The Legislative Process, Statutory Interpretation and Administrative Agencies

2nd Edition
2024 Supplement

BY

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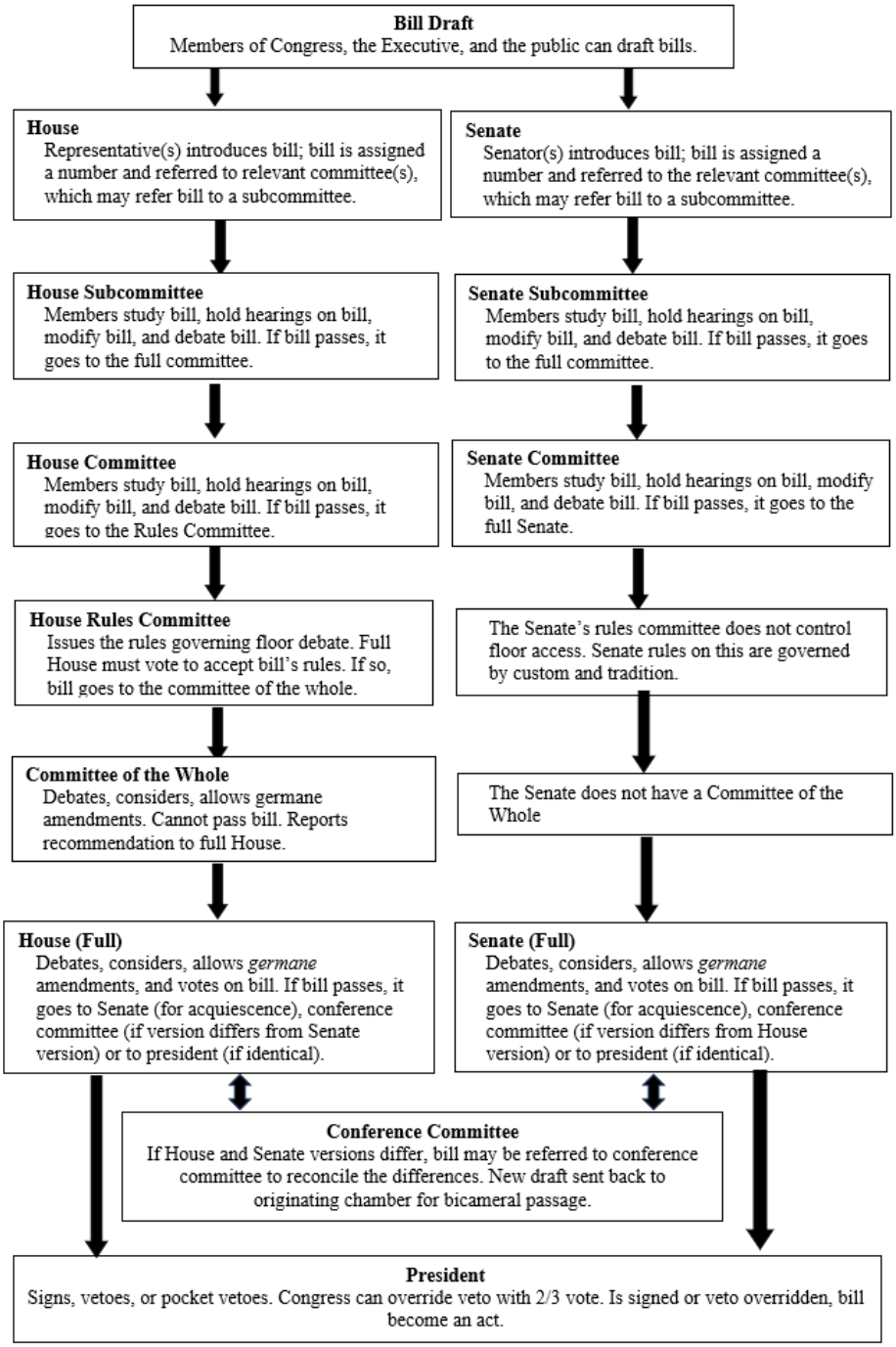
Contents

Updates for Chapter 2:

1. **Page 33: Fig. 1**[1]

Please replace the chart with this one:

[1] I want to thank Professor George W. Van Cleve for his helpful corrections to this section of Chapter 2.



2. **Page 41: i. Procedure in the House**

Add the following sentence at the end of the first paragraph: The Rules Committee holds tremendous power: it can tailor floor consideration of specific legislation with little regard to the formal rules except (in the relatively rare case) where there is substantial bipartisan opposition to the proposed approach. In the House, majority rules.

3. **Page 42: ii Procedure in the Senate**

Replace the first paragraph with the following: The procedure for considering a bill in the Senate fundamentally differs from the procedure in the House. The House Rules Committee is a useful tool of the House majority leadership, which sets the agenda and terms of debate on legislation. In contrast, the Senate leadership has far less control of the Senate floor agenda because of the Senate's cloture rule, which requires a supermajority to shut down debate. "The essential characteristic of the Senate, and the characteristic that most clearly distinguishes its procedures from those of the House of Representatives, is their emphasis on the rights and prerogatives of individual Senators."[2] In short, in the House, the majority rules; in the Senate a supermajority is needed (at least for now).

The Senate Rules Committee operates differently from the House Rules Committee. While the latter's primary function is to control floor access, senate rules, customs, and traditions govern that process in the Senate. To consider a bill on the floor, senators must first agree to bring the bill up for a vote – typically by agreeing to a unanimous consent request or by voting to adopt a motion to proceed to the bill. Party leaders typically try to negotiate unanimous consent agreements before a bill reaches the floor because any senator may block such an agreement. Under the Senate rules, most floor motions are subject to unlimited debate absent a successful cloture motion. Cloture requires a supermajority. The net result is that the Senate rules effectively require senators to successfully complete a complex, multi-party negotiating process before they bring any significant legislation to the floor.

4. **Page 45:**

Add a new subsection iii: The above subsections explain the traditional legislative process, and one still used for legislation that does not impact the budget or that is bipartisan. This subsection explains budget reconciliation, a process that republicans and democrats have used in recent years to overcome the difficulties of advancing key legislation while holding only a slim majority in Congress.

Concerned by the growing federal deficit, Congress established the budget reconciliation process in the Congressional Budget Act of 1974[3] to aid the process of deficit reduction. The Act enables Congress to change substantive law so that revenue and spending levels match budget

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[2] VALERIE HEITSHUSEN, CONG. RSCH. SERV., 96-548, THE LEGISLATIVE PROCESS ON THE SENATE FLOOR: AN INTRODUCTION 1 (2019).

[3] Congressional Budget Act of 1974, Pub. L. No. 93-344, 88 STAT. 297 (1974).

resolution policies.[4]

When the process was first created, members of Congress included extraneous provisions in reconciliation bills. In response, Congress enacted the Byrd Rule in 1985, which provides that reconciliation bills cannot increase the budget deficit beyond the budget window (typically ten years),[5] have more than an incidental budgetary impact, nor affect social security.[6] Hence, budget reconciliation bills must be limited to budget-related measures, but this term has been broadly defined. After all, what congressional program does not impact federal spending or revenue?

Congress first used the budget reconciliation process in December 1980[7] and has been using the process about once yearly since then. From 2001 to 2021, republicans and democrats each used the process to enact eight divisive pieces of legislation, including the Affordable Care Act (2010),[8] which is also known as Obamacare, the Tax Cut and Jobs Act ("TCJA") (2017),[9] which enacted significant tax cuts, and the American Rescue Plan (2021),[10] which provided COVID relief funds.

Budget reconciliation is a complex process that applies only to bills affecting permanent spending and revenue programs, but the most important impact of the Act is that it eliminated the minority's ability to filibuster budget-related bills. The process begins when the House or Senate Budget Committees adopt a budget resolution that directs other committees to develop legislation that alters spending, revenue, or both by specified amounts. The final bill must increase or reduce the federal deficit by the amount specified in the budget resolution. For example, for the TCJA, the budget resolution stipulated that the bill could increase the deficit by no more $1.5 trillion over ten years, which is why many of the provisions in the TCJA sunset in 2025.[11]

If only one committee gets marching orders, the bills forwarded from that committee is sent directly to the House or Senate floor for the full chamber's consideration. If multiple committees get reconciliation marching orders, the appropriate Budget Committee combines the committees' bills into a single omnibus reconciliation bill, which it forwards to the House or Senate for floor consideration under expedited procedures. For either bill, only a simple majority of members is needed to pass a reconciliation bill; hence, members of the Senate cannot filibuster. Indeed, while the process is used by both Houses, it is particularly useful in the Senate, the only chamber allowing its members to filibuster.

Should the House and Senate approve bills that differ, the bills go through the conference

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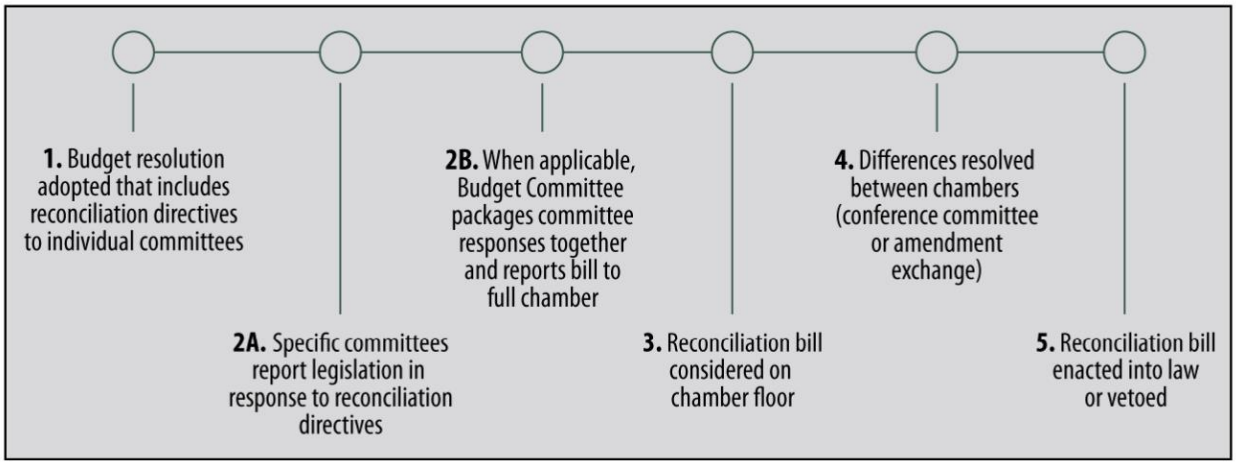
[4] BILL HENIFF JR., CONG. RSCH. SERV., RL30862, THE BUDGET RECONCILIATION PROCESS: THE SENATE'S "BYRD RULE" (2022).
[5] This restriction explains why the Tax Cut and Jobs Act sunsets in 2025.
[6] 2 U.S.C. § 644.
[7] Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, 94 STAT. 2599 (1980).
[8] Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 STAT. 1029 (2010).
[9] An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018, Pub. L. No. 115-97, 131 STAT. 2054 (2017).
[10] American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 STAT 4, (2021).
[11] *See* S. Con. Res. 5, 117th Cong. § 1101(4) (2021).

committee or amendment exchange process as appropriate and as described above. After passage in both houses, the bill is sent to the president for signature or veto. Presidents do veto reconciliation bills. President Clinton vetoed three such bills; President Obama vetoed one.[12] Figure 2 identifies the steps in this process.

Fig. 2

The Major Steps of the Reconciliation Process



Source: Congressional Research Service.

Although this process was originally envisioned as a way to help Congress address the deficit, it has become a powerful tool that both parties use when they hold a narrow majority of Congress. The process allows the governing party to enact controversial legislation (e.g., the Affordable Care Act) that would otherwise not make it through the cumbersome legislative process described above because it requires some level of compromise from both parties. Thus, the benefit of the budget reconciliation process is that it allows one party to legislate even when it holds power only by a slim majority. Yet this benefit is also a weakness, for legislation passed over another party's strong objection is often seen as illegitimate (e.g., the Affordable Care Act).

[12] Megan S. Lynch, Cong. Rsch. Serv., R40480, Budget Reconciliation Measures Enacted into Law Since 1980 (2022).

Updates for Chapter 19, 20, & 21:

Replace Chapters 19, 20, & 21 chapters with the following:

Chapter 19
Scope of Judicial Review

Learning Objectives

After reading this chapter, you should be able to:

1. Explain the difference between scope of review and standard of review.
2. Distinguish questions of law, questions of law application, questions of fact, and questions of policy.
3. Explain the difference between adjudicative and legislative facts.
4. Describe *Skidmore* analysis.
5. Describe the *Chevron* analysis and its limitations.
6. Describe *Loper Bright* analysis and understand how it overruled *Chevron* analysis.
7. Describe arbitrary and capricious review.
8. Describe substantial evidence review.

A. Overview

In the last chapter, you learned ways that Congress and the president oversee agencies. However, we did not discuss judicial oversight, or judicial review, at that time. We do so now.

When agencies promulgate rules or issue orders, they decide questions of law, law application, fact, and policy. Courts review agency decisions when they are challenged in court. If an agency loses, it generally must start its rulemaking or adjudication all over again. Thus, the possibility that the courts will review agency decisions serves an oversight function even if the agency's actions are never challenged in court. Agencies will consider how to best accomplish their objectives, knowing that their decisions are subject to judicial review.

Terminology: The *scope of review* refers to how deferential a court will be (e.g., very deferential), while the *standard of review* refers to the standard a court uses to review an action (e.g., *de novo*).

In the next two chapters, we explore the scope and standard of judicial review courts use to review agency decisions. The *scope of review* refers to how deferential a standard is (e.g., very deferential), while the *standard of review* refers to the particular standard the court will use (e.g., *de novo*).

The scope and standard of review a court applies depends on three things: (1) the nature of

the question being reviewed, (2) the process the agency used to resolve the question, and (3) the importance of agency expertise and flexibility to the resolution of the question. Agencies have expertise that informs their resolutions of questions of law, law application, fact, and policy. Moreover, to be able to respond to economic, technological, and political changes, agencies must have flexibility to change their decisions. Hence, the scope of judicial review is generally less exacting when agencies bring expertise to the question and more exacting when courts are equally, if not better, able to resolve the question. But this topic is substantially more complex than that snippet, as you will see below, and has radically changed over the years.

In this chapter, we begin with scope of review: what it is and why it matters. Then, you will learn to identify the type of question being reviewed: whether it is a question of law, law application, fact, or policy. Next, we turn to standards of review. You will learn the four different standards of review courts apply to agency decisions. At the end of Chapter 20 (the next chapter), you will find a flow chart showing which standard applies to which question. You might find it helpful to glance at it now.

Let's start with scope of review. What do lawyers mean when they talk about scope of review?

B. Scope of Review Generally

The role of a reviewing court is not to redo the decision being challenged. Nor is it to inquire into the correctness of that decision. Rather, the role of the reviewing court is to review the process by which the decision was reached to assess whether the decision resulted from a flawed process. Reviewing courts can defer greatly to the decisionmaker (either a lower court or an agency), not defer at all, or choose something in the middle. This choice is known as the scope of review.

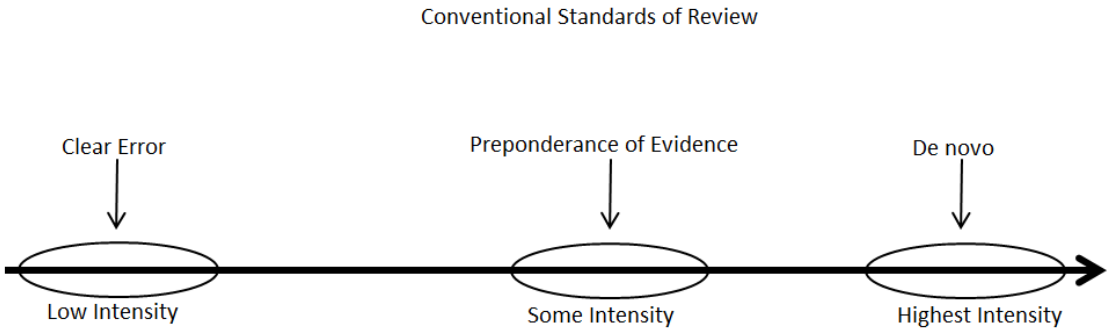
Before we talk about scope of review in the administrative context, let's look at scope of review in the non-administrative context. Low-intensity judicial review means the reviewing court is highly deferential to the decisionmaker's findings. For example, when an appellate court reviews a lower court's opinion using the clear error standard of review, the appellate court uses a low-intensity review standard. The trial judge must really get the decision wrong for the appellate court to reverse it.

At the other end of the spectrum, high-intensity review means the reviewing court ignores the decision of the decisionmaker. For example, when an appellate court reviews a lower court's opinion using the *de novo* standard of review, the appellate court uses a high-intensity review standard, perhaps the highest. The trial judge's decision is irrelevant to the appellate court's review. There are gradations in the middle of these two. See Figure 1 below.

While differences among the various standards of review are too subtle to be captured on a single linear spectrum, thinking about scope of review in this way will help you understand the intensity of the standards of review judges apply to review agency decisionmaking. After discussing the standards of review used to review agency decisionmaking, we will revise this

figure to include those standards in Part E below.

Fig. 1



C. Scope of Review for Agency Decisionmaking

Judicial review allows courts to determine the legality of agency action and prevents courts from interfering with congressional delegation and agency expertise. If the scope of a judicial review standard is too high, then federal judges will make policy. However, federal judges have neither technical expertise nor political accountability. In contrast, if the scope of a judicial review standard is too low, then agency policies may not sufficiently follow congressional delegation and the rule of law. Hence, in developing the standards of review for agency decisionmaking, courts have sought to balance these concerns; the scope of review is lower when agency expertise is pertinent and higher when it is not. The division relates to the type of question the agency is deciding.

Assume a regulated entity challenges an agency's decision in an Article III court and the agency action is reviewable.[13] The entity challenges one or more of the agency's resolutions of a question of law, a question of law application, a question of fact, or a question of policy. Let's talk about the differences among these four types of questions.

1. Pure Questions of Law

[13] You may need to address questions about the availability of judicial review before determining the applicable standard of review. The availability of judicial review involves questions about standing, finality, and exhaustion of administrative remedies, among other questions. It is an administrative law topic well beyond the scope of this text.

Terminology: A *question of law* is one in which resolution of the question does not require knowledge of the facts of a particular situation. The adjective *pure* is often used to show the question does not involve the application of law to the facts.

A *pure question of law* is one in which the resolution of the question does not require knowledge of the facts of a specific case. A statement of law is an assertion about legal effect that can be advanced with little to no knowledge of the facts in a particular case. *Little* because you need to know some basic facts, such as the law and the actors (e.g., food safety in school cafeterias), but you do not need to know the individual facts (e.g., school X served contaminated food).

Let's look at a civil law example: a car accident. During the investigation, the accident investigator noted that the speed limit was thirty mph on the road where the accident took place. This assertion would be a statement of law. The facts are irrelevant: it does not matter whether someone was speeding or drinking or texting when the crash occurred. The speed limit on that road in that location is invariable in every case.

Now let's look at administrative law. Congress delegates authority to federal agencies in enabling acts. Agencies must interpret language in their enabling act to identify the boundaries of their delegated authority. For example, what does "stationary source" mean? Or what does "a reasonable period of time" mean? These statutory interpretation questions are pure questions of law.

Federal agencies often resolve questions of law during rulemakings, although they may also do so during adjudications. For example, assume an act required certain "states to establish a permit program regulating new or modified major *stationary sources* of air pollution." Assume further that Congress delegated to the Environment Protection Agency (EPA) the authority to issue rules and regulations to implement this act. Assume further that the EPA uses rulemaking to define "major stationary sources." The EPA can choose to interpret "major stationary sources" to be any device in a manufacturing plant that produces pollution or the plant as a whole. When the EPA promulgates a regulation that resolves this question, the EPA resolves a question of law; the individual facts of a specific plant (e.g., their size or current pollution emissions) are irrelevant to the EPA's interpretation of the statutory language. Questions of law can occur during either adjudications or rulemaking.

2. Questions of Law Application

Terminology: A *question of law application* is one in which resolution of the question requires application of the law to the specific, adjudicative facts of a case.

A question of law application, or a mixed question of law and fact, requires the decisionmaker to have knowledge of both the law and the specific, adjudicative facts of a case. In our car accident example, assume the investigator concluded that the defendant must have exceeded the speed limit because the skid marks were unusually long. This determination involves applying the relevant law (the speed limit) to the specific facts in a particular case (the unusually long skid marks) to reach a conclusion (the

defendant was speeding).

Agencies typically resolve questions of law application during adjudications when agencies determine whether a particular law applies to a particular set of facts. For example, assume the EPA decided that "major stationary source" meant each individual device in a plant and fined Company X for violating the act. When Company X challenges the fine in an adjudication, the ALJ must decide whether Company X violated the act as interpreted by the EPA in its regulation. To resolve this question, the ALJ must consider both the specific facts of the case (how much pollution was emitted from each device) and the law (the act as interpreted by the agency's regulation). This type of question is a question of law application. Whether the regulation is a valid interpretation of the act is a pure question of law, but whether the company violated the act is a question of law application. Questions of law application typically occur during adjudications.

3. Questions of Fact

Terminology: A *question of fact* is one in which the resolution of the question does not require the decisionmaker to know or apply the law to the specific situation.

Now let's define a question of fact. A question of fact is one in which the resolution of the question does not require the decisionmaker to know or apply the law. Thus, a statement of fact "is an assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect." LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 548 (1965). In short, the facts are mostly irrelevant when resolving pure questions of law, and, conversely, the law is mostly irrelevant when resolving pure questions of fact.

Let's return to our civil law example: the car accident. Assume that during the investigation, the accident investigator noted that the skid marks on the pavement were forty-six feet long. This is a finding of fact. The law is irrelevant. Findings of fact answer questions about who did what to whom, when, how, and with what effect.

Terminology: *Adjudicative facts* are facts that explain who said what, who did what, and when did she do it. *Legislative facts* are generalized facts that relate to a population.

Let's turn back to administrative law. Agencies must make factual findings regularly. There are two types of factual findings: adjudicative and legislative. Adjudicative facts relate to the circumstances of specific cases. These facts explain who said what, who did what, and when it was done. For example, an agency may have to determine whether a witness is telling the truth. An agency may have to determine whether someone was fired in the way she claimed. An agency may have to decide whether an incident occurred before or after a rule took effect. These facts are adjudicative facts. Agencies typically resolve them during adjudications.

In contrast, legislative facts are generalized facts related to the population or industry as a whole (e.g., arsenic is poisonous). They are unrelated to particular parties. These facts are relevant

for determining policy (e.g., how much arsenic in water is safe?). For example, an agency may have to decide how much of a pesticide is safe for human consumption or whether specific types of testing will identify those immune from COVID-19. These types of facts are legislative, and agencies typically resolve them during rulemakings.

4. Questions of Policy

Terminology: A *question of policy* is one in which resolution of the question requires application of the law to the legislative facts.

Finally, agencies resolve questions of policy. Courts do not make policy decisions, so there is no comparable civil law example, as there was for our car accident. Earlier, we defined a question of law application as one in which the agency applies the relevant law to the specific facts to reach a conclusion, which typically occurs during an adjudication. A question of policy similarly involves resolution of both law and facts, but questions of policy generally arise during rulemakings rather than adjudications. And the relevant facts are legislative, not adjudicative.

For example, suppose agencies must decide on the location for a new highway, how many parts per billion of a certain chemical in the air will be injurious to human health, what kinds of safety features should be required in passenger cars, or what level of protection should be afforded workers in factories. Resolving these kinds of issues involves policy decisions, making value choices that are not fully resolved by the legislative facts (though these help) nor the legal standards (though these also help). In making policy decisions, the agency must consider the legislative facts in light of its delegated authority, e.g., "to make drinking water safe," to arrive at its policy choice. The legislative facts (arsenic is never safe to consume) and the law (the agency is required to develop safe drinking water standards) help the agency make the policy choice (absolutely no arsenic in the water supply).

To review, there are four types of agency decisions that courts review: (1) pure questions of law; (2) questions of law application, or mixed questions of law and fact; (3) questions of legislative or adjudicative fact; and (4) questions of policy. To determine which standard of review a reviewing court will apply, you must first determine which kind of question is being challenged. Once you have determined the kind of question, you can apply the appropriate standard of review from those identified in the next section.

D. Standard of Review for Agency Decisionmaking

To determine the standard of review the court will apply to review an agency's decision, you should start with the agency's enabling act. Congress often includes judicial review provisions in enabling acts. If Congress has provided a specific standard of review in the enabling act, that standard applies.

If Congress has not provided a specific standard, the APA default provision applies. 5 U.S.C. § 706(2). We will talk about three of these standards: (1) *de novo* review, (2) arbitrary and capricious review, and (3) substantial evidence review. The applicable standard depends, in part,

on the type of question the court is reviewing: a pure question of law, a question of law application, a question of fact, or a question of policy.

Let's begin with pure questions of law. We will return to this topic in the next two chapters as well for this topic has become increasingly complex since *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), was recently overruled.

1. Standard of Review for Pure Questions of Law

As mentioned above, agencies interpret statutory language as they implement and enforce their enabling acts. How much deference should courts give agency interpretations of their enabling acts; should reviewing courts defer to the agency's interpretation (low-intensity review) or should they examine the interpretation with less deference (high-intensity review)?

The appropriate scope of review for pure questions of law is one of the most challenging, and certainly the most discussed, issues in administrative law. The appropriate standard has changed during the last sixty years. Thus, to understand what the standard is today, you must understand what the standard was in the past.

a. Standard of Review Pre-Chevron: Skidmore Analysis

In the 1940s and early 1950s, the Supreme Court used two different deference standards: "no deference" (the *de novo* standard) and "some deference." While the deference world was never black and white, the standard the Court used depended on the type of question presented. When a federal agency interpretation involved a pure question of law, the Court used the *de novo* standard. *See, e.g.*, *Gray v. Powell*, 314 U.S. 402, 414–17 (1941) (refusing to defer to the agency's determination that coal that was transported from one entity to another without a title transfer constituted coal that was "sold or otherwise disposed of" within the meaning of the Bituminous Coal Act of 1937); *NLRB v. Hearst Publications*, 322 U.S. 111, 124–29 (1944) (refusing to defer to the agency's determination that newsboys were "employees" under the National Labor Relations Act); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 506 (1951) (refusing to defer to the agency's interpretation of the term "course of employment" in the Longshoremen's and Harbor Workers' Compensation Act).

In contrast, when a federal agency interpretation involved a question of law application, the Court used a "some deference" standard. *See, e.g.*, *Gray*, 314 U.S. at 410–13 (deferring to the agency's finding that a specific plaintiff was a coal producer); *O'Leary*, 340 U.S. at 507–08 (deferring to the agency's finding that a particular rescue occurred during an employee's employment). The Court deferred to agency resolution of application of law questions because the agency had expertise and Congress had expressly delegated authority to resolve the question to the agency. *Hearst Publications*, 322 U.S. at 120; *Gray*, 314 U.S. at 412 ("Congress . . . found it more efficient to delegate [these issues] to those whose experience in a particular field gave promise of a better informed, more equitable" resolution of the issues).

