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FCC v. WNCN Listeners Guild: An Old-Fashioned Remedy for What Ails Current Judicial Review Law

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A 1981 dialogue among jurists of the D.C. Circuit and the Supreme Court, including several of the most influential people in the history of administrative law, provides valuable guidance for today's floundering judicial review law.[1] These jurists build from fundamental principles in contrast to the formulaic approach that seems to guide today's review decisions. They derive from these principles a working review system aimed at optimizing the contribution of the agencies and courts. More importantly, they insist on a review system faithful to constitutional design and the role assigned by it to the courts and the legislature.

The Federal Communications Act of 1934 (the Act) empowers the Federal Communications Commission (Commission or FCC) to grant broadcast license renewals only if it determines that "the public interest, convenience, and necessity will be served thereby."[2] In response to a growing trend toward deregulation (arguably based on a mandate from the electorate), the FCC adopted a rule through notice and comment rulemaking announcing its determination that the public interest would best be served by promoting program diversity through market forces. This rule conflicted with D.C. Circuit law demanding a more interventionist regulatory regime. The Commission concluded that review of format change was not compelled by the language or history of the Act. It quoted a 1940 Supreme Court observation that Congress intended to leave

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1. FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981); WNCN Listeners Guild v. FCC, 610 F.2d 838 (D.C. Cir. 1979).

2. Federal Communications Act of 1934, 47 U.S.C. § 310(d) (2000).

programming to competitive forces.[3] In adopting this rule, the FCC "also concluded that practical considerations as well as statutory interpretation supported its reluctance to regulate changes in formats."[4]

The D.C. Circuit, in the Supreme Court's words, "held that the Commission's policy was contrary to the Act as construed and applied in the court's prior format decisions."[5] Justice White said of that opinion, "Although conceding that it possessed neither the expertise nor the authority to make policy decisions in this area, the Court of Appeals asserted that the format doctrine was 'law,' not 'policy,' and was of the view that the Commission had not disproved the factual assumptions underlying the format doctrine."[6] Much can be learned from Judge McGowan's opinion for the majority of an en banc panel of the D.C. Circuit, the separate analysis in concurring opinions from Judges Bazelon and Leventhal, dissenting opinion from Judge Tamm, and from Justice White's opinion for the Supreme Court.[7] These opinions offer guidance from jurists who have a sophisticated understanding of administrative law, and who were vital contributors to the evolution of that law.

Of these, Judge McGowan's opinion, in particular, provides a theoretically sound and useful framework. Judge McGowan focused the Circuit's disagreement on the "reading of the [a]ct" in which judicial authority is dominant.[8] Thus, he selected the battleground advantageous to

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3. *See* FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940) (stating that Congress wished to allow broadcasters to compete and to succeed or fail based on the ability to offer programs attractive to the public).

4. *FCC v. WNCN Listeners Guild*, 450 U.S. at 589.

5. *Id.* at 591. In the broad sense, "policy" decisions are those that advance or protect some collective goals of the community as opposed to those decisions that respect or secure some individual or group rights. *See also* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1058 (1975), *reprinted in* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81-130 (1977) (exploring the distinction between arguments of principle and policy); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 141 (William N. Eskridge, Jr. & Philip P. Frickey ed., 1994) ("A *policy* is simply a statement of objectives."). Here the term "policy" means such decisions assigned to the agency and policies made by legislators are embodied in the statutory language and hence are not "made" either by the agency or the courts, but are derived through the various techniques of statutory interpretation.

6. FCC v. WNCN Listeners Guild, 450 U.S. at 592-93. *See, e.g.*, Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1 (1985) (scrutinizing the difference between questions of law and other questions, such as policy).

