Chevron Legacy: Young v. Community Nutrition Institute Compounds the Confusion

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THE CHEVRON LEGACY: YOUNG v. COMMUNITY NUTRITION INSTITUTE COMPOUNDS
THE CONFUSION

Courts have applied varying standards when reviewing questions of law decided by administrative agencies.\(^1\) The Supreme Court, in *Chevron U.S.A. v. Natural Resources Defense Council*,\(^2\) attempted to establish the proper standard.\(^3\) The Court's subsequent applications of the *Chevron* standard, however, have produced diverse results. Most recently, in *Young v. Community Nutrition Institute*,\(^4\) the Court departed from *Chevron* and from the existing scope-of-review doctrine that forms the basis of *Chevron*.

Post-*Chevron* decisions demonstrate the dangers of according too much weight to *Chevron*'s deferential tone rather than respecting its underlying doctrine. Properly interpreted, *Chevron* conforms to traditional scope-of-review doctrine. This doctrine allows courts to defer to an agency's decision unless the intent of the agency's enabling statute dictates otherwise. Some post-*Chevron* cases consistently apply this doctrine; in *Young*, however, the Court went beyond *Chevron* to create a standard of greater deference.

This Note will attempt to shed light on the continuing confusion surrounding scope of review of administrative questions of law. It will trace the evolution of this doctrine, examining the traditional review framework. Then it will discuss the *Chevron* opinion, suggesting that the decision is consistent with pre-*Chevron* cases. Finally, the Note will look at post-*Chevron* cases, focusing particularly on the *Young* decision's departure from traditional review doctrine.

I

REVIEW BEFORE CHEVRON

A. Questions of Law Defined

Questions of law arise in administrative settings when an agency attempts to construe its statutory mandate.\(^5\) In promulgat-

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1 See, e.g., Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2d Cir. 1976) (recognizing two irreconcilable approaches); see also 5 K. Davis, Administrative Law Treatise §§ 29.9-29.10 (2d ed. 1978) (discussing inconsistencies in the doctrine).
3 Id. at 842-43.
4 106 S. Ct. 2360 (1986).
5 Professor Davis has explained the problem as one of applying the law to a given set of facts. See 5 K. Davis, supra note 1, § 29.9. Although accurate, this characterization may not frame the question properly because questions of law in the administrative context mainly address whether an agency correctly determined the scope of its own pow-
ing rules or enforcing regulations, an agency often interprets particular terms or phrases in its enabling statute.\(^6\) Decisions of law thus define the scope of an agency’s power.\(^7\) Courts will invalidate agency decisions of law if the agency interpreted its scope of authority incorrectly\(^8\) or in a statutorily impermissible manner.\(^9\)

The Administrative Procedure Act (APA)\(^10\) normally governs judicial review of administrative decisions. The APA mandates de novo review of questions of law.\(^11\) Actual review, however, often

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7 See supra note 7.

8 For example, in Chevron the challengers argued that both the words and history of the statute constrained the agency’s interpretation of “stationary source.” See infra notes 51-54 and accompanying text.

9 5 U.S.C. §§ 551-706 (1982). An agency’s enabling statute may, however, provide otherwise. R. Pierce, supra note 5, § 5.3.

10 Under the APA, “[t]he reviewing court shall decide all relevant questions of law. . . .” 5 U.S.C. § 706 (1982). The APA provides for a “substantial evidence” standard of review for questions of fact, id. § 706(2)(E), and an “arbitrary and capricious” standard of review for legislative-like policy questions. Id. § 706(2)(A). To be consistent with review of fact and policy one would expect questions of law to receive de novo review. See generally C. Koch, supra note 5, § 9.18.
falls short of conventional de novo review.\textsuperscript{12}

Many commentators have noted that prior to \textit{Chevron} court review of agency decisions of law fell into one of two fundamentally irreconcilable lines of cases: a conventional de novo review approach or a more deferential "reasonableness" approach.\textsuperscript{13} Thus, courts could either independently decide a question of law or defer to the agency decision.\textsuperscript{14}

\section*{B. The Two Lines of Cases of the Pre-\textit{Chevron} Era}

\textit{NLRB v. Hearst Publications}\textsuperscript{15} demonstrates the line of cases supporting judicial deference to agency decisions of law.\textsuperscript{16} \textit{Hearst} addressed whether newsboys were "employees" within the meaning of the National Labor Relations Act (NLRA).\textsuperscript{17} In \textit{Hearst} the newspapers had refused to bargain collectively with newsboys who sought

\textsuperscript{12} C. \textit{Koch}, \textit{supra} note 5, at 132. Conventional de novo review means review in the appellate court paradigm. Because a question of law in the administrative context involves statutory interpretation within the unique dynamics of the legislative/administrative relationship, the federal court paradigm does not provide an apt analogy. The inquiry is not, strictly speaking, whether the agency got it right, but whether the agency had the power to decide the question at all, and, if so, whether the agency decided within the proper bounds of its authority. This is de novo review in the sense that a court is still the ultimate arbiter of the statutory question, but the inquiry ends if the agency properly had the discretion to decide. \textit{See infra} notes 29-33 and accompanying text.

