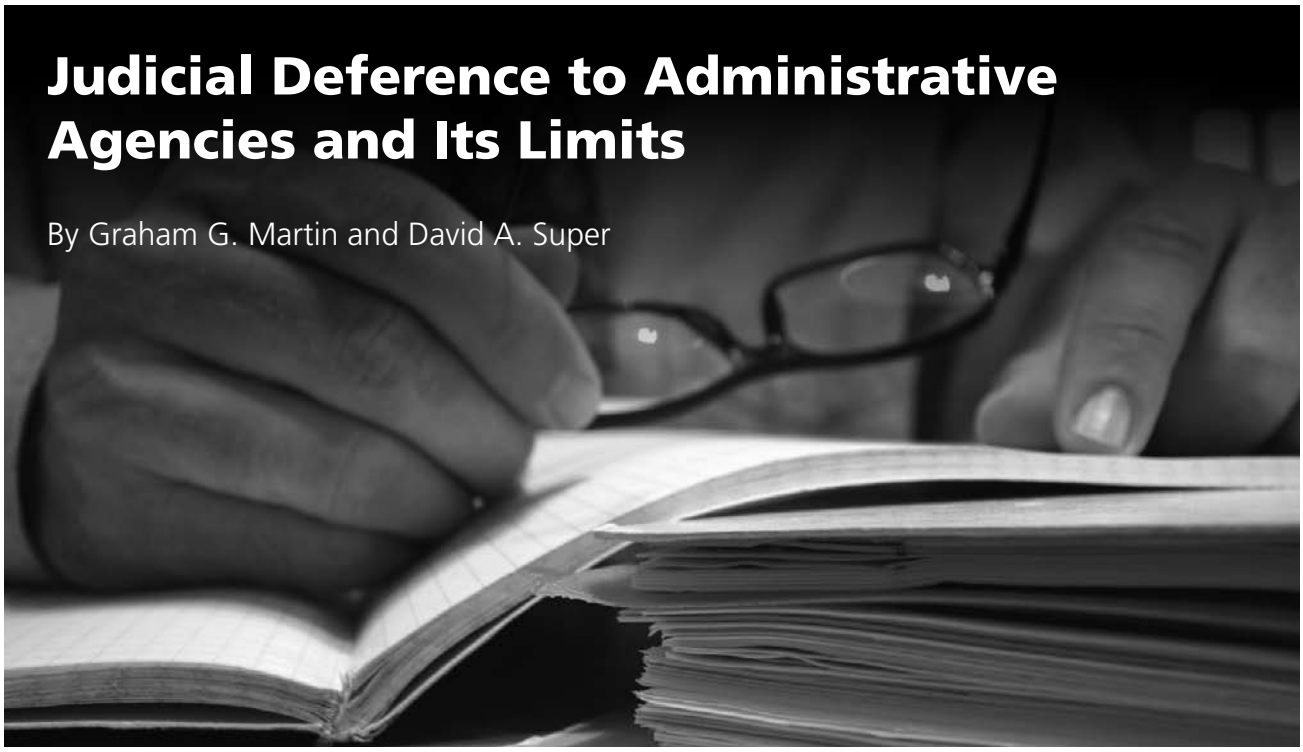
Judicial Deference to Administrative Agencies and Its Limits

By Graham G. Martin and David A. Super



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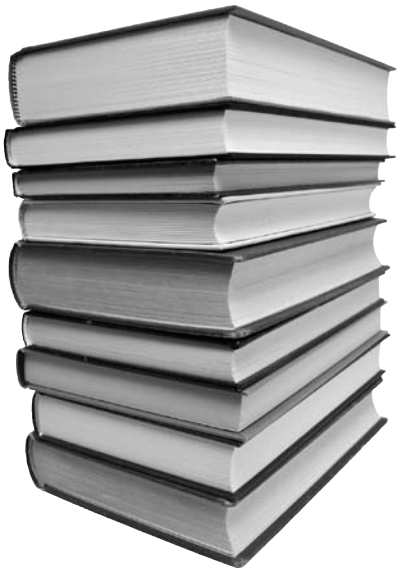
When two leading administrative law scholars declared that "the rules governing judicial review have no more substance at the core than a seedless grape," they were engaging in some hyperbole.[1] Nonetheless, the law on judicial deference to administrative agencies is far more flexible than government briefs suggest or than many practitioners believe. In this article we explore new developments as well as underutilized older doctrines that facilitate challenges to dubious interpretations of statutes. We begin with the basic test for when courts should defer to administrative agencies' interpretations of statutes under *Chevron U.S.A. Incorporated v. Natural Resources Defense Council Incorporated*, as sharply modified by *United States v. Mead Corporation*.[2] We then review a range of other doctrines that may prove relevant in many of the same cases in which agencies' statutory interpretations are scrutinized under the *Chevron/Mead* test.



I. Fundamentals of Deference to Administrative Agencies' Interpretations

Federal courts apply a framework to determine whether to defer to agencies' statutory constructions in most, although not all, cases. In some specific types of cases, such as those involving Native Americans, courts held deference inapplicable.[3] Many state courts apply considerably less deference to administrative agencies' statutory construction.[4]

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[1] Ernest Gellhorn & Glen D. Robinson, *Perspectives on Administrative Law*, 75 Columbia Law Review 771, 780–81 (1975).

[2] *Chevron U.S.A. Incorporated v. Natural Resources Defense Council Incorporated*, 467 U.S. 837 (1984); *United States v. Mead Corporation*, 533 U.S. 218 (2001).

[3] *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10th Cir. 1997). See *Officemax Incorporated v. United States*, 428 F.3d 583 (6th Cir. 2005) (finding *Chevron* inapplicable to Internal Revenue Service rulings).

[4] "Ordinarily, the construction and interpretation of a statute is a question of law for the courts where the administrative decision is not entitled to special deference, particularly where, as here, the statute has not previously been subjected to judicial scrutiny or time-tested agency interpretations." *Connecticut State Medical Society v. Connecticut Board of Examiners in Podiatry*, 546 A.2d 830, 834 (Conn. 1988). see, e.g., *State ex rel. Celebrezze v. National Lime and Stone Company*, 627 N.E.2d 538 (Ohio 1994).