7. WNCN Listeners Guild v. FCC, 610 F.2d 838, 838 (D.C. Cir. 1979).

8. *Id.* at 842. The *Chevron* doctrine makes no change in this fundamental principle. *See, e.g.*, Great Plains Coop. v. CFTC, 205 F.3d 353, 356 (8th Cir. 2000) (using the *Chevron* opinion as supporting the conclusion that "statutory interpretation is the province of the judiciary"); Antipova v. U.S. Att'y Gen., 392 F.3d 1259, 1261 (11th Cir. 2004) (explaining that the court reviews "the agency's statutory interpretation of its laws and regulations *de novo*. . . . However, we defer to the agency's interpretation if it is reasonable and does not contradict the clear intent of Congress"). *See generally* 3 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 12.32[1] (2d ed. 1997) (offering many more examples).

the court. He nonetheless noted that an administrative decision under delegated policymaking authority would be subject only to hard look review, which he properly characterizes: "[The Commission] must take a 'hard look' at the salient problems."[9] That is, the court must assure that the agency took a hard look, not take a hard look itself. "Only [the Commission], and not this court, has the expertise to formulate rules well-tailored to the intricacies of radio broadcasting, and the flexibility to adjust those rules to changing conditions .... And only it has the power to determine how to perform its regulatory function within the substantive and procedural bounds of applicable law."[10] In other words, the court must assure that the agency is acting within its statutory authority and, once it determines the agency is acting within delegated policymaking authority, the court is largely out of the picture. Upon crossing this boundary, the judicial job is limited to assuring that the policy is not arbitrary by determining whether the agency took a hard look.

The basic review system is revealed as Judge McGowan continues: "[The prior case] represents, not a *policy*, but rather the *law* of the land as enacted by Congress and interpreted by the Court...."[11] He properly noted that this distinction not only implicates the allocation of decision-making authority between a reviewing court and an agency, but between both and Congress:

> This court has neither the expertise nor the constitutional authority to make "policy" as the word is commonly understood .... That role is reserved to the Congress, and, within the bounds of delegated authority, to the Commission. But in matters of interpreting the "law" the final say is constitutionally committed to the judiciary .... Although the distinction between law and policy is never clearcut, it is nonetheless a touchstone of the proper relation between court and agency that we ignore at our peril.[12]

The last sentence is quite prescient in light of the current state of the law.

Then Judge McGowan moved to a review of the underlying factual support for agency policy determinations. "To the extent that the Commission was not questioning this court's legal judgment, but was attempting to demonstrate that faulty factual premises underlay that judgment, we agree that it was within its competence as an agency better equipped to develop legislative-type facts than this court."[13] In general, he

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9. *WNCN*, 610 F.2d at 842.
10. *Id.* at 852.
11. *Id.* at 854.
12. *Id.* at 854-55.
13. *Id.* at 855. *See* KOCH, *supra* note 8, § 1.2[2](e) (explaining that "legislative facts" are general facts that support a policy position, whereas "adjudicative facts" are specific facts that go to making individual decisions).

pinned his objection here to procedural inadequacy. "This procedural unfairness [inadequate notice], coupled with the substantive uncertainty flowing from the lack of adequate adversarial testing during the comment period, is enough to make us view skeptically the Commission's use of the study."[14] This defect led him to discount the Commission's factual judgments.

Judge Bazelon, though concurring, wrote separately because the "final [administrative] decision violates fundamental rulemaking principles."[15] Nonetheless, he could not fully associate himself with Judge McGowan's opinion:

> Implementing the public interest standard calls for a strong dose of policy judgment, a responsibility entrusted by Congress to the FCC. Yet the majority virtually confines the FCC to a spectator's role in formulating polic[y.] . . . Even apart from this unwillingness to give appropriate deference to the Commission's judgment, I would remain troubled by the route taken by the majority.[16]

He was troubled, as was Judge Tamm in dissent, by the majority's use of procedural doubts to drift into policymaking.[17]

Judge Leventhal's concurrence also distinguished the judicial role regarding statutory interpretation from that regarding administrative policymaking:

> As sponsor of the court-agency partnership concept and 'hard look' doctrine, I add a few words to underscore [Judge McGowan's] observation that this court does not view itself as cast in the role of policymaker . . . . The relationship of court and agency emerges from the functions assigned by Congress to each. Congress has delegated to the agency, here the FCC, the function of making policy. It has given the court the role of review to ensure that an agency decision stays within the intent of the law, and satisfies the requirement of reasoned decision-making . . . .[18]

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14. *WNCN*, 610 F.2d at 856. The court criticized the adequacy of the notice because it did not contain the data. *Id.* at 847.

15. *Id.* at 858.

16. *Id.* at 858-59 (Bazelon, J., concurring) (arguing further that the majority should have been more concerned about the First Amendment questions: "[T]he FCC's affirmative efforts to promote diversity have not only failed to achieve that goal, but have entangled the Commission and the courts in perilous government oversight of the content of expression").