\textsuperscript{13} 5 \textit{K. Davis}, \textit{supra} note 5, § 29:11; \textit{Diver, Statutory Interpretation in the Administrative State}, 133 U. Pa. L. Rev. 549, 551 (1985); \textit{Starr, Judicial Review in the Post-Chevron Era}, 3 \textit{Yale J. on Reg.} 283, 292-93 (1986); \textit{Note, A Framework for Judicial Review of an Agency's Statutory Interpretation: Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 1985 Duke L.J.} 469, 471 (authored by Stephen M. Lynch). Commentators found great difficulty reconciling these two lines of cases, ultimately deciding that a court had the discretion to choose one method of review or the other. Noting this apparent anomaly, Judge Friendly stated: "We think it is time to recognize... that there are two lines of Supreme Court decisions on this subject which are analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for the case at hand." \textit{Pittston Stevedoring Corp. v. Dellaventura}, 544 F.2d 35, 49 (2d Cir. 1976).

\textsuperscript{14} 5 \textit{K. Davis}, \textit{supra} note 5, § 29:11; G. \textit{Robinson}, E. \textit{Gellhorn} & H. \textit{Bruff, The Administrative Process} 157 (3d ed. 1986); \textit{see also Pittston Stevedoring Corp.}, 544 F.2d at 49.

\textsuperscript{15} 322 U.S. 111 (1944).

\textsuperscript{16} \textit{See also Gray v. Powell}, 314 U.S. 402 (1941). In \textit{Gray}, the receivers of a railroad challenged the Bituminous Coal Act of 1937, Pub. L. No. 75-48, 50 Stat. 72 (1937), arguing that the railroad met an exception to the Act's price restrictions for parties who were both producers and consumers; the receivers challenged the agency finding that it was not a producer under the Act. Deferring to the agency's decision, the Court stated: "Unless we can say that a set of circumstances deemed by the Commission to bring them within the concept 'producer' is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the Court's duty to leave the Commission's judgment undisturbed." \textit{Id.} at 413; \textit{see also Rochester Telephone Corp. v. FCC}, 307 U.S. 125 (1939) (allowing the agency to determine whether one phone company "controlled" another within the meaning of the statute).

\textsuperscript{17} 322 U.S. at 117; \textit{see 29 U.S.C. § 152(3)} (1982).
the protection of the National Labor Relations Board (NLRB).\textsuperscript{18} The NLRB determined that newsboys were “employees” and thus enforced their right to bargain collectively.\textsuperscript{19}

In upholding the NLRB’s determination, the Court apparently adopted a deferential standard of review for questions of law.\textsuperscript{20} The Court stated that “the Board’s determination that specified persons are ‘employees’ under [the] Act is to be accepted if it has ‘warrant in the record’ and a reasonable basis in law.”\textsuperscript{21} \textit{Hearst} has become a symbol for judicial deference to agency decisions.\textsuperscript{22}

\textit{Packard Motor Car Co. v. NLRB}\textsuperscript{23} exemplifies the second line of cases.\textsuperscript{24} In \textit{Packard} the NLRB determined that foremen were employees under the NLRA.\textsuperscript{25} The Court upheld the Board’s decision, but apparently decided the issue de novo.\textsuperscript{26} Reviewing the statute at issue, the Court attempted to determine Congressional intent from the language and purposes of the provision.\textsuperscript{27}

Both \textit{Hearst} and \textit{Packard} reviewed the NLRB’s construction of the term “employee.” The \textit{Hearst} Court deferred to the Board’s construction while the \textit{Packard} Court construed the term independent of any consideration of the Board’s construction. Although these two approaches appear contradictory, the \textit{Packard} Court made no attempt to reconcile the results.\textsuperscript{28}

\section*{C. Reconciling the Irreconcilable}

A closer analysis of the pre-\textit{Chevron} cases establishes some order among these apparently diverse results. A framework exists which reconciles the \textit{Hearst} rationality cases with the \textit{Packard} de novo review cases. The common thread running through these cases is the judicial search for congressionally imposed bounds.

\textsuperscript{18} 332 U.S. at 112.
\textsuperscript{19} Id. at 114.
\textsuperscript{20} Id. at 130-32.
\textsuperscript{21} Id. at 131.
\textsuperscript{23} 330 U.S. 485 (1947).
\textsuperscript{24} See also Office Employees Int’l Union v. NLRB, 353 U.S. 313 (1957). Office Employees addressed whether labor unions that hired clerical personnel were employers under section 2(2) of the NLRA, 29 U.S.C. § 152(2) (1982). The Board had exempted the union/employer from the requirements of the Act. The Court independently construed the statute, reversing the Board.
\textsuperscript{25} 330 U.S. at 488-89 (interpreting section 2(3) of the NLRA, 29 U.S.C. § 152(3) (1982)).
\textsuperscript{26} The Court called the issue a “naked question of law.” Id. at 493.
\textsuperscript{27} Id. at 488-91.
\textsuperscript{28} The majority in \textit{Packard} failed to mention \textit{Hearst}. The dissent cited \textit{Hearst} for the proposition that “‘employee’ must be considered in the context of the Act.” Id. at 495 (Douglas, J., dissenting).
Throughout the pre-*Chevron* decisions, courts struggled with their responsibility "to determine what statutory authority ha[d] been conferred upon the administrative agency."\(^{29}\) Courts have the primary responsibility for determining the proper scope of agency authority,\(^{30}\) which is really a search for parameters.\(^{31}\) Courts define those parameters by examining the agency's enabling act. Courts must decide what authority Congress delegated to the agency to determine whether the agency exceeded its congressional mandate.\(^{32}\)

Although the statutory language may provide some guidance, courts must look beyond the mere text of the enabling statute to make this determination.\(^{33}\) Courts must look to all reasonable sources to discover Congress's intent, including the statute's legislative history and its supporting policies.

