which [it] has been applied, and whether [it] was contemporaneous with the enactment of the statute being construed."316

Applying these principles, the Court first found that Congress had clearly intended to differentiate between decisions that are prosecutorial in nature, which are the province of the General Counsel, and those that have reached the stage of adjudication, which are within the authority of the Board.317 Having thus determined the binding congressional intent, the Court then left it to the agency to determine precisely where, between the two extremes, particular cases might fall. The Court ultimately upheld the agency's determination that a decision to settle prior to hearing was prosecutorial in nature. The Court found this to be a reasonable application of the statute.318

Justice Scalia, joined by Justices Rehnquist, White, and O'Connor, joined and concurred in the Court's opinion. The sole purpose of his concurrence, he said, was to assert that the Court's opinion "demonstrates the continuing and unchanged vitality of" his reading of Chevron. He argued that if the Court had applied Cardoza-Fonseca, the question at hand would have been "'a pure question of statutory construction' rather than the application of a 'standard... to a particular set of facts,' as to which 'the courts must respect the interpretation of the agency.'" Thus, he asserted, the Court would have decided the issue "conclusively and authoritatively, rather than merely 'decid[ing] whether the agency's regulatory placement is permissible.'"319

Justice Scalia's innocent assertion that he agreed with the Court's analysis and was simply noting the Court's consistency with Chevron is disingenuous at best. To the contrary, he was seeking to establish an interpretation of United Food & Commercial Workers that would be consistent with his own views as expressed in Cardoza-Fonseca, and that would be inconsistent with the Court's opinions in both cases. Moreover, his concurring opinions inaccurately characterize the Chevron decision and distort what the Court did in United Food and Commercial Workers.

Justice Scalia, joined by the rest of the Court's conservative

315. Id. at 421.
316. Id. at 421 n.20.
317. Id. at 421-22.
318. Id. at 422.
319. Id. at 426 (Scalia, J., concurring).
wing,320 differed from the other members of the Court321 on at least two crucial issues. First, relying on Chevron, he rejected the distinction between questions of law and questions of application of law to particular facts. Second, also relying on Chevron, he rejected the use of legislative history and other traditional tools of statutory construction in determining the meaning of statutes.

His rejection of the law-application of law distinction was premised on the proposition that the Court in Chevron had deferred to the EPA’s interpretation of the term “statutory source” rather than to a more concrete application of law to fact. He sought to buttress his argument by asserting that the Court would not have decided United Food & Commercial Workers as it did if it had applied the law-application of law analysis.

His analysis of both decisions is unduly simplistic. The Court in Chevron did not simply defer to an abstract interpretation by the agency.322 Rather, noting that the issue at hand involved only one phrase in a small portion of “lengthy, detailed, technical, complex, and comprehensive” amendments to the Clean Air Act,323 the Court emphasized that the statutory language appeared to reveal an intent “to enlarge, rather than to confine, the scope of the Agency’s power to regulate particular sources in order to effectuate the policies of the Act.”324 The Court also relied upon the fact that Congress had left it to the agency to resolve conflicting congressional policy interests “on the level of specificity” at issue in the particular cases.325 Finally, the Court relied upon the EPA’s superior expertise in determining that the particular “bubble concept” application of the statute would, as a matter of fact, serve both economic and environmental concerns.326

To characterize the Court’s approach in Chevron as an “abstract interpretation” is, in Justice Scalia’s words, “an evisceration” of the term “abstract interpretation.” The difference between Hearst and Chevron, for example, is not that the former involved the application of law to particular facts, while the latter did not. Rather, the differ-

320. As noted above, he was joined by Chief Justice Rehnquist and Justices White and O’Connor in his concurrence in United Food & Commercial Workers. After the resignation of Justice Powell, and before the confirmation of Justice Kennedy, these three Justices and Justice Scalia constituted the conservative wing of the Court. N.Y. Times, Aug. 13, 1987, at I31, col. 2.

321. The members of the Court who have not adopted Justice Scalia’s approach to deference are Justice Stevens, the author of Chevron and Cardoza-Fonseca, Justice Brennan, the author of United Food & Commercial Workers, Justice Marshall, and Justice Blackmun. Justice Kennedy had not yet joined the Court for any of the decisions discussed thus far.