17. *See id.* at 864 (Tamm, J., dissenting) (asserting "[t]he alleged procedural unfairness was serious enough . . . to allow the majority to subject the agency to unusually strict scrutiny"). At most, this procedural defect justifies remand, not what amounts to substitution of judgment as to such legislative facts as "assessment of market conditions." *Id. See also* Ronald J. Krotoszynski, Jr., *"History Belongs to the Winners": The Bazelon-Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action*, 58 ADMIN. L. REV. 995 (2006).

18. *WNCN*, 610 F.2d at 859-60.

The judicial role is determined by Congress in both regards. A court arrogates authority if it takes on policymaking, but it is still responsible to assure the policy is true to the goals set by Congress. To do so, it must assure that the agency correctly read the statute, but it must restrain any urge to question the policy judgment made within statutory authority.

Judge Tamm, in dissent, objected to the Court's mischaracterization of the Commission policy judgment as a question of law: "The majority has lost sight of our role as a reviewing court whose proper function is to uphold an agency's reasonable judgment .... Faced with a conflict between judicial and administrative policies, I believe we are obligated to uphold the Commission."[19] The distinction between the two types of decisions is emphasized by decisionmaking methods. As the majority itself recognized, the disagreement hinged on "legislative-type" facts and social factors, not on parsing statutory language or any other mental process that justifiably could be called interpretation.[20]

Justice White followed the D.C. panel's line of analysis and agreed with Judge Tamm as to where it should lead a reviewing court in determining the level of its authority. That is, he recognized the distinction between statutory interpretation and administrative policymaking—he simply disagreed with Judge McGowan's conclusion that this case hinged on statutory interpretation.[21] Of course, the threshold issue is whether the agency acted within its delegated authority and consistent with its congressionally assigned mission. Here, he followed the already well—established principle of judicial dominance. Nonetheless, he recognized the equally well-established principle of deference: "The construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong."[22] Recognizing the judicial role regarding statutory interpretation, he was nonetheless "unconvinced that the Court of Appeals' format doctrine is compelled by the Act."[23]

After concluding that the Commission had acted within its statutory authority, Justice White shifted from interpreting language to considerations of goals and "statutory duties":[24]

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19. *Id.* at 865.

20. *See id.* at 855 (quoting FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 814 (1978) (noting that "[i]n such circumstances complete factual support in the record for the Commission's judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency'"(internal references omitted)).

21. *See* FCC v. WNCN Listeners Guild, 450 U.S. at 582, 593 (1981) (disagreeing with the Court of Appeals's assessment).

22. *Id.* at 598 (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 381 (1969)).

23. *Id.* at 593.

24. *See id.* at 595-96 (noting the superiority in both authority and administrative predictions); *see also id.* at 600-01 (noting further the value of regulatory experience embodied in the Commission).

> This Court has approved of the Commission's goal of promoting diversity in radio programming . . . but the Commission is nevertheless vested with broad discretion in determining how much weight should be given to that goal and what policies should be pursued in promoting it. The Act itself, of course, does not specify how the Commission should make its public-interest determinations.[25]

In so ruling, the Court did not disagree with Judge McGowan's fundamental review principles but with his characterization of the contested issues.[26] In short, the distinction was pivotal.

Why is it that, in Judge McGowan's words, while "the distinction between law and policy is never clearcut . . . we ignore [it] at our peril"?[27] Judge McGowan tells us that "[the distinction] is . . . a touchstone of the proper relation between court and agency."[28] That is, interpretation and policy development are quite different tasks implicating distinct expertise and separate constitutional roles.

The distinction, for one thing, furthers the comparative advantages, particularly expertise, of the two institutions. As interpreters of statutory language, agencies are inferior to the courts even though their interpretative efforts are valuable. Thus, for generations, review law has given the courts dominant authority over statutory interpretation but recognized the value of the agency's understanding of its own legislation. In direct contrast, the agencies have the relevant expertise to pursue policymaking. Indeed, they are designed to do so. They are given the capacity to investigate and find the legislative facts that support policy judgments. They house the staff experts necessary to develop and digest those facts. The ultimate agency decisionmakers are selected for their policy perspective, if not necessarily their expertise. Thus agencies combine the information-gathering capacity and policy deliberation design which the legislature intended to be brought to bear on specific social issues. Overbearing judicial interference, even if

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25. *Id.* at 600 (defining the term "discretion" in the Administrative Procedure Act sense of policymaking authority); *see* FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 117 (1941) ("The situation is different in rule making or other discretionary determinations which involve, in effect, the formulation of new policies.").