Thus, when the issue involved law application, courts deferred because of the agency's

expertise and the likelihood that Congress intended to delegate resolution of the issue to the agency. However, when the agency interpretation involved a pure question of law, the Court did not defer to the agency interpretation at all because judges were as competent as agencies, if not more so, to determine the intended meaning of ambiguous statutory language. Pursuant to this bifurcated approach, judges retained the primary responsibility for interpreting statutes but deferred to agencies to apply those interpretations.

This bifurcated approach made sense and was consistent with the judicial review approach used in civil cases. In civil cases, appellate judges determine questions of law *de novo*. Because appellate judges are experts at interpreting law, no deference is due when trial courts interpret the law. This approach was also consistent with the APA, which provides, "the reviewing court shall decide all relevant questions of law, [and interpret] statutory provisions." 5 U.S.C. § 706. In contrast, questions of law application were reviewed more deferentially because agencies had experience understanding how the act should apply to a given situation and Congress had chosen that agency to resolve the issue.

While courts deferred to agency decisions involving law application, the scope of that deference was unclear. In 1944, the Supreme Court decided two cases that addressed the scope. In the first case, the Court held that as long as an agency interpretation had "a reasonable basis in law," a court should not substitute its own interpretation for that of the agency entrusted with administering the act. *Hearst Publications*, 322 U.S. at 131 (internal quotations omitted). In this case, the Court addressed the appropriate level of deference to give a National Labor Relations Board's (NLRB) determination that the word "employee" in the National Labor Relations Act applied to newsboys. *Id*. at 120–23. Because the NLRB had "familiarity with the circumstances and backgrounds of employment relationships in various industries," the Court held that determining the scope of the term "employees" in that industry "belong[ed] to the usual administrative routine of the [NLRB]." *Id*. at 130 (internal citations omitted). Thus, the Court sustained the NLRB's interpretation under this "reasonable basis in the law" standard. Some deference thus meant "a reasonable interpretation of the relevant law."

The second case is below. Oddly, the Court did not cite *Hearst Publications*. Instead it created a new definition of "some deference." The new definition, or test, focused on the reasonableness, or persuasiveness, of the agency's decisionmaking process, as opposed to the reasonableness of the agency's interpretation.

See if you can identify the new deference test and the Court's rationale for affording this level of deference. Also, be sure to determine the type of agency action at issue: was it a legislative or non-legislative rule?

Skidmore v. Swift & Co.
Supreme Court of the United States
323 U.S. 134 (1944)

❖ JUSTICE JACKSON delivered the opinion of the Court [with whom STONE, C.J., and DOUGLAS, BLACK, ROBERTS, MURPHY, REED, RUTLEDGE, and FRANKFURTER, JJ., concur].

¶1 Seven employees of the Swift and Company packing plant at Fort Worth, Texas, brought an action under the Fair Labor Standards Act[, 29 U.S.C.A. § 201 et seq.,*] to recover overtime, liquidated damages, and attorneys' fees, totaling approximately $77,000. . . . [Petitioners claim that the time they spent in the fire hall subject to call to answer fire alarms were periods of work. Combined with their daytime employment, petitioners were entitled to overtime pay.]

¶2 It is not denied that the daytime employment of these persons was working time within the Act. . . . [And that t]hey were paid weekly salaries.

¶3 Under their oral agreement of employment, however, petitioners undertook to stay in the fire hall on the Company premises, or within hailing distance, three and a half to four nights a week. This involved no task except to answer alarms, either because of fire or because the sprinkler was set off for some other reason. No fires occurred during the period in issue, the alarms were rare, and the time required for their answer rarely exceeded an hour. For each alarm answered the employees were paid in addition to their fixed compensation an agreed amount, fifty cents at first, and later sixty-four cents. The Company provided a brick fire hall equipped with steam heat and air-conditioned rooms. It provided sleeping quarters, a pool table, a domino table, and a radio. The men used their time in sleep or amusement as they saw fit, except that they were required to stay in or close by the fire hall and be ready to respond to alarms. It is stipulated that "they agreed to remain in the fire hall and stay in it or within hailing distance, subject to call, in event of fire or other casualty, but were not required to perform any specific tasks during these periods of time, except in answering alarms." The trial court . . . said, however, as a "conclusion of law" that "the time plaintiffs spent in the fire hall subject to call to answer fire alarms does not constitute hours worked, for which overtime compensation is due them under the Fair Labor Standards Act, as interpreted by the Administrator and the Courts," and in its opinion observed, "of course we know pursuing such pleasurable occupations or performing such personal chores does not constitute work." The Circuit Court of Appeals affirmed. . . .

¶4 [W]e hold that no principle of law found either in the statute or in Court decisions precludes waiting time from also being working time. We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. . . .

¶5 Congress . . . create[d] the office of Administrator [of the Wage and Hour Division of the Department of Labor], impose[d] upon him a variety of duties, endow[ed] him with powers to inform himself of conditions in industries and employments subject to the Act, and put on him the duties of bringing injunction actions to restrain violations. Pursuit of his duties has accumulated a considerable experience in the problems of ascertaining working time in employments involving periods of inactivity and a knowledge of the customs prevailing in reference to their solution. From these he is obliged to reach conclusions as to conduct without the law, so that he should seek

* [Editor's footnote]: The overtime provisions of FLSA applied only to "employees" and to "employment" in excess of a specified number of hours. 29 U.S.C. § 207. The definitions section of FLSA provided that "employ includes to suffer or permit to work." 29 U.S.C. § 203(g).

injunctions to stop it, and that within the law, so that he has no call to interfere. He has set forth his views of the application of the Act under different circumstances in an interpretative bulletin and in informal rulings. They provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it. Wage and Hour Division, Interpretative Bulletin No. 13.

¶6 The Administrator thinks the problems presented by inactive duty require a flexible solution, rather than the all-in or all-out rules respectively urged by the parties in this case, and his Bulletin endeavors to suggest standards and examples to guide in particular situations. . . . In general, [whether it is work] depends "upon the degree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform active work". . . .

¶7 The facts of this case do not fall within any of the specific examples given, but the conclusion of the Administrator, as expressed in the brief amicus curiae, is that the general tests which he has suggested point to the exclusion of sleeping and eating time of these employees from the work-week and the inclusion of all other on-call time: although the employees were required to remain on the premises during the entire time. . . .

¶8 There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions. And, while we have given them notice, we have had no occasion to try to prescribe their influence. The rulings of this Administrator are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact. They are not, of course, conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy. They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do. But the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. They do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons. The fact that the Administrator's policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect. This Court has long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of adversary origin.

¶9 We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

. . .

¶10 [I]n this case, although the District Court referred to the Administrator's Bulletin, its evaluation and inquiry were apparently restricted by its notion that waiting time may not be work, an understanding of the law which we hold to be erroneous. Accordingly, the judgment is reversed and the cause remanded for further proceedings consistent herewith.

* * *

Points for Discussion

1. *Legal Issue*: What was the legal issue? Cite the operative section of the Act relevant to that issue.

2. *Language at Issue*: What language in that section were the parties arguing about? What did each party argue that language meant? What meaning did the Court adopt?

3. *Theories*: The Court was determining the correct deference standard and not determining the meaning of the language; hence, no theory of interpretation is apparent.

4. *Type of Agency Action*: Neither lower court considered an "interpretive bulletin" that the Administrator of the Wage and Hour Division of the Department of Labor had issued. What type of agency action is an interpretive bulletin? The Supreme Court remanded the issue of whether the Act required overtime pay for "inactive duty" and directed the court of appeals to consider the interpretive bulletin in resolving this interpretive question. Why?

5. *Type of Question*: Was the issue before the Court a question of law, application of law to fact, fact, or policy?

6. *Skidmore Deference*: How does the Court describe the weight the court of appeals should give to the interpretation in the bulletin? In other words, was the agency's interpretation controlling or persuasive? If persuasive, what factors make it persuasive? Why is the agency entitled to any deference at all for its interpretation in a guidance document; aren't courts the appropriate branch to interpret statutory language pursuant to *Marbury v. Madison*? Does *Skidmore* deference violate separation of powers? Does if violate the APA? As you will see, *Skidmore* deference is understood to be a relatively weak form of deference (meaning a higher intensity scope of review than clear error but lower intensity than *de novo*).

* * *

b. Standard of Review Chevron: Chevron Analysis

In 1984, after forty years of *Skidmore*, the Supreme Court adopted a new deference approach. In one of the most cited Supreme Court cases of all time, *Chevron U.S.A., Inc. v.*

National Resources Defense Council, Inc., 467 U.S. 837 (1984), the Court flipped the bifurcated deference standard it had been using, in which agencies had played an advisory role and courts remained the final arbiters of what ambiguous statutory language meant. In this section, you will learn the standard of review known as *Chevron* analysis (or sometimes, wrongly, *Chevron* deference) then learn how to apply that standard. However, be aware that the Supreme Court recently overruled step two of the *Chevron* analysis in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). Despite this fact, you need to understand this doctrine that had a forty year history and is cited in so many cases.

In *Skidmore*, the agency's interpretation was issued in a non-legislative interpretive rule, a bulletin. In contrast, in *Chevron*, the Environmental Protection Agency (EPA) promulgated its interpretation using legislative rulemaking, specifically notice and comment rulemaking.

The provision of the Clean Air Act at issue required plants to obtain a permit when the plant wished to modify or build a "stationary source[]" that emitted air pollution. *Id.* at 840. The term "stationary source[]" was not defined in the Act. *Id*. at 841. Thus, the EPA had to interpret the meaning of the term. The agency issued its first regulation while President Carter was in office. It defined "stationary source[]" as the construction or installation of any new or modified equipment that emitted air pollutants. *Id*. at 840 n.2. Under this interpretation, each smokestack was a stationary source.

But the following year, when President Reagan came to office, the EPA repealed that regulation and issued a new one that changed the interpretation to encompass a plant-wide or "bubble concept" definition. *Id*. at 858. The bubble concept definition allowed a plant to offset increased air pollutant emissions at one part of its plant with reduced emissions at another part of the plant. So long as total emissions at the plant remained constant, no permit was required. *Id*. at 852. Because this interpretation was less protective of the environment, environmentalists sued. The issue for the court was whether the EPA's interpretation of "stationary source" in the Clean Air Act was a valid interpretation of the Act. The D.C. Circuit said no, using a *de novo* standard of review for this pure question of law. *Id*. at 842.

As you will see below, the Supreme Court reversed. In so doing, it developed the famous *Chevron* two-step (Google it! You will find a videos of overachieving administrative law students dancing and singing.)[14] As you read the case, identify each step. At which step were courts to determine the meaning of statutory language *de novo*, and at which step did courts consider whether the agency's interpretation of ambiguous statutory language was reasonable?

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.
Supreme Court of the United States
467 U.S. 837 (1984)

[14] Here's one example: https://www.youtube.com/watch?v=uHKujqyktJc.

❖ JUSTICE STEVENS delivered the opinion of the Court [in which BURGER, C.J., BRENNAN, WHITE, BLACKMUN, and POWELL, JJ. concur]. [JUSTICE MARSHALL and JUSTICE REHNQUIST took no part in the consideration or decision of these cases. JUSTICE O'CONNOR took no part in the decision of these cases.]

¶1 In the Clean Air Act Amendments of 1977, Congress enacted certain requirements applicable to States that had not achieved the national air quality standards established by the Environmental Protection Agency (EPA) pursuant to earlier legislation. [A designation as a "nonattainment area" indicated that an area had failed to achieve those national air quality standards and thus was in violation of national ambient air quality standards (NAAQS) or contributed to a nearby violation.] The amended Clean Air Act required these "nonattainment" States to establish a permit program regulating "new or modified major stationary sources" of air pollution. Generally, a permit may not be issued for a new or modified major stationary source unless several stringent conditions are met.[1] The EPA regulation promulgated to implement this permit requirement allows a State to adopt a plantwide definition of the term "stationary source."[*] Under [the EPA's plantwide] definition, an existing plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant. The question presented by [this case] is whether EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble" is based on a reasonable construction of the statutory term "stationary source." [Under the alternative interpretation, an increase in emissions at a single pollution-emitting device at a plant would trigger the requirement that the plant obtain a permit and install stringent control technology, regardless of whether the emissions from this single device were offset by decreases in emissions from other devices at the plant.]

I

¶2 The EPA regulations containing the plantwide definition of the term stationary source were promulgated on October 14, 1981. Respondents filed a timely petition for review in the United

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[1] Section 172(b)(6), 42 U.S.C. § 7502(b)(6), provides:

> "The plan provisions required by subsection (a) shall . . . (6) require permits for the construction and operation of new or modified major *stationary sources* in accordance with section 173 (relating to permit requirements)" (emphasis added).

[*] [Editor's footnote]: The EPA regulation at issue under the Clean Air Act defines "stationary source" as:

> "(i) 'Stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.
>
> "(ii) 'Building, structure, facility, or installation' means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel." 40 CFR §§ 51.18(j)(1)(i) and (ii) (1983).]

States Court of Appeals for the District of Columbia Circuit . . . . The Court of Appeals set aside the regulations.

¶3 The court observed that the relevant part of the amended Clean Air Act "does not explicitly define what Congress envisioned as a ‘stationary source, to which the permit program . . . should apply," and further stated that the precise issue was not "squarely addressed in the legislative history." In light of its conclusion that the legislative history bearing on the question was "at best contradictory," it reasoned that "the purposes of the nonattainment program should guide our decision here." Based on two of its precedents concerning the applicability of the bubble concept to certain Clean Air Act programs, the court stated that the bubble concept was "mandatory" in programs designed merely to *maintain existing air quality*, but held that it was "inappropriate" in programs enacted to *improve air quality*. Since the purpose of the permit program [in nonattainment areas] . . . was to improve air quality, the court held that the bubble concept was inapplicable in these cases under its prior precedents. It therefore set aside the regulations embodying the bubble concept as contrary to law. We granted certiorari . . . and we now reverse.

¶4 The basic legal error of the Court of Appeals was to adopt a static judicial definition of the term "stationary source" when it had decided that Congress itself had not commanded that definition. . . .

II

¶5 When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.[9] If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[11]

¶6 "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by

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[9] The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that congress had an intention on the precise question at issue, that intention is the law and must be given effect.

[11] The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.

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

¶7 We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer,[14] and the principle of deference to administrative interpretations "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.

> " . . . If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."

¶8 In light of these well-settled principles it is clear that the Court of Appeals misconceived the nature of its role in reviewing the regulations at issue. Once it determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was not whether in its view the concept is "inappropriate" in the general context of a program designed to improve air quality, but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one. Based on the examination of the legislation and its history which follows, we agree with the Court of Appeals that Congress did not have a specific intention on the applicability of the bubble concept in these cases, and conclude that the EPA's use of that concept here is a reasonable policy choice for the agency to make. . . .

III

¶9 In the 1950's and the 1960's Congress enacted a series of statutes designed to encourage and to assist the States in curtailing air pollution. The Clean Air Amendments of 1970 “sharply increased federal authority and responsibility in the continuing effort to combat air pollution,” but continued to assign “primary responsibility for assuring air quality” to the several States. Section 109 of the 1970 Amendments directed the EPA to promulgate National Ambient Air Quality Standards (NAAQS's) and § 110 directed the States to develop plans (SIP's) to implement the standards within specified deadlines. In addition, § 111 provided that major new sources of pollution would be required to conform to technology-based performance standards; the EPA was directed to publish a list of categories of sources of pollution and to establish new source performance standards (NSPS) for each. Section 111(e) prohibited the operation of any new source in violation of a performance standard.

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[14] . . . . *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944) . . . .

¶10 Section 111(a) defined the terms that are to be used in setting and enforcing standards of performance for new stationary sources. It provided [in Section 111(a)(3]):

"For purposes of this section:

"(3) The term 'stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant."

¶11 In the 1970 Amendments, that definition was not only applicable to the [] program required by § 111, but also was made applicable to a requirement of § 110 that each state implementation plan contain a procedure for reviewing the location of any proposed new source and preventing its construction if it would preclude the attainment or maintenance of national air quality standards.

Nonattainment

¶12 The 1970 legislation provided for the attainment of primary NAAQS's [national ambient air quality standards] by 1975. In many areas of the country, particularly the most industrialized States, the statutory goals were not attained. In 1976, the 94th Congress was confronted with this fundamental problem, as well as many others respecting pollution control. As always in this area, the legislative struggle was basically between interests seeking strict schemes to reduce pollution rapidly to eliminate its social costs and interests advancing the economic concern that strict schemes would retard industrial development with attendant social costs. The 94th Congress [had to reconcile these competing interests]. . . .

IV

¶13 The Clean Air Act Amendments of 1977 are a lengthy, detailed, technical, complex, and comprehensive response to a major social issue. A small portion of the statute expressly deals with nonattainment areas. The focal point of this controversy is one phrase in that portion of the Amendments. . . .[22]

¶14 [T]he statute provided that each [nonattainment state should prepare a plan that] shall

"(6) require permits for the construction and operation of new or modified major stationary sources in accordance with section 173...."

¶15 The 1977 Amendments contain no specific reference to the "bubble concept." Nor do they contain a specific definition of the term "stationary source," though they did not disturb the definition of "stationary source" contained in § 111(a)(3). Section 302(j), however, defines the term "major stationary source" as follows:

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[22] Specifically, the controversy in these cases involves the meaning of the term "major stationary sources" in § 172(b)(6) of the Act, 42 U.S.C. § 7502(b)(6). The meaning of the term "proposed source" in § 173(2) of the Act, 42 U.S.C. § 7503(2), is not at issue.

> "(j) Except as otherwise expressly provided, the terms 'major stationary source' and 'major emitting facility' mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant. . . ."

V

¶16 The legislative history of the portion of the 1977 Amendments dealing with nonattainment areas does not contain any specific comment on the "bubble concept" or the question whether a plantwide definition of a stationary source is permissible under the permit program. It does, however, plainly disclose that in the permit program Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality. . . .

VI

¶17 [P]rior to the 1977 Amendments, the EPA had adhered to a plantwide [bubble] definition of the term "source" . . .

¶18 In August 1980, however, the EPA adopted a regulation that, in essence, applied the basic reasoning of the Court of Appeals in these cases. The EPA . . . adopted a dual definition of "source" for nonattainment areas that required a permit whenever a change in either the entire plant, or one of its components, would result in a significant increase in emissions even if the increase was completely offset by reductions elsewhere in the plant. The EPA expressed the opinion that this interpretation was "more consistent with congressional intent" than the plantwide definition because it "would bring in more sources or modifications for review[.]" . . .

¶19 In 1981 a new administration took office and initiated a "Government-wide reexamination of regulatory burdens and complexities." In the context of that review, the EPA reevaluated the various arguments that had been advanced in connection with the proper definition of the term "source" and concluded that the term should be given the same definition in both nonattainment areas and [attainment] areas.

¶20 In explaining its conclusion, the EPA first noted that the definitional issue was not squarely addressed in either the statute or its legislative history and therefore that the issue involved an agency "judgment as how to best carry out the Act." It then set forth several reasons for concluding that the plantwide definition was more appropriate. It pointed out that the dual definition "can act as a disincentive to new investment and modernization by discouraging modifications to existing facilities" and "can actually retard progress in air pollution control by discouraging replacement of older, dirtier processes or pieces of equipment with new, cleaner ones." Moreover, the new definition "would simplify EPA's rules by using the same definition of 'source' for PSD [prevention of significant deterioration], nonattainment new source review and the construction moratorium. This reduces confusion and inconsistency." Finally, the agency explained that additional requirements that remained in place would accomplish the fundamental purposes of achieving attainment with NAAQS's as expeditiously as possible. These conclusions were

expressed in a proposed rulemaking in August 1981 that was formally promulgated in October. . . .

VII

¶21 In this Court respondents expressly reject the basic rationale of the Court of Appeals' decision. That court viewed the statutory definition of the term "source" as sufficiently flexible to cover either a plantwide definition, a narrower definition covering each unit within a plant, or a dual definition that could apply to both the entire "bubble" and its components. It interpreted the policies of the statute, however, to mandate the plantwide definition in programs designed to maintain clean air and to forbid it in programs designed to improve air quality. Respondents place a fundamentally different construction on the statute. They contend that the text of the Act requires the EPA to use a dual definition-if either a component of a plant, or the plant as a whole, emits over 100 tons of pollutant, it is a major stationary source. They thus contend that the EPA rules . . . violate the statute.

[Step 1] Statutory Language

¶22 The definition of the term "stationary source" in § 111(a)(3) refers to "any building, structure, facility, or installation" which emits air pollution. This definition is applicable only to the [New Source Performance Standard] program by the express terms of the statute; the text of the statute does not make this definition applicable to the [nonattainment] permit program. Petitioners therefore maintain that there is no statutory language even relevant to ascertaining the meaning of stationary source in the permit program aside from § 302(j), which defines the term "major stationary source." We disagree with petitioners on this point.

¶23 The definition in § 302(j) tells us what the word "major" means—a source must emit at least 100 tons of pollution to qualify—but it sheds virtually no light on the meaning of the term "stationary source." It does equate a source with a facility—a "major emitting facility" and a "major stationary source" are synonymous under § 302(j). The ordinary meaning of the term "facility" is some collection of integrated elements which has been designed and constructed to achieve some purpose. Moreover, it is certainly no affront to common English usage to take a reference to a major facility or a major source to connote an entire plant as opposed to its constituent parts. Basically, however, the language of § 302(j) simply does not compel any given interpretation of the term "source."

¶24 Respondents recognize that, and hence point to § 111(a)(3). Although the definition in that section is not literally applicable to the permit program, it sheds as much light on the meaning of the word "source" as anything in the statute. As respondents point out, use of the words "building, structure, facility, or installation," as the definition of source, could be read to impose the permit conditions on an individual building that is a part of a plant. A "word may have a character of its own not to be submerged by its association." On the other hand, the meaning of a word must be ascertained in the context of achieving particular objectives, and the words associated with it may indicate that the true meaning of the series is to convey a common idea. The language may reasonably be interpreted to impose the requirement on any discrete, but integrated, operation which pollutes. This gives meaning to all of the terms-a single building, not part of a larger

operation, would be covered if it emits more than 100 tons of pollution, as would any facility, structure, or installation. Indeed, the language itself implies a "bubble concept" of sorts: each enumerated item would seem to be treated as if it were encased in a bubble. While respondents insist that each of these terms must be given a discrete meaning, they also argue that § 111(a)(3) defines "source" as that term is used in § 302(j). The latter section, however, equates a source with a facility, whereas the former defines "source" as a facility, among other items.

¶25 We are not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress. We know full well that this language is not dispositive; the terms are overlapping and the language is not precisely directed to the question of the applicability of a given term in the context of a larger operation. To the extent any congressional "intent" can be discerned from this language, it would appear that the listing of overlapping, illustrative terms was intended 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.

Legislative History

¶26 In addition, respondents argue that the legislative history and policies of the Act foreclose the plantwide definition, and that the EPA's interpretation is not entitled to deference because it represents a sharp break with prior interpretations of the Act.

¶27 Based on our examination of the legislative history, we agree with the Court of Appeals that it is unilluminating. . . . We find that the legislative history as a whole is silent on the precise issue before us. It is, however, consistent with the view that the EPA should have broad discretion in implementing the policies of the 1977 Amendments.

¶28 More importantly, that history plainly identifies the policy concerns [purposes] that motivated the enactment; the plantwide definition is fully consistent with one of those concerns—the allowance of reasonable economic growth—and, whether or not we believe it most effectively implements the other, we must recognize that the EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives as well. . . .

[Step 2] Policy

¶29 The arguments over policy that are advanced in the parties' briefs create the impression that respondents are now waging in a judicial forum a specific policy battle which they ultimately lost in the agency and in the 32 jurisdictions opting for the "bubble concept," but one which was never waged in the Congress. Such policy arguments are more properly addressed to legislators or administrators, not to judges.

¶30 In these cases 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,[40] and the decision involves reconciling conflicting policies. Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

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

¶32 When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

¶33 We hold that the EPA's definition of the term "source" is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth. . . .

¶34 The judgment of the Court of Appeals is reversed.

* * *

Points for Discussion

1. *Legal Issue*: What was the legal issue? Cite the operative section of the Act relevant to that issue.

2. *Language at Issue*: What language in that section were the parties arguing about? What did each party argue that language meant? What meaning did the lower court and Supreme

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[40] *See* ... Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

Court adopt?

3. *Theories*: Which theory did the Court use? The lower court? Did the Supreme Court find ambiguity, a constitutional question to avoid, an absurd result, or a scrivener's error?

4. *Skidmore*: How did the Court alter the *Skidmore* analysis? The *Skidmore* analysis examines an agency's reasoning process: how thoroughly did the agency think about the issue, how well reasoned is the interpretation, and how consistent has the agency been over time. Do these factors matter at all in a *Chevron* analysis?

   Understanding the difference between deferring under *Chevron* and deferring under *Skidmore* is not always so easy. Professor Gary Lawson has offered a way of thinking about the difference, which he defines as the difference between legal deference and epistemological deference. Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 2–10 (2007). Legal deference is deference earned solely based on the identity of the interpreter. *Id*. at 9. For example, lower courts must defer to interpretations of higher courts within the same jurisdiction but need not defer to interpretations from courts in other jurisdictions. The decision of whether to defer depends entirely on the identity of the interpreter. *Chevron* deference is a form of legal deference: agencies earn deference simply because they are agencies that interpreted acts they administer.

   In contrast, epistemological deference is deference earned because of the persuasiveness and thoroughness of the reasoning. *Id*. at 10. Courts in neighboring jurisdictions need not follow each other's opinions but can choose to do so because the reasoning is persuasive. The decision of whether to defer depends entirely on the persuasiveness of the reasoning; the identity of the interpreter is irrelevant. *Skidmore* deference is a form of epistemological deference: agencies earn deference based on the soundness of their reasoning, not because they are agencies interpreting statutory language.

5. *Flexibility*: Under *Skidmore*, you will recall that agency consistency was one factor earning an agency deference. Here, consistency was completely absent. Prior to 1977, the EPA used the plantwide, or bubble concept, definition. After Congress amended the Clean Air Act in 1977 to deal with those states that were failing to attain air quality standards, the EPA adopted a dual definition in 1980: the plantwide definition for those states not in attainment and the single pollution-emitting device definition for those that were. In 1981, Ronald Reagan took office, and the EPA returned to the plantwide concept for both attainment and nonattainment states. The Court talked about agencies' need for flexibility in light of changing economic and political realities. Hence, the standard shifted from consistency to reasonableness. What changed between 1980 and 1981?

   Chevron's two step analysis allowed agencies to change their interpretations, so long as the new interpretation was also reasonable. Why might agencies wish to change an existing interpretation? Might an incoming executive have different policy agendas? Isn't this exactly what happened in *Chevron*?