322. See supra text accompanying notes 150-81, 186-98.


324. Id. at 862.

325. Id. at 865.

326. Id. at 863 n.37. See supra text accompanying notes 176-78, 196.
ence is that Hearst involved the application of law to fact in the context of an individual adjudication, while Chevron involved application of law to fact in the context of a rulemaking proceeding. The EPA’s expertise and its application of the conflicting statutory interests to the facts concerning market behavior and environmental effect appear to have been central to the outcome of Chevron.327 Thus, Chevron is an example of judicial review of an agency’s application of law to particular facts.

If Justice Scalia misinterpreted Chevron with respect to the law-application of law distinction, he simply ignored the Court’s adoption of the pre-Chevron deference analysis in United Food and Commercial Workers. As in Hearst, the Court’s opinion resolved the “pure question of statutory construction” by ruling that Congress had intended to differentiate between prosecutorial and adjudicatory decisions for the purpose of judicial review.328 Having established the boundaries of the agency’s discretion, the Court, in traditional fashion, deferred to the agency’s exercise of that discretion in applying the principles to the particular facts, in this case the fact that the hearing had not yet begun. As in Chevron, the only difference from Hearst was that the agency had applied the law to facts in a rulemaking proceeding, rather than in an individual case. Thus, Justice Scalia’s assertion that the Court would have reached a binding, rather than a deferential conclusion under the law-application of law distinction is incorrect. The Court’s decision was binding with respect to the principles bounding agency discretion, but deferential with respect to the exercise of the discretion in the particular case. Moreover, Justice Scalia’s discussion ignores the Court’s explicit reference to consistency and contemporaneous construction as factors to consider in deference analysis.329 That reference refutes Justice Scalia’s assertion that deference depends solely upon whether the statute is “silent or ambiguous.”330

The second deference issue on which Justice Scalia and his conservative colleagues part company with the rest of the Court involves the extent to which the Court may rely upon traditional tools of statutory construction in seeking to determine congressional intent under the first step of the Chevron analysis. In Cardoza-Fonseca, Justice Scalia asserted that the Court had mistakenly implied that a court could substitute its judgment for that of the “agency whenever, ‘[e]mploying traditional tools of statutory construction,’ [it is] able to reach a conclusion as to the proper interpretation of the statute.”

327. See supra text accompanying notes 177-79, 195.
329. Id. at 421 n.20.
330. Id. at 426.
argued that this would allow "courts to defer only if they would otherwise be unable to construe the enactment at issue." This, he said, would constitute "an evisceration of Chevron."331

Unfortunately, it is not entirely clear what Justice Scalia was attacking. It may be that he was asserting that legislative history and traditional tools of statutory construction have no place at all in determining, under the first step of the Chevron analysis, whether Congress has expressed a clear intent. If so, his position is inconsistent with Chevron's specific approval of the use of traditional tools of statutory construction.332 This is such a departure from long-accepted jurisprudential principles that it seems unlikely.

Perhaps, on the other hand, Justice Scalia is not complaining about the use of traditional tools of statutory construction per se, but, to use Professor Pierce's terminology, about their use to "tease" meaning from an ambiguous statute in order to achieve a particular result.333 If so, his complaint is inconsistent with what the Court actually did in Cardoza-Fonseca. The Court did not seek to determine what the proper interpretation would be in the case at hand. Rather, it left that question to the agency after identifying the clear congressional intent.334

There is no doubt, however, that Cardoza-Fonseca's adoption of the distinction between pure questions of statutory interpretation and questions of application of the statute to particular facts represents a far less deferential position than that urged by Justice Scalia and conservative commentators. It maintains the Court's traditional role of determining the boundaries of agency discretion, which is essential to the separation of powers. Hardly an evisceration of Chevron, it is consistent with a correct reading of that decision and with longstanding deference doctrine.

Two additional decisions reveal what may be the source of the conservative attempt to revise deference doctrine and limit the Court's role in statutory construction.335 K-Mart Corp. v. Cartier, Inc.336 is the

333. Pierce, supra note 8, at 308.
335. One other decision further reveals the split between the conservative and liberal wings of the Court, although it sheds little light on reasons for the split. In Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 108 S. Ct. 2428, 2443, 2446-48 (1988), Justices Scalia and Brennan clashed in concurring and dissenting opinions, respectively, over whether to grant deference to an agency's determination of the scope of its own jurisdiction. Justice Scalia argued for a strong reading and application of Chevron, while Justice Brennan argued for a more traditional, less deferential analysis.
first deference decision in which Justice Kennedy participated. It is a
horrendously complex decision, composed of three opinions with shift-
ing majorities depending upon which Justices joined which parts of
the opinions. It involved review of Customs Service regulations gov-
erning so-called "gray-market" goods. These are goods that are manu-
factured in a foreign country, bear a valid United States trademark,
and are imported into the United States without the consent of the
United States trademark holder. The governing statute prohibited
the importation, without the consent of the United States trademark
holder, of "any merchandise of foreign manufacture" bearing a trade-
mark "owned by" a citizen of, or by "a corporation . . . organized
within, the United States," whose trademark is "registered . . . by a
person domiciled in the United States."338