A. *Chevron* Test

The "*Chevron* Two-Step" has been ubiquitous for more than two decades. The test consists of two distinct steps. "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."[5] Footnote 9 of *Chevron v. Natural Resources Defense Council* directs courts to "employ[] traditional tools of statutory construction" in determining congressional intent, which opens the door to a wide range of arguments. It reminds them that "[t]he 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."[6] Thus even advocates whose arguments rely on legislative history, comparisons with other statutes, consistency in public policy, or other nontextual sources should not concede Step One to the government even if the statutory text is unclear. For example, courts rarely defer to administrative agencies' interpretations of ambiguities in criminal statutes because the rule of lenity—a traditional tool of statutory construction—directs that such ambiguities be resolved against the accused.[7] Similarly, even where an agency's reading of a statute is the most logical, a long-standing canon directs the court to seek a different construction if doing so would avoid a serious constitutional issue.[8] As the U.S. Supreme Court stated, "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."[9]

Accordingly agencies lose Step One far more often than is commonly understood.[10] Prof. Richard Pierce suggests that the courts are increasingly rejecting agencies' interpretations at *Chevron* Step One through "two distinct but related interpretive techniques: finding linguistic precision where it does not exist, and relying exclusively on the abstract meaning of a particular word or phrase even when other evidence suggests strongly

[5]*Chevron*, 467 U.S. at 842–43.

[6]*Id.* at 843 n.9.

[7]*United States v. McGoff*, 831 F.2d 1071, 1077 (D.C. Cir. 1987) (finding the interpretation of criminal statutes "far outside *Chevron* territory"); see *Lopez v. Gonzales*, 127 S. Ct. 625 (2006) (declining to defer to immigration agency on definition of "aggravated felony" in Immigration and Nationality Act).

[8]See, e.g., *Department of Commerce v. House of Representatives*, 525 U.S. 316 (1999); *Lowe v. Securities Exchange Commission,* 472 U.S. 181 (1985).

[9]*Solid Waste Agency v. Army Corps of Engineers,* 531 U.S. 159, 172 (2001); see also, e.g., *Getahun v. Office of the Chief Administrative Hearing Officer of the Executive Office for Immigration Review of the U.S. Department of Justice*, 124 F.3d 591, 594 (3d Cir. 1997).

[10]See, e.g., *Ragsdale v. Wolverine World Wide Incorporated*, 535 U.S. 81, 96 (2002); *Food and Drug Administration v. Brown and Williamson Tobacco Corporation*, 529 U.S. 120 (2000) (holding that Congress had not granted the Food and Drug Administration authority to regulate cigarettes); *Metropolitan Stevedore Company v. Rambo*, 521 U.S. 121 (1995); *Brown v. Gardner*, 513 U.S. 115, 122 (1994) ("a regulation's age is no antidote to clear inconsistency with a statute"); *MCI Telecommunications v. AT&T*, 512 U.S. 218 (1994); *National Labor Relations Board v. Health Care and Retirement Corporation*, 511 U.S. 571 (1994); *Reese Brothers Incorporated v. United States*, 447 F.3d 229, 237 (3d Cir. 2006); *Bona v. Gonzales*, 425 F.3d 663, 670–71 (9th Cir. 2005); *Cuadra v. Gonzales*, 417 F.3d 947 (8th Cir. 2005); *Northpoint Technology Limited v. Federal Commerce Commission*, 412 F.3d 145, 152 (D.C. Cir. 2005); *AFL-CIO v. Chao*, 409 F.3d 377 (D.C. Cir. 2005); *American Library Association v. Federal Commerce Commission*, 406 F.3d 689, 699 (D.C. Cir. 2005); *Succar v. Ashcroft*, 394 F.3d 8, 35–36 (1st Cir. 2005); *Wilderness Watch v. Mainella*, 375 F.3d 1085 (11th Cir. 2004); *DaimlerChrysler Corporation v. United States*, 361 F.3d 1378, 1385 (Fed. Cir. 2004); *Nutritional Health Alliance v. Food and Drug Administration*, 318 F.3d 92, 102 (2d Cir. 2003); *Sierra Club v. Environmental Protection Agency*, 314 F.3d 735, 741 (5th Cir. 2002); *Sierra Club v. Environmental Protection Agency*, 311 F.3d 853 (7th Cir. 2002); *Sierra Club v. United States Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001); *Edelman v. Lynchburg College*, 228 F.3d 503 (4th Cir. 2000); *New York Life Insurance Company v. United States*, 190 F.3d 1372 (Fed. Cir. 1999); *Whitney v. Booker*, 147 F.3d 1280, 1282 (10th Cir. 1998); *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998); *First City Bank v. National Credit Union Administration Board,* 111 F.3d 433, (6th Cir. 1997); *Public Citizen v. Young*, 831 F.2d 1108 (D.C. Cir. 1987).

that Congress intended a result inconsistent with that usage."[11] Professor Pierce hypothesizes that "the Court may be attempting to respond to the age-old problem of excessively broad delegations of power to agencies."[12]

If a court is unable to arrive at a construction of a statute at Step One, *Chevron* Step Two directs that it "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."[13] This is the source of the widespread belief that *Chevron* commands exceptionally broad deference to administrative agencies. This deference, however, is subject to important limitations. Most obvious, the agency will lose if the court finds its interpretation unreasonable. Arbitrary rules that truncate broad statutory standards may be unreasonable.[14] So, too, may hypertechnical readings of statutory terms that undermine congressional intent.[15]

The two parts of the *Chevron* test together recognize that Congress can legislate in either of two distinct ways. At times, it defines policy as a very specific "point."[16] On other occasions it legislates in broad terms, merely designating an "area" within which policy is to be located.[17] Step One seeks to assure that agencies honor any "point" Congress selected; Step Two enforces the boundaries of a congressionally designated "area" of permissible policy. Nothing in *Chevron* establishes any presumption that Congress did not have specific intent on a question even if the statutory language is not crystalline. In the words of the District of Columbia Circuit, "[a]s we have often cautioned, to suggest, as the [Commission] effectively does, that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power is both flatly unfaithful to the principles of administrative law and refuted by precedent."[18]

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[11]Richard Pierce, *The Supreme Court's New Hypertextualism: A Prescription for Cacophony and Incoherence in the Administrative State*, 95 Columbia Law Review 749, 752 (1994); see, e.g., *Aremu v. Department of Homeland Security*, 450 F.3d 578, 581 (4th Cir. 2006) (literally construing "admission" to reject agency's attempt to broaden it to include immigrants' adjustments in status).

[12]Pierce, *supra* n. 11, at 776.

[13]*Chevron*, 467 U.S. at 843. In language familiar to anyone who litigates against federal agencies, footnote 11 advises that "[t]he 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." *Id.*, 467 U.S. at 843 n.11.

[14]E.g., the Sixth Circuit held that a "Commission's attempt to place a per se time limit on what qualifies as 'prompt medical attention' is unreasonable." *CMC Electric Incorporated v. Occupational Safety and Health Administration*, 221 F.3d 861, 867 (6th Cir. 2000).