26. *See* FCC v. WNCN Listeners Guild, 450 U.S. at 607 (Marshall, J., dissenting) (conceding that the Commission may adopt a general policy but contended that the Commission must make that determination as to each applicant: "Consequently, the issue presented by these cases is not whether the Commission may adopt a general policy of relying on licensee discretion and market forces to ensure diversity . . . . Rather, the question before us is whether the Commission may apply its general policy on format changes indiscriminately and with regard to the effect in particular cases"). For Justice Marshall, like Judge McGowan, this is a case of statutory interpretation. "The Act imposes an affirmative duty on the Commission to make a particularized 'public interest' determination for each application that comes before it." *Id.* at 609 (finding that the Act requires a "safety valve" which allows some individualizing).

27. WNCN Listeners Guild v. FCC, 610 F.2d 838, 855 (D.C. Cir. 1979).

28. *Id.*

well meaning, tends to cancel out these institutional advantages. The *WNCN* jurists were sensitive to this danger because they participated in the initial debates surrounding the administrative process. Their early experience made them keenly aware of the limitations of the judiciary in confronting society's problems.

Much more is at stake than optimizing decisionmaking resources, however. The FCC program rule, for example, was no more an interpretation of the Federal Communications Act than the Act was an interpretation of the Commerce Clause. The act of developing both requires not interpretation but actual policymaking. When Congress chooses not to exercise its full policymaking authority and assigns that authority to a specially designed and empowered agency, the courts must enforce that choice. In policymaking, agencies are not to parse language, delve into legislative history, or engage in the other interpretative strategies. Rather, they are to make permissible, but not mandated, judgments based on legislative facts developed for that purpose. Courts may not ignore Congress and take over this function by converting it into interpretation.

These principles create a sound and workable system for allocating decisionmaking competence and governmental authority. As such, they can provide a foundation for operation of the "*Chevron* Framework."[29] To some extent, applicable policy is expressed in statutes and the agency must read statutory language to glean legislative policy. When agencies derive policy, the courts must assure that they are true to the legislative commands. Nonetheless, courts have long recognized the advantages of administrative interpretations. As stated above, Judge McGowan understood this precedent when he quoted *Red Lion*: "The construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong."[30] Thus, whether termed "*Chevron* deference" or not, the law has long compelled courts to give deference to the administrative interpretation.[31]

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29. *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, __, 125 S. Ct. 2688, 2699 (2005) (demonstrating that the term "framework" used here by the Court seems more apt at this point than "*Chevron* doctrine").

30. FCC v. WNCN Listeners Guild, 450 U.S. at 598 (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 381 (1969)).

31. *See, e.g.*, Udall v. Tallman, 380 U.S. 1, 16 (1965) ("When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."); *see also* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.11 (1984) (suggesting that earlier cases offered a more incremental contribution to Justice Stevens' now famous *Chevron* statement: "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding").

In contrast, often the policy expressed in the statute is inchoate, incomplete, or insufficiently specific and the agency must actually make policy, not just find it in the statutory language. These administrative decisions are actually carrying forward the mandate of the statute and, hence, they are extending the policymaking process begun by the legislation rather than merely reading the language. Courts must review this administrative policymaking quite differently from statutory interpretation. Judge Leventhal admonished,

> As sponsor of the court-agency partnership concept and 'hard look' doctrine, I add a few words to underscore [Judge McGowan's] observation that this court does not view itself as cast in the role of policymaker . . . . The relationship of court and agency emerges from the functions assigned by Congress to each.[32]

Thus, review jurisprudence tells the courts to afford administrative policy controlling effect unless the policy is arbitrary or an abuse of the discretion granted by the legislature. An impressive body of law has restrained review of policymaking.[33] Indeed, the *Chevron* opinion itself seemed grounded on this principle: "When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."[34]

The distinction, then, is fundamental and longstanding. Judge McGowan tells us why: "This court has neither the expertise nor the constitutional authority to make 'policy' as the word is commonly understood . . . . That role is reserved to the Congress, and, within the bounds of delegated authority, to the Commission."[35] In contrast, he derived a quite different judicial role regarding statutory interpretation: "But in matters of interpreting the 'law' the final say is constitutionally committed to the judiciary."[36] This observation merely modernized Chief Justice Marshall's

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32. *WNCN*, 610 F.2d at 859-60.