Under this approach, the two "inconsistent" lines of pre-*Chevron* cases simply represent cases decided at different levels of inquiry.\(^{34}\) For instance, *Hearst* contains language suggesting a rational basis approach,\(^{35}\) but this language came after the Court in-
quired into the proper parameters for the agency decision. The major portion of the Hearst opinion analyzed whether the statute mandated either a state law or a general common law approach to the definition of “employee.” The Court deferred to the agency’s definition only after finding no clear statutory intent, effectively holding that Congress implicitly left the question to the agency.

Packard similarly fits into this approach. In Packard the statute defined both “employer” and “employee.” Thus, the issue differed from that in Hearst because Congress’s intent was clear. The Court simply interpreted the statute and decided that the foremen more appropriately fit into the definition of employee. Packard represents a case in which the statute specifically bound agency action. The Court’s “only function [was] to determine whether the order of the Board [was] authorized by the statute.”

II

The Chevron Decision

Many commentators have hailed Chevron U.S.A. v. Natural Resources Defense Council as a landmark decision. Restrained to its facts, however, Chevron is consistent with prior case law. The Chevron Court deferred to the agency because of the Court’s interpretation of the statute rather than any new standard of review. Thus, properly viewed, Chevron is simply one of many in a long line of cases.

A. The Facts

Chevron involved the EPA’s interpretation of “stationary source,” a phrase in the 1977 amendments to the Clean Air Act.

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36 Id. at 129 (“the broad language of the Act’s definitions . . . leaves no doubt that its applicability is to be determined broadly”).
37 Id. at 122-24.
38 Id. at 120-22.
39 Thus, one may view Hearst as a paradigm example of the framework set forth above. Levin, supra note 30, at 23-25; Monaghan, supra note 29, at 28-30.
40 Section 2(3) of the National Labor Relations Act defined “employee” while section 2(2) defined “employer.” The Court compared the two competing definitions. 330 U.S. at 488-89; see 29 U.S.C. § 152 (1982).
41 330 U.S. at 488 (“The point that these foremen are employees both in the most technical sense at common law as well as in common acceptance of the term, is too obvious to be labored.”)
42 Id.
44 See, e.g., Braff, Legislative Formality, Administrative Rationality, 63 Tex. L. Rev. 207, 224-25 (1984); Starr, supra note 13, at 283-84; Note, supra note 13, at 470.
45 See infra notes 70-74 and accompanying text.
46 See infra notes 69-73 and accompanying text.
The Clean Air Act requires the EPA to impose emission standards on each “stationary source.” Consequently, the interpretation of “stationary source” is critical for regulating emissions.

The EPA defined stationary source according to the “bubble” concept, treating each polluter as a single source rather than regulating each individual smokestack. Under this definition, polluters can shift emissions among smokestacks to meet EPA guidelines, and the EPA has limited control over individual smokestack pollution.

The Natural Resources Defense Council (NRDC) challenged the EPA’s definition, arguing that the statute constrained the definition of stationary source to a “building, structure, facility, or installation.” The NRDC further argued that the statute’s legislative history and policies supported the more narrow smokestack definition. The D.C. Circuit found no express guidance from those sources, but invalidated the agency’s ruling on general policy grounds. The Supreme Court reversed, upholding the EPA’s construction.

Writing for a unanimous Court, Justice Stevens enunciated a two-step framework for reviewing agency decisions of law. The first step requires courts to look at congressional intent. If congressional intent is clear, courts and agencies must comply. If intent is not clear, then the second step allows courts to defer to a reasonable

48 Id.
49 467 U.S. at 857-58.
50 Before adopting the “bubble” concept, the EPA had used a dual definition, applying a more stringent “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.” Id. at 857.
51 The EPA universally adopted the “bubble” definition because of the disadvantages of this dual system. The Court summarized the agency’s reasons as follows: [The EPA] 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.’” Id. at 858 (quoting Requirements for Preparation, Adoption, and Submittal of Plans; Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 16,280, 16,281 (proposed Mar. 12, 1981)).
52 467 U.S. at 860. Although this language came from a different section of the Act, § 111(a)(3), 42 U.S.C. § 7411(a)(3), and was itself ambiguous, the NRDC argued that it indicated congressional intent.
53 467 U.S. at 862, 864.
55 467 U.S. at 866.
56 Id. at 842-43.
agency construction.\textsuperscript{57}

B. Greater Deference?

Many commentators view \textit{Chevron} as the beginning of greater judicial deference towards agency determinations.\textsuperscript{58} They suggest that the first step of \textit{Chevron} entails a very narrow analysis of congressional intent: If Congress has not explicitly spoken on the precise issue at hand, courts must defer.\textsuperscript{59}

The \textit{Chevron} framework alone, however, sheds little light upon the nature of the inquiry into congressional intent. The amount of deference accorded an agency depends on where the courts search for congressional intent. This is the crux of the inquiry. \textit{Chevron} supports heightened judicial deference only if \textit{Chevron} restrains the search for congressional intent. However, \textit{Chevron} and the doctrine on which it is based do not support such an approach.

Some language in \textit{Chevron} does suggest a deferential approach. The opinion could be read as mandating heightened deference by deferring to the agency when Congress has not “directly addressed the precise question at issue.”\textsuperscript{60} Under this view, courts would uphold agency judgments unless clear congressional language existed to the contrary.\textsuperscript{61} This approach prevents courts from using their full arsenal of interpretive tools in assessing congressional intent.