[15]See, e.g., *South Coast Air Quality Management District v. Environmental Protection Agency*, 472 F.3d 882 (D.C. Cir. 2006); *Peter Pan Bus Lines Incorporated v. Federal Motor Carrier Safety Administration*, 471 F.3d 1350, 1354 (D.C. Cir. 2006); *Alabama Education Association v. Chao*, 455 F.3d 386, 396 (D.C. Cir. 2006); *Zheng Zheng v. Gonzales*, 422 F.3d 98, 120 (3d Cir. 2005); *Harbert v. Healthcare Services Group Incorporated*, 391 F.3d 1140, 1151 (10th Cir. 2004); *NSK Ltd. v. United States*, 390 F.3d 1352, 1358 (Fed. Cir. 2004); *Akhtar v. Burzynski*, 384 F.3d 1193, 1202 (9th Cir. 2004); *Louisiana Environmental Action Network v. Environmental Protection Agency*, 382 F.3d 575, 586 (5th Cir. 2004); *Getahun*, 124 F.3d at 594.

[16]Thus, e.g., the Food Stamp Act provides a precise formula to account for recipients' work-related expenses. 7 U.S.C. § 2014(e)(2), (3) (2000).

[17]E.g., the Aid to Families with Dependent Children statute addressed the problem of work expenses on a much more conceptual, general level, requiring only that the income attributed to families be limited to that which was "actually available." *Shea v. Vialpando*, 416 U.S. 251 (1974).

[18]*American Bar Association v. Federal Trade Commission*, 430 F.3d 457, 468 (D.C. Cir. 2005). The District of Columbia Circuit stated: "To find this interpretation deference-worthy, we would have to conclude that Congress not only had hidden a rather large elephant in a rather obscure mousehole, but had buried the ambiguity in which the pachyderm lurks beneath an incredibly deep mound of specificity, none of which bears the footprints of the beast or any indication that Congress even suspected its presence." *Id.* at 469.

B. Limiting *Chevron's* Reach in *Mead*

In 2001, in *United States v. Mead Corporation*, the Court sharply curtailed *Chevron*'s scope. *Mead* limited *Chevron* deference to cases where "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."[19] The eight-member *Mead* majority proceeded to note that "[d]elegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent."[20] Thus, instead of automatically applying the *Chevron* Two-Step, a court must first determine whether that, or a lesser degree of deference, is appropriate. In effect, we now have the "*Mead* Three-Step."

In applying this new first step, the court analyzes the nature of the action under review. Where the agency's interpretation comes before the court in rules promulgated after formal hearings under Sections 556 and 557 of the Administrative Procedure Act or a notice-and-comment period under Section 553, *Chevron* deference generally is appropriate.[21] For example, the Supreme Court found *Chevron* deference appropriate after the use of notice-and-comment rule making even though the policy in question was initially promulgated through an informal agency ruling, entries in an agency manual, and a letter.[22] The Court emphasized that, by the time the policy had reached it, the agency had given the public the opportunity to comment through the rule-making proceeding. If the agency formulates its interpretation in a formal adjudication, with interested parties having the opportunity to argue its merits, *Chevron* deference also may follow.[23]

If, however, the agency does not act through formal or informal rule making or formal adjudication, the court seeks some other clear indication that Congress intended the agency's interpretation to have the force of law. Finding such indications where the agency did not proceed through rule making or formal adjudication is exceptional. *Mead* declared, "We have recognized a very good indicator of delegation meriting *Chevron* treatment in *express congressional authorizations* to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed."[24] Courts have consistently articulated the requirement of such "express congressional authorizations."[25] The common case, in which an agency seeks deference for an interpretation advanced for the first time in its counsel's briefs, now

[19] *Mead*, 533 U.S. at 226–27.

[20] *Id.*

[21] *Id.* at 229–30.

[22] *Barnhart v. Walton*, 535 U.S. 212 (2002).

[23] *Chevron* deference is inappropriate to a nonprecedential, unpublished decision of a single member of an agency even after a formal adjudication. *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1014–15 (9th Cir. 2006).

[24] *Mead*, 533 U.S. at 229 (emphasis added).

[25] See, e.g., *Alaska Department of Environmental Conservation v. Environmental Protection Agency*, 540 U.S. 461, 487–88 (2004) (denying deference to internal guidance memos); *Yellow Transportation Incorporated v. Michigan*, 537 U.S. 36, 45 (2002) (granting *Chevron* deference because "Congress made an express delegation of authority to the [Interstate Commerce Commission] to promulgate standards for implementing the new Single State Registration System"); *Equal Employment Opportunity Commission v. Seafarers International Union*, 394 F.3d 197, 200–202 (4th Cir. 2005) (holding that "Congress has vested in the [Equal Employment Opportunity Commission (EEOC)] the power to 'issue such rules and regulations as it may consider necessary or appropriate for carrying out [the Age Discrimination in Employment Act (ADEA)].' The agency thus promulgated the 1996 regulation pursuant to explicit congressional delegation.... For the foregoing reasons we review the EEOC's interpretation of the ADEA under the deferential standard of *Chevron*"); *A.T. Massey Coal Company v. Barnhart*, 472 F.3d 148 (4th Cir. 2006); *Coke v. Long Island Care at Home Limited*, 462 F.3d 48, 51 (2d Cir. 2006), *cert. granted*, 127 S. Ct. 853 (2007); *George Harms Construction Company v. Chao*, 371 F.3d 156, 162 (3d Cir. 2004); *Public Citizen Incorporated v. Department of Health and Human Services*, 332 F.3d 654, 661–62 (D.C. Cir. 2003); *Pool Company v. Cooper*, 274 F.3d 173, 177 n.6 (5th Cir. 2001); *U.S. Freightways Corporation v. Commissioner of Internal Revenue*, 270 F.3d 1137, 1142 (7th Cir. 2001); *Nodarse v. Barnhart*, 319 F. Supp. 2d 1333, 1339–40 (S.D. Fla. 2004); *Ngwanyia v. Ashcroft*, 302 F. Supp. 2d 1076, 1083 (D. Minn. 2004); *Scharpf v. AIG Marketing*, 242 F. Supp. 2d 455, 465 (W.D. Ky. 2003); cf. *Regan v. United States*, 421 F. Supp. 2d 319, 337 (D. Mass. 2006).

falls squarely outside *Chevron* deference.[26] Even where a statute authorizes some part of an agency to interpret a statute with the force of law, courts do not assume that *all* administrative entities operating under that statute are similarly empowered. For example, the Court held that a commission authorized to carry out adjudicatory functions under the Occupational Safety and Health Administration did not have the authority to interpret authoritatively an ambiguous regulation. That power was instead held by the secretary of labor, who promulgated the regulation pursuant to her powers under the Occupational Safety and Health Administration.[27]

If an agency does not proceed through one of the three procedures that trigger *Chevron* deference, and no other authorization to interpret the statute authoritatively is apparent, the much weaker form of deference under *Skidmore v. Swift and Company* applies.[28] Under *Skidmore* "[t]he weight of [an agency's] 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."[29] Put more simply, "the interpretation is 'entitled to respect' only to the extent it has the 'power to persuade.'"[30] Saying that an agency's interpretation influences courts based on its "power to persuade" is all but circular: *anything* the court reads presumably receives that kind of deference.