33. *See* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941) (advising that "courts must not enter the allowable areas of Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy"); *see also* SEC v. Chenery Corp., 318 U.S. 80, 94 (1943) (*Chenery I*) (distinguishing its authority from the policymaking authority of the agency). In *Chenery I*, the Court stated:

> If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law.

Chenery I, 318 U.S. at 94.

34. 467 U.S. at 866 (clarifying the entire opinion as the notion that the judiciary must defer to agency policy choices).

35. *WNCN*, 610 F.2d at 854.

36. *Id.* at 854-55.

allocation of authority in *Marbury v. Madison*.[37] Societal decisions are, except at the margin, left to the legislature and the executive. The "judicial power," even in a common law legal culture, is confined to resolving individual disputes and interpreting the law where necessary to resolve individual disputes.[38] The occasion of review of administrative action may not be used to inject the courts into general policymaking.

In the administrative scheme, the agencies, not the reviewing courts, are the designated "faithful agents" of the legislature.[39] The administrative review system need not be confused by the nuances of the textualism debate. Even under the most pro-judiciary theory, courts also must obey the law. When the legislature itself has assigned the function of extending the legislative process, the courts must obey that law. A reviewing court is not stuck between formalism and evolution, literalism and flexibility, and cannot derive authority from such alleged dilemmas. Policy development has an instrument, and it is not the courts. Courts should not arrogate that authority through the exercise of the review function. This is a common thread of the *WNCN* opinions, the teaching of the jurists who participated in the dialogue.

So the key is the legislative choice.[40] Justice Breyer's observation, dissenting in *Christensen v. Harris County*,[41] is particularly useful: "*Chevron* made no relevant change. It simply focused upon an additional,

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37. 5 U.S. (1 Cranch) 137, 170 (1803) (declaring "the province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion").

38. This allocation is consistent with the general prohibition against federal courts making law or "federal common law." In that context, Merrill expressed the distinction: "'Federal common law' . . . means *any* federal rule of decision that is not mandated on the face of some authoritative federal text—whether or not that rule can be described as the product of 'interpretation' in either a conventional or an unconventional sense." Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 5 (1985). More generally, the common law system envisions incremental judicial policymaking, but not when policymaking is assigned to other institutions.

39. *See, e.g.*, John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648 (2001) (defending the view that courts should be the "faithful agents" of the legislature which here would mean remaining faithful to the legislative allocation of decisionmaking authority).

40. *See* United States v. Mead Corp., 533 U.S. 218, 226-27 (2001) (ruling that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority"). However, for the relevant statute here, the Court found that the statute gave no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law. *See also* Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 239 (2004) (showing how *Chevron* deference is required where Congress has expressly delegated authority to the agency); Barnhart v. Walton, 535 U.S. 212, 223-24 (2002) (using the language of "interpretation" best understood as concluding that the agency's policy was due substantial deference because it was within the agency's authority).

41. 529 U.S. 576 (2000).

separate legal reason for deferring to certain agency determinations, namely, that Congress had delegated to the agency the legal authority to make those determinations."[42] Many seem surprised by the Court's focus on delegation as the key to determining the effect of administrative pronouncements. But this focus is a simple recognition of the constitutional demand for majoritarian government. The *WNCN* dialogue is the voice of a generation of intellectuals who still had faith in democracy; the *WNCN* jurists understood that conceptualizing interpretation merely as policymaking by another name threatens fundamental principles.[43] The *WNCN* jurists (as well as most of their past and present judicial colleagues) understood their role and respected that of the other institutions of government. In the administrative process, this respect operates through the distinction between the judicial responsibility regarding statutorily prescribed policy and that regarding a legislative choice to delegate policymaking authority. In both instances, the judicial duty is to enforce congressional will.[44]

A recent Federal Communications Act case, quite reminiscent of *WNCN*, *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Services*, assures that this judicial intuition, if not unfortunately the precise formulation, survives in the *Chevron* doctrine world.[45] The FCC issued a declaratory ruling that broadband internet service was not subject to common carrier regulation. As in *WNCN*, the appellate court held that the ruling violated Circuit precedent, but the Supreme Court found that an agency must follow judicial precedent only if the judicial interpretation was based on unambiguous statutory language.[46] In this case, the Court found that the statute was ambiguous because the statutory definition turned not on

42. *Id.* at 596.