6. *Two-Step*: *Chevron* was often described as a two-step process. What are the two steps? At which step does the court try to determine *de novo* what the statutory language means? What tools should the court consider when doing so? (Look at footnote 9.) At which step did the court consider whether the agency's interpretation was permissible? You should return to this question after you read *Loper Bright* below.

7. *Step Two*: While Justice Stevens used the word *permissible* at step two, courts more recently typically used the word *reasonable* instead. At step two, the lower courts were very deferential to agencies. *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 35 fig.3 (2017) (examining every published *Chevron* decision in the circuit courts from 2003 through 2013 and finding that agencies prevailed under the *Chevron* framework 77.4% of the time: with a 39.0% win rate at step one and a 93.8% win rate at step two); Orin S. Kerr, *Shedding Light on* Chevron: *An Empirical Study of the* Chevron *Doctrine in the United States Courts of Appeals*, 15 YALE J. REG. 1, 31 (1998) (finding that agencies won 42% of the time at step one and 89% of the time at step two). Thus, step one was more constraining on agencies.

8. *The Supreme Court's Step Two Approach*: The Supreme Court never clearly explained exactly what step two entailed. Some experts argued that the second step was arbitrary and capricious review, which you'll learn later. This approach focuses on the process the agency used to reach its decision by asking whether the agency engaged in reasoned decisionmaking. *See, e.g.*, *Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011) ("Were we to [apply *Chevron*], our analysis would be the same, because under *Chevron* step two, we ask whether an agency interpretation is 'arbitrary or capricious in substance.'") (citations omitted); *Mayo Foundation for Medical Education & Research v. United States*, 562 U.S. 44, 58–60 (2011) (conflating step two and arbitrary and capricious review); Ronald M. Levin, *The Anatomy of* Chevron: *Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1254–55 (1997) (arguing that arbitrary and capricious review should absorb *Chevron*'s step two); Mark Seidenfeld, *A Syncopated* Chevron: *Emphasizing Reasoned Decision-Making in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 129–30 (1994) (proposing that courts assess an agency's reasoning process rather than its interpretation at step two).

   Other experts argued that the second step involved determining whether the interpretation fit within a range of "reasonableness" options. This approach focused on the closeness of the interpretation to the prototype. If, for example, the language being interpreted was "orange" and the agency interpreted "orange" to include red-yellow, that interpretation would be *reasonable*. But if the agency interpreted "orange" to include blue or green, that interpretation would likely be *unreasonable*.

   For your information, the Court rejected an agency's interpretation at step two just three times. *Michigan v. EPA*, 576 U.S. 743, 751–54 (2015) (rejecting the EPA's interpretation of the Clean Air Act as inconsistent with the text and purpose of the Act and established administrative practice); *Utility Air Regulatory Group. v. EPA*, 573 U.S. 302, 321 (2014)

(rejecting the EPA's interpretation of the Clean Air Act at step two as both inconsistent with the text and the Act's structure and design); *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 391–92 (1999) (rejecting the Federal Communication Commission's interpretation of the Telecommunication Act as a misreading of the text). In these cases, the Court seemed to apply a reasonableness inquiry, one that questioned whether the agency's interpretation fell comfortably within the language Congress used either in the relevant act or in related acts.

* * *

Test Your Understanding

You represent an entity challenging an agency's interpretation of statutory language. At which step of *Chevron* are you more likely to lose your case and why?

(A) Step one because it is more deferential to the agency's interpretation.

(B) Step one because agencies usually agree with congressional intent.

(C) Step two because it is more deferential to the agency's interpretation.

(D) Step two because agencies usually agree with congressional intent.

* * *

An empirical study by Professors Cass Sunstein and Thomas Miles suggests that former Justice Scalia reversed an agency's interpretation of a statute at step one more often than any of the other Supreme Court Justices. Assuming the accuracy of this finding, why might Justice Scalia have reversed more often?

(A) He found the agency's interpretation plainly wrong more often.

(B) He found the agency's interpretation unreasonable more often.

(C) He found the agency's interpretation arbitrary and capricious more often.

(D) He found that Congress directly spoke to the precise issue more often.

* * *

c. Standard of Review Post-Chevron: Chevron's Limitations

When the Supreme Court decided *Chevron*, it appeared to streamline the analysis into two

straightforward steps: first, a court should look to see if Congress had an intent as to the meaning of the statutory language before the court; if not, the court should accept the agency's interpretation so long as it was reasonable. But *Chevron* did not apply every time an agency interpreted legal language. Before a court could apply *Chevron*, the court had to make sure that the interpretation is one entitled to *Chevron*.

After *Chevron* was decided, the Court developed a number of limitations regarding when *Chevron* applied. The limitations focus on the answers to the following questions: (1) *What* did the agency interpret? (2) *Which* agency did the interpreting? (3) *When* did the agency interpret the statute, before or after a court? (4) *Can* this agency interpret the statute, or does the issue involve a major question? And (5) *how* did the agency interpret the statute?

i. What did the Agency Interpret?

Chevron analysis was applicable only when an agency interpreted a specific type of legal text: statutory language in an act (or statute). *Chevron* did not apply when agencies interpreted the U.S. Constitution, court opinions, and contracts. Similarly, *Chevron* did not apply when agencies interpreted other agencies' regulations. Indeed, in these situations, courts did not defer to the agency's interpretation at all, using *de novo* review instead.

Rule: *Auer* deference may apply when an agency interprets language in a regulation it promulgated. Under *Auer*, an agency is entitled to deference unless its interpretation is plainly erroneous or inconsistent with the regulation.

When an agency interprets its own regulation, however, a different standard of review applies: *Auer* deference, or *Seminole Rock* deference. The former term refers to the Supreme Court case of *Auer v. Robbins*, 519 U.S. 452 (1997), which came after *Chevron* and confirmed that *Seminole Rock* deference had survived *Chevron*. *Id.* at 461–63. In *Bowles v. Seminole Rock & Sand Co.*, the Supreme Court held that an agency's interpretation of its own, ambiguous regulation was entitled to "controlling weight unless [the interpretation was] plainly erroneous or inconsistent with the regulation." 325 U.S. 410, 414 (1945). The Court reasoned that when Congress delegates authority to an agency to promulgate regulations, Congress also delegates authority to the agency to interpret those regulations; such power is a necessary corollary to the former. This judicial review standard is very deferential to agencies, a low-intensity scope of review.

Auer was heavily criticized for several reasons. First, the lower courts blindly applied it. Second, some suggested it was contrary to separation of powers because the writer of the law, the agency, was also the determiner of that law's meaning. Granting deference to an agency's interpretation of its own regulations allows agencies to function both as law writers and law interpreters, violating separation or powers. Third, others argued that giving too much deference to agency interpretations limited public participation in the rulemaking process. Agencies do not have to use notice and comment rulemaking to issue interpretative rules. So, when an agency interprets its own regulation, it may do so using non-legislative procedures, which cutout public participation.

Consequently, in 2019, *Kisor v. Wilkie*, 588 U.S. 558 (2019), the Court *Chevron*ized *Auer*, adding a two-step approach equivalent to *Chevron*'s. Additionally, the Court cabined *Auer* by adding four deference prequalifications.

The facts in this case help explain the context for the interpretive language at issue. James Kisor served in the Vietnam War. In 1982, he sought disability benefits for post-traumatic stress disorder ("PTSD") for having served in Operation Harvest Moon. However, a psychiatrist had diagnosed Kisor as suffering from personality disorder rather than PTSD. Consequently, the Veterans Administration ("VA") rejected Kisor's claim for benefits. *Id.* at 564.

In 2006, Kisor submitted a request to reopen the denied claim and included a new psychiatric evaluation diagnosing him with PTSD. This time, the VA granted the request; however, the VA made the award effective on the date Kisor had filed his second claim (2006), rather than on the date of his first claim (1982). The VA denied benefits pre-2006 because the psychiatric evaluation of PTSD came only after Kisor's second claim was filed. *Id.*

Kisor appealed to the Board of Veterans' Appeals (the "Board"), the part of the VA that reviews disability claims. A single administrative judge affirmed, relying on a VA regulation. That regulation provided that the VA could grant retroactive benefits if the veteran provided "*relevant* official service department records" that the VA had not considered in the initial denial. *Id.* at 2409 (citing 38 C.F.R. § 3.156(c) (2013) (emphasis added). The Board concluded that Kisor had provided new information about his military service in Operation Harvest Moon, but that information was not "relevant" because it did not address the reason for the denial, namely that Kisor did not have PTSD. The Court of Appeals for Veterans Claims, an Article I court that reviews the Board's decisions, affirmed for the same reason. *Id.*

The Court of Appeals for the Federal Circuit also affirmed, applying *Auer*. *Id.* (quoting *Kisor v. Shulkin*, 869 F.3d 1360, 1366 (2017)). On appeal, Kisor had argued that to be "relevant," a service record need only relate to some criterion for obtaining disability benefits; it need not "counter[ ] the basis of the prior denial," as the Board had reasoned. The Federal Circuit found the regulation to be ambiguous because the regulation did not specifically address "'whether 'relevant' records are those casting doubt on the agency's prior [rationale or] those relating to the veteran's claim more broadly.'" *Id.* The appellate court deferred to the VA's interpretation of its own because it was not "'plainly erroneous or inconsistent with the VA's regulatory framework.'" *Id.*

In a fractured decision, the Court affirmed. Writing for the majority, Justice Kagan began by describing the rationale for *Auer* deference. "[O]ur account of why the doctrine emerged—and also how we have limited it—goes a long way toward explaining our view that it is worth preserving." *Id.* at 566. In sum, *Auer* deference is rooted in a presumption that Congress would generally prefer that an agency resolve regulatory ambiguity rather than a court; however, this presumption is always rebuttable. Further, agencies have "unique expertise, often of a scientific or technical nature" that relates to resolving policy choices. *Id.* at 571.

Next, Justice Kagan *Chevron*ized *Auer*. First, she explained *Auer* applies only when a

regulation is "genuinely ambiguous," meaning after a court has applied all the traditional tools of interpretation, much like *Chevron*'s step one. *Id.* at 574–575.

Second, if ambiguity remains, the agency's reading must be reasonable, much like *Chevron*'s step two. "Under *Auer*, as under *Chevron*, the agency's reading must fall 'within the bounds of reasonable interpretation.'" *Id.* at 576 (quoting Arlington v. FCC, 569 U.S. 290, 296 (2013)). *Id.*

Third, Justice Kagan added four deference prerequisites, meaning that even *reasonable* agency interpretations of genuinely ambiguous regulations may not get deference. First, the interpretation must be the agency's authoritative, or official position, rather than an ad hoc statement by lower-level personnel. *Id.* at 577. (citing *United States v. Mead Corp*., 533 U.S. 218, 257–59 & n.6 (2001) (Scalia, J., dissenting)). Second, the interpretation must implicate the agency's area of substantive expertise. *Id.* at 577–578. Third, the interpretation must reflect the agency's fair and considered judgment; it cannot be advanced as a convenient litigating position or post hoc rationalization. Fourth, the interpretation cannot create "unfair surprise" to those being regulated. *Id.* at 579.

Although Justice Gorsuch concurred, he specifically disagreed with the decision not to overrule *Auer*, which he said should have been "easy." *Id.* at 592 (Gorsuch, J., concurring). He suggested the Court had granted *Auer* a stay of execution, rather than a pardon. *Id.*

Prior to *Kisor*, courts routinely deferred to agency interpretations with little analysis and no concern for the process the agency used to reach its interpretation. See, *e.g.*, *United States v. Larionoff*, 431 U.S. 864, 872 (1977) (stating that the Court "need not tarry" over the regulation's language given *Seminole Rock*); *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 276, & nn. 22–23 (1969) (deferring to an agency's view as expressed in letters to third parties). The Court's *Chevron*ization and prerequisites are intended to curb this reflexive deference.

Finally, there is one other limitation on *Auer*'s applicability that existed prior to *Kisor*: courts will not defer when agencies merely parrot statutory language in their regulation and then, in a later regulation, claim they are interpreting the first, parroting regulation rather than the statute. Courts do not defer in this situation because the agencies are really just interpreting statutory language, even if they say they are interpreting their own, parroting regulation. *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (refusing to defer to the Attorney General's interpretive rule that physician-assisted suicide was not a legitimate medical purpose for prescribing medication when the regulation repeated two statutory phrases and summarized others).

In sum, the judicial approach to *Auer* and *Chevron* fused. An agency's interpretation of regulatory language is only eligible for deference under *Auer* when the language is truly ambiguous (after the court employs traditional tools of interpretation) and when the agency's interpretation falls within the reasonableness range. Further, courts must ensure that the interpretation of the regulation is authoritative, within the agency's expertise, carefully considered, and is not one creating unfair surprise. As reformulated, *Auer* is safe for now, but I, like Justice Gorsuch, do not expect the stay of execution to last long.

In summary, *Chevron* applied only when an agency (1) *interpreted statutory language*.

ii. Which Agency Did the Interpreting?

But it is not enough that an agency interpreted the correct legal text, an act. *Chevron* applied only when the agency that interpreted the act "administered" that act. While the Supreme Court never clearly articulated what it means to "administer" an act, lower courts that have addressed this issue suggest that agencies administer an act when they have a special and unique responsibility for enforcing it. *See, e.g.*, *Wagner Seed Co. v. Bush*, 946 F.2d 918, 925–26 (D.C. Cir. 1991) (Williams, J., dissenting) (arguing that the Environmental Protection Agency did not administer the reimbursement provisions of the Superfund Amendments and Reauthorization Act of 1986).

Sometimes, more than one agency administers an act. In these cases, *Chevron* was inapplicable. In other situations, multiple agencies interpret an act, but only one administers it. In these cases *Chevron* applied only to the administering agency. For example, although multiple agencies interpret the Internal Revenue Code, it is generally only the Department of Treasury that is authorized to administer the Code; thus, only the Treasury should have received *Chevron* deference for interpretations of the Code. *See, e.g.*, *Mayo Foundation for Medical Education & Research v. United States*, 562 U.S. 44, 55–56 (2011) (applying *Chevron* deference to review the Department of Treasury's interpretation of a section of the Code).

Agencies also must interpret generally applicable acts, such as the Administrative Procedure Act (5 U.S.C. § 500 *et seq.*), the Regulatory Flexibility Act (5 U.S.C. §§ 601–12), and the Freedom of Information Act. (5 U.S.C. § 552). For such generally applicable acts, no agency's interpretation was entitled to *Chevron* analysis. *See, e.g.*, *Ass'n of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 913 (D.C. Cir. 1993) (interpreting *de novo* the Federal Advisory Committee Act); *FLRA v. U.S. Department of Treasury*, 884 F.2d 1446, 1451 (D.C. Cir. 1989) (refusing to apply *Chevron* to the Federal Labor Relation Authority's interpretation of the Freedom of Information Act or the Privacy Act because "[the agency] is not charged with a special duty to interpret [these acts]"); *Reporters Committee for Freedom of the Press v. DOJ*, 816 F.2d 730, 734 (D.C. Cir. 1987) (stating that no deference would be given to an agency's interpretation of the Freedom of Information Act because "it applies to all government agencies, and thus no one executive branch entity is entrusted with its primary interpretation"), *rev'd on other grounds,* 489 U.S. 749 (1989).

In summary, *Chevron* applied only when an agency (1) interpreted statutory language in an act (2) *that the agency administered*.

iii. When did the agency interpret the statute, before or after a court (or the Brand X Doctrine)?

But it was not enough that an agency interpreted statutory language in an act the agency administered. So far, we have assumed there are no pre-existing judicial interpretations of the same

statutory language. What if there were a prior judicial opinion? Should a court defer to an agency interpretation of a statute that varies from an existing judicial interpretation? This part explains the Supreme Court's approach to prior existing judicial interpretations.

Prior judicial interpretations exist (1) when a court has interpreted the meaning of a statutory provision *de novo* because an agency has not yet interpreted it, and (2) when an agency has already interpreted a statutory provision and the court has agreed with the agency's interpretation. When the agency later interprets that same statutory language, must the agency follow the prior judicial interpretation or is the agency free to interpret the statute differently? On the one hand, agencies need flexibility—the ability to adjust policy and statutory interpretations over time because technology and economics advance and administrative priorities change with time and new administrations. If agencies were unable to alter their interpretations over time, flexibility would be significantly hindered, and agencies would be less effective at responding to changes. On the other hand, too much flexibility can lead to unpredictability, uncertainty, and, potentially, unfairness. Similarly situated litigants expect the government to treat them alike.

The Supreme Court addressed this issue in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). In that case, the Court chose flexibility over certainty by holding that, if a prior court had determined that a statute was clear under *Chevron*'s first step, then that judicial interpretation would bind the agency. *Id*. at 984. But, if the court did not decide that the statute was clear under *Chevron*'s first step, then a court's prior interpretation would not bind the agency. *Id*. at 992. In other words, a prior judicial interpretation did not eliminate a preexisting ambiguity. Instead, the prior judicial interpretation merely reflected a determination that either there was no ambiguity (so, no deference to the agency's new interpretation was due) or there was ambiguity (so, deference to the agency's new interpretation was due). If there is no ambiguity, then Congress has spoken, and the agency and the courts must follow Congress's intent. The agency has no ability to change the interpretation. But if there was ambiguity, then whether a court issued the first interpretation of an ambiguous statute or an agency did, that interpretation did not bind the agency. *Id*. at 983.

This approach is intuitively appealing and seemed to flow from *Chevron*'s two step approach; however, judges are not always clear about whether an interpretation rested on a finding that Congress was ambiguous at *Chevron*'s first step, especially for cases that predated *Chevron*. Justice Scalia eloquently summarized this point:

> In cases decided pre-*Brand X*, the Court had no inkling that it *must* utter the magic words "ambiguous" or "unambiguous" in order to (poof!) expand or abridge executive power, and (poof!) enable or disable administrative contradiction of the Supreme Court. Indeed, the Court was unaware of even the utility (much less the necessity) of making the ambiguous/nonambiguous determination in cases decided pre-*Chevron*, before that opinion made the so-called "Step 1" determination of ambiguity *vel non* a customary (though hardly mandatory) part of judicial-review analysis. For many of those earlier cases, therefore, it will be incredibly difficult to determine whether the decision purported to be giving meaning to an ambiguous, or rather an unambiguous, statute.

United States v. Home Concrete & Supply, 566 U.S. 478, 493–94 (2012) (Scalia, J., concurring in part). Calling for *Brand X*'s death, Justice Scalia lamented, "Rather than making our judicial-review jurisprudence curiouser and curiouser, the Court should abandon the opinion that produces these contortions, *Brand X*." *Id*. at 496. Perhaps Justice Scalia got this case right. Justice Thomas, who wrote the majority opinion in *Brand X* has come to agree with Justice Scalia's criticisms.

In summary, *Chevron* applied only when an agency (1) interpreted a statute, (2) that the agency administered, and (3) *that the courts had not already interpreted*.

iv. Can the Agency Interpret the Statute (or the Major Questions Doctrine)?

But it was not enough that an agency interpreted statutory language in an act the agency administered and the courts had not yet interpreted. The Supreme Court added another layer of complexity to the *Chevron* doctrine when it developed the major questions doctrine. This doctrine directed a court *not* to apply *Chevron* analysis to an agency's interpretation of statutory language when the agency claims power to resolve a matter of great political significance or a matter of economic significance.

In *Chevron*, the Court had rationalized deference to an agency's interpretation by suggesting that when Congress enacts laws with gaps and ambiguities, Congress implicitly intends to delegate interpretive authority of that law to the administering agency. Beginning in 1994 and then again in 2000, however, the Supreme Court rejected, or at least narrowed, this implicit-delegation rationale in two cases. First, in *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994), the Supreme Court cited *Chevron*, but then reasoned that Congress would not use the term "modify" to grant sweeping authority to the Federal Communications Commission. Then, in *Food & Drug Administration v. Brown & Williamson Tobacco Corp*. 529 U.S. 120 (2000), the Court explained that in extraordinary cases involving statutory ambiguity it was likely that Congress did not intend to delegate rulemaking authority to the agency. As the Court noted:

> Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.

Id. at 159. In these *extraordinary cases*, the Court requires a clear statement from Congress that it intended to delegate interpretive authority to the agency. Implicit delegation is insufficient.

In 2022, the Supreme Court officially began using the term "major questions doctrine" in *West Virginia v. Environmental Protection Agency*, 597 U.S. 697 (2022). In that case, the Court transformed the doctrine into something never seen before.

The background involved three administrations. Under President Obama, the EPA had introduced the Clean Power Plan ("CPP") rule in 2015 under section 111 of the Clean Air Act.

That section allows the EPA to determine the "best system of emission reduction … that has been adequately demonstrated" to regulate both new and existing sources of air pollutants. *Id*. at 709 (quoting § 7411(a)(1)). Obama's EPA determined that the best way to reduce emissions would be to require *generation shifting*. Under generation shifting, polluting power plants would be replaced with cleaner energy sources, such as wind and solar. When the CPP was challenged, the Supreme Court stayed its implementation.

When President Trump took office, the EPA replaced the CPP with the Affordable Clean Energy ("ACE") rule. Twenty-seven states and private interest groups sued. The D.C. Circuit rejected ACE as arbitrary and capricious, vacated the EPA's repeal of the CPP, and remanded the case to the agency for further consideration.

When President Biden took office, the EPA declined to reissue the CPP because it was now obsolete; the industry had already met CPP goals without governmental regulation. Oddly, even though the CPP was not reissued and not in effect, the Court reviewed its legality anyway. The issue for the Court was whether the EPA's interpretation of "the best system of emission reduction" in the CPP was *ultra vires*.

Writing for the majority, Chief Justice Roberts rejected the EPA's interpretation. *Id*. at 735. In so doing, he never mentioned *Chevron.* Instead, Chief Justice Roberts noted that this was a major questions case, which made the Court "'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there." *Id*. at 723. The EPA thus needed "clear congressional authorization" to implement the CPP. Because Congress had not provided clear authorization, the CPP—a plan not even in effect—was invalid.

Chief Justice Roberts applied a two-step inquiry for using the major questions doctrine. First, a court determines whether the agency action presents an extraordinary case because it touches on a question of major economic or political significance. If so, then the court looks for specific language authorizing the agency action. In short, the majority replaced the *Chevron* two-step with the new major questions two-step. But Chief Justice Roberts never specified which cases were *extraordinary*.

In his concurrence, Justice Gorsuch identified the following four types of extraordinary cases: when the agency claims power (1) to resolve a matter of great political significance, (2) to regulate a significant portion of the American economy, (3) "to require billions of dollars in spending by private persons or entities," or (4) "to intrude into an area that is the particular domain of state law." *Id*. at 743–44 (Gorsuch, J., concurring). If any of these is present, then courts must determine whether Congress has clearly authorized the agency action. In other words, Congress must provide a clear statement if it wants an agency to resolve the oh so important issue. Because clear statements are almost always absent in these cases, when the major questions doctrine applies, it sounds a death knell to the agency's interpretation.

In summary, *Chevron* applied only when an agency (1) interpreted a statute, (2) that the agency administered, (3) that the courts had not already interpreted, and (4) *that was not extraordinary, however that was defined.*

v. How Did the Agency Interpret the Statute (or *Chevron* Step Zero)?

Rule: Pursuant to *Chevron* step zero, the process an agency used to interpret statutory language affected the standard of review.

But it was not enough that an agency interpreted statutory language in an act it administered, that courts had not already interpreted, and that was not extraordinary. Agencies promulgate rules using both legislative and non-legislative rulemaking. Legislative rulemaking includes formal rulemaking, notice and comment rulemaking, and publication rulemaking. Non-legislative rulemaking includes issuing guidance in the form of interpretive rules and policy statements. Agencies also adjudicate, using formal and informal adjudication. These processes involve varying degrees of procedural formality.

Using any of these processes, an agency might interpret statutory language. For example, an agency might interpret statutory language as part of a notice and comment rulemaking process, like the EPA did in *Chevron*. An agency might interpret statutory language during a formal adjudication. Or an agency might interpret statutory language when drafting an internal policy manual, when writing a letter to a regulated entity, or in some other guidance document. And, the Supreme Court held that the level of deference a court should give to an agency's interpretation depended, in part, on the process the agency used to reach its interpretation.

For formal rulemaking, formal adjudication, publication rulemaking, and notice and comment rulemaking, Congress gave the agency the authority to act with the force of law (meaning regulated entities are subject to legal action if they fail to follow the rule), and the agency used that authority to act. If Congress has given the agency the authority to act with the force of law, Congress likely intended courts to respect the agency's interpretations of the law they are implementing. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). In contrast, for non-legislative rulemaking, even if Congress gave the agency the authority to act with the force of law, the agency did not use that process to issue the rule; hence, deference is not required. *Id*. at 230–31.

Moreover, formal rulemaking, formal adjudication, publication rulemaking, and notice and comment rulemaking typically involve more deliberative procedures than informal adjudication and non-legislative rulemaking. If one purpose of judicial review is to cure procedural shortfalls that limit neutral and fair decision making, then limiting *Chevron*'s applicability to more formal processes made sense. If an agency proceeds informally during which the protections of neutral and fair decision making are more limited, then a more intensive judicial review standard (less deference) would seem appropriate. If, instead, the agency proceeds formally in a way that facilitates neutral and fair decisionmaking, then a less intensive judicial review standard (more deference) would seem appropriate.

Terminology: An agency action has *force of law* when a person or entity is subject to legal action for failing to abide by it.

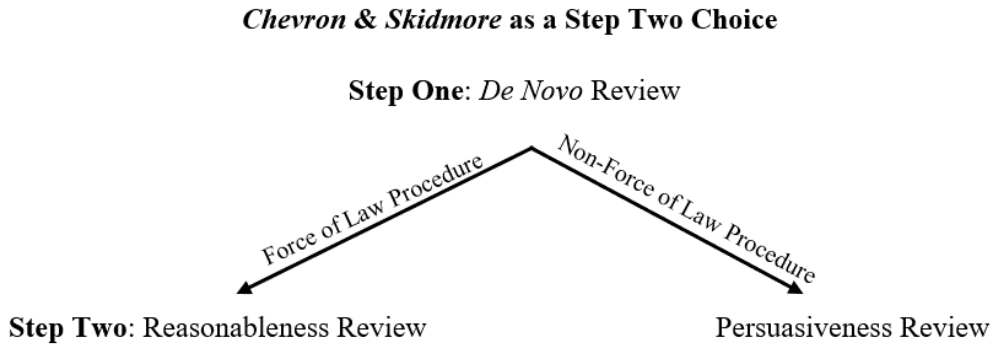
In *Chevron*, the Supreme Court did not indicate, expressly or implicitly, whether the formality of the agency's procedures affected the applicability of the two-step analysis. Before the Court decided *Chevron*, however, the Court had factored the deliberative nature of the agency's interpretive process into the analysis. Under *Skidmore*'s power-to-persuade test, interpretations made through a more deliberate process, such as notice and comment rulemaking, were considered more persuasive than interpretations made through a less deliberative process, such as non-legislative rulemaking.

Immediately after the Supreme Court decided *Chevron*, the Court did not distinguish among the types of agency decisionmaking. Rather, the Court applied its two-step analysis to all types of agency interpretations, regardless of the procedure involved. Over time, the type of procedure became relevant. Beginning in 2000, in two cases, the Court limited *Chevron*'s applicability based, in part, upon the type of procedure the agency used to reach the interpretation being challenged.