Thus *Mead* offers an important means for compelling agencies to engage in debates over statutory construction on largely equal terms with their challengers. In effect, the Court tells agencies that they may still take advantage of the exemptions from notice-and-comment rule making in Section 553(b) of the Administrative Procedure Act to make policy through opinion letters, action transmittals, manual pages, and the like, but doing so likely costs them the deference that they would receive for decisions reached through the Act's more participatory methods.[31] For example, in a case where no rule making or formal adjudication was employed, the Court held that "[t]he Agency's interpretation … presented in internal guidance memoranda … does not qualify for the dispositive force described in *Chevron*."[32]

1. Agencies' Interpretations of Their Own Regulations

Mead's limitations on deference to agencies' interpretations of statutes would mean little if agencies could obtain sweeping deference to their interpretations of their own regulation. Were this the case, an agency could promulgate broad rules that do not directly address a crucial issue and then assert that those rules, properly construed, support its position in litigation. Promulgation of vague regulations that do little more than mimic the statutory language serves none of the participatory or openness purposes of *Mead*. Fortunately, courts long have disallowed agencies from adding post hoc rationalizations to legitimate their actions: "The grounds upon which an administrative order must be

[26] *Pool Company*, 274 F.3d at 177 n.6.

[27] *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144 (1991); see also *Michigan ex rel. Kelly v. Environmental Protection Agency*, 25 F.3d 1088, 1092 (D.C. Cir. 1994) ("When Congress treats an agency only as a prosecutor without specific authority to issue regulations bearing on the questions prosecuted, we accordingly do not assume that Congress has delegated this sort of policymaking authority to the agency.").

[28] *Skidmore v. Swift and Company,* 323 U.S. 134 (1944).

[29] *Id.* at 140.

[30] *Gonzales v. Oregon*, 126 S. Ct. 904 (2006) (citing *Skidmore*). *Mead* uses similar language, noting that decisions reached without the public input involved in rule making or formal adjudication may "seek a respect proportional to its 'power to persuade,' and may claim the merit of its writer's thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight." *Mead*, 553 U.S. at 218 (citing *Skidmore*); *Eldredge v. Department of Interior*, 451 F.3d 1337, 1342 (Fed. Cir. 2006) (denying even *Skidmore* deference when neither handbook nor advisory opinion cited any authority).

[31] 5 U.S.C. § 553(b) (2000). This theme had been present in lower-court cases since shortly after *Chevron*. E.g., *Doe v. Reivitz*, 830 F.2d 1441 (7th Cir. 1987).

[32] *Alaska Department of Environmental Conservation*, 540 U.S. at 487–88 (citing *Mead*).

judged are those upon which the record discloses that its action was based."[33] Post-*Mead* courts have applied this rule to deny *Chevron* deference.[34] The District of Columbia Circuit noted that to allow agencies to reinterpret the meaning of a legislative regulation that was originally promulgated via notice-and-comment rule making would "render the requirements of § 553 [of the Administrative Procedure Act] basically superfluous in legislative rulemaking by permitting agencies to alter their requirements for affected public members at will through the ingenious device of 'reinterpreting' their own rule."[35] Last year the Supreme Court crystallized this line of cases by holding that no special deference is due an agency's interpretation of regulations that merely "parrot" the underlying statute.[36] Consistent with *Mead*, this requires an agency actually to seek public comment on its important interpretations through rule making and respond to any concerns raised. Rules whose language adds little to the statute will be found to be "parroting" and hence receive no deference from the courts.

This is a special case of the broader problem of how courts should treat agencies' interpretations of their own regulations. The basic test was described over sixty years ago in *Bowles v. Seminole Rock and Sand Company*.[37] The Court held that "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[38] *Auer v. Robbins* confirmed that *Chevron* had not formally subsumed this standard.[39] Nonetheless, courts only apply *Bowles/Auer* deference after undertaking a threshold analysis that is the functional equivalent of *Chevron* Step One: "*Auer* deference is warranted only when the language of the regulation is ambiguous."[40]

2. Deference and Federalism

Federal courts may defer to a state agency's interpretation of state law.[41] They do not, however, defer to states on questions of federal law:

> A state agency's interpretation of federal statutes is not entitled to the deference afforded a federal agency's interpretation of its own statutes.... What concerns us is whether the state law and regulations are consistent with federal law. Neither the district court nor we defer to the state to answer that question.[42]

This makes sense, particularly under *Mead*: Congress is unlikely to have au-

[33] *Securities Exchange Commission v. Chenery Corporation*, 318 U.S. 80, 87 (1943) (*Chenery I*); see also *Burlington Truck Lines Incorporated v. United States*, 371 U.S. 156, 168–69 (1962) ("The courts may not accept appellate counsel's post hoc rationalizations for agency action; [*Chenery I*] requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself."); *Pool Company*, 274 F.3d at 177 n.6.

[34] See, e.g., *PDK Laboratories Incorporated v. Drug Enforcement Agency*, 362 F.3d 786 (D.C. Cir. 2004) (citing *Chevron* and *Chenery I* to admonish that "it is important to remember that if we find that an agency's stated rationale for its decision is erroneous, we cannot sustain its action on some other basis the agency did not mention.... [I]n those circumstances ... we withhold *Chevron* deference and remand to the agency so that it can fill in the gap"); but cf. *Bank of America National Association v. Federal Deposit Insurance Corporation*, 244 F.3d 1309, 1319 (11th Cir. 2001) (allowing counsel for the agency to advance arguments about the proper reading of a statute at Step One, the nondeferential stage of *Chevron* analysis).

[35] *National Family Planning and Reproductive Health Association v. Sullivan*, 979 F.2d 227 (D.C. Cir. 1992).

[36] *Gonzales v. Oregon*, 126 S. Ct. 904 (2006).

[37] *Bowles v. Seminole Rock and Sand Company*, 325 U.S. 410 (1945).

[38] *Id.* at 414.

[39] *Auer v. Robbins*, 519 U.S. 452 (1997). "Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless '*plainly erroneous or inconsistent with the regulation.*'" *Id.* at 461 (emphasis added).

[40] *Christensen v. Harris County*, 529 U.S. 576, 588 (2000).

[41] *Pharmaceutical Research and Manufacturers of America v. Meadows*, 304 F.3d 1197, 1208 (11th Cir. 2002).