43. The net result of this tactic, whether conscious or not, is the vast increase in judicial authority. *See, e.g.*, Joseph L. Smith & Emerson H. Tiller, *The Strategy of Judging: Evidence from Administrative Law*, 31 J. LEGAL STUD. 61, 81 (2002) (observing a 32% increase in reversals after *Chevron*); *see also* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1749 (2002) ("Accountability is not lost through delegation, then; it is transformed. Congress is accountable for the performance of agencies generally, and people properly evaluate the agencies' accomplishments as well as failures when deciding whether to hold members responsible for authorizing the agency, or for failing to curtail its power, fix its mistakes, or eliminate it altogether.").

44. *See* Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 583-84 (2002) (finding that the legislative drafting process is highly variable and contextual, with legislators more interested in getting the job done than providing an interpretative tool). Their findings suggest that a theory of interpretation requires normative judgments about the allocation of lawmaking authority between the courts and the legislature.

45. 545 U.S. 967, __, 125 S. Ct. 2688, 2688 (2005).

46. *See id.* at 2700 (writing "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion").

statutory language, but on "factual particulars."[47] Since the answer could not be found in the statute, it concluded "that the Commission's construction was 'a reasonable policy choice for the [Commission] to make' at *Chevron*'s second step."[48] In determining whether the Commission's judgment was permissible, the Court considered the regulatory history and the Commission's reasoned explanation. It concluded that "[n]othing in the Communications Act or the Administrative Procedure Act makes unlawful the Commission's use of its expert policy judgment to resolve these difficult questions."[49] In sum, if a court determines that an agency acted within its delegated policymaking authority, then the agency's policy judgments are controlling and a court may not use the device of "interpretation" to set aside that judgment.

Still, agencies nearly always have delegated authority to make policy. Thus, the question is generally whether an agency made the policy pursuant to authority.[50] This principle has been applied for generations in determining the effect of legislative versus nonlegislative rules. That is, legislative rules, which are by definition made pursuant to delegated authority, have the force of law and hence are reviewed only for arbitrariness. By contrast, guidance documents, policy announcements, and the like, not invoking such authority, are given the deference generally expressed by *Skidmore*.[51] It makes sense from an allocation of authority and expertise perspective to extend this principle, as the Court has done, to any authoritative expression of policy, and not to limit it to those contained in rules.[52] Indeed, the major advance brought about by the *Chevron* framework is the shift from a focus on process to a focus on the nature of the contested issue.[53] The *Chevron* framework cases then extend this focus to all administrative policymaking regardless of the procedural context.[54]

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47. *See id.* at 2705 (boiling the facts down to questions of how Internet technology functions and how it is provided to consumers).

48. *Id.* at 2708 (internal citations omitted).

49. *Id.* at 2712.

50. Operation of the distinction, then, creates a bridge between the majority's approach and Justice Scalia's dissent in *United States v. Mead*. *See* 533 U.S. 218, 257 (2001) (Scalia, J., dissenting) (arguing that "*Chevron* sets forth an across-the-board presumption, which operates as a background rule of law against which Congress legislates: Ambiguity means Congress intended agency discretion. Any resolution of the ambiguity by the administering agency that is authoritative—that represents the official position of the agency—must be accepted by the courts if it is reasonable").

51. *See* Skidmore v. Swift, 323 U.S. 134, 140 (1944) (holding "[t]he weight of such a judgment . . . will depend upon . . . all those factors which give it power to persuade, if lacking power to control").

52. *See* KOCH, *supra* note 8, §§ 9.13, 12.1, 12.30 (predicting this conclusion as it seemed to emerge naturally as a logical extension of seeing the review not in formulaic terms but as a working system for the proper allocation of decisionmaking authority and optimum use of decision-making expertise).

53. *See id.* § 12 (discussing this more completely).