First, in *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), the Supreme Court decided that *Chevron* analysis did not apply to review the validity of an interpretation issued in an opinion letter. For the first time since *Chevron* had been decided, the Court found the type of procedure the agency used to reach its interpretation to be relevant to the standard of review the Court would use. The Court reasoned that the Division's opinion letter was not entitled to *Chevron* analysis because it lacked *force of law*; it had been issued through an informal, non-legislative process. Agency actions that are more deliberate, such as formal adjudication and notice and comment rulemaking, have *force of law*, while less deliberate actions, such as "opinion letters … policy statements, agency manuals, and enforcement guidelines … lack the force of law." *Id*. The Court explained that "interpretations contained in [informal] formats such as opinion letters are 'entitled to respect' under our decision in *Skidmore* … but only to the extent that those interpretations have the 'power to persuade.'" *Id*.

Thus, *Christensen* divided agency interpretations into two, well-defined categories: those subject to *Chevron* analysis—the force of law category—and those subject to *Skidmore* analysis—the non-force of law category. This was a simple, albeit formalistic test: courts should apply *Chevron* analysis to an agency's interpretation of statutory language when an agency used formal procedures (including formal adjudication, formal rulemaking, and notice and comment rulemaking), and courts should apply *Skidmore* analysis when an agency used less formal procedures (including interpretive rules, policy statements, and ruling letters). Figure 2 shows this breakdown.

Fig. 2



In summary, *Chevron* applied only when an agency (1) interpreted a statute, (2) that the agency administered, (3) that the courts had not already interpreted, (4) that was not extraordinary, and (5) *during which the agency used force of law procedures*. If the agency used informal rulemaking, the courts applied *Skidmore*.

* * *

d. Standard of Review Post-Chevron: Loper Bright Analysis

Beginning in 2016, the Supreme Court reversed course entirely. The Court stopped citing and relying on *Chevron*. It disappeared literally overnight. Conservative members of Congress had tried repeatedly, albeit unsuccessfully, to legislatively overrule it. The Court did what Congress could not. In 2023, the Court granted certiorari on a pair of cases that were extremely unimportant substantively but would prove to be *Chevron*'s downfall.

As you read the case, identify why the majority overruled *Chevron* and what exactly the majority overruled: step one, step two, both? What about *Chevron*'s limitations; did any of them survive?

Loper Bright Enterprises v. Raimondo
Supreme Court of the United States
603 U.S. __ (2024)

❖ JUSTICE ROBERTS delivered the opinion of the Court [in which THOMAS, ALITO, GORSUCH, KAVANAUGH, and BARRETT JJ., concur].

¶1 Since our decision in *Chevron*, we have sometimes required courts to defer to "permissible" agency interpretations of the statutes those agencies administer—even when a reviewing court reads the statute differently. In these cases we consider whether that doctrine should be overruled.

I

¶2 Our *Chevron* doctrine requires courts to use a two-step framework to interpret statutes administered by federal agencies. [A] court must first assess "whether Congress has directly spoken to the precise question at issue." If, and only if, congressional intent is "clear," that is the end of the inquiry. But if the court determines that "the statute is silent or ambiguous with respect to the specific issue" at hand, the court must, at *Chevron*'s second step, defer to the agency's interpretation if it "is based on a permissible construction of the statute." The reviewing courts in each of the cases before us applied *Chevron*'s framework to resolve in favor of the Government challenges to the same agency rule.

A

¶3 Before 1976, unregulated foreign vessels dominated fishing in the international waters off the U.S. Coast, which began just 12 nautical miles offshore. Recognizing the resultant overfishing and the need for sound management of fishery resources, Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act (MSA). The MSA . . . claimed "exclusive fishery management authority over all fish" within [200 nautical miles beyond the U.S. territorial sea], known as the "exclusive economic zone." The National Marine Fisheries Service (NMFS) administers the MSA under a delegation from the Secretary of Commerce.

¶4 The MSA established eight regional fishery management councils [that] develop fishery management plans . . . which the NMFS approves and promulgates as final regulations. . . .

¶5 Relevant here, a [fishery management] plan may . . . require that "one or more observers be carried on board" domestic vessels "for the purpose of collecting data necessary for the conservation and management of the fishery." §1853(b)(8). . . .

¶6 The MSA does not contain . . . terms addressing whether Atlantic herring fishermen may be required to bear costs associated with any observers a plan may mandate. And at one point, NMFS fully funded the observer coverage the New England Fishery Management Council required in its plan for the Atlantic herring fishery. In 2013, however, the council proposed amending its fishery management plans to empower it to require fishermen to pay for observers if federal funding became unavailable. Several years later, NMFS promulgated a rule approving the amendment. See 85 Fed. Reg. 7414 (2020). . . .

¶7 NMFS estimated that the cost of such an observer would be up to $710 per day, reducing annual returns to the vessel owner by up to 20 percent.

B

¶8 Petitioners Loper Bright Enterprises, Inc., [*et al*.] are family businesses that operate in the Atlantic herring fishery. In February 2020, they challenged the Rule under the MSA . . . . In relevant part, they argued that the MSA does not authorize NMFS to mandate that they pay for observers required by a fishery management plan. The District Court granted summary judgment to the Government. It concluded that the MSA authorized the Rule, but noted that even if these petitioners' "arguments were enough to raise an ambiguity in the statutory text," deference to the

agency's interpretation would be warranted under *Chevron*.

¶9 A divided panel of the D. C. Circuit affirmed. . . . [at] *Chevron*'s second step and deferred to the agency's interpretation as a "reasonable" construction of the MSA. . . .

¶10 We granted certiorari in . . . limited to the question whether *Chevron* should be overruled or clarified.

II

A

¶11 Article III of the Constitution assigns to the Federal Judiciary the responsibility and power to adjudicate "Cases" and "Controversies"—concrete disputes with consequences for the parties involved. . . .

¶12 In the foundational decision of *Marbury v. Madison*, Chief Justice Marshall famously declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is." And in the following decades, the Court understood "interpret[ing] the laws, in the last resort," to be a "solemn duty" of the Judiciary. When the meaning of a statute was at issue, the judicial role was to "interpret the act of Congress, in order to ascertain the rights of the parties."

¶13 The Court also recognized from the outset, though, that exercising independent judgment often included according due respect to Executive Branch interpretations of federal statutes. . . .

¶14 Such respect was thought especially warranted when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time. That is because "the longstanding 'practice of the government'"—like any other interpretive aid—"can inform [a court's] determination of 'what the law is.'" The Court also gave "the most respectful consideration" to Executive Branch interpretations simply because "[t]he officers concerned [were] usually able men, and masters of the subject," who were "[n]ot unfrequently . . . the draftsmen of the laws they [were] afterwards called upon to interpret."

¶15 "Respect," though, was just that. The views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it. Whatever respect an Executive Branch interpretation was due, a judge "certainly would not be bound to adopt the construction given by the head of a department." Otherwise, judicial judgment would not be independent at all. As Justice Story put it, "in cases where [a court's] own judgment . . . differ[ed] from that of other high functionaries," the court was "not at liberty to surrender, or to waive it.". . . .

B

¶16 During [the New Deal], the Court often treated agency determinations of fact as binding on the courts, provided that there was "evidence to support the findings." "When the legislature itself acts within the broad field of legislative discretion," the Court reasoned, "its

determinations are conclusive." Congress could therefore "appoint[ ] an agent to act within that sphere of legislative authority" and "endow the agent with power to make *findings of fact* which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily."

¶17 But the Court did not extend similar deference to agency resolutions of questions of law. It instead made clear, repeatedly, that "[t]he interpretation of the meaning of statutes, as applied to justiciable controversies," was "exclusively a judicial function.". . .

¶18 Perhaps most notably along those lines, in *Skidmore v. Swift & Co.*, 323 U.S.134 (1944), the Court explained that the "interpretations and opinions" of the relevant agency, "made in pursuance of official duty" and "based upon . . . specialized experience," "constitute[d] a body of experience and informed judgment to which courts and litigants [could] properly resort for guidance," even on legal questions. "The weight of such a judgment in a particular case," the Court observed, would "depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

¶19 On occasion, to be sure, the Court applied deferential review upon concluding that a particular statute empowered an agency to decide how a broad statutory term applied to specific facts found by the agency. For example, in *Gray v. Powell*, 314 U.S.402 (1941), the Court deferred to an administrative conclusion that a coal-burning railroad that had arrangements with several coal mines was not a coal "producer" under the Bituminous Coal Act of 1937. Congress had "specifically" granted the agency the authority to make that determination. The Court thus reasoned that "[w]here, as here, a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched" so long as the agency's decision constituted "a sensible exercise of judgment." Similarly, in *NLRB v. Hearst Publications, Inc.*, 322 U.S.111 (1944), the Court deferred to the determination of the National Labor Relations Board that newsboys were "employee[s]" within the meaning of the National Labor Relations Act. The Act had, in the Court's judgment, "assigned primarily" to the Board the task of marking a "definitive limitation around the term 'employee.'" The Court accordingly viewed its own role as "limited" to assessing whether the Board's determination had a "'warrant in the record' and a reasonable basis in law."

¶20 Such deferential review, though, was cabined to factbound determinations like those at issue in *Gray* and *Hearst*. Neither *Gray* nor *Hearst* purported to refashion the longstanding judicial approach to questions of law. In *Gray*, after deferring to the agency's determination that a particular entity was not a "producer" of coal, the Court went on to discern, based on its own reading of the text, whether another statutory term—"other disposal" of coal—encompassed a transaction lacking a transfer of title. The Court evidently perceived no basis for deference to the agency with respect to that pure legal question. And in *Hearst*, the Court proclaimed that "[u]ndoubtedly questions of statutory interpretation . . . are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute." At least with respect to questions it regarded as involving "statutory interpretation," the Court thus did not disturb the traditional rule. It merely thought that a different approach should

apply where application of a statutory term was sufficiently intertwined with the agency's factfinding. . . .[3]

C

¶21 Congress in 1946 enacted the APA . . . [which] delineates the basic contours of judicial review of such action. As relevant here, Section 706 directs that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. §706. It further requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law." §706(2)(A).

¶22 The APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment. It specifies that courts, not agencies, will decide "*all* relevant questions of law" arising on review of agency action, §706 (emphasis added)—even those involving ambiguous laws—and set aside any such action inconsistent with the law as they interpret it. And it prescribes no deferential standard for courts to employ in answering those legal questions. That omission is telling, because Section 706 *does* mandate that judicial review of agency policymaking and factfinding be deferential. See §706(2)(A) (agency action to be set aside if "arbitrary, capricious, [or] an abuse of discretion"); §706(2)(E) (agency factfinding in formal proceedings to be set aside if "unsupported by substantial evidence").

¶23 In a statute designed to "serve as the fundamental charter of the administrative state," Congress surely would have articulated a similarly deferential standard applicable to questions of law had it intended to depart from the settled pre-APA understanding that deciding such questions was "exclusively a judicial function." But nothing in the APA hints at such a dramatic departure. On the contrary, by directing courts to "interpret constitutional and statutory provisions" without differentiating between the two, Section 706 makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are not entitled to deference. Under the APA, it thus "remains the responsibility of the court to decide whether the law means what the agency says."

¶24 The text of the APA means what it says. And a look at its history if anything only underscores that plain meaning. According to both the House and Senate Reports on the legislation, Section 706 "provide[d] that questions of law are for courts rather than agencies to decide in the last analysis." H. R. Rep. No. 1980, 79th Cong., 2d Sess., 44 (1946) (emphasis

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[3] The dissent plucks out *Gray*, *Hearst*, and—to "gild the lily," in its telling—three more 1940s decisions, claiming they reflect the relevant historical tradition of judicial review. But it has no substantial response to the fact that *Gray* and *Hearst* themselves endorsed, implicitly in one case and explicitly in the next, the traditional rule that "questions of statutory interpretation . . . are for the courts to resolve, giving appropriate weight"—not outright deference—"to the judgment of those whose special duty is to administer the questioned statute." *Hearst*, 322 U. S., at 130-131. . . .

added); accord, S. Rep. No. 752, 79th Cong., 1st Sess., 28 (1945). Some of the legislation's most prominent supporters articulated the same view. See 92 Cong. Rec. 5654 (1946) (statement of Rep. Walter); P. McCarran, Improving "Administrative Justice": Hearings and Evidence; Scope of Judicial Review, 32 A. B. A. J. 827, 831 (1946). Even the Department of Justice—an agency with every incentive to endorse a view of the APA favorable to the Executive Branch—opined after its enactment that Section 706 merely "restate[d] the present law as to the scope of judicial review." Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 108 (1947). That "present law," as we have described, adhered to the traditional conception of the judicial function. . . .

¶25 The APA, in short, incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions. In exercising such judgment, though, courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes. Such interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" consistent with the APA. *Skidmore*, 323 U. S., at 140. And interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning. . . .

III

A

¶26 *Chevron*, decided in 1984 by a bare quorum of six Justices, triggered a marked departure from the traditional approach. . . . Without mentioning the APA, or acknowledging any doctrinal shift, the Court articulated a second step applicable when "Congress ha[d] not directly addressed the precise question at issue." In such a case—that is, a case in which "the statute [was] silent or ambiguous with respect to the specific issue" at hand—a reviewing court could not "simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." A court instead had to set aside the traditional interpretive tools and defer to the agency if it had offered "a permissible construction of the statute," even if not "the reading the court would have reached if the question initially had arisen in a judicial proceeding[.]" That directive was justified, according to the Court, by the understanding that administering statutes "requires the formulation of policy" to fill statutory "gap[s]"; by the long judicial tradition of according "considerable weight" to Executive Branch interpretations; and by a host of other considerations, including the complexity of the regulatory scheme, EPA's "detailed and reasoned" consideration, the policy-laden nature of the judgment supposedly required, and the agency's indirect accountability to the people through the President. . . .

¶27 [With time,] the Court decided that *Chevron* rested on "a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.". . .

B

1

¶28 *Chevron* defies the command of the APA that "the reviewing court"—not the agency whose action it reviews—is to "decide all relevant questions of law" and "interpret . . . statutory provisions." § 706 (emphasis added). It requires a court to ignore, not follow, "the reading the court would have reached" had it exercised its independent judgment as required by the APA. And although exercising independent judgment is consistent with the "respect" historically given to Executive Branch interpretations, *Chevron* insists on much more. It demands that courts mechanically afford binding deference to agency interpretations, including those that have been inconsistent over time. Still worse, it forces courts to do so even when a pre-existing judicial precedent holds that the statute means something else—unless the prior court happened to also say that the statute is "unambiguous." *Brand X*, 545 U. S., at 982. That regime is the antithesis of the time honored approach the APA prescribes. In fretting over the prospect of "allow[ing]" a judicial interpretation of a statute "to override an agency's" in a dispute before a court, *Chevron* turns the statutory scheme for judicial review of agency action upside down.

¶29 *Chevron* cannot be reconciled with the APA, as the Government and the dissent contend, by presuming that statutory ambiguities are implicit delegations to agencies. Presumptions have their place in statutory interpretation, but only to the extent that they approximate reality. *Chevron*'s presumption does not, because "[a]n ambiguity is simply not a delegation of law-interpreting power. *Chevron* confuses the two." As *Chevron* itself noted, ambiguities may result from an inability on the part of Congress to squarely answer the question at hand, or from a failure to even "consider the question" with the requisite precision. In neither case does an ambiguity necessarily reflect a congressional intent that an agency, as opposed to a court, resolve the resulting interpretive question. And many or perhaps most statutory ambiguities may be unintentional. . . .

¶30 Courts, after all, routinely confront statutory ambiguities in cases having nothing to do with *Chevron*—cases that do not involve agency interpretations or delegations of authority.

¶31 In an agency case as in any other, though, even if some judges might (or might not) consider the statute ambiguous, there is a best reading all the same—"the reading the court would have reached" if no agency were involved. *Chevron*, 467 U. S., at 843, n. 11. It therefore makes no sense to speak of a "permissible" interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible.

¶32 Perhaps most fundamentally, *Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do. . . . The very point of the traditional tools of statutory construction—the tools courts use every day—is to resolve statutory ambiguities. That is no less true when the ambiguity is about the scope of an agency's own power—perhaps the occasion on which abdication in favor of the agency is least appropriate.

2

¶33 The Government responds that Congress must generally intend for agencies to resolve

statutory ambiguities because agencies have subject matter expertise regarding the statutes they administer; because deferring to agencies purportedly promotes the uniform construction of federal law; and because resolving statutory ambiguities can involve policymaking best left to political actors, rather than courts. But none of these considerations justifies *Chevron*'s sweeping presumption of congressional intent. . . .

¶34 [E]ven when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to the agency. Congress expects courts to handle technical statutory questions. . . . In an agency case in particular, the court will go about its task with the agency's "body of experience and informed judgment," among other information, at its disposal. *Skidmore*, 323 U.S., at 140. And although an agency's interpretation of a statute "cannot bind a court," it may be especially informative "to the extent it rests on factual premises within [the agency's] expertise." Such expertise has always been one of the factors which may give an Executive Branch interpretation particular "power to persuade, if lacking power to control." *Skidmore*, 323 U.S., at 140. . . .

¶35 Nor does a desire for the uniform construction of federal law justify *Chevron*. Given inconsistencies in how judges apply *Chevron*, it is unclear how much the doctrine as a whole (as opposed to its highly deferential second step) actually promotes such uniformity. In any event, there is little value in imposing a uniform interpretation of a statute if that interpretation is wrong. We see no reason to presume that Congress prefers uniformity for uniformity's sake over the correct interpretation of the laws it enacts.

¶36 The view that interpretation of ambiguous statutory provisions amounts to policymaking suited for political actors rather than courts is especially mistaken, for it rests on a profound misconception of the judicial role. It is reasonable to assume that Congress intends to leave policymaking to political actors. But resolution of statutory ambiguities involves legal interpretation. That task does not suddenly become policymaking just because a court has an "agency to fall back on." . . .

3

¶37 In truth, *Chevron*'s justifying presumption is, as Members of this Court have often recognized, a fiction. So we have spent the better part of four decades imposing one limitation on *Chevron* after another, pruning its presumption on the understanding that "where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is 'inapplicable.'"

¶38 Consider the many refinements we have made in an effort to match *Chevron*'s presumption to reality. We have said that *Chevron* applies only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S., at 226-227. In practice, that threshold requirement—sometimes called *Chevron* "step zero"—largely limits *Chevron* to "the fruits of notice-and-comment rulemaking or formal adjudication." But even when those processes are used, . . . *Chevron* does not apply if the question

at issue is one of "deep 'economic and political significance.'" *King v. Burwell*, 576 U.S. 473, 486 (2015). We have instead expected Congress to delegate such authority "expressly" if at all for "[e]xtraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s],'" *West Virginia v. EPA*, 597 U.S. 697 (2022). . . .

¶39 This Court, for its part, has not deferred to an agency interpretation under *Chevron* since 2016. But *Chevron* remains on the books. So litigants must continue to wrestle with it, and lower courts—bound by even our crumbling precedents—understandably continue to apply it. . . .

¶40 [O]ur intricate *Chevron* doctrine has been nothing more than a distraction from the question that matters: Does the statute authorize the challenged agency action? And at worst, it has required courts to violate the APA by yielding to an agency the express responsibility, vested in "the reviewing *court*," to "decide all relevant questions of law" and "interpret . . . statutory provisions." § 706 (emphasis added). . . .

¶41 [Next, the majority reasoned that *Chevron* need not be upheld under *stare decisis* because the doctrine was unworkable, the decision's reasoning was weak, and the opinion did not foster reasonable reliance. By refusing to uphold *Chevron*], however, we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology. Mere reliance on *Chevron* cannot constitute a "'special justification'" for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, "just an argument that the precedent was wrongly decided." That is not enough to justify overruling a statutory precedent.

¶42 The dissent ends by quoting *Chevron*: "'Judges are not experts in the field.'" That depends, of course, on what the "field" is. If it is legal interpretation, that has been, "emphatically," "the province and duty of the judicial department" for at least 221 years. *Marbury*, 5 U.S. 137. . . .

¶43 *Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. . . . [C]ourts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.

¶44 Because the [reviewing courts] relied on *Chevron* in deciding whether to uphold the Rule, their judgments are vacated, and the cases are remanded for further proceedings consistent with this opinion.

❖ [The concurring opinions from THOMAS, J., and GORSUCH, J., are omitted].

❖ KAGAN, J., filed a dissenting opinion, which SOTOMAYOR, and JACKSON,* JJ., joined.

¶45 For 40 years, *Chevron* has served as a cornerstone of administrative law, allocating responsibility for statutory construction between courts and agencies. Under *Chevron*, a court uses all its normal interpretive tools to determine whether Congress has spoken to an issue. If the court finds Congress has done so, that is the end of the matter; the agency's views make no difference. But if the court finds, at the end of its interpretive work, that Congress has left an ambiguity or gap, then a choice must be made. Who should give content to a statute when Congress's instructions have run out? Should it be a court? Or should it be the agency Congress has charged with administering the statute? The answer *Chevron* gives is that it should usually be the agency, within the bounds of reasonableness. That rule has formed the backdrop against which Congress, courts, and agencies—as well as regulated parties and the public—all have operated for decades. It has been applied in thousands of judicial decisions. It has become part of the warp and woof of modern government, supporting regulatory efforts of all kinds—to name a few, keeping air and water clean, food and drugs safe, and financial markets honest.

¶46 And the rule is right. This Court has long understood *Chevron* deference to reflect what Congress would want, and so to be rooted in a presumption of legislative intent. Congress knows that it does not—in fact cannot—write perfectly complete regulatory statutes. It knows that those statutes will inevitably contain ambiguities that some other actor will have to resolve, and gaps that some other actor will have to fill. And it would usually prefer that actor to be the responsible agency, not a court. Some interpretive issues arising in the regulatory context involve scientific or technical subject matter. Agencies have expertise in those areas; courts do not. Some demand a detailed understanding of complex and interdependent regulatory programs. Agencies know those programs inside-out; again, courts do not. And some present policy choices, including trade-offs between competing goods. Agencies report to a President, who in turn answers to the public for his policy calls; courts have no such accountability and no proper basis for making policy. And of course Congress has conferred on that expert, experienced, and politically accountable agency the authority to administer—to make rules about and otherwise implement—the statute giving rise to the ambiguity or gap. Put all that together and deference to the agency is the almost obvious choice, based on an implicit congressional delegation of interpretive authority. We defer, the Court has explained, "because of a presumption that Congress" would have "desired the agency (rather than the courts)" to exercise "whatever degree of discretion" the statute allows.

¶47 Today, the Court flips the script: It is now "the courts (rather than the agency)" that will wield power when Congress has left an area of interpretive discretion. A rule of judicial humility gives way to a rule of judicial hubris. . . . In one fell swoop, the majority today gives itself exclusive power over every open issue—no matter how expertise-driven or policy-laden—involving the meaning of regulatory law. As if it did not have enough on its plate, the majority turns itself into the country's administrative czar. It defends that move as one (suddenly) required by the (nearly 80-year-old) Administrative Procedure Act. But the Act makes no such demand.

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* Justice Jackson did not participate in the consideration or decision in *Loper Bright* but joined the companion case, *Relentless, Inc. v. Department of Commerce*.

Today's decision is not one Congress directed. It is entirely the majority's choice. . . .

I

¶48 Begin with the problem that gave rise to *Chevron* (and also to its older precursors): The regulatory statutes Congress passes often contain ambiguities and gaps. Sometimes they are intentional. . . . Sometimes, though, the gaps or ambiguities are what might be thought of as predictable accidents. They may be the result of sloppy drafting, a not infrequent legislative occurrence. Or they may arise from the well-known limits of language or foresight. "The subject matter" of a statutory provision may be too "specialized and varying" to "capture in its every detail." Or the provision may give rise, years or decades down the road, to an issue the enacting Congress could not have anticipated. Whichever the case—whatever the reason—the result is to create uncertainty about some aspect of a provision's meaning.

¶49 Consider a few examples from the caselaw. They will help show what a typical *Chevron* question looks like—or really, what a typical *Chevron* question is. Because when choosing whether to send some class of questions mainly to a court, or mainly to an agency, abstract analysis can only go so far; indeed, it may obscure what matters most. So I begin with the concrete:

- Under the Public Health Service Act, the Food and Drug Administration (FDA) regulates "biological product[s]," including "protein[s]." 42 U.S.C. §262(i)(1). When does an alpha amino acid polymer qualify as such a "protein"? Must it have a specific, defined sequence of amino acids?

- Under the Endangered Species Act, the Fish and Wildlife Service must designate endangered "vertebrate fish or wildlife" species, including "distinct population segment[s]" of those species. 16 U.S.C. §1532(16); see §1533. What makes one population segment "distinct" from another? Must the Service treat the Washington State population of western gray squirrels as "distinct" because it is geographically separated from other western gray squirrels? Or can the Service take into account that the genetic makeup of the Washington population does not differ markedly from the rest?

- Under the Medicare program, reimbursements to hospitals are adjusted to reflect "differences in hospital wage levels" across "geographic area[s]." 42 U.S.C. §1395ww(d)(3)(E)(i). How should the Department of Health and Human Services measure a "geographic area"? By city? By county? By metropolitan area?

- Congress directed the Department of the Interior and the Federal Aviation Administration to reduce noise from aircraft flying over Grand Canyon National Park—specifically, to "provide for substantial restoration of the natural quiet." §3(b)(1), 101 Stat. 676; see §3(b)(2). How much noise is consistent with "the natural quiet"? And how much of the park, for how many hours a day, must be that quiet for the "substantial restoration" requirement to be met?

- Or take *Chevron* itself. In amendments to the Clean Air Act, Congress told States to require permits for modifying or constructing "stationary sources" of air pollution. 42 U.S.C. §7502(c)(5). Does the term "stationary source[]" refer to each pollution-emitting piece of equipment within a plant? Or does it refer to the entire plant, and thus allow escape from the permitting requirement when increased emissions from one piece of equipment are offset by reductions from another?

¶50 In each case, a statutory phrase has more than one reasonable reading. And Congress has not chosen among them: It has not, in any real-world sense, "fixed" the "single, best meaning" at "the time of enactment" (to use the majority's phrase). A question thus arises: Who decides which of the possible readings should govern?

¶51 This Court has long thought that the choice should usually fall to agencies, with courts broadly deferring to their judgments. . . .