The word “precise” could indeed connote a narrow judicial search for intent. The Court’s actual use of the standard, however, belies that connotation. The fundamental inquiry is this: Where did the Court look to determine if Congress had addressed the issue?\textsuperscript{62} At this level, \textit{Chevron} differs little from \textit{Hearst}.

The \textit{Chevron} Court examined congressional intent by analyzing (1) the statutory language;\textsuperscript{63} (2) the legislative history;\textsuperscript{64} and (3) the

\footnotesize{\textsuperscript{57} Id. at 843.}

\footnotesize{\textsuperscript{58} See supra note 44, see also Starr, supra note 13, at 294, 295 (\textit{Chevron} “strengthened the deference principle by restricting the power of federal courts to reject an agency interpretation on the grounds of infidelity to the policies underlying the statute.” Starr acknowledged, however, that policy questions must enter into the Court’s analysis of congressional intent.).}

\footnotescript{59} The operative words here are “explicitly” and “precise.” Congress often provides broad guidelines for precise issues. However, deference depends on whether a court will demand explicit congressional guidance; one view of \textit{Chevron} is that it supports deference whenever the statute is not very explicit. See id. at 292.

\footnotescript{60} 467 U.S. at 843.

\footnotescript{61} See Starr, supra note 13, at 294-95 (arguing for a restricted analysis of congressional intent).

\footnotescript{62} The range of sources to which a court may look is potentially quite large. See generally R. Dworkin, supra note 33, at 311-51 (1986) (discussing statutory interpretation).

\footnotescript{63} 467 U.S. at 859-62.

\footnotescript{64} Id. at 862-64.
policies behind the statute. The opinion fully discusses the inconsistent legislative history and underlying policy conflicts. The Court found two distinct and irreconcilable policy goals, one environmental and the other economic.

After reviewing these sources, the Court felt compelled to accept the agency's interpretation because the sources did not provide any clear guidelines. Thus, Chevron does not advance a more deferential standard of review, but simply represents a case which, on its facts, required judicial deference. The nature of Chevron's search for guidance tempers its deferential language concerning congressional intent.

This analysis does not suggest that the Court correctly resolved the statutory interpretation question. Ample support existed for the challengers' view. A court necessarily has some discretion in matters of statutory interpretation. A court must justify its decision, however, by looking to the statute. Reaching an arguably wrong decision on the statutory question is very different from adopting a different standard of review. In Chevron, the Court may have done the former, but did not do the latter.

Chevron expressly endorses the existing scope-of-review framework. Justice Stevens's analysis in Chevron parallels the search for parameters evident in the pre-Chevron cases. By stating that the Court's analysis must begin with a determination of congressional boundaries, Justice Stevens apparently intended the opinion in Chevron to be consistent with traditional judicial review doctrine.

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65 Id. at 864-66. At the end of its opinion, the Court addressed the policy question with deferential language. However, earlier in the opinion, the Court carefully examined competing policy goals exemplified in the statute. Id. at 851-53.
66 Id. at 862-64.
67 Id. at 864-66.
68 Id. at 851-52, 865-66. The Court carefully considered but failed to resolve these competing goals. This is contrary to Judge Starr's conception of the decision, see Starr, supra note 13, at 291-300, and indicates compliance with existing scope-of-review practice. While the Court disavowed any expertise in resolving policy conflicts, 467 U.S. at 865, it did not advocate ignoring clear expressions of congressional intent. Specifically, the Court stated that the agency's role was restricted to "resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency." Id. at 865-66.
69 The Court found that deference was necessary because of the lack of congressional guidance on what was fundamentally a policy question. 467 U.S. at 864-65. This does not mean, however, that the Court was unwilling to consider all sources of congressional intent. Indeed, the Court's extensive discussion and analysis indicates otherwise.
70 Id. at 842-45.
71 See supra sections I(B) and I(C).
72 "First, always, is the question whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842.
73 Indeed, Justice Stevens cited a number of cases which implicitly contained the Chevron framework. See, e.g., F.E.C. v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981) ("Courts are the final authorities on issues of statutory construction.

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Although the particular facts of *Chevron* led to a deferential opinion, *Chevron* does not necessarily endorse greater deference.  

### III

**POST-CHEVRON CASES**

Post- *Chevron* decisions fall into two groups. The first fits neatly into the traditional framework and therefore is consistent with *Chevron*. The second, represented by *Young v. Community Nutrition Insti-

They must reject administrative constructions of the statute ... that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement."); S.E.C. v. Sloan, 436 U.S. 103, 119 (1978) ("our clear duty in [cases where the agency construction is inconsistent with the statutory mandate] is to reject the administrative interpretation of the statute"); NLRB v. Hearst Publications, 322 U.S. 111, 130-31 (1944) ("questions of statutory interpretation ... are for the courts to resolve").

For example, if congressional intent had more clearly favored clean-up, the agency could not have adopted the plant-wide "bubble" definition. In *Chevron*, congressional intent was unfathomable even after a careful search. Most importantly, *Chevron*’s deference came only after this careful search.