54. Both *Christensen v. Harris County*, 529 U.S. 576 (2000), and *Mead*, 533 U.S. at

Still, as in *WNCN*, the threshold question must be whether the agency policy was within the agency's authority. By necessity, a claim of authority, as opposed to other varieties of statutory interpretation, demands close judicial scrutiny. The Court always has been particularly alert when an agency is defining its jurisdiction while generally still granting the agency considerable discretion to do so.[55] This threshold question must be answered whether the agency engages in statutory interpretation or policymaking. Of course, as to both, the question is one of statutory interpretation over which the courts have dominant authority. Within the *Chevron* framework, however, a court must give some deference to administrative statutory interpretation even as to this threshold question.

In *Gonzales v. Oregon*, the Justices focused the *Chevron* framework on the agency's assertion of jurisdiction.[56] On November 9, 2001, the Attorney General of the United States (AGUS), without public procedures, issued an interpretive rule announcing an intent to restrict the use of controlled substances for physician-assisted suicide. The Controlled Substances Act places certain substances in one of five schedules based on their potential for abuse or dependence, but permits the AGUS to add, remove, or reschedule substances after making prescribed findings. Breaking with the prior administration, the revised policy conflicted with an Oregon statute permitting physician-assisted suicides. The Court applied the *Chevron* framework to the AGUS's interpretation of statutory authority. It determined that Congress had not delegated rulemaking power over this question; hence, the AGUS "is not authorized to make a rule declaring illegitimate a medical standard . . . under state law."[57] "[T]he statute manifests no intent to regulate the practice of medicine generally" and thus there is no evidence that Congress intended to displace the states.[58] Even

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218, use process to determine whether policymaking authority exists, whereas, in some respects, administrative laws have used process to determine directly the effect of policy. For example, legislative rules are limited to arbitrariness review, but guidance documents receive de novo review tempered by *Skidmore*. Formal adjudication receives substantial evidence review. Ironically, Justice Scalia, dissenting in another forgotten case, opined that review of policymaking in formal adjudications should be subject to substantial evidence or reasonableness review. NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 801 (1990); *see also* Antonin Scalia & Frank Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 UCLA L. REV. 899, 933-36 (1973) (arguing that substantial evidence review is "essential to the distinctive character and purpose of an on-the-record proceeding").

55. *See* KOCH, *supra* note 8, § 12.34[8] (outlining the deference given to agencies in this situation).

56. __ U.S. __, 126 S. Ct. 904 (2006).

57. *Gonzales*, 126 S. Ct. at 916; *see also id.* at 920 (noting further that the Attorney General of the United States shared policymaking authority with the Health and Human Services Secretary, and his claim of authority trenched on authority delegated to the Secretary).

58. *Id.* at 923.

Chevron deference will not protect an agency that misinterprets its authority. Still, once authority is affirmed, the judicial role shifts dramatically as described above.

The jurists participating in the *WNCN* dialogue, products of the formative era of administrative law, operated from a comprehensive review system, a system founded on the most advantageous allocation of decision-making resources, a system that was faithful to constitutional design. Not only is this analytical scheme compelled by the nature of our government, but it also establishes a very workable review system. The judicial exchange in *WNCN* demonstrates that this system was well understood a generation ago. It isolated fact-finding and procedural questions and the relevant considerations guiding review of these issues. Most importantly, it recognized that review of statutory interpretation and administrative policymaking must be founded on quite different principles of authority and expertise.

Recent Supreme Court opinions struggle to rediscover this understanding.[59] One can almost see the Justices knocking their heads with the heels of their hands, looking for the means to express their sense of the proper allocation of decisionmaking authority. Judge McGowan and his colleagues on both *WNCN* courts invoke the necessary system and furnish the vocabulary to apply it. The judicial review law would gain substantial clarity merely by following their guidance.

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59. *See* Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 1 (1998) ("Three descriptive models have emerged. Some commentators have embraced a contextual model and contend that *Chevron* is a 'revolution on paper' that has failed to replace the traditional contextual approach to judicial review of agency action. Others rely on a political model and maintain that the *Chevron* doctrine is so indeterminate that it serves primarily as cover for judges who decide cases based on their personal political preferences. Other commentators rely on an interpretive model and insist that *Chevron* is unstable because textualist judges apply the doctrine differently from judges who reject a textualist approach.").