The Customs Service regulations authorized import of foreign-
manufactured goods by the same person who holds the United States
trademark or by a person who is subject to control in common with
the United States trademark holder, such as a parent or subsidiary of
the United States trademark holder. This is referred to as the com-
mon-control exception. The Customs Service regulations also author-
ized entry of foreign-manufactured goods where the foreign
manufacturer had received the United States trademark owner's per-
mission to use the trademark. This is the authorized-use exception.
The Court ultimately upheld the common-control exception, but
struck down the authorized use exception as contrary to the statute.339

Deference analysis, applied in various ways in the three opinions,
hinged on whether the statutory terms "foreign manufacture" and
"owner"340 were ambiguous such that the Court should defer to the
agency's interpretation. Justice Kennedy asserted, for example, that
"foreign manufacture" could mean manufactured in a foreign country,
by a foreign company, or in a foreign country by a foreign company," and that "owned by" could mean owned by a foreign parent of a do-
mestic company or owned only by a domestic subsidiary of a foreign
parent.341

Two aspects of this decision are important to this discussion. First,
Justice Brennan and Justice Scalia disagreed vehemently about the
proper judicial role in construing the statute. Second, Justice Ken-
ddy's opinion, joined by Justice White, suggests that legislative his-
tory should be considered virtually irrelevant in deference analysis.

Justice Brennan, joined by Justices Marshall and Stevens, wrote that "[e]ven if the language of [the statute] clearly covered [a particu-

337. Id. at 1814.
338. Id.
339. Id. at 1816 n.2.
340. Id. at 1815.
341. Id. at 1818.
lar situation, ‘[i]t is a “familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.’”342 Accordingly, citing Cardoza-Fonseca, he turned to “traditional tools of statutory construction” to determine congressional intent.343 With respect to the “common-control exception,” he found ambiguity in the statutory language, reviewed the legislative history, and ultimately deferred to the agency on the ground that the exception was reasonable in light of the legislative history and the longstanding nature of the agency’s position.344 This aspect of Justice Brennan’s opinion, together with the portion of Justice Kennedy’s opinion joined by Justice White, made up the majority position on this issue.

Turning to the “authorized-use exception,” Justice Brennan, joined now by Justice White in addition to Justices Marshall and Stevens, argued, in essence, that the statute could not have contemplated the authorized-use situation because at the time the statute was enacted it was generally not possible for a trademark owner to license the use of its trademark by another firm without losing ownership of the trademark.345 Thus, while “the casual reader” might believe that a domestic firm that had authorized use of its trademark still “owned” the trademark, Congress could not have contemplated this result.346 Further, he argued, this result is inconsistent with the purpose of the statute. Accordingly, the statute was ambiguous with respect to this situation, and the Court should defer to the agency’s longstanding position.347 Justice Scalia, joined by Justices Rehnquist, Blackmun, and O’Connor, dissented with respect to the majority position upholding the “common-control exception.” On this issue, they argued that the statute was not ambiguous, and that the majority had purported to defer to “a view of the statute that the agency clearly rejects.”348 This aspect of the dispute within the Court has little significance beyond the particular decision. These Justices simply found clarity where the

342. Id. at 1821-22 (citations omitted).
343. Id.
344. Id. at 1828. In discussing the “common-control exception,” he delved at great length into the legislative history and concluded that “if Congress had any particular intent with respect to the application of” the statute to the common-control situation, it was to exclude domestic trademark owners affiliated with foreign manufacturers from the protection of the Act. Accordingly, he argued, the Customs Service’s common-control exception was reasonable and should be sustained. Id. at 1826. He further buttressed this position by arguing that the Court does “not lightly overturn administrative practices as longstanding” as these, which dated back fifty years. Id. at 1828.
345. Id. at 1829-30.
346. Id.
347. Id. at 1830-31.
348. Id. at 1832-33.
others found ambiguity. It is interesting to note, however, that Justice Scalia emphasized “one of the most important reasons we defer to an agency’s construction of a statute: its expert knowledge of the interpretation’s practical consequences.”\textsuperscript{349} This suggests that a litigant might be able to sway some of these Justices away from deference by showing that an agency has no expertise on the point, or that its expertise is irrelevant to the issue at hand.