¶52 The next question is why. For one, because agencies often know things about a statute's subject matter that courts could not hope to. The point is especially stark when the statute is of a "scientific or technical nature." Agencies are staffed with "experts in the field" who can bring their training and knowledge to bear on open statutory questions. Consider, for example, the first bulleted case above. When does an alpha amino acid polymer qualify as a "protein"? I don't know many judges who would feel confident resolving that issue. (First question: What even is an alpha amino acid polymer?) But the FDA likely has scores of scientists on staff who can think intelligently about it, maybe collaborate with each other on its finer points, and arrive at a sensible answer. Or take the perhaps more accessible-sounding second case, involving the Endangered Species Act. Deciding when one squirrel population is "distinct" from another (and thus warrants protection) requires knowing about species more than it does consulting a dictionary. How much variation of what kind—geographic, genetic, morphological, or behavioral—should be required? A court could, if forced to, muddle through that issue and announce a result. But wouldn't the Fish and Wildlife Service, with all its specialized expertise, do a better job of the task—of saying what, in the context of species protection, the open-ended term "distinct" means? One idea behind the *Chevron* presumption is that Congress—the same Congress that charged the Service with implementing the Act—would answer that question with a resounding "yes."

¶53 A second idea is that Congress would value the agency's experience with how a complex regulatory regime functions, and with what is needed to make it effective. Let's stick with squirrels for a moment, except broaden the lens. In construing a term like "distinct" in a case about squirrels, the Service likely would benefit from its "historical familiarity" with how the term has covered the population segments of other species. Just as a common-law court makes better decisions as it sees multiple variations on a theme, an agency's construction of a statutory term benefits from its unique exposure to all the related ways the term comes into play. Or consider, for another way regulatory familiarity matters, the example about adjusting Medicare reimbursement for geographic wage differences. According to a dictionary, the term "geographic area" could be as large as a multi-state region or as small as a census tract. How to choose? It would make sense to gather hard information about what reimbursement levels each approach will produce, to explore the ease of administering each on a nationwide basis, to survey how regulators have dealt

with similar questions in the past, and to confer with the hospitals themselves about what makes sense. Congress knows the Department of Health and Human Services can do all those things—and that courts cannot.

¶54 Still more, *Chevron*'s presumption reflects that resolving statutory ambiguities, as Congress well knows, is "often more a question of policy than of law." The task is less one of construing a text than of balancing competing goals and values. Consider the statutory directive to achieve "substantial restoration of the [Grand Canyon's] natural quiet." Someone is going to have to decide exactly what that statute means for air traffic over the canyon. How many flights, in what places and at what times, are consistent with restoring enough natural quiet on the ground? That is a policy trade-off of a kind familiar to agencies—but peculiarly unsuited to judges. Or consider *Chevron* itself. As the Court there understood, the choice between defining a "stationary source" as a whole plant or as a pollution-emitting device is a choice about how to "reconcile" two "manifestly competing interests." The plantwide definition relaxes the permitting requirement in the interest of promoting economic growth; the device-specific definition strengthens that requirement to better reduce air pollution. Again, that is a choice a judge should not be making, but one an agency properly can. Agencies are "subject to the supervision of the President, who in turn answers to the public." So when faced with a statutory ambiguity, "an agency to which Congress has delegated policymaking responsibilities" may rely on an accountable actor's "views of wise policy to inform its judgments."

¶55 None of this is to say that deference to agencies is always appropriate. The Court over time has fine-tuned the *Chevron* regime to deny deference in classes of cases in which Congress has no reason to prefer an agency to a court. The majority treats those "refinements" as a flaw in the scheme, but they are anything but. Consider the rule that . . . an agency will not receive deference if it has reached its decision without using—or without using properly—its rulemaking or adjudicatory authority. [T]hat should not be surprising: Congress expects that authoritative pronouncements on a law's meaning will come from the procedures it has enacted to foster "fairness and deliberation" in agency decision-making. Or finally, think of the "extraordinary cases" involving questions of vast "economic and political significance" in which the Court has declined to defer. The theory is that Congress would not have left matters of such import to an agency, but would instead have insisted on maintaining control. So the *Chevron* refinements proceed from the same place as the original doctrine. Taken together, they give interpretive primacy to the agency when—but only when—it is acting, as Congress specified, in the heartland of its delegated authority.

¶56 That carefully calibrated framework "reflects a sensitivity to the proper roles of the political and judicial branches." Where Congress has spoken, Congress has spoken; only its judgments matter. And courts alone determine when that has happened: Using all their normal interpretive tools, they decide whether Congress has addressed a given issue. But when courts have decided that Congress has not done so, a choice arises. Absent a legislative directive, either the administering agency or a court must take the lead. And the matter is more fit for the agency. The decision is likely to involve the agency's subject-matter expertise; to fall within its sphere of regulatory experience; and to involve policy choices, including cost-benefit assessments and trade-offs between conflicting values. So a court without relevant expertise or experience, and without

warrant to make policy calls, appropriately steps back. The court still has a role to play: It polices the agency to ensure that it acts within the zone of reasonable options. But the court does not insert itself into an agency's expertise-driven, policy-laden functions. . . .

¶57 The majority makes two points in reply, neither convincing. First, it insists that "agencies have no special competence" in filling gaps or resolving ambiguities in regulatory statutes; rather, "[c]ourts do." Score one for self-confidence; maybe not so high for self-reflection or -knowledge. Of course courts often construe legal texts, hopefully well. And *Chevron*'s first step takes full advantage of that talent: There, a court tries to divine what Congress meant, even in the most complicated or abstruse statutory schemes. The deference comes in only if the court cannot do so—if the court must admit that standard legal tools will not avail to fill a statutory silence or give content to an ambiguous term. That is when the issues look like the ones I started off with: When does an alpha amino acid polymer qualify as a "protein"? How distinct is "distinct" for squirrel populations? What size "geographic area" will ensure appropriate hospital reimbursement? As between two equally feasible understandings of "stationary source," should one choose the one more protective of the environment or the one more favorable to economic growth? The idea that courts have "special competence" in deciding such questions whereas agencies have "no[ne]" is, if I may say, malarkey. Answering those questions right does not mainly demand the interpretive skills courts possess. Instead, it demands one or more of: subject-matter expertise, long engagement with a regulatory scheme, and policy choice. It is courts (not agencies) that "have no special competence"—or even legitimacy—when those are the things a decision calls for.

¶58 Second, the majority complains that an ambiguity or gap does not "necessarily reflect a congressional intent that an agency" should have primary interpretive authority. On that score, I'll agree with the premise: It doesn't "necessarily" do so. *Chevron* is built on a presumption. . . . The presumed answer is [Congress would prefer the] agency. And as with any default rule, if Congress decides otherwise, all it need do is say. . . .

II

¶59 The majority's principal arguments are in a different vein. Around 80 years after the APA was enacted and 40 years after *Chevron*, the majority has decided that the former precludes the latter. . . . But neither the APA nor the pre-APA state of the law does the work that the majority claims. Both are perfectly compatible with *Chevron* deference.

¶60 Section 706 . . . states: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. §706. That text, contra the majority, "does not resolve the *Chevron* question.". . . The majority highlights the phrase "decide all relevant questions of law" (italicizing the "all"), and notes that the provision "prescribes no deferential standard" for answering those questions. But just as the provision does not prescribe a deferential standard of review, so too it does not prescribe a *de novo* standard of review . . . . In point of fact, Section 706 does not specify any standard of review for

construing statutes. . . .[2]

¶61 Section 706's references to standards of review in other contexts only further undercut the majority's argument. The majority notes that Section 706 requires deferential review for agency fact-finding and policy-making (under, respectively, a substantial-evidence standard and an arbitrary-and-capricious standard). Congress, the majority claims, "surely would have articulated a similarly deferential standard applicable to questions of law had it intended to depart" from *de novo* review. Surely? In another part of Section 706, Congress explicitly referred to *de novo* review. §706(2)(F). With all those references to standards of review—both deferential and not—running around Section 706, what is "telling" is the absence of any standard for reviewing an agency's statutory constructions. That silence left the matter, as noted above, "generally indeterminate": Section 706 neither mandates nor forbids *Chevron*-style deference.[3] . . . .

¶62 The majority's view of Section 706 likewise gets no support from how judicial review operated in the years leading up to the APA. That prior history matters: As the majority recognizes, Section 706 was generally understood to "restate[ ] the present law as to the scope of judicial review." . . .

¶63 *Gray v. Powell*, 314 U.S.4021 (1941), was then widely understood as "the leading case" on review of agency interpretations. There, the Court deferred to an agency construction of the term "producer" as used in a statutory exemption from price controls. Congress, the Court explained, had committed the scope of the exemption to the agency because its "experience in [the] field gave promise of a better informed, more equitable, adjustment of the conflicting interests." Accordingly, the Court concluded that it was "not the province of a court" to "substitute its judgment" for the agency's. Three years later, the Court decided *NLRB v. Hearst Publications, Inc*., 322 U.S.111 (1944), another acknowledged "leading case." The Court again deferred, this time to an agency's construction of the term "employee" in the National Labor Relations Act. The scope of that term, the Court explained, "belong[ed] to" the agency to answer based on its "[e]veryday experience in the administration of the statute." *Hearst*, 322 U. S., at 130. The Court therefore "limited" its review to whether the agency's reading had "warrant in the record and a reasonable basis in law.". . .[6]

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[2] The majority tries to buttress its argument with a stray sentence or two from the APA's legislative history, but the same response holds. As the majority notes, the House and Senate Reports each stated that Section 706 "provid[ed] that questions of law are for courts rather than agencies to decide in the last analysis." H. R. Rep. No. 1980, 79th Cong., 2d Sess., 44 (1946); S. Rep. No. 752, 79th Cong., 1st Sess., 28 (1945). But that statement also does not address the standard of review that courts should then use. . . .

[3] In [footnote 4], the majority raises the white flag on Section 706's text. Yes, it finally concedes, Section 706 does not say that *de novo* review is required for an agency's statutory construction. Rather, the majority says, "some things go without saying," and *de novo* review is such a thing. But why? What extra-textual considerations force us to read Section 706 the majority's way? In its footnote, the majority repairs only to history. But as I [explained], the majority also gets wrong the most relevant history, pertaining to how judicial review of agency interpretations operated in the years before the APA was enacted.

[6] [In footnote 3,] the majority says that I have "pluck[ed] out" *Gray* and *Hearst*, impliedly from a vast number of not-so-helpful cases. . . . *Gray* and *Hearst*, as noted above, were the leading cases about agency interpretations in the years before the APA's enactment. . . . The real "pluck[ing]" offense is the majority's—for taking a stray sentence

¶64 The majority's whole argument for overturning *Chevron* relies on Section 706. But the text of Section 706 does not support that result. And neither does the contemporaneous practice, which that text was supposed to reflect. So today's decision has no basis in the only law the majority deems relevant. It is grounded on air. . . .

IV

¶65 Judges are not experts in the field, and are not part of either political branch of the Government. Those were the days, when we knew what we are not. When we knew that as between courts and agencies, Congress would usually think agencies the better choice to resolve the ambiguities and fill the gaps in regulatory statutes. Because agencies are "experts in the field." And because they are part of a political branch, with a claim to making interstitial policy. And because Congress has charged them, not us, with administering the statutes containing the open questions. At its core, *Chevron* is about respecting that allocation of responsibility—the conferral of primary authority over regulatory matters to agencies, not courts.

¶66 Today, the majority does not respect that judgment. It gives courts the power to make all manner of scientific and technical judgments. It gives courts the power to make all manner of policy calls, including about how to weigh competing goods and values. It puts courts at the apex of the administrative process as to every conceivable subject—because there are always gaps and ambiguities in regulatory statutes, and often of great import. What actions can be taken to address climate change or other environmental challenges? What will the Nation's health-care system look like in the coming decades? Or the financial or transportation systems? What rules are going to constrain the development of A.I.? In every sphere of current or future federal regulation, expect courts from now on to play a commanding role. It is not a role Congress has given to them, in the APA or any other statute. It is a role this Court has now claimed for itself, as well as for other judges.

¶67 And that claim requires disrespecting, too, this Court's precedent. There are no special reasons, of the kind usually invoked for overturning precedent, to eliminate *Chevron* deference. And given *Chevron*'s pervasiveness, the decision to do so is likely to produce large-scale disruption. All that backs today's decision is the majority's belief that *Chevron* was wrong—that it gave agencies too much power and courts not enough. But shifting views about the worth of regulatory actors and their work do not justify overhauling a cornerstone of administrative law. In that sense too, today's majority has lost sight of its proper role.

¶68 And it is impossible to pretend that today's decision is a one-off, in either its treatment of agencies or its treatment of precedent. As to the first, this very Term presents yet another example of the Court's resolve to roll back agency authority, despite congressional direction to the contrary. See *SEC v. Jarkesy*, 603 U.S.___, 2024 U.S. LEXIS 2847 (2024). As to the second, just my own defenses of *stare decisis*—my own dissents to this Court's reversals of settled law—by

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from *Hearst* to suggest that both *Hearst* and *Gray* stand for the opposite of what they actually do.

now fill a small volume. See *Dobbs* [among other cases]. Once again, with respect, I dissent.

* * *

Points for Discussion

1. *Legal Issue*: What was the legal issue? Cite the operative section of the Act relevant to that issue.

2. *Language at Issue*: What language in that section were the parties arguing about? Do you know what each party wanted that language to mean? Why not? Where does the case go from here?

3. *Who should decide?*: Can Congress ever write statutes that avoid all ambiguities and gaps? Assuming not, who should determine how those gaps should be filled and how those ambiguities should be resolved? The majority argued that generalist, unelected judges should resolve these ambiguities and gaps. The dissent argued that technical experts subject to presidential oversight should do so.

4. *Section 706*: What does § 706 provide? Does that text clearly indicate that judges should decide these questions *de novo*? Does it clearly preclude or require deference to agency interpretations? How does the section's legislative history clear up the ambiguity according to the majority? The dissent?

5. *Gray & Hearst*: What was the law prior to the APA's enactment according to the majority? The dissent?

6. *Best Meaning*: Do statutory ambiguities have one single best meaning? Why did the majority think so while the dissent thought not? With whom to you agree?

7. *New Test*: How does *Loper Bright*'s new test alter the *Chevron* two-step? Under *Chevron* step one, courts must apply *de novo* review to see if Congress had spoken to the precise issue. Under *Chevron* step two and only if step one does not resolve the question, courts should defer to the agency's interpretation if it is reasonable, even if the court would prefer a different interpretation. What part of this two-step process did *Loper Bright* overrule, assuming the Court can overrule a methodology?

8. *The Dissent's Examples*: Are the dissent's examples questions of law or questions of law application (mixed questions of law and fact)? For example, the question of "when does an alpha amino acid polymer qualify as a 'protein'" seems to involve two questions: one a question of what is a "protein" and the second of whether an alpha amino acid polymer can qualify as such. In contrast, the question of "whether the term 'stationary source' refers to each pollution-emitting piece of equipment within a plant or to the entire plant" seems to involve just one question: what does "stationary source mean. Possibly, Justice Kagan's examples show when a court is likely to rely on an agency's "persuasive" interpretation

while Chevron shows an example of when a court is likely to decide the issue *de novo*.

9. Skidmore*'s Power-to-Persuade test*: How did the Court alter *Skidmore*'s power-to-persuade test? What factors did the Court add?

10. *Stemming the Floodgates*: The majority was clear that prior cases decided under the *Chevron* framework remain good law, including *Chevron* itself. The Court likely did not want to open the courts to numerous cases being relitigated. But what does this limitation mean? Is that party specific or is it issue specific? Could a regulated entity other than the Chevron company or, more likely, an association fighting for cleaner air successfully argue that the Clean Air Act requires the plant-wide definition rather than the smoke-stack definition? If the limitation is issue specific, then the answer is no, but if the limitation is party specific, then the answer is yes.

11. *Practical v. Doctrinal Change*: The Supreme Court has not relied on *Chevron* since 2016 and has not really mentioned it in many years, instead turning to *de novo* review. Further, since its inception, the Court has chipped away at *Chevron*'s domain by limiting the doctrine's application in ways we will see in the next chapter and that the majority mentions. Does *Loper Bright*'s decision to "overrule" *Chevron*'s second step really matter?

12. *Brand X & the Major Questions Doctrine*: The Court did not indicate whether these doctrines survived its *Loper Bright* decision. *Brand X* is based on *Chevron*. The major questions doctrine began as an exception to its application. Can either survive? If the holding of *Loper Bright* is that *de novo* review always applies, are these doctrines still necessary?

* * *

Test Your Understanding

The federal Coastal Bay Protection Act prohibits "man-made structures from being located less than 100 yards from a water source." The Act further provides:

§ 248: Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that in the face of rising levels of pollution to coastal water areas, the threat of pollution is especially threatening to coastal wildlife.

(b) It is, therefore, the purpose of this chapter to promote a clean coastal water environment.

The Environmental Protection Agency (the "EPA") promulgated a regulation that

provides, “any man-made industrial structure may not be located within 500 yards from a water source.” Assuming a regulated entity challenges the regulation, what is the likely result?

(A) The EPA will most likely win, as the agency’s interpretation is persuasive.

(B) The EPA will most likely win, as the agency’s interpretation is reasonable.

(C) The EPA will most likely lose, as the agency’s interpretation is arbitrary and capricious.

(D) The EPA will most likely lose under *de novo* review.

* * *

Applying What You’ve Learned

Problem 19B

Return to Problem 8C in Chapter 8. Because you had not yet studied standards of review, you were directed to assume the agency’s interpretation would get no deference from the court. Now that you’ve studied *Loper Bright*, let’s apply it.

Plaintiffs are logging companies that are located in the Pacific Northwest. They clear cut old growth forests. Clear cutting cuts and removes every tree in a specific area, thereby negatively impacting the habitat of some endangered species, specifically the red-cockaded woodpecker and the northern spotted owl. When their habitat is modified or degraded, these animals stop breeding, further injuring their population by reducing their numbers. However, there is no direct or physical injury to any individual animal or animals.

The Department of the Interior (the “DOI”), a federal agency, promulgated a regulation using notice and comment rulemaking. The regulation interprets the Endangered Species Act of 1973 (the “ESA”) to prohibit activities, like clear cutting, which significantly impair essential behavioral patterns, including breeding, feeding, and sheltering. Plaintiffs sued the DOI arguing that the interpretation of the ESA is *ultra vires*.

You work for the attorneys representing the plaintiffs. Your boss has asked you to draft the argument section of their brief. Both parties have moved for summary judgment. Use the questions below to outline your argument.

The facts are not in dispute. The standard of review is not in dispute: *Chevron* applies. Further, the parties have stipulated for purposes of this motion that plaintiffs' activity would be prohibited by the regulation, if it is valid. Your argument should address only whether the regulation is entitled to deference under *Chevron*, not whether the logging companies violated the ESA.

Relevant Materials

Legislation

AN ACT

to provide for the conservation of endangered and threatened species of fish, wildlife, and plants, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; FINDINGS; PURPOSES; POLICY

(a) SHORT TITLE—this Act may be cited as the "Endangered Species Act of 1973."

(b) FINDINGS.—The Congress finds and declares that —

> (1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation; . . .
>
> (2) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people; . . .
>
> (3) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.

(c) PURPOSES.—

> (1) The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of this section.

(d) POLICY.—

> (1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act. . . .

SECTION 2. DEFINITIONS

(a) For the purposes of this Act —

> (13) The term "person" means an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States. . . .
>
> (19) The term "take" means to harass, hunt, harm, trap, capture, shoot, wound, kill, or to attempt to engage in any such conduct.

SECTION 3: AGENCY POWERS

(a) GENERAL—

The Secretary of Department of the Interior ("Secretary") may issue such regulations as are necessary to interpret and implement this statute and conduct hearings as necessary to enforce this Act.

SECTION 9: PROHIBITED ACTS

(a) GENERAL.—

> (1) Except as provided [elsewhere in this Act], it shall be unlawful for any person subject to the jurisdiction of the United States to— . . .
>
> > (B) take any such species within the United States or the territorial sea of the United States[.]

(b) PENALTY.—

Any person who knowingly violates any provision of this Act may be imprisoned for up to six months and/or required to pay up to $10,000 for each violation.

Legislative History

Two bills, S. 1592 and S. 1983, were introduced in the Senate and referred to the

Commerce Committee. Neither bill included the word "harm" in its definition of "take," although the definitions otherwise closely resembled the one that appeared in the bill as ultimately enacted.

The definition of "take" that originally appeared in S. 1983 included "the destruction, modification, or curtailment of the habitat or range" of fish and wildlife. However, the Senate Commerce Committee's Subcommittee on Environment (“Subcommittee”) removed this phrase from the definition of "take" before S. 1983 went to the floor. During floor debates, Senator Tunney, the floor manager of the bill in the Senate, introduced a floor amendment to S. 1983 that added the word "harm" to the definition of "take," noting that this and accompanying amendments would "help to achieve the purposes of the bill." Senator Tunney stated:

> With this Act, we will be able to conserve habitats necessary to protect fish and wildlife from further destruction.
>
> Although most endangered species are threatened primarily by the destruction of their natural habitats, a significant portion of these animals are subject to predation by man for commercial, sport, consumption, or other purposes. The provisions of this bill will prohibit the commerce in or the importation, exportation, or taking of endangered species.

After S. 1983 passed the Senate, it was sent to the House. Designated H.R. 1613, the bill passed out of committee unchanged and was sent to the full chamber for consideration.

During debate in the House, floor manager, Representative Sullivan, stated:

> The principal threat to animals stems from destruction of their habitat. This bill will meet this problem by providing funds for acquisition of critical habitat. It will also enable the Department of Agriculture to cooperate with willing landowners who desire to assist in the protection of endangered species, but who are understandably unwilling to do so at excessive cost to themselves. Another hazard to endangered species arises from those who would capture or kill them for pleasure or profit. There is no way that Congress can make it less pleasurable for a person to take an animal, but Congress can certainly make it less profitable for them to do so.

The Senate and House Committee Reports accompanying the bills that became the Endangered Species Act provide the following additional information. The Senate Report stated that "‘take' is defined . . . in the broadest possible manner to include every conceivable way in which a person can ‘take' or attempt to ‘take' any fish or wildlife."

The House Report stated that "the broadest possible terms" were used to define restrictions on takings. The House Report noted that "take" included "harassment, whether

intentional or not." The Report noted that the definition "would allow, for example, the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young."

Regulation

CODE OF FEDERAL REGULATIONS
50 CFR § 17.3–Definitions

In addition to the definitions contained in [another part of the regulation], and unless the context otherwise requires:

Act means the Endangered Species Act of 1973;

Harass in the Act means a direct action that annoys or bothers individual wildlife or populations of wildlife in a constant or repeated way.

Harm in the Act means an action that actually kills or injures individual wildlife or populations of wildlife. Such action may include significant habitat modification or degradation where the act kills or injures a population by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

Problem Questions

1. What is the legal issue?

2. Were you provided with the relevant statutory provisions (sections of the act as codified) or the uncodified act?

3. What is the operative section of the ESA? What language in that section relates to the legal issue?

4. Is the relevant language in the operative section defined in the ESA? If so, what is the definition, and what language in that definition is relevant to the legal issue?

5. Does the regulation define that language? If so, what is the definition?

6. Start with *Loper Bright* and the text of the ESA. What arguments should the logging companies make to show that the text of the ESA is clear and inconsistent with the DOI's interpretation?

7. What arguments should the DOI make to show that the text of the ESA is clear and consistent with the DOI's interpretation?

8. Now, address the other traditional tools of statutory interpretation. What arguments should the logging companies make to show that the legislative history or purpose is clear and inconsistent with DOE's interpretation? How should the DOI respond?

9. Turn to *Skidmore*. What arguments should the logging companies make to show that the DOI's interpretation is unpersuasive? How should the DOI respond?

* * *

2. Standard of Review for Questions of Law Application

The last sections described the complex analysis for determining the appropriate standard of review for pure questions of law, specifically interpretations of statutory language. This section describes the standard of review applicable to questions of law application. This section is substantially shorter for the simple reason that the standard is currently unclear. Some courts have treated the question as a question of law, while others have treated the question as one of adjudicative fact. *See, e.g.*, *O'Leary*, 340 U.S. at 507 (treating as a question of fact the issue of whether the death of a federal worker "arose out of and in the course of employment").

Perhaps the best approach to application questions is to break the compound question into its two parts, the question of law and the question of fact, and then apply the appropriate standard of review for each question. This seems to be what the Supreme Court did in its landmark case: *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944). There, the Court accepted an agency's resolution of an application question because the resolution had "warrant in the record" and "a reasonable basis in the law." *Id.* at 131. Justice Stevens may well have been trying to restate this standard from *Hearst Publications* when he wrote *Chevron*. He cited the earlier case to support his explanation: "We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." *Chevron*, 467 U.S. at 844 (citing *Hearst Publications,* 322 U.S. at 131). And *Chevron*'s second step, reasonableness, echoed *Hearst Publications'* "reasonable basis in the law" language. Of course, *Loper Bright* will replace *Chevron* in this analysis.

3. Standard of Review for Questions of Fact & Policy

For judicial review of questions of fact that agencies resolve, reviewing courts use two standards of review. Assuming that Congress has not provided a different standard in the enabling act, the APA's default provision applies. The default provisions identify two standards of review for agency factual findings: the substantial evidence standard and the arbitrary and capricious standard. 5 U.S.C. § 706(2). The appropriate standard depends on the procedure the agency used, just as it did for pure questions of law.

The APA provides that for findings of fact from *formal* proceedings (adjudications or rulemakings required to be conducted on the record after a hearing), a reviewing court must use

the "substantial evidence" standard to review the agency's findings. 5 U.S.C. § 706(2)(E). In contrast, the APA provides that for *informal* proceedings (notice and comment rulemaking and informal adjudications), a reviewing court must apply the "arbitrary and capricious" standard to review the agency's findings. 5 U.S.C. § 706(2)(A). The next sections explain these two standards and how they differ, if at all.

For judicial review of questions of policy that agencies resolve, reviewing courts use the arbitrary and capricious standard of review regardless of the process the agency used. The APA directs that courts "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Because agencies exercise discretion when making policy decisions, this "abuse of discretion" standard—which we also call arbitrary and capricious review—makes sense.

Below, each standard is explained, and then the two are compared.

a. Substantial Evidence Review

Rule: Courts apply the *substantial evidence standard* to review agency findings of fact made during formal proceedings. A court will review the evidence in the record to confirm that reasonable people could make the same factual finding as the agency.

When an agency makes a factual determination during formal procedures (most commonly during a formal adjudication), the APA directs reviewing courts to review those findings using the substantial evidence standard of review. 5 U.S.C. § 706(2)(E). Substantial evidence has been defined as follows:

> "[S]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." . . . [I]t "must do more than create a suspicion of the existence of the fact to be established. . . . it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (internal citations omitted). Pursuant to this standard, judges should not substitute their judgment for that of the agency. Rather, a judge should review the evidence in the record to confirm that a reasonable person could make the same factual finding that the agency made. In other words, the question is whether the determination is well reasoned given the administrative record, not whether the finding is correct. Thus, the task of the reviewing court is to examine each of the agency's findings to see if there is evidence in the record supporting that finding. In making this determination, the reviewing court must take into account not only the evidence supporting the agency's findings but also any evidence that "fairly detracts" from that finding. *Id.* at 487.