In addition to Chemical Mfrs. Ass’n v. Natural Resources Defense Council, 470 U.S. 116 (1985), a number of other post-*Chevron* opinions demonstrate the consistency of the doctrine. For example, in INS v. Cardoza-Fonseca, 107 S. Ct. 1207 (1987), Justice Stevens’s majority opinion rejected an INS policy applying similar standards for granting asylum and withholding deportation. Id. at 1210. Citing *Chevron*, Stevens asserted that when a court confronts a question of statutory interpretation, it must use all the "traditional [interpretive] tools" to resolve the ambiguity. Id. at 1221. *Cardoza-Fonseca* demonstrates clearly that the *Chevron* framework is consistent with the traditional approach.

See also United States v. City of Fulton, 475 U.S. 657 (1986), a case involving interim rates set for the sale of federally-generated hydroelectric power. Federal law provided that rates became effective upon approval by the Secretary of Energy. The regional power administration set interim rates effective until final approval by the Federal Energy Regulatory Commission. The city contended that these interim rates violated the Commission’s enabling act. The Court relied expressly on *Chevron* in upholding the agency’s interpretation allowing interim rates. Id. at 666. The Court looked to statutory language, congressional intent, and the policy behind the statute to determine the constraints on agency action before deferring to the agency’s decision.

In *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361 (1986), the Court overruled agency action as violating clear congressional intent in a classic application of the first tier of the review framework. The Federal Reserve Board had expanded its regulations to encompass institutions which offered bank-like services. In so doing, the Board re-interpreted the definition of "bank" found in section 2(c) of the Bank Holding Company Act of 1956, 12 U.S.C. § 1841(c) (1982). The Court ruled that the statutory definition of "bank" clearly precluded the Board’s action. 474 U.S. at 368. Failure to regulate these institutions, the Board urged, would leave a gap in regulation. Id. at 373-74. The Court, however, found itself constrained by the Act’s language, stating, "If the Bank Holding Company [Act] falls short of providing safeguards desirable or necessary to protect the public interest, that is a problem for Congress, and not the Board or the courts, to address." Id. at 374. See generally Note, supra note 13, at 481-87 (discussing Securities Indus. Ass’n v. Board of Governors, 468 U.S. 137 (1984) and Securities Indus. Ass’n v. Board of Governors, 468 U.S. 207 (1984)).

The standard of review in these cases, if not its application, remained consistent with traditional doctrine. The Court was willing to look below the statutory surface to divine congressional intent. A departure from that willingness would be more radical
tute,\textsuperscript{76} radically departs from this doctrine. \textit{Young} unjustifiably expands judicial deference beyond the \textit{Chevron} framework.

A. Cases Within the Traditional Framework

Most post-\textit{Chevron} cases adhere to the traditional question-of-law doctrine. \textit{Chemical Manufacturers Association v. Natural Resources Defense Council,}\textsuperscript{77} for example, indicates that post-\textit{Chevron} review should not differ markedly from pre-\textit{Chevron} review. Both the majority and the dissent in \textit{Chemical Manufacturers} invoked \textit{Chevron} and approached the problem according to the traditional framework established in \textit{Hearst}.

In \textit{Chemical Manufacturers} the Court interpreted section 301(l) of the Clean Water Act,\textsuperscript{78} which stated: “The Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 1317(a)(1) of this title.”\textsuperscript{79}

Prior to the enactment of this section in 1977, the EPA granted variances from toxic pollutant effluent limitations promulgated under the Clean Water Act based upon proof of “fundamentally different factors” (FDF) unique to an individual case.\textsuperscript{80} FDF variances allowed the EPA to tailor its regulations to individual polluters upon demonstration of “factors fundamentally different from those considered by EPA” in promulgating its effluent regulations.\textsuperscript{81} The issue in the case was whether section 301(l) prohibited these variances.\textsuperscript{82}

The NRDC advocated a broad reading of the term “modify” in section 301(l), arguing that FDF variances were modifications that the statute expressly barred.\textsuperscript{83} The EPA advocated a more restricted reading, “insist[ing] that § 301(l) prohibits only those modifications expressly permitted by other provisions of § 301, namely, those that § 301(c) and § 301(g) would allow on economic or water-

\begin{footnotesize}
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\item[76] 106 S. Ct. 2360 (1986).
\item[77] 470 U.S. 116 (1985).
\item[79] Id.
\item[80] 470 U.S. at 120-22.
\item[81] Id. at 121-22. The EPA promulgated extensive criteria for evaluating the necessity of an FDF variance. Theoretically, such a variance could either weaken or strengthen the existing regulations. \textit{Id.} at 120-22 n.7.
\item[82] \textit{Id.} at 124-25.
\item[83] \textit{Id.} at 125 (“NRDC insists that the language of § 301(l) is itself enough to [pre-empt the agency action], since on its face it forbids any modifications of the effluent limitations that EPA must promulgate for toxic pollutants. If the word ‘modify’ in § 301(l) is read in its broadest sense, that is, to encompass any change or alteration in the standards, NRDC is correct.”).
\end{itemize}
\end{footnotesize}
Invoking *Chevron*, the Court exhaustively analyzed the statute, its legislative history, and its supporting policies. The Court found that "neither the language nor the legislative history of the Act demonstrate[d] a clear Congressional intent to forbid EPA's sensible variance mechanism." Consequently, the Court deferred to the agency's determination that "§ 301(l) does not prohibit FDF variances."