[42] *Orthopaedic Hospital v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997).

thorized *state* agencies to make rules with the force of *federal* law—nor is it clear that Congress could do so constitutionally. Moreover, no individual state can establish an interpretation that will apply nationally.

A special case arises in determining the effect of federal approvals of state plans and regulations. State plans reflect states'—not federal agencies'—interpretations of federal law and thus are not entitled to deference from the court, as courts recognized.[43] Some courts, however, treated federal agencies' approval letters as implicit interpretations of statute entitled to *Chevron* deference.[44] This seems clearly wrong under *Mead* and *Christensen v. Harris County*, both of which rejected applying *Chevron* deference to agencies' letters expressing opinions of law.[45] Unlike formal and informal rule making and formal adjudications (the procedures that *Mead* recognizes as deserving *Chevron* deference), the state plan approval process offers no opportunity for interested parties and the public to inform the agency's decision making and no requirement that the decision be made reflectively or at the senior levels of the agency.[46] The key question is not whether state plan approval letters have legal effect—the letters in *Christensen* and *Mead* had legal consequences for their recipients, too—but whether "Congress delegated authority to the agency generally to make rules carrying the force of law" in this manner.[47]

C. Highly Discretionary Statutes

Just as *Mead* and *Skidmore* create a large class of cases where courts scrutinize agencies' interpretations far more closely than under *Chevron*, the Administrative Procedure Act recognizes a much smaller class in which agencies' actions will receive less than the usual attention. The Act's judicial review provisions "appl[y], according to the provisions thereof, except to the extent that … agency action is committed to agency discretion by law."[48] The Court held that "[r]eview is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."[49]

This, however, is an extraordinarily narrow exception. Even prior to *Chevron* the Court observed that "[t]his is a very narrow exception [and] is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is *no law to apply*.'"[50] The Court found agencies' discretion to be unreviewably broad only in exceptional cases that raised separation-of-powers concerns, such as

[43]See, e.g., *AMISUB Incorporated v. Colorado Department of Social Services,* 879 F.2d 789, 796 (10th Cir. 1989) (holding that a "state [Medicaid] agency's determination of procedural and substantive compliance with federal law is not entitled to the deference afforded a federal agency"); *Turner v. Perales*, 869 F.2d 140, 141–42 (2d Cir. 1989) (same); *Belshe*, 103 F.3d at 1495 ("A state agency's interpretation of federal statutes is not entitled to the deference afforded a federal agency's interpretation of its own statutes… What concerns us is whether the state law and regulations are consistent with federal law. Neither the district court nor we defer to the state to answer that question.").

[44]See, e.g., *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006); *S.D. v. Hood*, 391 F.3d 581, 594 (5th Cir. 2004); *Pharmaceutical Research and Manufacturers of America v. Thompson*, 362 F.3d 817, 822 (D.C. Cir. 2004) (granting *Chevron* deference because "Congress expressly conferred on the Secretary authority to review and approve state Medicaid plans as a condition to disbursing federal Medicaid payments"); *Georgia Department of Medical Assistance ex rel. Toal v. Shalala*, 8 F.3d 1565 (11th Cir. 1993) (applying *Chevron* deference to the denial of a state plan amendment); *Alaska Department of Health and Social Services v. Centers for Medicare and Medicaid Services*, 424 F.3d 931 (9th Cir. 2005) (holding that *Chevron* deference to the federal agency's denial of a state plan amendment to its Medicaid program "is required").

[45]*Christensen*, 529 U.S. at 588.

[46]See, e.g., *Fortin v. Mass. Department of Public Welfare Commissioner*, 692 F.2d 790, 796 (1st Cir. 1982) (finding federal approval of state plan no bar to courts' de novo review of legality of state's policy); *Morgan v. Cohen*, 665 F. Supp 1164, 1168, 1180 (E.D. Pa. 1987) (same).

[47]*Mead*, 533 U.S. at 226–27.

[48]5 U.S.C. § 701(a) (2000).

[49]*Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

[50]*Citizens to Preserve Overton Park Incorporated v. Volpe*, 401 U.S. 402, 410 (1971) (emphasis added).

- enforcement discretion[51] and
- security clearances for employment at the Central Intelligence Agency.[52]

The Court has never found "no law to apply" in a routine rule-making case. Indeed, if a statute authorizing rule making lacked intelligible standards to guide a court, that statute presumably would lack intelligible standards to guide the agency and hence would violate the antidelegation doctrine.[53]

II. Challenges to Agencies' Actions Not Dependent on Statutory Interpretation

In many cases where individuals disagree with an administrative agency's interpretation of a statute, they may have claims besides a direct assault on that interpretation. These claims are decided outside the *Chevron/Mead* framework. Here we consider procedural challenges to an agency's failure to promulgate rules when setting policy; examine challenges to the procedural validity of rules that the agency issues; and address substantive challenges other than to the agency's interpretation of a statute.

A. Failure to Promulgate Rules

In general, the Administrative Procedure Act requires that administrative agencies make policy through rules promulgated after the public receives notice and an opportunity to comment.[54] Although compliance with these procedures can be extremely labor-intensive, the Court insisted on it: "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required.... The Secretary has presented no reason why the requirements of the Administrative Procedure Act could not or should not have been met."[55] Whatever the merits of the underlying decision, the failure to engage in proper rule making can cause courts to overturn the agency's action.[56]

1. Exceptions to Requirement to Promulgate Rules

The Administrative Procedure Act does contain several exceptions to this requirement, including one for "public grants [and] benefits."[57] In practice, this exception has relatively little impact on programs serving low-income people. Some authorizing legislation requires agencies to operate programs under uniform national standards promulgated through notice-and-comment rule making.[58] U.S. Department of Health and Human Services and Department of Housing and Urban Development policies dating back to the 1970s bind them to follow notice-and-comment rule making for the programs that they administer.[59] Numerous cases have treated these agencies as being just as susceptible to judicial review for noncompliance with the Administrative Procedure Act's rule-making requirements as agencies

[51] *Chaney* (rejecting death row inmate's attempt to force Food and Drug Administration to ban drugs used in lethal injections as not "safe and effective").

[52] *Webster v. Doe*, 486 U.S. 592 (1988).

[53] *Whitman v. American Trucking Associations Incorporated*, 531 U.S. 457 (2001) (finding such standards constitutionally required in a delegation of rule-making authority while allowing them to be gleaned from relatively vague statutory language); *Yakus v. United States*, 321 U.S. 414 (1946) (same).

[54] 5 U.S.C. § 553 (2000). In a few rare cases, where an authorizing statute requires that rules be made "on the record after opportunity for an agency hearing," the agency must hold a formal, trial-type adversarial hearing. *Id.* §§ 553(c), 556, 557.