The heart of Justice Scalia’s opinion is an attack upon what he viewed as Justice Brennan’s willingness “to decline to apply a statute to a situation that its language concededly covers.”\textsuperscript{350} He argued, in essence, that where statutory language is clear, it must govern any attempt to discern and apply congressional intent, and that it is the prerogative of Congress, not the courts, to change the laws. He viewed Justice Brennan’s approach to statutory construction as an affront to “[t]he principle of our Democratic system.”\textsuperscript{351}

This debate between a leading liberal member of the Court and one of its most conservative members highlights the political nature of the struggle over deference doctrine. The debate is not limited to matters involving deference, or even to statutes involving administrative agencies. Both arguments apply to any judicial consideration of a legislative enactment. They relate to deference only because a determination of statutory ambiguity would generally lead to deference in the administrative arena. Accordingly, this is a fundamental debate about the role of the judiciary.

Turning to the narrower field of deference doctrine itself, it is reasonable to conclude that Justice Scalia and his conservative colleagues view Justice Brennan and the liberal members of the Court as playing fast and loose with the first step of the \textit{Chevron} analysis, determination of whether the statute is ambiguous. While it seems unlikely that any member of the Court had a political agenda with respect to the particulars of \textit{K-Mart}, Justice Brennan’s opinion with respect to the authorized-use exception could be read as an attempt to allow the agency to maintain the viability of a regulatory program despite seemingly rigid statutory language. Seen in that light, Justice Brennan’s approach to statutory construction could play a major role in maintaining the administrative state by allowing courts to sustain agency actions that are consistent with the apparent purpose of Congress even if they may seem inconsistent with statutory language. This arguably serves not only to strengthen the hand of administrative agencies, but also to protect the interests of Congress by assuring that the apparent congressional purpose will be followed even if Congress was imprecise

\textsuperscript{349} Id. at 1833.
\textsuperscript{350} Id. at 1834.
\textsuperscript{351} Id.
in its choice of language or had not adequately anticipated changes that would alter the effect of the statutory language.

By contrast, refusal to consider legislative history in determining statutory ambiguity, as advocated by Justice Scalia, tends to reduce judicial flexibility in construing statutes. Since Congress could no longer rely upon the Court to require agencies to adhere to the purpose of congressional enactments, it would be burdened by the need to be more precise in its use of language and in its decisionmaking about all aspects of a proposed regulatory program. Since, as Judge Mikva explained, this is probably an unrealistic expectation, the result could well be to hamper the achievement of congressional purposes and to slow the development of the administrative state. Ironically, the attempt to move toward heightened deference to administrative agencies through a strong reading of Chevron could result ultimately in the decline of the administrative state. This could be the fundamental reason why conservative interests are pressing for an approach to deference that otherwise seems contrary to their abhorrence of governmental power.

Justice Kennedy's opinion in K-Mart, joined by Justice White, and Justice White's concurrence in the otherwise unexceptional Regents of the University of California v. Public Employment Relations Board, are consistent with this proposition. In K-Mart, Justice Kennedy argued that in determining whether a statute is "arguably ambiguous,... any reference to legislative history... is in the first instance irrelevant." Similarly, in Regents, Justice White wrote that "[w]here the statute itself is not determinative and is open to more than one construction, the legislative history must be quite clear if it is to foreclose the agency's construction." Thus, Justices Kennedy and White both seem to go beyond even Justice Scalia in restricting the judiciary's ability to determine statutory meaning. They more clearly reject the use of legislative history as an aid in determining whether Congress had a clear intent where the statutory language itself is arguably ambiguous. The result of this approach is likely to

352. Mikva, Reply, supra note 205, at 380-82 & n.212.
353. 108 S. Ct. 1404 (1988). This case involved the question of whether a state university's refusal to carry unstamped letters in its internal mail for union members constituted an unfair labor practice under California law. It hinged on the interpretation of federal statutes governing the mails, which the university argued prohibited it from competing with the Postal Service. The majority, relying upon both statutory language and legislative history, concluded that Congress' clear intent was ascertainable and did not consider the matter of deference.
356. It is noteworthy that this position has been argued by Judge Starr, a conservative Reagan appointee to the D.C. Circuit. Starr, Observations About the Use of Legislative History, 1981 DUKE L.J. 371, 375-79. This further suggests that the goal of
be a greater tendency to find ambiguity in statutes, which would, in turn, increase agency discretion in implementing statutes.