Justice Marshall's dissent argued that congressional intent was clear. Marshall applied the *Chevron* framework, but found clear congressional intent under the first prong of the *Chevron* test. He found that Congress intended section 301(l) to prohibit FDF variances:

The plain meaning of § 301(l), the changes made prior to enactment of the bill containing this provision, and the clearly expressed congressional objectives in enacting § 301(l)—to deal vigorously and comprehensively with the extremely serious environmental problem caused by toxic pollutants—establish that this provision's scope was meant to be considerably broader than that attributed to it by EPA.

In determining congressional intent, Marshall analyzed the "language, history, structure, and purpose" of the statute.

Two possible explanations exist for the split in the Court. First, the majority may have applied *Chevron* more deferentially than the dissent. If so, this would support the view that *Chevron* began a new, more deferential era. One reason to reject this explanation is that Justice Stevens, the author of *Chevron*, joined in Marshall's dissent. A plausible conclusion is that Stevens found the dissent more consistent with his view of *Chevron*. A more compelling reason for rejecting this explanation is that both the majority and the dissent

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84 *Id.*
85 *Id.* at 126-33.
86 *Id.* at 134.
87 *Id.*
88 *Id.* at 134-65 (Marshall, J., dissenting). Justices Blackmun and Stevens joined in the full dissent while Justice O'Connor joined parts I, II, and III. *Id.* at 165 (O'Connor, J., dissenting).
89 *Id.* at 152 (Marshall, J., dissenting) ("My disagreement with the Court does not center on its reading of *Chevron*, but instead on its analysis of the congressional purposes behind § 301(l). If I agreed with the Court's analysis of the statute and the legislative history, I too would conclude that *Chevron* commands deference to the administrative construction.").
90 *Id.* at 165.
91 *Id.* at 137.
92 *Id.* at 135.
considered the same factors in reaching their results.\textsuperscript{93}

Second, the Court may have applied the \textit{Chevron} framework consistently with past review doctrine but individual applications may have produced different results. Both the majority and the dissent applied a standard similar if not identical to the traditional scope-of-review standard.\textsuperscript{94} In all cases under \textit{Chevron}, courts must look at specific factors\textsuperscript{95} to determine congressional intent. Various judges may or may not find guidance in those factors, but the method remains constant.\textsuperscript{96}

\section*{B. The \textit{Young} Case}

\subsection*{1. The Opinion}

\textit{Young v. Community Nutrition Institute}\textsuperscript{97} involved the Food and Drug Administration's (FDA) decision not to promulgate a tolerance level for the carcinogen aflatoxin in feed corn.\textsuperscript{98} Challengers to this decision argued that because aflatoxin was an unavoidable added contaminant of food, the Federal Food, Drug, and Cosmetic Act (FDCA)\textsuperscript{99} required the FDA to establish such a tolerance level.\textsuperscript{100} Their argument was based on section 346 of the FDCA:

\begin{quote}
Any poisonous or deleterious substance added to any food, except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice shall be deemed to be unsafe for purposes of the application of clause (2)(a) of section 342(a) of this title; but when such substance is so required or cannot be so avoided, the Secretary shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health, and any quantity exceeding the limits so fixed shall also be deemed to be unsafe for purposes of the application of clause (2)(A) of section 342(a) of this title.\textsuperscript{101}
\end{quote}

The FDA argued that the phrase "to such extent as he finds necessary for the protection of public health"\textsuperscript{102} modified the word "shall," allowing the FDA discretion in promulgating tolerance

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\textsuperscript{93} Both the majority and the dissent relied on the words, legislative history, and goals of the statute. \textit{Id.} at 129, 135.
\textsuperscript{94} \textit{See supra} notes 63-74 and accompanying text.
\textsuperscript{96} \textit{See supra} note 75.
\textsuperscript{97} \textit{106} S. Ct. 2360 (1986).
\textsuperscript{98} \textit{Id.} at 2363.
\textsuperscript{100} \textit{106} S. Ct. at 2364.
\textsuperscript{101} \textit{21} U.S.C. \textsection{346} (1982) \textit{(emphasis added)}.
\textsuperscript{102} \textit{106} S. Ct. at 2364.
\end{flushright}
levels. The challengers argued that the phrase modified "the quantity therein or thereon," leaving "shall" unqualified. Under this view, the statute required the FDA to set tolerance levels for any "added" substance that is "harmful" and "unavoidable."

The D.C. Circuit ruled against the agency, holding that the statute precluded the agency's interpretation. The Supreme Court reversed and upheld the agency interpretation, basing its decision on the *Chevron* doctrine.

Applying the first level of the *Chevron* inquiry, the *Young* Court found the statute ambiguous because "the phrasing of § 346 admits of either respondents' or petitioner's reading." The statute's facial ambiguity justified deference to the agency interpretation. Consequently, the Court held that *Chevron* compelled judicial deference and upheld the agency's interpretation.