[55] *Morton v. Ruiz*, 415 U.S. 199, 235 (1974).

[56] See *Lincoln v. Vigil*, 508 U.S. 182 (1993) (holding that while an agency's decision on how to spend funds was not reviewable, the question on whether it must undertake notice-and-comment rule making was).

[57] 5 U.S.C. § 553(a) (2000).

[58] 7 U.S.C. §§ 2014(b), 2013(c) (2000) (Food Stamp Act); 42 U.S.C. § 1769c (2000) (school lunches).

[59] 24 C.F.R. 10.1 (2006) (U.S. Department of Housing and Urban Development (HUD)); 36 Fed. Reg. 2532 (Feb. 5, 1971) (U.S. Department of Health and Human Services (HHS)).

that have no statutory exception in the first place.[60]

The Administrative Procedure Act does not require notice-and-comment rule making for "interpretative rules," "general statements of policy," and "rules of agency organization, procedure, or practice."[61] Courts held that these exceptions should be applied only "reluctantly."[62] Specifically, for an action to qualify as an "interpretive rule" or "general statement of policy," it cannot contain a "binding norm."[63] In other words, the policy cannot be "finally determinative of the issues or rights to which it is addressed."[64] The District of Columbia Circuit formulated a two-part test to see if a given policy not promulgated as a rule is permissible rather than a binding norm. First, the policy must be solely prospective in nature.[65] Second, it must "genuinely leave the agency and its decision-makers free to exercise discretion."[66] If the agency's act does not satisfy both of these requirements, the exceptions do not apply. Similarly, "[w]here nominally procedural rules encode a substantive value judgment or substantially alter the rights or interests of regulated parties … the rules must be preceded by notice and comment."[67]

The Administrative Procedure Act does not require notice-and-comment rule making when "the agency for good cause finds that it would be impracticable, unnecessary, or contrary to the public interest."[68] Courts have applied this exception sparingly as well.[69] One unusual case held to fall within its ambit involved new market regulations that might be evaded if the agency gave advance notice of them.[70] Courts have divided about whether impending statutory deadlines justify dispensing with notice-and-comment rule making.[71]

2. Duty to Exercise Discretion

Courts have distinguished between legitimate adverse exercises of discretion and the illegitimate failures to exercise delegated discretion at all. In an immigration case, for example, one circuit declared that, "[a]lthough eligibility for suspension does not compel the granting

[60]E.g., *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442 (9th Cir. 1994) (HUD); *Mt. Diablo Hospital District v. Bowen*, 860 F.2d 951, 957 (9th Cir. 1988) (HHS); *W.C. v. Bowen*, 807 F.2d 1502 (9th Cir. 1987) (HHS); *Levesque v. Block*, 723 F.2d 175 (1st Cir. 1983) (U.S. Department of Agriculture); *Hickman v. Pierce*, 1984 U.S. Dist. LEXIS 21838, 6–7 (N.D. Ill. 1984) (HUD).

[61]5 U.S.C. § 553(b) (2000).

[62]"Exceptions to the notice and comment provisions of section 553 are to be recognized only reluctantly." *National Association of Home Health Agencies v. Schweiker*, 690 F.2d 932 (D.C. Cir. 1982) (holding that because of the potential for severe economic impact of an agency action, Administrative Procedure Act rule making was required).

[63]*American Bus Association v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980).

[64]*Id.* (citing *Pacific Gas and Electric Company v. Federal Power Commission*, 506 F.2d 33, 38 (D.C. Cir. 1974)).

[65]*Id.*

[66]*Id.*

[67]*Air Transport Association v. Department of Transportation*, 900 F.2d 369, 376 (D.C. Cir. 1990), *vacated on other grounds*, 111 S. Ct. 944 (1991) (internal quotations and citations omitted).

[68]5 U.S.C. § 553(b)(3)(B) (2000).

[69]*Natural Resources Defense Council v. Abraham*, 355 F.3d 179, 205 (2d Cir. 2004) ("We cannot agree, though, that an emergency of [the U.S. Department of Energy's] own making can constitute good cause" to not comply with notice-and-comment requirements); *Xin-Chang Zhang v. Slattery*, 55 F.3d 732, 747 (2d Cir. 1995); *Levesque v. Block*, 723 F.2d 175, 184 (1st Cir. 1983); *Thrift Depositors of America v. Office of Thrift Supervision,* 862 F. Supp. 586, 590–91 (D.D.C. 1994).

[70]See *De Rieux v. Five Smiths Incorporated*, 499 F.2d 1321 (Temp. Emer. Ct. App. 1974) (excusing failure to publish advance public notice of a proposed price freeze because of likelihood of evasion via a rush to purchase items in advance of the freeze).

[71]Compare, e.g., *Clay Broadcasting Corporation v. United States*, 464 F.2d 1313 (5th Cir. 1972) (allowing the publication of new fee schedule without notice due to statutory deadline), with, e.g., *New Jersey Department of Environmental Protection v. Environmental Protection Agency*, 626 F.2d 1038 (D.C. Cir. 1980) (requiring opportunity for public comment on state Clean Air Act compliance plans despite statutory deadline).

of the requested relief, eligibility does trigger the exercise of discretion. The Board's failure to exercise discretion is reversible error."[72] An agency's failure to explain persuasively the basis on which it denied a request can suggest that the agency did not consider that request at all—that it failed to exercise its delegated discretion.[73] Affirming an agency's decision "on the theory that [it] necessarily considered whatever the petitioner asserted would free the [agency] of the obligation to articulate a reasoned basis for its decisions, eliminating any guaranty of rationality and foreclosing meaningful review for abuse of discretion."[74] Moreover, as long as an agency is empowered to grant discretionary relief, it must inform affected persons of that authority so that they may petition for its exercise.[75]

If an agency wishes to avoid exercising a particular aspect of the discretion it has under existing statutes and regulations, it must promulgate rules under appropriate procedures. A proper rule-making proceeding is necessary to foreclose exercises of discretion that a statute provides even if the statute permits such limits. An agency that issues informal guidance, memos, handbook pages, and the like that purport to limit its previously existing discretion may be compelled to consider requests for discretionary relief on their merits until it engages in a proper rule making.[76] Any policy that constrains the agency's operational discretion and that could have been decided differently consistent with the agency's statutory and regulatory structure must be promulgated as a rule.[77]

3. Lack of Rules as a Due Process Violation

The due process clause of the Fifth and Fourteenth Amendments protect against arbitrary decision making. An important line of cases holds that implementing this protection requires agencies to have some articulated standards to guide their decisions:[78] "The requirements of due process include a determination of the issues according to articulated standards. The lack of such standards … deprives any hearing, whether before an agency or a court, of its meaning and value as an opportunity for the plaintiffs to prove their qualifications for assistance."[79] These standards must be written down and made available to the public.[80]

Courts have required articulable standards in a wide array of situations. They barred state universities from punishing students for "misconduct" without providing some specific standard of what constitutes misconduct.[81] They have taken a similar approach to public benefit pro-

[72] *Asimakopoulos v. Immigration and Naturalization Service*, 445 F.2d 1362, 1365 (9th Cir. 1971).