For example, suppose an agency denied an individual's claim for disability; in doing so, the agency relied on the testimony of its medical expert, who stated that the claimant could stand for seven or eight hours in a workday. The claimant had testified he could stand only for short

periods. Based on this evidence, the agency determined that the claimant could stand for eight hours to work. The claimant appealed and challenged the finding that he could stand for this long. A reviewing court would likely sustain the agency's finding under the substantial evidence standard. Although there is evidence on both sides of the issue, after examining the record, "a reasonable mind" would accept the agency's factual finding—that the individual could stand for eight hours.

Let's change the hypothetical. Assume instead that there were other medical experts who testified that the claimant could stand only for short periods. Assume further that these medical experts actually examined the individual, while the agency's medical expert merely reviewed the individual's medical records. The agency again determined that the claimant could stand for eight hours, ignoring the medical experts who disagreed. The claimant appealed and challenged the finding. This time, a reviewing court would likely find that the agency's finding should not be sustained under the substantial evidence standard. The evidence in favor of the agency's finding is minimal, while the evidence opposed to the agency's finding is very convincing; in other words, after reviewing the record, "a reasonable mind" would *not* accept the agency's finding.

Thus, the substantial evidence standard is fairly deferential to an agency's factual findings. If there is substantial (not overwhelming or even necessarily convincing) evidence, then the court sides with the agency A reviewing court's job is to decide whether the agency's findings were well reasoned given the record in the case, not whether the findings were right. Similar to the civil law context, courts use a deferential standard to review these findings because the agency as the trier of fact has expertise that the reviewing court does not. But to be clear, the standard is not the same as in a civil law context. In the civil law context, judges typically apply the preponderance of the evidence standard of review.

b. Arbitrary & Capricious Review

Courts use the substantial evidence standard to review the sufficiency of findings of fact made during formal proceedings. For reviewing the sufficiency of findings of fact made during non-formal proceedings and findings of policy made during either type of proceeding, the APA provides that the reviewing court shall hold unlawful and set aside agency findings that are "arbitrary, capricious, [or] an abuse of discretion." APA § 706(2)(A). These three terms do not have independent significance; rather, combined, they are understood to mean arbitrary and capricious review. An agency finding is arbitrary or capricious when it is not "reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021). While a court cannot substitute its judgment for the agency, the court must ensure that the agency "has offered 'a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'" *Ohio v. EPA*, 144 S. Ct. 2040, 2053 (2024) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

Historically, the arbitrary and capricious standard of review was viewed as providing overwhelming deference to agency findings. However, the Supreme Court gave the standard unexpected teeth in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), describing it in the following way:

> To make [a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"] the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Id. at 416 (quoting APA § 706(A)(2)). Thus, using arbitrary and capricious review, courts must review the administrative record that was before the agency when it made its findings to determine whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id*.

Twelve years later, the Supreme Court applied this standard in *Motor Vehicles Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983). There, the Court reviewed an agency's policy findings (that air bags and automatic seatbelts would not save enough lives to justify their cost). In doing so, the Court further explained the arbitrary and capricious standard of review:

> [T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. at 43 (citations omitted). In other words, "[the rule must be] the product of reasoned decisionmaking." *Id*. at 52.

In *State Farm*, the Department had justified the rule change by claiming that the car manufacturers would choose to put in automatic seatbelts rather than airbags and that individuals would then unhook those seatbelts; hence, the rule would not improve safety. *Id*. at 52–53. Rejecting this argument, the Court reasoned that the Department had failed to consider an important aspect of the problem, namely, a rule that required the car manufacturers to include air bags only. *Id*. at 53. Further, the Court found that the agency's explanation for its decision ran counter to the evidence: the evidence did not support the agency's finding that people detach automatic seatbelts at the same rate as they fail to use manual seatbelts. The agency had ignored inertia (otherwise known as laziness). *Id*. at 54.

State Farm demonstrates what happens when scientific findings (seatbelts and air bags unquestionably save lives) run into (a) public perceptions about the sanctity of the private automobile, (b) political attitudes about regulation, (c) stiff industry opposition, (d) insurance

company interests, and (e) the normal complications of the legislative process. Even though we had seatbelt and air-bag technology in the 1960s, these complicating factors resulted in twenty years of delay in promulgating regulations requiring their use, at a cost of 12,000 lives annually.

State Farm is not a great example of good arbitrary and capricious review. The Court rejected the agency's policy decisions as unreasonable thus substituting the Court's policy choices for those of the agency. The Court should instead have decided whether the agency's decisionmaking process was sufficient. Perhaps the majority believed that the real reason for the change in the rule was the newly elected president's preference for deregulation. If true, then Justice Rehnquist had a response:

> The agency's changed view of the standard seems to be related to the election of a new President of a different political party. It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration. A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.

Id. at 59 (Rehnquist, J., concurring and dissenting). *Accord, DHS v. Regents of Univiversity of California*, 591 U.S. 1 (2020) (holding that the Department of Homeland Security's decision to terminate the Deferred Action for Childhood Arrivals program was arbitrary and capricious because the agency failed to consider the forbearance aspect of its decision).

Today, arbitrary and capricious review is known as *hard look* review. Originally, hard look review focused on the competency of the agency's review of the record before it, not the appellate court's review of the agency's decision. As Judge Leventhal explained, hard look review meant that a court would overturn agency decisions "if the court [became] aware . . . that the agency ha[d] not really taken a 'hard look' at the salient problems and ha[d] not genuinely engaged in reasoned decisionmaking." *Greater Boston Television* v. FCC, 444 F.2d 841, 851 (D. C. Cir. 1970). Today, as a result of *Overton Park* and *State Farm*, hard look review requires that a court ensure not only that the agency took a hard look at the problem but also that the court itself take a hard look at the agency's resolution of that problem.

The Supreme Court recently sharpened the teeth of this standard. In *Ohio v. EPA*, the Court held that the EPA acted arbitrarily when it failed to offer a reasoned response to significant comments the agency received during the rulemaking proceeding. 144 S. Ct. 2040 (2024). The Court noted that "[a]lthough commenters posed this concern to EPA during the notice and comment period . . . EPA offered no reasoned response." The Court quoted *Perez v. Mortgage Bankers Ass'n*, for the rule that "[a]n agency must consider and respond to significant comments received during the period for public comment." 575 U.S. 92, 96 (2015).

The Court described the arbitrary and capricious standard as follows:

> An agency action qualifies as "arbitrary" or "capricious" if it is not "reasonable and reasonably explained." In reviewing an agency's action under that standard, a court may not "'substitute its judgment for that of the agency.'" But it must ensure, among other things, that the agency has offered "a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made." Accordingly, an agency cannot simply ignore "an important aspect of the problem."

Ohio, 144 S. Ct. at 2053.

Recall that in *State Farm*, Justice Rehnquist suggested that a change in the executive is enough to support an agency's change in policy so long as the agency "remains within the bounds established by Congress." In *FCC v. Fox*, the Court debated whether an agency needs to justify a rule change with more than the fact that the president had changed. 556 U.S. 502, 504 (2009). *Fox* involved broadcasts with fleeting, indecent language. *Id*. at 510. The Federal Trade Commission ("the Commission") had for many years prohibited fleeting expletives only when the offending words were used multiple times in one broadcast. *Id*. at 507–08. When President George W. Bush came to the White House, the Commission changed its rule to prohibit a single use of an offending word. *Id*. at 508. The Commission chose not to impose fines for violations right away because the rule had changed. *Id*. at 510. When two celebrities swore on a program on Fox, the Commission sent violation notices to the broadcaster. Fox sued, claiming the new policy was arbitrary and capricious. The Second Circuit held that the Commission's change of policy was inadequately explained; hence, it was arbitrary and capricious. *Id*. at 511–12.

The Supreme Court reversed. *Id*. at 530. There were six different opinions in the case, making it difficult to know what the Court actually held. Justice Scalia, writing for the majority, found the Commission's explanation for the change sufficient. *Id*. at 520–21. Justice Scalia said an agency can change its policy but must explain why it is changing policy; however, the agency is under no duty to prove to a court that the new policy is better than the old. *Id*. at 513. All an agency needs to do is establish that the new policy is rational and within its authority. *Id*. at 514. If the new policy results from changes in facts, laws, or policies on which the old policy rested, those changes should be identified and explained. *Id*. at 514–15.

Dissenting, Justice Breyer defined the duty to explain as more encompassing:

> [T]he agency must explain why it has come to the conclusion that it should now change direction. Why does it now reject the considerations that led it to adopt that initial policy? What has changed in the world that offers justification for the change? What other good reasons are there for departing from the earlier policy?

Id. at 550 (Breyer, J., dissenting) (emphasis omitted). So, does an agency need to explain a policy change by saying anything more than "We have a new president and she believes a new policy is preferable." We really do not know.

In summary, arbitrary and capricious review of policy decisions is called "hard look" review. Not only should a court be sure the agency took a hard look at the problem, but the court itself should take a hard look at the agency's policy choice, the explanation for that choice, and the decisionmaking process. With this change, arbitrary and capricious review moved up on the intensity scale.

c. A Difference in Name Only

Today it is unclear whether there is any difference between substantial evidence and arbitrary and capricious review. A generation ago, practitioners challenging discretionary decisions made during formal proceedings frequently invoked the substantial evidence standard. *See, e.g.*, *State Farm*, 463 U.S. at 36. (applying arbitrary and capricious review despite the challengers' argument that the substantial evidence standard applied). They had a good reason for doing so. At that time, substantial evidence review was believed to be significantly more intense than arbitrary and capricious review.

Because of cases like *Overton Park*, *State Farm*, and *Fox*, arbitrary and capricious review has become better defined, and the difference in intensity between the two has been narrowed or been eliminated. Thus, when Justice Scalia was a circuit court judge, he explained that the two tests were essentially identical because "it is impossible to conceive of a 'nonarbitrary' factual judgment supported only by evidence that is not substantial in the APA sense." *Association of Data Processing Serv. Orgs. v. Board of Governors of Fed. Reserve Sys*., 745 F.2d 677, 684 (D.C. Cir. 1984).

Others argue that subtle differences do exist; substantial evidence requires the court to conduct a slightly more searching inquiry. There is some support for this argument; after all, Congress specifically identified two different standards in the APA. *Expressio unius*, the identical words presumption, and the rule against surplusage would all tell us that these standards must mean different things.

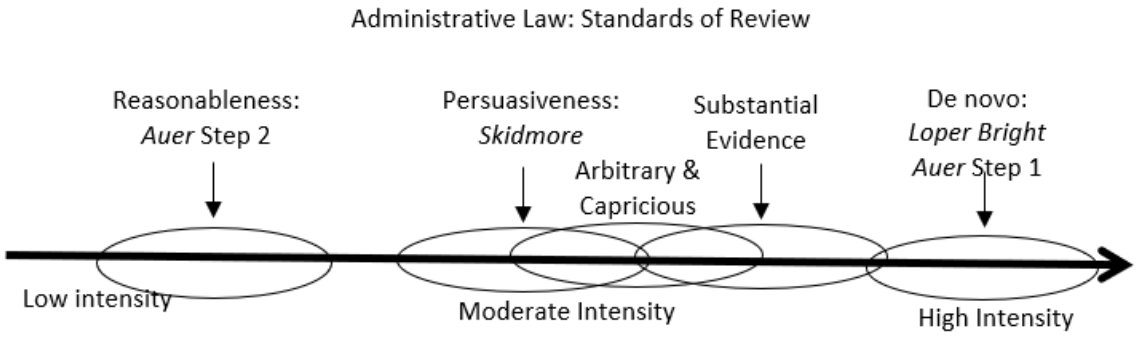
Further, Congress sometimes requires the substantial evidence standard in an enabling act when the arbitrary and capricious standard would be the default, suggesting the Congress does not consider the standards interchangeable. For example, the Occupational Safety and Health Administration, the Consumer Product Safety Commission, and the Federal Trade Commission all have enabling acts requiring a court to apply the substantial evidence standard when reviewing factual decisions made during informal proceedings. *See* 29 U.S.C. §660(a); 15 U.S.C. § 2060(c); 15 U.S.C. §45(c). The legislative history of these acts shows that Congress intended courts to more closely supervise the adequacy of the factual decisions from these agencies.

In sum, whether the two standards truly reflect different intensity standards, the language differs; be sure you use the right standard and the corresponding test.

E. Scope of Administrative Review Standards

Returning to our discussion of the intensity spectrum for scope of review, let's replace the conventional judicial standards of review with the standards of review used in administrative law, assuming that there is some, albeit minor, difference between arbitrary and capricious review and substantial evidence review. Our revised figure might look something like Figure 3 below.

Fig. 3



Note that the standards are not set points on the spectrum. Rather, judges apply varying levels of intensity even when using the same standard of review. Other factors may nudge the intensity of the review further in one direction or the other. For example, the quality of an agency's decisionmaking process nudges the standard to the left. One would expect less intensive review of agency decisionmaking that is thorough, fair, and considered. Additionally, a judge's view of the appropriate judicial role may nudge the standard. One would expect more intensive review from judges who doubt the efficacy of political controls on agencies and who regard courts as effective and legitimate instruments for imposing such controls.

* * *

Test Your Understanding

The Department of Education (the "DOE") administers the "Children Are Exceptional" ("CARE") Act. CARE implements the president's policy of "decreasing drug use, teenage pregnancy, and domestic violence through education." To this end, CARE provides federal funds to schools that meet certain criteria. CARE authorizes the DOE to promulgate rules using notice and comment procedures. The DOE published a notice of proposed rulemaking ("NPRM") and invited comments on how to meet the program's objectives. In its NPRM, the DOE proposed that it provide funding for schools that offer sex education classes that advocate abstinence-only to decrease teenage pregnancy.

The American Academy of Pediatrics and the American Public Health Society responded by providing multiple studies showing that comprehensive sex education was significantly more effective in decreasing teenage pregnancy than abstinence-only sex education. And the American

Medical Association provided statements from medical experts, none of which supported the DOE's choice. The DOE implements its proposed rule with no changes after the notice and comment period has ended. The American Medical Association files suit. Assume reviewability.

(1) What type of question, or decision, did the DOE make in deciding that abstinence-only sex education classes are the best way to prevent teenage pregnancy?

(A) A question of law.

(B) A question of law application.

(C) A question of fact.

(D) A question of policy.

* * *

(2) What standard of review will the court apply (assuming CARE Act is silent on standard of review)?

(A) The substantial evidence standard.

(B) The arbitrary and capricious standard.

(C) *Chevron* analysis.

(D) *Loper Bright* analysis.

* * *

F. Test Your Comprehension of this Chapter

At the beginning of this chapter, you encountered a list of learning objectives. Ask yourself how confident you feel with each of those actions. Before checking any column, you should actually try to complete each activity.

Action	Shaky	Comfortable	Confident
Explain the difference between scope of review and standard of review.			
Distinguish questions of law, questions of law			

application, questions of fact, and questions of policy.			
Explain the difference between adjudicative and legislative facts.			
Describe *Skidmore* analysis.			
Describe the *Chevron* analysis and its limitations.			
Describe *Loper Bright* analysis and understand how it overruled *Chevron* analysis			
Describe arbitrary and capricious review.			
Describe substantial evidence review.			

Updates for Chapter 22:

Replace the material in Chapter 22 with the following:

Chapter 20~~2~~
Conclusion: The Linear Approach to Interpretation

Learning Objectives

After reading this chapter, you should be able to:

1. Describe the linear approach to interpretation.
2. Apply the linear approach to a fact situation.

A. Overview

As you've learned, there are many ways to approach the process of interpreting an act (or any legal text). Textualists rely heavily on the intrinsic, or text-based, sources to determine meaning. Former Justice Scalia, Justices Thomas, Kagan, Alito, Gorsuch, and Kavanaugh, and Judge Easterbrook were or are textualists. Next, intentionalists search all sources, particularly an act's legislative history, to discern the enacting legislature's specific intent when enacting the law. Former Justices Rehnquist, Stevens, O'Connor, and Ginsburg were intentionalists. This approach is less popular today than it was during the years of the Rehnquist Court. Finally, purposivists search all of the sources to discern the enacting legislature's general intent, or statutory purpose, and then harmonize the text and purpose of the act. Chief Justice Roberts, Justices Breyer and Sotomayor, and former Judge Posner are purposivists.

This chapter focuses on the interpretive process and provides a checklist for you to use as you approach these questions, whether on an exam or in practice. Following the checklist is an example of a judicial opinion that exemplifies the linear approach to interpretation.

The linear approach appeals to textualists, intentionalists, and purposivists alike. This approach offers a process for approaching statutory interpretation that begins with the text and moves outward from concrete sources linked to the text to abstract sources based on policy. The linear approach organizes the possible arguments you can use to convince a court to rule for your client. Further, it shows the depth of possible arguments you or your opponent may use to persuade a court about an act's meaning. Below you will find this checklist, with cases illustrating the concepts. The cases are included in footnotes to avoid interruption of the outlined text.

B. The Linear Approach

Below is a checklist for you to apply as you approach an interpretive issue. It is not exhaustive. And as you write or argue, you might choose to reorder the arguments to improve persuasiveness. For example, if purpose is your client's strongest argument, perhaps raise purpose immediately after applying the plain meaning canon. Again, this is a checklist, not a recipe. Be a chef, not a cook!

- ✓ Step 1: Identify the standard of review to frame your arguments.
    - If there is no agency interpretation of the language at issue, *de novo* review applies (proceed to Step 2 below).

    - If there is an agency interpretation of the language at issue, *Auer* or *Loper Bright* applies.
        - Agency interpretations of language in regulations, *Auer* applies.
            - First: Apply *de novo* review (proceed to Step 2 below).
            - Second: Reasonableness review[15] if ambiguity remains after *de novo* review is complete.

        - Agency interpretations of language in statutes, MQD or *Loper Bright* applies.
            - First: Check to see if the major questions doctrine applies.
                - Ask whether the agency action present an *extraordinary* case (meaning the agency is trying to regulate (1) a matter of great political significance, (2) a significant portion of the American economy, (3) a matter requiring private persons or entities to spend billions of dollars, or (4) a matter that is the particular domain of state law).
                - If so, look for specific language authorizing the agency action (a clear statement (see Step 9)).[16]
                - If not, proceed to the *Loper Bright* analysis.

            - Second: If the major questions doctrine does not apply, apply *Loper Bright*.[17]
                - First, apply *de novo* review (proceed to Step 2 below).

[15] Auer v. Robbins, 519 U.S. 452, 461 (1997). Kisor v. Wilkie, 588 US. 558 (2019).

[16] West Virginia v. EPA, 597 U.S. 697, 724 (2022) (explaining that the major questions doctrine refers "to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."); King v. Burwell, 576 U.S. 473, 485–86 (2015) ("Whether those [health care] credits are available on Federal Exchanges is thus a question of deep 'economic and political significance' that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly."); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

[17] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

- Second, if ambiguity remains after applying *de novo* review, apply *Skidmore*'s power-to-persuade test.[18]
  - Under this test, an agency interpretation is given respect based on its power to persuade as determined by these factors:
    - Consistency of the agency's interpretation,
    - Thoroughness of the agency's interpretation,
    - Validness of the agency's interpretation,
    - Relevance of the agency's expertise, and
    - Contemporaneousness of the agency's interpretation.

✓ Step 2: Identify the legal issue.
- Identify the operative section of the act related to that legal issue.

✓ Step 3: Identify specific language in the operative section of the act or regulation related to the legal issue.
- The language of the statute is always the starting point for interpretation.
  - Start with the operative section of the act or regulation.
  - Then move to other sections as needed, e.g., definitions if that language has been defined.

- Identify what your client wants the language to mean.[19]
  - Be specific: e.g., "use a firearm" means to shoot a gun or to use it as a weapon.
  - Don't just say, the language should be narrowly or broadly interpreted.

- Identify what your opponent wants the language to mean
  - Be specific: e.g., "use a firearm" means to use it in any way, including trading it for drugs.
  - Again, don't just say, the language should be narrowly or broadly interpreted.

✓ Step 4: Determine whether Congress intended the language to have its ordinary or technical meaning.
- To determine which was intended,
  - First, identify the audience of the act, and

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[18] Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944).

[19] *See, e.g.*, Smith v. United States, 508 U.S. 223, 240 (1993) (Justice O'Connor held that "use" of a firearm during a drug trafficking crime included trading the gun for drugs, while former Justice Scalia, dissenting, said "use" of a firearm meant using it as a weapon). *Cf.* Watson v. United States, 552 U.S. 74, 83 (2007) (holding that accepting a gun for drugs was not "use" of a firearm).

        - Second, consider the other words within the act.
        - Remember: Ordinary meaning is generally intended

    - Apply the Grammar & Punctuation Canons (See below).
        - Grammar and punctuation are intrinsic sources.
        - When used properly, grammar and punctuation are generally considered when finding ordinary/technical meaning.
        - When used improperly, they are considered later in the interpretive process.

    - If ordinary meaning was intended, apply the plain meaning canon.
        - That canon directs that words and phrases shall be construed according to the commonly approved usage of the language.
            - Ordinary meaning differs from definitional meaning.
                - Ordinary meaning is the meaning most people would give the language and is often narrower than the dictionary meaning.
                    - E.g., To use a gun as a weapon is the ordinary meaning of "use a gun."

                - Dictionary meaning includes all ways words are used and is broader
                    - E.g., to use an item in any way, including as an item of barter, is one dictionary meaning of "use" (notice the word gun is omitted to broaden the meaning)

            - Places to find the ordinary meaning of a word.
                - Dictionaries.[20]
                    - Consider which dictionary to use, one in effect when the act was written or in effect today.[21]
                - Newspapers, magazines, literature, songs, pop culture.[22]

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[20] Nix v. Heddon, 149 U.S. 304, 307 (1893) (saying that dictionary definitions are offered "not as evidence, but only as aids to the memory and understanding of the court.").

[21] Chisom v. Roemer, 501 U.S. 380, 410 (1991) (Scalia J., dissenting) (saying that a dictionary in effect at the time legislation was drafted would be appropriate). In *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218 (1994), former Justice Scalia, for the majority, identified different dictionaries with similar definitions of the word at issue: "modify." While the majority of dictionaries suggested that "modify" meant a modest change, one dictionary, Webster's Third New International Dictionary, suggested that "modify" could mean either a modest or substantial change. *Id.* at 225–26.

[22] *See, e.g.*, Muscarello v. United States, 524 U.S. 125, 128, 140 (1998) (in which the majority and dissent turned to each of these sources to discern ordinary meaning).

- Grammar & Punctuation:
  - General Rule: Acts are interpreted as punctuated using ordinary rules of grammar unless either contradict the ordinary meaning.[23]

- Specific Rules for resolving ambiguity and absurdity.
  - Commas:
    - Doctrine of last antecedent:[24]
      - The doctrine directs that words and phrases modify only the immediately preceding noun or noun phrase in a list of items.
      - Exception: when the drafter includes a comma between the modifier and the last antecedent, then all the nouns or noun phrases are modified.

  - And v. Or:
    - Generally, the word "and" has a conjunctive meaning, while the word "or" has a disjunctive meaning.
    - However, when context dictates, courts will interchange these two words.[25]

  - Singular v. Plural:
    - For ease of drafting, laws are typically written in the singular.[26]
    - But for statutory interpretation, the legislature's use of the singular is assumed to include the plural, and the legislature's use of the plural is assumed to include the singular unless context directs otherwise.[27]

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[23] In England, "until 1849 statutes were enrolled upon parchment and enacted without punctuation. No punctuation appearing upon the rolls of Parliament such as was found in the printed statutes simply expressed the understanding of the printer." Taylor v. Caribou, 67 A. 2, 4 (Me. 1907). Congress passes bills with the punctuation included; hence, "[t]here is no reason why punctuation, which is intended to and does assist in making clear and plain the meaning of all things else in the English language, should be rejected in the case of the interpretation of [American] statutes." *Id.*

[24] *See, e.g.*, Barnhart v. Thomas, 540 U.S. 20, 26 (2003) (applying the doctrine and explaining its limitations); Commonwealth v. Kelly, 64 Mass. (10 Cush.) 69, 71 (1852) (applying the doctrine to hold that hotel owners could not sell alcohol after eleven).

[25] *See, e.g.*, Comptroller of Treasury v. Fairchild Indus., Inc., 493 A.2d 341, 343–44 (Md. 1985).

[26] Homebuilders Ass'n v. Scottsdale, 925 P.2d 1359, 1366 (Ariz. Ct. App. 1996) ("The historical purpose of construing plural and singular nouns and verbs interchangeably is to avoid requiring the legislature to use such expressions as 'person or persons,' 'he, she, or they,' and 'himself or themselves.' Under this principle, the plural has often been held to apply to the singular in a statute, absent evidence of contrary legislative intent.").

[27] *See, e.g.*, 1 U.S.C. § 1 ("In determining the meaning of any Act [or resolution] of Congress, unless the context indicates otherwise[,] words importing the singular include and apply to several persons, parties, or things; words

- Masculine v. Feminine:
    - For ease of drafting, laws are typically written in the masculine (or were).
    - The masculine pronoun is generally interpreted to include the feminine or neuter.[28]
    - The feminine pronoun may be interpreted to include the male or neuter, but this is less common.[29]
    -
- Mandatory & Discretionary:
    - General rule:
        - "Shall" is mandatory.[30]
        - "May" is discretionary.[31]
        - "Must" is mandatory and used when a condition precedent is present.
        - "Should" is discretionary.[32]
    - When context dictates, courts will interchange the meaning of these words.[33]

- If technical meaning was intended, apply the technical meaning canon.
    - That canon directs that technical words and phrases as have acquired a peculiar meaning shall be construed accordingly.
        - A word must be used in its technical context, so look to the act's audience.

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importing the plural include the singular. . . ."). For an example of a case in which the rule was ignored, see *Van Horn v. William Blanchard Co.*, 438 A.2d 552, 554 (N.J. 1981).

[28] *See, e.g.*, 1 U.S.C. § 1 (providing that "words importing the masculine gender include the feminine as well"); Commonwealth. v. Henninger, 25 Pa. D. & C.3d 625, 626 (Pa. Ct. Com. Pl. 1981) (interpreting "he" in a statutory rape statute to include female defendants).

[29] *See, e.g.*, In re Compensation of Williams, 635 P.2d 384, 386 (Or. Ct. App. 1981) (refusing to interpret the word "woman" to include men because "woman" was not a word used "in the *masculine* gender"), *aff'd*, 653 P.2d 970 (Or. 1982).

[30] *See, e.g.*, Escondido Mut. Water Co. v. LaJolla Indians, 466 U.S. 765, 772 (1984) ("The mandatory nature of the language chosen by Congress [shall] appear[] to require that the Commission include the Secretary's conditions in the license even if it disagrees with them.").

[31] *But see* Fink v. City of Detroit, 333 N.W.2d 376, 379 (Mich. App. 1983) (holding that "may" was mandatory).

[32] Daniel v. United Nat'l Bank, 505 S.E.2d 711, 716 (W. Va. 1998).

[33] Jersey City v. State Bd. of Tax Appeals, 43 A.2d 799, 803–04 (N.J. 1945) (refusing to interpret "shall" in a statute to be mandatory); Cobb County v. Robertson, 724 S.E.2d 478, 479 (Ga. App. 2012) ("Even though the word 'shall' is generally construed as mandatory, it need not always be construed in that fashion.").