The Court focused on the ambiguous wording of section 346 in finding an ambiguity that necessitated deference. The Court only superficially attempted to resolve that ambiguity. *Chevron*, however, requires a deeper analysis. The search for congressional intent must center not only on the specific statutory language, but on the statute as a whole. Normal modes of discerning congressional intent require courts to extend the search beyond the statutory language alone. The *Young* Court failed to undertake or even to rec-
A More Consistent Result

Justice Stevens dissented in Young, adopting an approach consistent with both his Chevron opinion and with pre-Chevron doctrine. Stevens argued that the Court misapplied the first level of the Chevron framework and that the Court should properly reverse the agency. He found no ambiguity in the statute and thus found clear congressional intent. He objected to the majority on two grounds: first, the language of section 346 was not ambiguous on its face; second, the majority failed to look beyond the statute for congressional intent. In conclusion Stevens stated that "[t]he task of interpreting a statute requires more than merely inventing an ambiguity and invoking administrative deference." Stevens noted that the Court easily could construe the statute against the agency. Indeed, Stevens primarily argued that the statute had only one proper meaning:

To one versed in the English language, the meaning of this provision is readily apparent. The plain language of the section tells us when the Secretary's duty to promulgate regulations arises—"when such substance . . . cannot be so avoided"; it tells us the purpose of the regulations—to establish a tolerance level that will enable manufacturers to know what they can lawfully produce and to enable the public to know what they can safely consume; and it tells us what standard he should employ in drafting them—"to such extent as he finds necessary for the protection of public health." For purposes of deciding this case, the parties' agreement that aflatoxins are substances that "cannot be so avoided" within the meaning of the section triggers the obligation to initiate rulemaking.

According to Stevens, "[t]he Court's contrary conclusion reflect[ed]
an absence of judgment and of judging.’”

Under the *Chevron* framework, a court must also look beyond the statute’s facial meaning to general legislative intent. The *Young* Court only briefly discussed this issue.

The Court had significant evidence of legislative intent before it to aid in its analysis. Before finally approving section 346, Congress changed its language from “the Secretary is authorized to promulgate” to “the Secretary shall promulgate.” Additionally, the House Committee report stated: “The addition of poison to foods is prohibited except where such addition is necessary or cannot be avoided; and in such cases tolerances are provided limiting the amount of added poison to the extent necessary to safeguard public health.”

The Court erred analytically in failing to discern congressional intent. Regardless of the eventual outcome, *Chevron* and the traditional review framework obligated the Court to give more than a

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120 *Id.* at 2367.

The Court’s finding of ambiguity is simply untenable. The antecedent of the qualifying language is quite clearly the phrase “limiting the quantity therein or thereon,” which immediately precedes it, rather than the word “shall,” which appears eight words before it. Thus, the Commissioner is to “limit[ing] the quantity [of an added, unavoidable poisonous or deleterious substance] therein or thereon to such extent as he finds necessary for the protection of public health.” By instead reading the section to mean that “the Secretary shall promulgate regulations . . . to such extent as he finds necessary,” the Court ignores the import of the words immediately following, which specify the effect of the “limits so fixed”—i.e., fixed by “limiting the quantity [of the poisonous substance] therein or thereon to such extent as he finds necessary for the protection of public health”—which can only mean that the qualification modifies the limits set by regulation rather than the duty to regulate. In addition, the Court’s construction, by skipping over the words “limiting the quantity therein or thereon,” renders them superfluous and of no operative force or effect.

121 See supra notes 66-68 and accompanying text.

122 *Id.* at 2365-66. The Court devoted one paragraph to the issue, primarily restating the arguments without analysis.


124 99 H.R. REP. No. 2139, 75th Cong., 3d Sess., pt. 1, at 2 (1938) (emphasis added). The Court responded to the change in the language by saying that it was ambiguous, like the statute itself. 106 S. Ct. at 2365-66. Actually, the Court simply labeled this change ambiguous in comparison to a statement in the legislative history that the Secretary “is authorized to promulgate” tolerance levels. *Id.* at 2365-66. The Court also held that Congress’s failure to act in response to the agency’s long-standing interpretation provided evidence against the challengers’ position. *Id.* at 2366. The Court previously rejected this method of statutory interpretation in *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 44-46 (1983). Thus, in one paragraph devoid of analysis, the Court found no evidence of congressional intent in the legislative history.
The analysis of the legislative history certainly warranted more than a one-paragraph dismissal, especially when *Chevron* devoted sixteen pages to such analysis.\(^{126}\)

3. *The Significance of Young*

*Young* raises fundamental questions about the proper role of courts in reviewing agency decisions of law. The majority's view unjustifiably expands the deference of *Chevron*. If *Chevron* represents deference, *Young* represents an almost total abdication of judicial review.

*Young* significantly departs from the existing scope-of-review doctrine for questions of law. *Young* is based not on the true analytical framework of *Chevron*, but rather on *Chevron*’s deferential tone and language. Scope-of-review doctrine, including *Chevron*, does not support the result in *Young*.\(^{127}\) Court deference to the agency in *Young* extends far beyond any deference granted in *Chevron*.\(^{128}\)

Some arguments favored the agency’s position in *Young*. That fact alone, however, does not excuse the Court for abdicating its interpretational duty. Courts still have primary responsibility to interpret the congressional framework within which an agency must operate.\(^{129}\) As with other interpretational responsibilities, courts must employ all the reasonable tools available.\(^{130}\) In *Young* Justice Stevens argued that proper use of such tools would have provided a single answer. More fundamentally, however, the Court should have undertaken the inquiry. In failing to do so, the *Young* Court failed to fulfill “the singularly judicial role of marking the boundaries of agency choice.”\(^{131}\)

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125 See supra notes 66-68 and accompanying text.
127 See supra notes 63-69 and accompanying text.
128 See supra note 69 and accompanying text.
129 See supra notes 29-42 and accompanying text.
A Broader View—Explanations for Young’s Deference

A. Misinterpreted Doctrine

The Young Court may have perceived a need for greater judicial deference than existing doctrine allowed. The majority fashioned its own doctrine of greater deference with only nominal reliance on existing doctrine. The Court abandoned its review function in this area. Existing doctrine does not support such a move. Additionally, such a move is poor and perhaps irresponsible jurisprudence. To implement a broader political agenda at the expense of clear doctrine to the contrary is confusing to say the least.