[73] Another way to conceptualize these cases is as ones where the agency may be relying on an undisclosed, illegitimate factor in denying discretionary relief. See II.C. Actions that Are Arbitrary and Capricious or an Abuse of Discretion.

[74] *Santana-Figueroa v. Immigration and Naturalization Service*, 644 F.2d 1354, 1357 (9th Cir. 1981).

[75] *Bliek v. Palmer*, 102 F.3d 1472 (8th Cir. 1997).

[76] *Hoctor v. Department of Agriculture*, 82 F.3d 165 (7th Cir. 1996).

[77] *Id.*

[78] *Carey v. Quern*, 588 F.2d 230 (7th Cir. 1978); *White v. Roughton*, 530 F.2d 750 (7th Cir. 1976); *Holmes v. New York City Housing Authority*, 398 F.2d 262 (2d Cir. 1968).

[79] *White*, 530 F.2d at 754.

[80] "To allow the [agency] to administer a … scheme using unwritten standards leads to rule by decree and not by law." *Burke v. Department of Justice Drug Enforcement Agency*, 968 F. Supp. 672, 681 (M.D. Ala. 1997).

[81] "[D]efendants contend [that their policy of punishing 'misconduct' without defining the term in advance] represents the inherent power of the University to discipline students and that this power may be exercised without the necessity of relying on a specific rule of conduct. This rationale would justify the ad hoc imposition of discipline without reference to any preexisting standards of conduct so long as the objectionable behavior could be called misconduct at some later date." *Soglin v. Kauffman*, 418 F.2d 163, 167 (7th Cir. 1969).

grams.[82] Due process was held to require that claimants be "informed of … rules of thumb" for determining their compliance with eligibility requirements.[83] Where there are too many equally qualified applicants for any given resource, the agency must use "reasonable" standards such as first-come-first served or even a lottery rather than engage in arbitrary ad hoc decision making.[84] Once the state makes a benefit available, it may not deny a claimant access to that benefit without affording the claimant the chance to make a case on the merits.[85]

B. Rules Promulgated in Violation of the Administrative Procedure Act

The Administrative Procedure Act contains three principal requirements for an agency promulgating rules without formal adversarial hearings: it must publish in the *Federal Register* a notice of proposed rule making setting out the substance of the rules that it intends to issue, it must allow the public a reasonable opportunity to comment on its proposed rules, and it must consider those comments when crafting the final rule that it publishes.[86] In cases of unusual urgency, agencies may publish rules that take effect immediately, but even then they must solicit public comment on these "interim final rules" and publish changes to the extent those comments warrant.[87]

Challenges to the procedural validity of a rule making typically take one of two forms. Some assert that the notice of proposed rule making and opportunity to comment were inadequate because the public was not given proper notice of the possible content of the final rules. Others argue that the agency failed to demonstrate proper consideration of the comments that it did receive.

Failure to Disclose the Basis for Proposed Rules. Courts hold that the scientific evidence an agency is relying upon must be disclosed so that the public has a meaningful opportunity to comment on its validity.[88] Similarly, agencies may not rely upon their own private studies whose results are not disclosed in the notice of proposed rule making.[89]

Final Rules that Deviate from Proposed Rules. The scope of the final rule may not deviate from that of the proposed rule in any significant manner without denying the public a meaningful right to comment:

> An interested party must have been alerted by the notice to the

[82] "In the context of eligibility for welfare assistance, due process requires at least that the assistance program be administered in such a way as to insure fairness and to avoid the risk of arbitrary decision making. Typically this requirement is met through the adoption and implementation of ascertainable standards of eligibility. The record in the instant case demonstrates that the defendants employed no system or method designed to inform members of the plaintiff class of their right to a clothing allowance as a part of their General Assistance grant. Further, defendants neither issued an Official Bulletin nor utilized any administrative guidelines governing eligibility determinations for the 'as needed' program pertaining to unemployed recipients. In short, it is readily apparent from the record that prior to August 1, 1976, an unemployed recipient could have received a clothing allowance benefit only upon the making of an application for a benefit of which the applicant was unaware, and upon favorable action with respect to the application by the defendants without reference to any standards of eligibility. The district court correctly found that the clothing allowance benefit was administered in a manner inconsistent with the requirements of due process." *Carey*, 588 F.2d at 232.

[83] *Cosby v. Ward*, 843 F.2d 967, 984 (7th Cir. 1988) (citing *Carey*).

[84] *Holmes*, 398 F.2d at 265.

[85] *Logan v. Zimmerman Brush*, 455 U.S. 422, 427–28 (1982) ("The Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged.... To put it as plainly as possible, the [government] may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement...."); see also *Pressley Ridge School v. Stottlemyer*, 947 F. Supp. 929, 940 (S.D. W.V. 1997) (citing *Holmes*) (observing that "due process further requires that decisions regarding entitlements to government benefits must be made according to 'ascertainable standards' that are applied in a rational and consistent manner").

[86] 5 U.S.C. § 553(b), (c) (2000); see generally Gary F. Smith, *The Quid Pro Quo for* Chevron *Deference: Enforcing the Public Participation Requirements of the Administrative Procedure Act*, 30 Clearinghouse Review 1132 (1997).

[87] 5 U.S.C. § 553(e).

[88] *United States v. Nova Scotia Food Products Corporation*, 568 F.2d 240 (2d Cir. 1977).

[89] *Id.*

> possibility of the changes eventually adopted from the comments. Although an agency, in its notice of proposed rulemaking, need not identify precisely every potential regulatory change, the notice must be sufficiently descriptive to provide interested parties with a fair opportunity to comment and to participate in the rulemaking.[90]

To defend against a claim of inadequate notice, an agency must show that the "final rule is … a logical outgrowth of the original proposal."[91]

Failure to Explain Rejection of Public Comments. Agencies are not bound to accept all comments submitted to them. An agency's rejection of a comment may be challenged substantively only if it is arbitrary and capricious or an abuse of discretion.[92] However, the agency is required to *consider* every relevant comment it receives. To demonstrate that it actually has weighed these comments, and that its rejection of them is not arbitrary and capricious, an agency needs to explain its decisions in the preamble to the final rule:

> [T]he rule that the "whole record" be considered—both evidence for and against—means that the procedures must provide some mechanism for interested parties to introduce adverse evidence and criticize evidence introduced by others. This process of introduction and criticism helps assure that the factual basis of [the rule] will be accurate and provides the reviewing court with a record from which it can determine if the agency has properly exercised its discretion.[93]