        - E.g., a tomato is a vegetable, not a fruit, because the act taxing tomatoes was written for merchants, not botanists.[34]
    - Technical meaning is rarely intended because most audiences are not technical.
        - Exception: words with legal meaning.[35]
            - E.g., statute of limitations, conviction,[36] and assault.[37]

- ✓ Step 5: Determine whether the language is ambiguous, meaning there is more than one ordinary meaning.
    - If so, court will examine sources other than the text of the act, such as legislative history.

    - Definitions of ambiguity:
        - Easier definition to meet: 2 or more reasonable people disagree.[38]
        - Harder definition to meet: 2 or more equally plausible meanings.[39]
            - There is no agreement on the correct definition of ambiguity, so use an easier definition if you want the court to find ambiguity and the harder definition if you do not want the court to find ambiguity[40]

- ✓ Step 6: Determine whether there is a reason to reject the ordinary meaning for another, fair interpretation.
    - Classical constitutional avoidance doctrine:[41]
        - Applies when two interpretations are fairly possible, but one violates the

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[34] *Nix*, 149 U.S. at 306.

[35] *See, e.g*., Dickens v. Puryear, 276 S.E.2d 325, 446 (N.C. 1981) (interpreting the term "assault" to have its legal, tortious meaning, specifically freedom from the apprehension of a harmful or offensive contact).

[36] *But see* St. Clair v. Commonwealth, 140 S.W.3d 510, 568 (Ky. 2004) (interpreting the term "prior record of conviction" in its ordinary rather than legal sense).

[37] *But see* Patrie v. Area Coop. Educ. Serv., 37 Conn. L. Rptr. 470 (Conn. Super. Ct. 2004) (interpreting the term "assault" in its ordinary sense because the statute was written for educators rather than lawyers).

[38] In re Unknown, 701 F.3d 749, 760 (5th Cir. 2012), *cert. granted in part and vacated*, 133 S. Ct. 2886 (2013).

[39] Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 41 (2008).

[40] *See, e.g*., Goswami v. Am. Collections Enters., Inc.**,** 377 F.3d 488, 492 (5th Cir. 2004) ("In interpreting statutes we do not look beyond the plain meaning of the statute unless the statute is absurd or ambiguous.").

[41] United States v. Marshall, 908 F.2d 1312, 1335–36 (7th Cir. 1990) (en banc) (Posner, J., dissenting) (judges should use the constitutional avoidance canon when "there is not merely a constitutional question about, but a constitutional barrier to, the statute when interpreted literally."), *aff'd sub nom*. Chapman v. United States, 500 U.S. 453 (1991).

constitution.
        - Under the classical doctrine, a court first determines that the act is unconstitutional, then determines whether another interpretation is fairly possible.
    - Ambiguity resolver doctrine:
        - Applies when the language is ambiguous, and one fairly possible construction would avoid the constitutional question.[42]
        - Under the ambiguity resolver doctrine, a court first determines that one of two options may violate the constitution, then determines whether another interpretation is fairly possible.
    - Modern constitutional avoidance doctrine:
        - Applies when two interpretations are fairly possible, but one raises doubt about the constitutionality of the act.[43]
            - Note that the two interpretations need not be equally plausible, just fairly possible (otherwise, ambiguity and constitutional avoidance would be the same).[44]
        - Under the modern version, a court first determines that one of two options raises constitutional questions, then determines whether another interpretation is fairly possible.

    - Absurdity:
        - Definitions of absurdity:
            - Easier definition: result would frustrate purpose/intent.
            - Harder definition: result would shock the general moral/common sense.[45]
        - There is no agreement on the definition of absurdity, so use an easier definition if you want the court to find absurdity and a harder definition if you do not want the court to find absurdity.

    - Scrivener's (drafting) error:
        - Definition: the statute contains an obvious drafting error.

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[42] *Id*. at 1335–36 (7th Cir. 1990) (quoting Crowell v. Benson, 285 U.S. 22, 62, 52 S. Ct. 285, 296–297, 76 L. Ed. 598, 619 (1932)).

[43] *See, e.g.*, Public Citizen v. DOJ, 491 U.S. 440, 455 (1989); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 510 (1989).

[44] United States v. Marshall, 908 F.2d 1312, 1318 (7th Cir. 1990), *aff'd sub nom*. Chapman v. United States, 500 U.S. 453 (1991).

[45] In *King v. Burwell*, Justice Scalia defined an absurd result as "a consequence 'so monstrous, that all mankind would, without hesitation, unite in rejecting the application.'" 576 U.S. 473, 514 (2015) (Scalia, J., dissenting) (quoting Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 203 (1819)); Mayor of Lansing v. Mich. Pub. Serv. Comm'n, 680 N.W.2d 840, 847 (Mich. 2004) (explaining why the "reasonable people disagree" standard cannot be accurate).

- This is a very narrow exception.[46]
- It permits judges to correct obvious clerical or typographical errors.[47]

✓ Step 7: Determine whether intrinsic sources (other than text, grammar, and punctuation) relate to meaning.

- **Intrinsic sources** are materials that are part of the official act being interpreted, such as the linguistic canons, other sections of the act, etc.

- Linguistic canons: canons regarding understood word usage.
  - *In pari materia*:
    - Where a court may look for help in interpreting an act.
      - Means "of the same material."
      - Judges will look at an entire act and related acts to determine meaning.[48]
        - Whole act aspect: the entire act is relevant to interpretation.[49]
        - Whole code aspect: acts with similar purposes may be relevant to interpretation.[50]
    - Helps ensure consistency within acts, across acts, and even within the code as a whole.

  - The presumption of consistent usage and meaningful variation (also called the identical words presumption):[51]

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[46] United States v. Granderson, 511 U.S. 39, 68 (1964) ("It is beyond [a court's] province to rescue Congress from its drafting errors, and to provide for what [it] might think … is the preferred result.").

[47] *See, e.g.*, U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 462 (1993) (correcting misplaced punctuation); United States v. Coatoam, 245 F.3d 553, 557 (6th Cir. 2001) (correcting an incorrect cross-reference to another section in the statute); United States v. Scheer, 729 F.2d 164, 169 (2d Cir. 1984) (changing the word "request" to "receipt" where language in statute provided that a certificate would be furnished "upon *request* of the … request").

[48] *See, e.g.*, Fla. Dep't of Highway Safety & Motor Vehicles v. Hernandez, 74 So.3d 1070, 1076 (Fla. 2011) (noting that a statute that allowed the state to suspend the driver's license of any person who refused to submit to a "lawful" breath test must be read *in pari materia* with a different statute that defined the parameters of a lawful breath-alcohol test).

[49] *See, e.g.*, Rhyne v. K-Mart Corp., 594 S.E.2d 1, 20 (N.C. 1994) (interpreting the words "a defendant" in a punitive damages statute to mean each defendant or each verdict because in the same section of the act being interpreted, the legislature also referred to "*a* verdict" and to "*the* award.").

[50] *See, e.g.*, Smith v. City of Jackson, 544 U.S. 228, 233 (2005) (interpreting the ADEA and the Civil Rights Act *in pari materia*); Commonwealth v. Smith, 728 N.E.2d 272, 278–79 (Mass. 2000) (discussing whether an incest statute and rape statute were *in pari materia*).

[51] *See, e.g.*, Robinson v. City of Lansing, 782 N.W.2d 171, 182 (2010) ("[U]nless the Legislature indicates otherwise, when it repeatedly uses the same phrase in a statute, that phrase should be given the same meaning throughout the

- Directs that when the legislature uses the same word in different parts of the same act, the legislature intended those words to have the same meaning (consistent usage).[52]
- Also directs that, if the legislature uses a word in one part of the act, then changes to a different word in the same act, the legislature intended the different words to have different meanings (meaningful variation).

- *Noscitur a sociis*:
  - Means "it is known from its associates."
  - Used for words within a list, not for the catch-all.[53]
  - Listed words have a commonality that should be shared by all
  - Directs that when a word has more than one meaning, the appropriate meaning should be gleaned from the textual context (meaning the surrounding words in the act).[54]

- *Ejusdem generis*:
  - Means "of the same kind, class, or nature."
  - Used for general words & catch-alls, not for words within a list.
    - Is a subset of *noscitur a sociis*.
  - Directs that when general words or catch-alls are near specific words or listed words, the general words and catch-alls should be limited to include only things similar to the specific words.[55]

- The rule against surplusage, or redundancy:
  - Directs that the proper interpretation of statutory language is the one in which every word, phrase, section, etc. has independent meaning; nothing is redundant or meaningless.[56]

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statute.").

[52] *See, e.g.*, Travelscape, LLC v. S.C. Dep't of Revenue, 705 S.E.2d 28, 33–35, 40 (2011) (in which the majority and dissent argue about whether the words "furnished" and "furnishing" in a state tax statute should have the same meaning).

[53] Babbitt v. Sweet Home Chapter Cmtys., 515 U.S. 687, 720 (1995) (Scalia, J., dissenting) (noting that the agency incorrectly identified the appropriate canon).

[54] *See, e.g.*, G.C. Timmis & Co. v. Guardian Alarm Co., 662 N.W.2d 710, 713 (Mich. 2003) (discussing whether *noscitur a sociis* is applied intuitively by English speakers); People v. Vasquez, 631 N.W.2d 711, 714 (Mich. 2001) (applying *noscitur a sociis* to determine whether a defendant who lied to a police officer about his age "obstruct[ed], resist[ed], oppose[d], assault[ed], beat, or wound[ed]" that officer).

[55] *See, e.g.*, Yates v. United States, 574 U.S. 536, 1081 (2015); Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 225, 231 (2008) (majority refused to apply the canon while the dissent found it dispositive).

[56] Begay v. United States, 553 U.S. 137, 143 (2008) (applying the canon to limit the meaning of "violent felony" to

- Disfavored canon because it does not reflect legal drafting.

- *Expressio unius est exclusio alterius* :
  - Means the expression of one thing precludes the inclusion of other similar things.[57]
  - Directs that when the legislature includes things explicitly, courts should conclude that the legislature intentionally omitted other similar things that would logically have been included.
  - Disfavored canon because it does not reflect legal drafting.[58]

- Act's Components (other than operative provisions):
  - Titles:
    - Types:
      - Long titles, precede enacting clauses,
      - Short titles, may follow enacting clauses,
      - Section titles, and
      - Code and other titles.
    - The canon for all is the same: titles cannot control clear text but can be used where there is ambiguity or absurdity.[59]

  - Definition Sections:
    - One of the first places to look after finding the relevant language in an operative section of the act.
    - When the legislature defines a word or phrase in an act, that definition is controlling even if it makes no sense.[60]

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not apply to felony drunk driving).

[57] *See, e.g.*, Dickens v. Puryear, 276 S.E.2d 325, 330 n.8 (N.C. 1981).

[58] Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 676 (D.C. Cir. 1973) ("[*Expressio unius*] is increasingly considered unreliable, for it stands on the faulty premise that all possible alternative or supplemental provisions were necessarily considered and rejected by the legislative draftsmen.").

[59] Brotherhood of R. R. Trainmen v. Baltimore & O. R. Co., 331 U.S. 519, 529 (1947) (stating that section titles "are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain."); Caminetti v. United States, 242 U.S. 470, 490 (1917) ("[T]he name [or short title] given to an act by way of designation or description . . . cannot change the plain import of its words."); Church of the Holy Trinity v. United States, 143 U.S. 457, 462 (1892) ("The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature.").

[60] *See, e.g.*, Commonwealth v. Plowman, 86 S.W.3d 47, 49 (Ky. 2002) (holding that a defendant who set fire to a bulldozer started a fire "with intent to destroy or damage a building" because the statute defined "building" to include "any . . . automobile, truck, watercraft, aircraft, . . . or other . . . vehicle. . . ."). For a fun fictional case, see *Regina v. Ojibway*, 8 Crim. L.Q. 137 (Toronto 1965) (interpreting the term "bird" to include a pony covered in feathers).

- Preambles, findings, purpose clauses, policy:
  - Included in acts more commonly today than in the past.
  - Cannot contradict clear text but can aid meaning where there is ambiguity or absurdity.[61]

- Provisos & exceptions:
  - Defined: provisions that exclude something from an act's reach or qualify something otherwise within an act.
  - Construed narrowly.

- Non-severability & severability clauses:
  - Severability provisions allow for the remaining sections of an act to remain valid with the invalid provision excised.
    - Rebuttable presumption of the act's validity.[62]
    - Common, generally followed even though added as boilerplate language.
  - Inseverability provisions require that an act as a whole be held invalid if any one section is invalid.
    - Less common than severability provisions.
    - Rarely followed even though they arguably show. legislative intent better than severability provisions.[63]
    - Rebuttable presumption of the act's validity.[64]

✓ Step 8: Determine whether extrinsic sources relate to meaning.

- **Extrinsic sources** are sources outside of the enacted act but within the legislative process that created the act, *e.g.*, legislative history, purpose.

- Other acts that conflict with the act at issue.
  - For conflicts within a jurisdiction:
    - Harmonize if possible, but if not, follow these steps in this order:
      - Specific acts trump general acts,[65]

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[61] Sutton v. United Air Lines, Inc., 527 U.S. 471, 484 (1999) (examining a findings provision to limit the reach of the Americans with Disabilities Act ("ADA")).

[62] Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987) (stating such a clause is merely a rebuttable presumption that can be overcome by "strong evidence that Congress intended otherwise.").

[63] Farrior v. Sodexho, U.S.A., 953 F. Supp. 1301, 1302 (N.D. Ala. 1997) ("A non-severability [provision] is almost unheard of and constitutes a legislative finding that every section [of an act] is so important to the single subject that no part of the act can be removed without destruction of the legislative purpose.").

[64] Biszko v. RIHT Fin. Corp., 758 F.2d 769, 773 (1st Cir. 1985) ("[A] non-severability clause cannot ultimately bind a court, it establishes [only] a presumption of non-severability.)."

[65] *See, e.g.*, Palm Beach Cnty. Canvassing Bd. v. Harris, 772 So. 2d 1220, 1234 (Fla. 2000) ("First, it is well-settled

- Later-enacted acts trump earlier-enacted acts,[66]
- Repeal by implication is disfavored,[67]
  - Especially for appropriations acts.[68]

- For conflicts across jurisdictions:
  - When a federal act conflicts with a state act:
    - Preemption: federal law controls state law.[69]
      - Express preemption.[70]
      - Implied preemption.[71]
        - Field preemption (rare).[72]
        - Conflict preemption (more common):[73]
          - Found when it is impossible for an entity to comply with both laws, or
          - When the state law stands as an obstacle to the accomplishment of the federal objective.

  - When one state's act impacts interpretation of another state's act.
    - Modeled & Borrowed Acts:
      - Directs that when legislature *models* one act based

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that where two statutory provisions are in conflict, the specific statute controls the general statute.").

[66] Williams v. Kentucky, 829 S.W.2d 942, 947 (Ky. Ct. App. 1992) (Huddleston, J., concurring in part and dissenting in part); Palm Beach Cnty. Canvassing Bd., 772 So. 2d at 1234 ("The more recently enacted provision may be viewed as the clearest and most recent expression of legislative intent.").

[67] Morton v. Mancari, 417 U.S. 535, 550 (1974) ("In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable. Clearly, this is not the case here."). There is a related aspect to this implied repeal canon: The presumption against repeal is especially strong when the second bill is an appropriations (or budget) bill.

[68] Tenn. Valley Auth. v. Hill, 437 U.S. 153, 189 (1978) (noting that "the [canon] applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act.").

[69] U.S. CONST. art. VI, cl. 2.

[70] *See, e.g.*, Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (refusing to find preemption even though the statute provided that "no State . . . may establish . . . any requirement . . . which is different from, or in addition to, any [federal] requirement. . . .").

[71] Wyeth v. Levine, 555 U.S. 555, 565 (2009) (explaining that preemption turns on congressional intent).

[72] *See* Rogers v. Yonce, No. 07–CV–704–GKF–PJC, 2008 WL 2853207, at *10 (N.D. Okla, July 21, 2008) (identifying the three times the Supreme Court has found field preemption: (1) the Labor Management Relations Act; (2) the Employee Retirement Income Security Act, and (3) the National Bank Act).

[73] Pulkkinen v. Pulkkinen, 127 So. 3d 738, 742 (Fla. Dist. Ct. App. 2013).

on an existing act, the modeling act and its settled judicial interpretations are relevant to interpretation.[74]

- Directs that when a legislature *borrows* statutory language from another jurisdiction—whether state or federal—courts assume that the borrowing legislature took not only the statutory language, but also any settled judicial opinions interpreting that language from the highest court in the patterning jurisdiction *at the time of the adoption* as well.[75]
    - Subsequent judicial interpretations are only persuasive.[76]

- Uniform Acts:
    - When a state legislature enacts a uniform act, uniformity across jurisdictions is essential.[77]
    - Interpretations of uniform acts from jurisdictions are strongly persuasive, regardless of when or where they occur.
        - Contrary to borrowed statutes canon above.

- Model Acts:
    - When a state legislature enacts a model act, uniformity is less important, unless the model act is widely adopted.
    - Interpretations of a model act from other jurisdictions are informative, but not controlling.[78]

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[74] Lorrillard v. Pons, 434 U.S. 575, 579 n.5 (1978) (examining FLSA to determine whether ADEA provided a right to jury trials because ADEA specifically provided that it be interpreted in accordance with the "powers, remedies, and *procedures*" of FLSA quoting 29 U.S.C. §626(b)).

[75] Zerbe v. State, 583 P.2d 845, 846 (Alaska 1978) (refusing to adopt the judicial opinion of a lower court).

[76] Van Horn v. William Blanchard Co., 438 A.2d 552, 555–56 (N.J. 1981).

[77] Pileri Indus., Inc. v. Consol. Indus., Inc., 740 So. 2d 1108, 1114 (Ala. Civ. App. 1999) (Crawley, J., dissenting); Blitz v. Beth Isaac Adas Israel Congregation, 720 A.2d 912, 918 (Md. 1998) (interpreting the word "disbursements" in the Uniform Arbitration Act to include attorney's fees, in part, because other states had done so even though the text of the Act suggested that attorney's fees should not be included); Holiday Inns, Inc. v. Olsen, 692 S.W.2d 850, 853 (Tenn. 1985).

[78] Brown v. Arp & Hammond Hardware Co., 141 P.3d 673, 680 (Wyo. 2006) ("When the words of a statute are materially the same and where the reasoning of another court interpreting the statute is sound, we do not sacrifice sovereign independence, nor undermine the unique character of Wyoming law, by relying upon the precedent of a foreign jurisdiction.") (internal quotation marks omitted).

- Timing of enactment:
  - Using pre-enactment context (what occurred before enactment):
    - Legislative history:
      - Types of legislative history:
        - Conference committee reports,[79]
        - Committee reports,[80]
        - Bill drafts and amendments,[81]
        - Committee hearings,
        - Floor debates,[82]
        - Sponsor statements,[83]
        - Silence,[84] and
          - The dog does not bark canon: if the act would cause significant change, a legislature likely would not have intended such a change and not discussed it.[85]
        - Presidential signing statements & veto messages.
          - Not "legislative" history at all.
          - Generally, not relevant to interpretation.[86]

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[79] United States v. Salim, 287 F. Supp. 2d 250, 340 (S.D.N.Y. 2003) (identifying the conference committee report as "the most persuasive evidence of congressional intent, next to the statute itself.").

[80] Church of the Holy Trinity v. United States, 143 U.S. 457, 464 (1892) (relying on a committee report to understand which of two meanings the legislature intended for the word "labor" (manual labor or all labor)); *but see* Blanchard v. Bergeron, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring in part and concurring in the judgment) (criticizing the use of committee reports).

[81] NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 515 (1979) (Brennan, J., dissenting) (finding rejected amendments informative).

[82] United Steelworkers v. Weber, 443 U.S. 193, 202 (1979) (citing floor debates); In re Virtual Network Servs. Corp., 98 B.R. 343, 349 (Bankr. N.D. Ill. 1989) ("The floor statements of individual legislators are larded with remarks which reflect a political ('sales talk') rather than a legislative purpose.").

[83] United Steelworkers, 443 U.S. at 231–44 (1979) (Rehnquist, J., dissenting) (referring to statements from both the Senate and House sponsors to argue that Title VII of the Civil Rights Act was color-blind); Overseas Educ. Ass'n, Inc., v. Fed. Labor Rels. Auth., 876 F.2d 960, 967 n.41 (D.C. Cir. 1989) (citing more than ten cases relying on sponsor statements).

[84] Am. Online, Inc. v. United States, 64 Fed. Cl. 571, 578 (2005) ("Silence in the legislative history about a particular provision . . . is not a good guide to statutory interpretation and certainly is not more persuasive than the words of a statute.").

[85] Harrison v. PPG Indus., Inc., 446 U.S. 578, 585 (1980) ("The 'most revealing' aspect of the legislative history of [the subsection at issue] . . . was the complete absence of any discussion of such a 'massive shift' in jurisdiction.").

[86] Hamdan v. Rumsfeld, 548 U.S. 557, 623 (2006) (ignoring President Bush's signing statement); United States v. Stevens, 559 U.S. 460, 480 (2010) (ignoring President Clinton's signing statement); DaCosta v. Nixon, 55 F.R.D.

- Using legislative history:
  - To find the purpose, or spirit, of the act.[87]
  - To find specific congressional intent .
  - Judges vary in their willingness to consider legislative history at all[88] and specific types of legislative history.

- Criticizing the use of legislative history:
  - Unconstitutional,
  - Unreliable,
  - Not accessible to all, and
  - Expensive to research.

- Unexpressed statutory purpose:
  - Finding purpose:
    - Within the text:[89]
      - *Heydon*'s case: The Mischief Rule:[90]
        - Identify the law before enactment,
        - Identify the mischief and defect, or the problem, the legislature wanted to correct,
        - Identify the remedy the legislature chose, and
        - Interpret the act to advance the remedy and suppress the mischief.

145, 146 (E.D.N.Y. 1972) (ignoring President Nixon's signing statement); *but see* United States v. Lovett, 328 U.S. 303, 313 (1946) (citing President Roosevelt's signing statement).

[87] United Steelworkers v. Weber, 443 U.S. 193, 201, 217 (1979) (in which the majority used legislative history to identify purpose while the dissent used it to find congressional intent).

[88] Wisc. Pub. Intervenor v. Mortier, 501 U.S. 597, 610 n.4 (1991) ("Our precedents demonstrate that the Court's practice of utilizing legislative history reaches well into its past. We suspect that the practice will likewise reach well into the future."); United States v. American Trucking Ass'ns, Inc., 310 U.S. 534, 543–44 (1940) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'); Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 73 (2004) (Scalia, J., dissenting) (criticizing the use of legislative history); *see, e.g.*, In the Matter of Sinclair, 870 F.2d 1340, 1344 (7th Cir. 1989) (refusing to consider a conference committee report because it contradicted the ordinary meaning of the statute).

[89] American Trucking Ass'ns, Inc., 310 U.S. at 543 ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation.").

[90] 76 Eng. Rep. 637 (Ex. 1584).

- Within purpose & findings clauses,
- Within legislative history, and
- Within historical context.

- Using purpose:
  - To confirm ordinary meaning,[91]
  - To resolve ambiguity, constitutional question, absurdity, or scrivener's error, and
  - To overcome ordinary meaning.[92]

- Using post-enactment context (using what occurred after enactment):
  - Subsequent legislative acts:
    - Subsequent legislatures can always change an existing act.
    - The reenactment canon: recodification clarifies law, does not make substantive changes.[93]

  - "Subsequent" legislative history:[94]
    - Use of subsequent legislative history is highly controversial because the enactment of a subsequent act does not show the enacting legislature's intent regarding the existing act.[95]
    - However, subsequent acts may provide insight into the contours of an existing act.

  - Super-strong *stare decisis*:
    - A heightened form of *stare decisis*.
    - Directs that even when a judicial interpretation of an act is "wrong," judges should be reluctant to overrule that interpretation because of the possibility of legislative

[91] Church of Scientology v. United States, 612 F.2d 417, 426 (9th Cir. 1979).

[92] Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc., 435 F.3d 1140, 1145 (2006) (finding a statute that imposed a waiting period to appeal rather than a time limit). *Cf.* Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607, 617 (1944) ("To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another.").

[93] Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 227 (1957).

[94] Consumer Prod. Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 117–18 n.13 (1980) ("[S]ubsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.").

[95] Sullivan v. Finkelstein, 496 U.S. 617, 632 (1990) (Scalia, J., concurring) ("Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote."); *but see* Mont. Wilderness Ass'n v. U.S. Forest Serv., 655 F.2d 951, 957 (9th Cir. 1981) (relying on a conference committee report from a subsequent act).

acquiescence.[96]

- Legislative acquiescence:[97]
  - Directs a court to presume that through silence a legislature agreed with a prior statutory interpretation because the legislature did not amend the act in response.
  - Legislative acquiescence is based on *stare decisis* and separation of powers.
  - Criticisms**:**
    - Silence can mean many things, including (as legislative acquiescence presumes) that the legislature agreed with the judicial interpretation, and
    - The most common legislative response to a judicial interpretation of an act is silence, and
    - Legislative acquiescence should be invoked rarely, if at all.

✓ Step 9: Determine whether policy-based sources relate to meaning.

- **Policy-based sources** are extrinsic both to the act and to the legislative process; they are based on the U.S. Constitution or policy preferences.

- Canons based on the Constitution:
  - Clear Statement Rules:
    - When courts require a legislature to include a clear statement when the legislature wishes to impact important areas of the law.
    - Courts assume that a legislature would not make such important changes without being clear that it was doing so.
    - Clear statements are required in many areas, including:
      - Federalism,[98]
      - Preemption,[99]
      - American Indian lands,[100]

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[96] Faragher v. City of Boca Raton, 524 U.S. 775, 804 n.4 (1998); Flood v. Kuhn, 407 U.S. 258, 279 (1972) (acknowledging that its earlier opinions holding that baseball was not interstate commerce was wrong but leaving the correction to Congress).

[97] *Flood*, 407 U.S. at 283.

[98] BFP v. Resolution Trust Corp., 511 U.S. 531, 544 (1994).

[99] Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996).

[100] Hagen v. Utah, 510 U.S. 399, 411 (1994); Solem v. Bartlett, 465 U.S. 463, 477–78 (1984).

- Sovereign immunity,[101]
- Criminal statutes, and (see below, rule of lenity)
- Constitutional questions.

- Penal Statutes:
  - The rule of lenity:[102]
    - Penal acts[103] are those that punish citizens by imposing a fine or imprisonment.
      - Whether the rule of lenity applies when acts imposing administrative penalties are interpreted is unclear.
    - Directs that judges should strictly interpret penal acts because the Due Process Clause requires that citizens have notice of criminal activity.[104]
      - Former Justice Scalia applied the rule of lenity early in the interpretive process.
      - Most judges apply the rule of lenity after all other sources of meaning have been considered and have not resolved the interpretation.[105]
      - Some states have tried to abolish the rule of lenity by statute but have had limited luck due to the constitutional underpinnings.
      -
  - *Ex post facto* prohibition:[106]
    - *Ex post facto* laws defined.[107]
      - Redefine criminal conduct or
      - Increase the penalty for criminal conduct.
    - *Ex post facto* laws violate the U.S. Constitution.