Chevron arguably creates a more deferential judicial mood towards agencies. This mood, however, does not support deference in different contexts. The Court found ambiguity in the statute in Chevron only after a lengthy analysis of legislative intent. Chevron does not stand for general judicial deference, but merely exemplifies a deferential result reached under the existing framework. Young was not an appropriate case for Chevron-type deference to the agency’s interpretation because the facts in Young do not parallel the facts in Chevron. The Clean Air Act amendments in Chevron were much more ambiguous than section 346 of the FDCA. Because the Chevron Court extensively analyzed the legislative history and policies behind the statute, its framework does not support greater judicial deference. Nevertheless, the Young Court supported its decision with Chevron’s deferential result.

B. A Political Approach

A political perspective may more easily explain the move toward greater deference. Judicial review may constitute an unwarranted intrusion into issues more appropriately addressed by agencies that are politically responsive to the executive branch and, to a lesser extent, to the Congress. Agencies often must balance

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132 One hesitates to use such an amorphous word as mood. However, some would argue that mood is the key: “What scope doctrine exists to do is to set or affect judges’ moods in reviewing agency action.” W. GELLHORN, supra note 5, at 351. Nevertheless, to rely solely on mood to the exclusion of doctrine is inappropriate. The doctrine sets the framework within which this mood operates.

133 See supra note 69 and accompanying text.

134 In Chevron, unlike Young, the Court could not resolve the issue based upon either the language of the provision or clear legislative history.


competing policy questions appropriately addressed by Congress or the executive branch. Judicial review under this perspective is simply politically unresponsive interference with this process.

Such an argument misapprehends the nature of the judicial role in this process. Some bounds always exist to limit an agency's range of choices.\textsuperscript{137} Congress certainly intends to bind an agency by the words and purposes of its enabling statute; the judiciary provides the most effective means of enforcing such congressional restraints on agency action.\textsuperscript{138} Courts allow values to compete in a neutral setting, apart from the pressures of partisan politics.\textsuperscript{139} The role of judicial review in this setting is not to control how agencies perform their function, but rather to enforce congressional limits on exactly what that function includes. To allow agencies to define the scope of their own authority is to unleash agency administrators from any effective control over the limits of their authority and power.\textsuperscript{140} Such nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. The fundamental policy questions appropriately resolved in Congress and in the state legislatures are not subject to re-examination in the federal courts under the guise of judicial review of agency action. Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually make that judgment.\textsuperscript{137}

Similarly, in Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983), Rehnquist stated, "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." Id. at 59 (Rehnquist, J., concurring in part and dissenting in part).

\textsuperscript{137} Levin, \textit{supra} note 30, at 21.
\textsuperscript{138} See R. PIERCE, \textit{supra} note 5, § 5.1, at 120-21 ("[J]udicial review serves important purposes linked to the dual goals of assuring that agencies act within constitutional limits and assuring that agency action effectuates policy decisions made by the legislature."); see also id. § 7.1 at 350 (The judiciary's role "is to ensure that agencies act only in ways that are consistent with the legislative policy decisions reflected in statutes that delegate power to agencies.").
\textsuperscript{139} L. JAFFE, \textit{supra} note 5, at 320 ("The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid."); see also J. MASHAW & R. MERRILL, ADMINISTRATIVE LAW, THE AMERICAN PUBLIC LAW SYSTEM 269-70 (1985) (discussing various rationales for judicial review).
a result is contrary to fundamental democratic principles.\textsuperscript{141} \textit{Young} has implications affecting the balance of power between the executive and the legislative branches. The judicial role of review has always been narrow, but \textit{Young} suggests a dangerous "hands-off" attitude. Courts reviewing agency decisions of law do not intrude on the executive or legislative function, but prevent the executive from intruding on the legislative function. In this sense, the judiciary serves a vital separation-of-powers function. The political battles fought in Congress are not to be refought at the administrative level. Abdicating all responsibility for this type of review removes a necessary check on executive power.\textsuperscript{142}

CONCLUSION

The \textit{Young} Court failed to fulfill its basic obligation of statutory interpretation. A court cannot simply state that the bare language of the provision is ambiguous and whenever it is ambiguous, the agency should decide. Questions of law almost invariably involve ambiguous terms. The proper question, therefore, is: "Who can properly give meaning to the ambiguous provision?" The \textit{Young} analysis automatically requires deference to the agency whenever the statute "admits of two meanings," rendering a challenge to the agency interpretation futile.

A court should not defer to the agency unless, using all the interpretational tools available, it cannot discover clear congressional intent. When the \textit{Chevron} Court says it will not defer if Congress has spoken clearly to the precise issue in question, it restates the judiciary's traditional responsibility. The language in \textit{Chevron} does not excuse a court from this responsibility. Nor does it allow a court the discretion to decide when deference is appropriate. A court has the duty to decide, in the first instance, the congressional intent behind a statute at issue. Courts must make an effort to find guidance from all reasonable sources. Deference is only appropriate if, after such an inquiry, Congress's mandate is still unclear.

Jonathan Bloomberg

\begin{footnotesize}
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\item See generally Mayton, supra note 140.
\item Levin, supra note 30, at 18 (judicial review is "certainly a very basic part of our government's tradition of checks and balances").
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