Once an agency has published a final rule without a preamble that explains the reasoning for its disposition of the comments it received, it cannot easily correct the problem if challenged. The Supreme Court has criticized lower courts for

> bas[ing] their review on the litigation affidavits that were presented. These affidavits were merely "post hoc" rationalizations, which have traditionally been found to be an inadequate basis for review. And they clearly do not constitute the "whole record" compiled by the agency: the basis for review required by § 706 of the Administrative Procedure Act.[94]

C. Actions that Are Arbitrary and Capricious or an Abuse of Discretion

The *Chevron/Mead* standard applies to an agency's interpretations of a statute's commands. Courts judge an agency's exercises of discretion within its legal authority under an entirely separate standard of review, one that asks whether the action was arbitrary and capricious or an abuse of discretion.[95] Commonly the same action can be challenged on two substantive bases: first that the agency lacked the authority to act as it did, and second that, if it did have such authority, making this particular choice was an abuse of discretion.[96] Several distinct types of arguments can support a claim that an action is arbitrary and capricious or an abuse of discretion.

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[90]*Chocolate Manufacturers Association v. Block*, 755 F.2d 1098, 1104 (4th Cir. 1985).

[91]*American Medical Association v. United States*, 887 F.2d 760, 767 (7th Cir. 1989).

[92]See II.C. Actions that Are Arbitrary and Capricious or an Abuse of Discretion.

[93]*Mobil Oil Corporation v. Federal Power Commission*, 483 F.2d 1238 (D.C. Cir. 1973).

[94]*Citizens to Preserve Overton Park*, 401 U.S. at 419.

[95]See, e.g., *Arent v. Shalala*, 70 F.3d 610 (D.C. Cir. 1995) (finding review for arbitrary and capricious decision making, not *Chevron* deference, appropriate where the agency's legal authority to proceed was not in question).

[96]See, e.g., *Shays v. Federal Exchange Commission*, 414 F.3d 76 (D.C. Cir. 2005) (striking down two of five challenged regulations under *Chevron* Step One and the remaining ones as arbitrary and capricious).

Failure to Consider Mandatory Factors. Arguments that an agency failed to consider all factors specified in the authorizing statute commonly underlie assertions that a decision is arbitrary and capricious. The leading case here is *Citizens to Preserve Overton Park Incorporated v. Volpe*.[97] The Court blocked construction of an interstate highway because the secretary of transportation could not prove that he had considered the environmental impact of building a highway through a city park or the feasibility of alternate routes, as required by federal highway legislation. More generally, agencies have "an affirmative duty to inquire into and consider all relevant facts."[98] Challengers may persuade courts to insist that the agency consider factors that it did not recognize as important.[99] They also may identify alternatives that appear superior in meeting statutory criteria that the agency rejected without an explicit, legitimate basis.[100]

Illegitimate Factors Considered. Closely related to the requirement that the agency consider all relevant factors is the prohibition on basing decisions on illegitimate factors. Here again the leading case is *Overton Park*. The Supreme Court found evidence to suggest that the secretary had deferred to the preferences of state and local officials rather than weighing environmental considerations himself. Because it found no statutory authority for such deference, the Court unanimously overturned the decision as apparently resting on an illegitimate factor: "Certainly, the Secretary's decision is entitled to a presumption of regularity. But that presumption is not to shield his action from a thorough, probing, in-depth review."[101] In a separate case, the Court remanded a regulation that classified companies on the basis of size where the statute had required that they be classified by geography only.[102] In yet another, the Court found that a statute's use of a test to determine eligibility for one form of relief implied that an agency was not allowed to make eligibility for a lesser form of relief contingent on meeting that same stringent test.[103]

Unexplained Changes in Direction. An agency's sudden and unexplained change in direction can suggest arbitrary and capricious decision making. The issue is partly one of the public's reliance on the prior policy.[104] The unexplained abandonment of a prior decision—one that the agency had found properly balanced the relevant statutory considerations—raises concerns that the agency is disregarding mandatory factors or relying on unauthorized ones. Here the leading case is *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company.*[105] In *State Farm* the newly

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[97]*Citizens to Preserve Overton Park,* 401 U.S. at 402.

[98]*Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608, 620 (2d Cir. 1965).

[99]See, e.g., *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995) (requiring consideration of combined impact of claimant's impairments).

[100]*Michigan Consolidated Gas Company v. Federal Power Commission,* 283 F.2d 204 (D.C. Cir. 1960) ("[S]ince the Commission is charged with the duty of protecting the ultimate consumer from 'exploitation at the hands of natural gas companies,' it cannot refuse to consider a proposal which appears, on its face at least, consistent with that duty.").

[101]*Overton Park*, 401 U.S. at 415. The Court also observed that "inquiry into the mental processes of administrative decisionmakers is usually to be avoided. And where there are administrative findings that were made at the same time as the decision, … there must be a strong showing of bad faith or improper behavior before such inquiry may be made. But here there are no such formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves." *Id.* at 420.

[102]*Addison v. Holly Hill Fruit Products Incorporated*, 322 U.S. 607 (1944).

[103]*Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

[104]"Of course the mere fact that an agency interpretation contradicts a prior agency position is not fatal[, but s]udden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation, may be 'arbitrary, capricious [or] an abuse of discretion.'" *Smiley v. Citibank (South Dakota), National Association*, 517 U.S. 735, 742 (1996) (internal citations omitted).

[105]*Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29 (1983).

elected Reagan administration set aside Carter administration rules requiring automakers to install passive restraint devices such as airbags. The Court did not find that requiring airbags was the only possible way for the agency to comply with the statute, but the Court did find the sudden change in direction a red flag suggesting possible illegitimate decision making. The Court then applied "hard look" review to the agency's new action and found that the agency had failed to explain why it was disregarding several scientific studies on which it had relied in imposing the airbag rule. Declaring that "the agency must explain the evidence which is available, and must offer a 'rational connection between the facts found and the choice made,'" the Court struck down the Reagan administration's action.[106]

■ ■ ■

Undeniably, administrative agencies come to litigation with important legal and institutional resources that most other parties lack. Courts are not inclined to second-guess agencies' routine decisions casually. However, courts continue to take seriously their responsibilities for interpreting the law.[107] Individuals facing unwarranted administrative actions have extensive recourse within the original *Chevron* doctrine, through the broad new exceptions to *Chevron* deference that *Mead* has created, and under a range of other substantive and procedural principles that apply in many cases where statutory interpretations also are at issue.

Authors' Note

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[106]*Id.* at 52.

[107]See *Marbury v. Madison*, 5 U.S. 137 (1803).

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