This position would further hamstring Congress by denying it the right to use the traditional tools of the legislative process to achieve its ends. While there is no doubt that statutory language is the most important determinant of congressional intent, it is also true that Congress expresses its intent in other ways, particularly with respect to matters that may not be specifically addressed in the statute itself. Those other ways include committee reports, floor debates, and all of the variety of actions and discussions that make up legislative history. The conservative approach would render all of these tools useless in congressional efforts to direct agencies and to avoid excessive agency discretion. To deprive Congress of the right to rely upon these mechanisms, which it has chosen to develop and use over the last 200 years, would be a serious judicial infringement upon the prerogatives of another branch of government.

IV. CONCLUSION

At this point, deference doctrine and the matter of judicial review of agency statutory interpretations are highly unsettled. It is clear that if the Court believes that Congress has clearly expressed its intent with respect to a particular matter, that intent is binding. The difficulty here is that there are at least two, and perhaps three, views on the Court about what a court may consider and how far it may go in attempting to discern congressional intent. At one end, the more liberal members of the Court will employ the full range of traditional tools of statutory construction to divine intent, while at the other, Justices Kennedy and White seem to reject all but the clearest indications of intent appearing anywhere other than the language of the statute. It is not clear where Justice Scalia and the other conservatives draw the line, but there is no doubt that they will demand great specificity

restricting judicial authority to interpret statutes is consistent with a conservative political agenda. In addition to the goal discussed earlier, that of strengthening the hand of a conservative administration, the agenda may also include the hampering of the administrative state.

357. It may be argued that the very concept of legislative intent outside the language of a statute is a myth because it is not possible to determine the intent of all 535 members of Congress and because much of what later becomes legislative intent is gamesmanship among the members interested in the particular legislation. This argument misconceives the concept of congressional intent. The point is not that the members of Congress think in a particular way, but that there are various mechanisms for influencing the outcome of legislative battles. It is accepted in Congress that, in addition to formal amendments, committee reports and contrived dialogues among interested members are legitimate mechanisms for affecting the interpretation and application of statutes. Mikva, Reply, supra note 205, at 380-82 & n.212.
in legislative history before finding clarity outside the language of the statute.

Whatever approach is used to determine statutory meaning, if the statute is found to be ambiguous on a particular point it appears that the Court is split on the next step. Justices Stevens, Brennan, Marshall, and Blackmun would apparently have the courts decide all pure questions of law, leaving application of law to the agency. The other Justices, however, would then defer to the agency's interpretation if it were reasonable. Moreover, it appears that the conservative wing generally rejects, or at least does not require consideration of, traditional deference factors, while the other Justices will be swayed by such things as whether or not an agency took its position contemporaneously with enactment of the statute, whether its position has been longstanding and consistent, and whether the agency's expertise has a bearing on the construction of the statute in the particular case.

It is difficult, therefore, to suggest any guidance either to litigants or to lower courts. If, as Professor Strauss has argued, Chevron was intended as a management tool to improve consistency in applying the laws and to enhance control over the lower courts, that tool is in serious disrepair. It has been torn asunder by the Court's ideological division, which has the conservative Justices seeking to expand Chevron far beyond its original bounds, while the other members of the Court adhere to a more traditional approach to judicial review of agency statutory interpretations.

Perhaps more important, this review suggests that deference doctrine depends in large part upon the politics of the various judges and the relationship between their politics and those of the administrations whose decisions they are reviewing. Accordingly, as commentators and jurists seek to recover from the post-Chevron disintegration of deference doctrine, they must attempt to develop objective criteria that either eliminate political considerations from deference decisions, or, if need be, that acknowledge and highlight the role of political considerations so they can be understood and controlled.

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358. While Justice Blackmun joined Justice Scalia's opinion in K-Mart Corp. v. Cartier, 108 S. Ct. 1811, 1830 (1988), his adherence to Justice Scalia's view of how a statute should be interpreted does not contradict his joining Justice Stevens in Cardoza-Fonseca and Justice Brennan in United Food & Commercial Workers on the proposition that pure questions of statutory construction are for the courts to decide.

359. Strauss, supra note 184, at 1093 n.19.