- Canons based on prudential considerations:

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[101] Burch v. Sec'y of Health & Human Servs., No. 99–946V, 2001 WL 180129, at *11 (Fed. Cl. Feb. 8, 2001).

[102] McNally v. United States, 483 U.S. 350, 375 (1987) (Stevens, J., dissenting); United States v. Universal C.I.T. Corp., 344 U.S. 218, 221–22 (1952).

[103] Babbitt v. Sweet Home Chapter, 515 U.S. 687, 704 n.18 (1995) (rejecting the rule of lenity argument in a case imposing regulatory fines); Modern Muzzleloading, Inc. v. Magaw, 18 F. Supp. 2d 29, 33 (D.C. 1998).

[104] Keeler v. Superior Court, 470 P.2d 617, 626 (Cal. 1970).

[105] United States v. Gonzalez, 407 F.3d 118, 125 (2d Cir. 2005); Reno v. Koray, 515 U.S. 50, 65 (1995).

[106] U.S. CONST. art. I, § 9, cl. 3.

[107] Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798).

- Acts in derogation of the common law:[108]
  - Defined: act that partially repeals or abolishes existing common law rights or otherwise limits the scope, utility, or force of that law.
  - Such acts should be narrowly construed.
- Remedial acts:[109]
  - Defined: act that create new rights or expand remedies,
  - Such acts should be broadly, not narrowly, construed to achieve their remedial purpose.
    - E.g. the American with Disabilities Act.
- Implied causes of action & remedies:[110]
  - Implied causes of action are not expressly provided for in the act; rather, they are implied by a court.[111]
    - Under today's more textualist approach to interpretation, implied causes of action are found less often.
    - Whether a cause of action should be implied is one of congressional intent.
  - Once a cause of action is implied, generally all statutory remedies will similarly be implied.[112]
  - If no cause of action for federal court, either state court action or agency enforcement should be available.

✓ Step 10: Determine whether substantive canons unique to areas of law relate to meaning.
- Some examples:
  - **Contracts**: construe ambiguities against the drafter.
  - **Tax**: tax statutes should be strictly construed, and if any ambiguity is found to exist in a tax statute, that ambiguity should be resolved in favor of the taxpayer.
  - **Veteran's law**: *Gardner*'s Presumption: interpretive doubt should be

[108] Behrens v. Raleigh Hills Hosp., 675 P.2d 1179, 1184 (Utah 1983); Cohen v. Rubin, 460 A.2d 1046, 1055 (Md. Ct. Spec. App. 1983).

[109] Chisom v. Roemer, 501 U.S. 380, 403 (1991); Smith v. Brown, 35 F.3d 1516, 1525 (Fed. Cir. 1994).

[110] Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 182 (2005) (reaffirming *Cannon*); Cannon v. Univ. of Chicago, 441 U.S. 677, 711–12 (1979) (finding an implied cause of action).

[111] Alexander v. Sandoval, 532 U.S. 275, 285 (2001) (identifying the Court's current approach to implying causes of action); CBOCS West, Inc. v. Humphries, 533 U.S. 442, 445 (2008); Transcript of Oral Argument at 45, CBOCS West, Inc. v. Humphries, 553 U.S. 442 (2008) (No. 06-1431) ("We inferred that cause of action [for section 1982] in the bad old days, when we were inferring causes of action all over the place.").

[112] Doe v. County of Centre, 242 F.3d 437, 456 (3d Cir. 2001); Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 66 (1992).

resolved in the veteran's favor.
- **Antitrust**: statutes should be liberally interpreted.
- **Immigration**: interpret ambiguities in favor of aliens.
- **International Law**: national statutes must be construed so as not to conflict with international law.
- **American Indians**: statutes are to be construed liberally in favor of Indians with ambiguous provisions interpreted to their benefit.

***

C. Applying the Linear Approach

In the case below, see how the court applies the linear approach outlined above. Identify each source the court examines. Are there any sources you think the court should have used but did not?

People v. Spriggs
Court of Appeals of the State of California
224 Cal. App. 4th 150 (2014)

❖ LEVY, ACTING P.J.

¶1 While stopped in heavy traffic, Steven Spriggs pulled out his wireless telephone to check a map application for a way around the congestion. A California Highway Patrol officer spotted him holding his telephone, pulled him over, and issued him a traffic citation for violating Vehicle Code section 23123, subdivision (a), which prohibits drivers from "using a wireless telephone unless that telephone is specifically designed and configured to allow hands-free listening and talking, and is used in that manner while driving." Spriggs contends he did not violate the statute because he was not talking on the telephone. We agree. Based on the statute's language, its legislative history, and subsequent legislative enactments, we conclude that the statute means what it says—it prohibits a driver only from holding a wireless telephone while conversing on it. Consequently, we reverse his conviction.

¶2 After Spriggs was cited for violating . . . section 23123(a), he contested the citation. . . . The traffic court commissioner subsequently found Spriggs guilty of violating section 23123(a) and ordered him to pay a $165 fine. . . .

¶3 On appeal, Spriggs asserts [that] he was not "using" the wireless telephone within the meaning of the statute because the statute applies only if a driver is listening and talking on a wireless telephone that is not being used in a hands-free mode. The People contend the statute is much broader and applies to all uses of a wireless telephone unless the telephone is used in a hands-free manner. . . .

DISCUSSION

1. The applicable principles of statutory construction are well-settled.

¶4 The principles of statutory construction are clearly established. "Our task is to discern the Legislature's intent. The statutory language itself is the most reliable indicator, so we start with the statute's words, assigning them their usual and ordinary meanings, and construing them in context. If the words themselves are not ambiguous, we presume the Legislature meant what it said, and the statute's plain meaning governs. On the other hand, if the language allows more than one reasonable construction, we may look to such aids as the legislative history of the measure and maxims of statutory construction. In cases of uncertain meaning, we may also consider the consequences of a particular interpretation, including its impact on public policy." Moreover, "[r]eviewing courts may turn to the legislative history behind even unambiguous statutes when it confirms or bolsters their interpretation."

¶5 To resolve [an] ambiguity, we rely upon well-settled rules. "The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. . . . An interpretation that renders related provisions nugatory must be avoided; each sentence must be read not in isolation but in light of the statutory scheme; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed." We must interpret a statute in accord with its legislative intent and where the Legislature expressly declares its intent, we must accept that declaration. Absurd or unjust results will never be ascribed to the Legislature, and a literal construction of a statute will not be followed if it is opposed to its legislative intent.

2. Section 23123(a) is reasonably construed as only prohibiting a driver from holding a wireless telephone while conversing on it.

a. Statutory language

¶6 Section 23123(a) provides: "A person shall not drive a motor vehicle while using a wireless telephone unless that telephone is specifically designed and configured to allow hands-free listening and talking, and is used in that manner while driving." The statute does not define the word "using" or any other term contained therein.

¶7 Spriggs contends the statute is clear: "It applies if a person is listening or talking on a wireless telephone while driving and while the wireless telephone is not being used in hands-free mode." He asserts this interpretation is bolstered by the words "telephone" and "hands-free listening and talking[,]" which demonstrate the focus of the statute is on talking on the wireless telephone and not some other use of the telephone, such as looking at a map application.

¶8 The People, however, assert the statute clearly prohibits the act of "using a wireless telephone" while driving and, since the word "using" is not ambiguous, it encompasses all uses of the telephone. According to the People, the statute "allows ‘using' a wireless ‘telephone while driving if the telephone is specifically designed and configured to allow hands-free listening and

talking, and is used in that manner while driving.' Otherwise, using a wireless telephone while driving is prohibited." The People reason that, because under section 23123(a) a "driver may not use *a cell phone unless it is used in a hands-free manner[,]" that section is violated when a driver holds a wireless telephone and looks at a map application while driving.*

¶9 While the statute may be interpreted, on its face, as the People assert, we agree with Spriggs that the statute is reasonably construed as only prohibiting engaging in a conversation on a wireless telephone while driving and holding the telephone in one's hand. . . . Had the Legislature intended to prohibit drivers from holding the telephone and using it for all purposes, it would not have limited the telephone's required design and configuration to "hands-free listening and talking," but would have used broader language, such as "hands-free operation" or "hands-free use." To interpret section 23123(a) as applying to any use of a wireless telephone renders the "listening and talking" element nonsensical, as not all uses of a wireless telephone involve listening and talking, including looking at a map application. . . .

b. Legislative history

¶10 The legislative history of section 23123(a) supports our interpretation. Section 23123 was enacted . . . as part of the California Wireless Telephone Automobile Safety Act of 2006 (the Act). A review of the legislative history . . . reveals that, while the Legislature was concerned about hand-held use of wireless telephones, this concern was addressed by prohibiting drivers from engaging in conversations while holding the telephone in one's hand rather than prohibiting all hand-held uses of the telephone.

¶11 As explained in both the Senate and Assembly analyses of the bill, two distractions arise when one uses a cell phone while driving: (1) "the physical distraction a motorist encounters when picking up the phone, punching the number keypad, holding the phone up to his or her ear to converse, or pushing a button to end a call"; and (2) "the mental distraction which results from the ongoing conversation carried on between the motorist and the person on the other end of the line."

¶12 According to these analyses, the bill addresses the first distraction, i.e. the physical distraction of placing a telephone call and holding the phone to one's ear to converse. There is no mention in the legislative history of trying to prevent distractions that arise from other uses of a wireless telephone when driving, such as looking at a map application while holding the telephone. . . .

c. Executive Branch actions

¶13 [S]tatements from the executive branch, while not controlling, further confirm the law was intended to only prohibit holding wireless telephones during conversations. . . . [I]n Governor Schwarzenegger's press release upon signing the bill, the Governor stated the "'simple fact is it's dangerous to talk on your cell phone while driving.'" The press release further commented: "Using a hands-free device while driving does not eliminate the distraction that comes with cell phones. Talking on the phone and dialing and hanging up the phone create a distraction. However, requiring drivers to use hands-free devices better ensures that drivers have two hands free to place

on the wheel while driving."

4. The Legislature's subsequent enactments of sections 23124 and 23123.5 confirm it intended section 23123(a) to only prohibit a driver from holding a wireless telephone while conversing on it.

¶14 The Legislature's subsequent enactments pertaining to the use of wireless telephones and other electronic devices while driving confirm our conclusion. [The court explains that the legislature subsequently enacted two acts prohibiting drivers under age 18 and adult drivers from "from using a wireless telephone or other mobile service device even if used in a hands-free manner while operating a motor vehicle," including "talking, writing, sending, reading or using the internet, or any other function such a device may enable." Neither act would have been necessary if section 23123(a) were interpreted in the manner the state suggested.]

¶15 In sum, based on the legislative history of section 23123 and the statute's language, as well as the Legislature's subsequent enactments of sections 23123.5 and 23124, we conclude that section 23123(a) does not prohibit all hand-held uses of a wireless telephone. Instead, it prohibits "listening and talking" on the wireless telephone unless the telephone is used in a hands-free mode. Accordingly, Spriggs did not violate the statute when he held his cellular telephone in his hand and looked at a map application while driving and his conviction must be reversed.

* * *

Points for Class Discussion

1. *Legal Issue*: What was the legal issue? Cite the operative section of the Act relevant to that issue.

2. *Language at Issue*: What language in that section were the parties arguing about? What did each party argue that language meant? What meaning did the court adopt?

3. *Theories*: Which theory did the court use? Did the court find the language was ambiguous, raised a constitutional question, was absurd, or contained a scrivener's error?

4. *Linear Approach*: This opinion demonstrates the linear approach to interpretation. Notice how the court discusses the text first, then the legislative history, then subsequent executive and legislative acts to reach an interpretation. What sources are missing from this discussion that you believe are relevant?

5. *Smith v. United States*: Recall that in Chapter 4, you read *Smith v. United States*, 508 U.S. 223 (1993), in which the Supreme Court broadly interpreted the phrase "uses . . . a firearm" to include bartering a gun for drugs. In *Spriggs*, the California Court of Appeals narrowly interpreted the phrase "using a wireless telephone" to include only talking on the phone. Which court do you think more accurately discerned the ordinary meaning of the word “use”?

* * *

Applying What You've Learned

Problem 22A[1]

In January of this year, Jennifer McGill, a private attorney, was operating a drone (an unmanned flying device) to investigate the activities of the husband of a client she was helping with a divorce matter. McGill believed that the husband was involved in an extra-marital affair, so she was using the drone to film evidence of the affair. Unfortunately, while McGill was operating the remote controls for the drone, an incoming call on her cell phone distracted her, and she crashed the drone into a grocery store window, injuring several shoppers and causing hundreds of dollars' worth of damage to the store. The Ames Attorney General, who enforces the Ames Aircraft Passenger Safety Act, filed a criminal complaint against McGill for violating Section 3 of the act, seeking $10,000 in criminal penalties, in addition to compensation for the property damage the drone caused.

McGill would like to challenge the government's decision to prosecute. While unmanned aerial vehicles (often called drones) were originally used in the United States by the military for surveillance and for combat, civilians have used smaller versions of the devices for recreational purposes for many years, and businesses are using them for commercial purposes, including aerial photography, filming movies, inspecting wind farms, herding cattle, and tracking people, among other purposes. Indeed, Amazon and Google have explored the use of drones to deliver packages to customers. Most of the non-military drones are operated at altitudes of 5 feet to 35 feet above the ground and most drones that are not used for commercial purposes weigh less than 55 pounds. While the drones are relatively quiet (sounding much like a buzzing wasp's nest), they can cause harm to persons or property (due to their speed and size) if they are operated in a careless or reckless manner.

McGill has been using drones to further her business for several years and would like to continue to use them without being subjected to criminal prosecution for accidents she might cause. She is willing to pay the costs of any injuries and damages she might cause.

McGill asked you for help. If McGill concedes that her operation of the drone was reckless or careless, what arguments can you make on her behalf that Ames cannot impose criminal penalties?

Relevant Materials

[1] This problem was based on an exam question written by Professor Stephen M. Johnson. I am grateful to him for allowing me to include a modified version in this text.

Legislation

AN ACT

to protect the health, safety, and property of individuals in and around aircraft

*Be it enacted by the people of the state of Ames***,**

Section 1. Short Title

This act may be cited as the "Aircraft Passenger Safety Act."

Section 2. Findings and Purposes

(a) During the past year, four commercial airlines have crashed in Ames, injuring hundreds of persons, including passengers, and persons on the ground in the crash sites.

(b) The airline crashes have caused millions of dollars of property damage in addition to personal injuries.

(c) Although the planes that have crashed were commercial airlines, smaller private aircraft can cause similar harm to individuals or property when such aircraft are not operated in a safe manner.

(d) Regulation of all aircraft under this law is necessary to protect the health, safety, and property of individuals in and around aircraft.

Section 3. Prohibited conduct

No person may operate a jet, biplane, turboprop, hot air balloon, blimp, helicopter, seaplane, or any other aircraft in a reckless or careless manner so as to endanger the life or property of any person or the quiet enjoyment of any person's property.

Section 4. Licenses

(a) Except as provided in (b), no person may operate an aircraft unless that person obtains a license to operate an aircraft from the Ames Department of Aviation.

(b) This section does not require a license for the operation of a model airplane or other aircraft so long as it is operated solely by remote control.

Section 5. Penalties

Any person who violates any provision of this Act may be required to pay up to $10,000 for each violation and/or be imprisoned for up to six months. In addition, any person who violates any provision of this Act may be required to provide compensation to any person who is harmed by the violation of the Act for any personal injuries or property damage.

Section 6. Military Exception (added in 2005)

Nothing in this law applies to drones that are used for military purposes.

Section 7. Effective Date

This law is effective January 1, 1951.

Legislative History

When the bill was first introduced in the Ames Senate, Senator Hardy, the sponsor of the bill, introduced it as the Aircraft Noise Reduction Act, and indicated that the major purpose of the law was to reduce the noise caused by the proliferation of aircraft in residential neighborhoods. At that time, Section 3 prohibited only the operation of aircraft in a manner that interfered with the quiet enjoyment of property. Shortly after the bill was introduced, however, it was referred to the Senate Transportation Committee.

At a hearing on the bill in committee, Senator Isakson suggested that it seemed nonsensical to work on legislation to address the noise caused by aircraft when aircraft passengers were being injured in crashes at an alarming rate in Ames. He argued that the legislature should focus on protecting the safety of airline passengers. The Transportation Committee changed the title of the bill to the "Aircraft Passenger Safety Act," changed the language in Section 3 to prohibit the operation of aircraft in a manner that endangers the health or safety of any individual or interferes with the quiet enjoyment of property. With the changes approved, the committee reported the bill to the full Senate, which passed the Bill 50 to 6.

In the Ames's General Assembly, the Senate version of the bill was referred to the General Assembly's Aviation Committee. While the committee approved the bill, the committee report indicated that, despite the title of the bill, the purpose of the Act was to protect persons and property that might be harmed by aircraft, regardless of whether they were passengers on the aircraft. When the bill reached the General Assembly floor, Representative Walton raised concerns that the bill seemed broad enough to regulate model airplanes as aircraft, an outcome he considered unwise, because the bill required licenses for operators of all aircraft. Representative Tattnall, whose district included the leading national producer of model airplanes, responded, in a statement on the floor, that a licensing requirement

for model airplanes would be absurd. He stated that the term "aircraft" clearly did not include model airplanes, arguing that because a string of common law court decisions in Ames had protected persons who operated model airplanes and remote controlled aircraft from liability for nuisances or trespass, it would be inconsistent with these decisions for the bill to require licenses or impose other limitations on operating model airplanes or remote controlled aircraft in Ames. But to be safe, Tattnall proposed an amendment to Section 4 of the bill that exempted model airplanes and other remote-controlled aircraft from the licensing requirements of the statute. After the amendment passed, the bill passed 256–9.

After these different versions of the bill passed both chambers, a conference committee reconciled the versions to produce the law above and issued a report. The conference committee report included the following statement: "In order to protect the health and safety of persons and property, broad regulation of aircraft used for commercial purposes is appropriate."

In 2005, when Ames produced drones for the military, the Ames legislature amended the Ames Aircraft Passenger Safety Law to include a new Section 6, which provides "Nothing in this law applies to drones that are used for military purposes." The amendment did not define "drones."

In 2011, the Ames legislature enacted the "Protect Our Parks Act", which was designed to protect state parks from over-use by recreational outfitters. The legislature concluded that hang-gliding, helicopter tours, and various other activities were interfering with the aesthetics of the parks, increasing access to and traffic in areas of the parks that were formerly wilderness areas, and degrading the environment of the parks. Accordingly, the Act prohibited the operation of aircraft in state parks, except in accordance with regulations established by the State Parks Commissioner. The Protect Our Parks Act defines aircraft broadly to include "model aircraft, drones of all types, and many other remote-controlled aircraft."

Judicial Decisions

While researching, you discover that the bill was modeled on a 1950 Mississippi act and was identical to that act. The Mississippi act included an exemption in its Section 3 for operating model airplanes and remote-controlled aircraft similar to the exemption the version from the general assembly had added to Section 4. The Mississippi act, including the findings and purposes section, was identical to the act Ames adopted.

In 2010, the Mississippi Supreme Court concluded, in *Mississippi v. Wyatt*, that drones operated by civilians are exempt from the prohibitions in Section 3 of the Mississippi law, because they are remote controlled aircraft, whether or not they are operated for recreational or commercial purposes.

Further, you discovered that in a 1973 case, *Ames v. Baldwin*, the Ames Supreme Court held that a model airplane being used for recreational purposes was not an aircraft for purposes of Section 3 of the Ames Passenger Safety Act. The court reasoned that the language was ambiguous, but the legislative history and statutory purpose supported its holding.

Baldwin has not been overruled, and the Ames legislature did not amend the law to expand the definition of aircraft in Section 3 in response to *Baldwin*; however, the legislature did consider five bills that would have amended the Ames Aircraft Passenger Safety Law to overrule *Baldwin*. None of the bills passed both chambers.

Problem Questions

1. Apply the linear approach. **Step 1**: Identify the standard of review a court will apply to determine the meaning of the language at issue. **Ask**: What is being interpreted, statutory or regulatory language, and who is interpreting that language?

    a. If the court is interpreting statutory language without an agency's help, apply *de novo* review. Proceed to Question 2.

    b. If the court is reviewing an agency interpretation of a regulation, apply *Auer*. First apply *de novo* review, then proceed to Question 2. If any ambiguity remains after applying *de novo* review, consider whether the agency's interpretation is reasonable.

    c. If the agency interpretation presents an *extraordinary* case (meaning the agency is trying to regulate (1) a matter of great political significance, (2) a significant portion of the American economy, (3) a matter requiring private persons or entities to spend billions of dollars, or (4) a matter that is the particular domain of state law). Proceed to Step 9: Clear Statement Rules.

    d. If the major questions doctrine does not apply, *Loper Bright* applies. Proceed to Step 2 and apply *de novo* review. If after applying de novo review ambiguity remains, apply Skidmore's power-to-persuade test.
        i. An agency interpretation is given respect based on its power to persuade as determined by these factors:
            1. Consistency of agency interpretation,
            2. Thoroughness of agency interpretation,
            3. Validness of agency interpretation,
            4. Relevance of agency's expertise, and
            5. Contemporaneousness of agency interpretation. Stop here.

2. **Step 2**: What is the legal issue? What is the operative section of the act related to that legal issue?

3. **Step 3**: What is the specific language in the operative section of the act related to that legal issue? What does your client want that language to mean? What does the State want that language to mean?

    a. Is the language you identified defined in the act? If so, what language in the definition is at issue?

4. **Step 4**: Apply the plain meaning canon.

    a. Was ordinary or technical meaning intended and how do you know? What is that ordinary or technical meaning. How can you "prove" what the ordinary or technical meaning is?

    b. Is grammar or punctuation relevant? Are any of the specific rules related to grammar and punctuation relevant (doctrine of last antecedent, and v. or, singular v. plural, masculine v. feminine, mandator v. discretionary)? If so, which? What arguments would you make using these sources? How would the Government respond to your arguments? What arguments would the Government make using these sources? How would you respond?

5. **Step 5**: Should you argue the language is ambiguous? Should the Government? Which definition of ambiguity would each use assuming at least one party will argue ambiguity?

6. **Step 6**: Should you or the Government argue that there is a reason to avoid the ordinary meaning of the language, such as it raises a constitutional question, leads to an absurd outcome, or contains a scrivener's error? Why or why not?

    a. If either party argues that the interpretation will raise a constitutional question, what is that question?

    b. If either party argues that the ordinary meaning would lead to an absurd result, what is the absurd result? Which definition of absurdity should each side use assuming at least one party will argue that there is absurdity?

    c. If either party argues that there is a scrivener's error, what is that error?

7. **Step 7**: Are there any other intrinsic sources that aid your or the Government's argument (linguistic canons, components)? If so, which? What arguments would you make using these sources? How would the Government respond to your arguments? What arguments would the Government make using these sources? How would you respond?

8. **Step 8**: Are there any extrinsic sources that aid your or the Government's argument (conflicting acts, modeled or borrowed acts, uniform acts, legislative history, purpose, subsequent legislative acts, subsequent legislative history, or legislative acquiescence)? If

so, which? What arguments would you make using these sources? How would the Government respond to your arguments? What arguments would the Government make using these sources? How would you respond?

9. **Step 9**: Are there any policy-based sources that aid your or the Government's argument (clear statement rules, rule of lenity, *ex post facto* prohibition, acts in derogation, remedial acts, or implied causes of action or remedies)? If so, which? What arguments would you make using these sources? How would the Government respond to your arguments? What arguments would the Government make using these sources? How would you respond?

10. **Step 10**: Are then any substantive canons unique to an area of law that aid your or the Government's argument? If so, which?

11. Now that you have completed *Chevon*'s step one analysis, apply *Chevron*'s step two analysis if an agency interpretation of statutory language was involved: is the agency's interpretation reasonable? (Alternatively, is the agency's interpretation arbitrary and capricious?) If there was no agency interpretation of statutory language, go to Question 12.

12. Using the outline you just created, draft the argument section of your brief.

* * *

Applying What You've Learned

Problem 22B

Assume instead, that the Aircraft Passenger Safety Act is a federal law, rather than a state law, that all references in the preceding question to the Ames legislature refer to Congress, that all references in the preceding question to the Ames Supreme Court refer to the U.S. Supreme Court, and that the Federal Aviation Administration (the "FAA") enforces the Act, instead of the state Attorney General. In addition, assume that the Act includes the following provision, in addition to the provisions included in 22A:

> **Section 8. Federal Aviation Administration**
>
> The Federal Aviation Administration may issue such regulations as are necessary to interpret and implement this Act and conduct hearings on the record as necessary to enforce this act.

Assume the following additional facts:

In 2006, after the Aircraft Passenger Safety Act was amended to exempt military drones from regulation as "aircraft" under Section 6 of the law, the FAA posted a policy statement to its website. The policy statement provided, "Although the 2005 amendment only explicitly exempts

military drones from regulation as ‘aircraft' under the Aircraft Passenger Safety Act, civilian drones do not pose any threat to health, welfare, or the quiet enjoyment of property, so we do not intend to regulate them as ‘aircraft' under the law, regardless of whether such civilian drones are used for recreational or commercial purposes."

By 2010, however, there was a significant increase in the use of drones for commercial purposes, and the FAA determined that they posed a significant risk of harm to persons and property if operated in a careless or reckless manner. Accordingly, in 2011, the FAA promulgated a regulation, using notice and comment rulemaking procedures, that defined "aircraft," in the Aircraft Passenger Safety Act, to include drones operated by civilians. In the preamble to its final rule, the FAA explained:

> Although many organizations commented that the FAA should exempt civilian drones from regulation and although Congress exempted military drones from the definition of ‘aircraft' under the law, most of the operations of military drones take place outside of the United States or in areas that are not heavily populated. Drones operated by civilians, on the other hand, are routinely used in the United States and are frequently used in heavily populated areas. Thus, it is reasonable to regulate them as ‘aircraft,' even though military drones are exempted from regulation as “aircraft.”

Jennifer McGill is prosecuted for violating Section 3 of the act for the conduct described earlier. If McGill concedes that her operation of the drone was reckless or careless, what arguments can you make on her behalf that the federal government cannot impose criminal penalties?

Problem Questions

1. If you have not already done so, complete the steps in Problem 22A above, but assume that the FAA’s action does not present an extraordinary case (regardless of your findings above) and that after applying *de novo* review, a court would find that ambiguity remains.

2. Apply *Skidmore*’s power-to-persuade test to analyze whether the court will give the FAA’s interpretation respect.

3. Draft the argument section of your brief on this issue.

* * *

D. Test Your Comprehension of this Chapter

At the beginning of this chapter, you encountered a list of learning objectives. Ask yourself how confident you feel with each of those actions. Before checking any column, actually try to complete each activity.

Action	Shaky	Comfortable	Confident
Describe the linear approach to interpretation.			
Apply the linear approach to a fact situation.			