Judicial Review of Administrative Policymaking

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ESSAY

JUDICIAL REVIEW OF ADMINISTRATIVE POLICYMAKING

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Following the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, scholars have delved into every nook and cranny of judicial review of agency statutory interpretation. Yet inquiry into the more subtle and practically potent questions involving the broad category of review of administrative policymaking has languished. Perhaps administrative law scholars have mined the *Chevron* doctrine sufficiently and the time has come to rediscover the rich question of judicial review of this other source of policy. James Landis, the oracle of administrative law, observed in a landmark essay that "[t]he ultimate test of the administrative [institution] is the policy that it formulates; not the fairness as between the parties of the disposition of a controversy on a record of their own making." The founding generation of administrative law recognized that the administrative process grew out of the desire to develop a mechanism for effective policymaking.

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1. 467 U.S. 837 (1984) (setting out a two step scheme for reviewing administrative agency interpretation of statutes agencies are charged with administering by Congress).


4. See, e.g., LOUIS JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 612–13 (1965) (noting that policymaking is a duty of agencies and that delegation to hearing examiners would be an abdication of this duty). But see Keith Werhan, *Delegalizing Administrative Law*, 1996 U. ILL. L. REV. 423 (observing that certain recent reforms are undermining the policymaking role for agencies contemplated by the founding generation of administrative law).
This Essay asserts a categoric difference between judicial review of statutory interpretation and review of administrative policy-making. Ordinarily, the judiciary confronts statutory language de novo. In the administrative process, however, a reviewing court has before it a prior authoritative treatment of the statutory language. The existence of another "faithful agent" between the legislature and the courts instrumentally changes the role of the courts. The *Chevron* doctrine recognizes one aspect of this instrumental difference. It demands that the courts accept that an authorized agent of the legislature has pronounced on the topic and it compels courts to give that meaning more weight than they would interpretations offered by ordinary litigants. It says that when a court is confronting an administrative interpretation of a statute, they must accept that interpretation if the meaning gleaned from the statute is not contrary to the clear meaning of the language and is reasonable. As to interpreting statutory language, the courts must give due deference to the prior agent, the agency created to execute the legislative program, and that deference is defined by the *Chevron* doctrine. In a sense, the judicial role here is not distinguishable in kind from the role played by courts in any statutory interpretation; the additional element is the injection of an authoritative agent.

The doctrine does not cover another category of administrative decisions, however. Specifically, the *Chevron* doctrine does not address those agency decisions executing statutory language through the authorized creation of policy itself. These administrative decisions do not interpret language but actually carry forward the mandate of the statute; in doing so they extend the policy-making process begun by the legislation rather than figuring out what policy the language conveys. In this context, the judicial role cannot be defined as some special variety of the statutory interpretation. Rather, it must be conceived as a distinct category.

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5. Professor Manning argued that the best understanding of the Constitution is that the courts are to be "faithful agents" of the legislature. John Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648 (2001). Certainly, in the context of statutory interpretations, they should be agents, even if the degree of faithfulness is contestable. This Essay cannot, and need not, explore the various concepts of statutory interpretation. For a more in-depth analysis of these concepts, see WILLIAM ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION (2000).
of judicial review. Although some of the impressive thinking that has constructed the *Chevron* doctrine, as well as the *Chevron* opinion itself, may be useful, review law about this category of administrative decisions, policymaking, must be developed independently. This Essay reaches into the existing law of review of administrative policymaking, informed by the work done in developing the *Chevron* doctrine, to urge a renewed attention to this category of judicial review.

Although agencies are generally designed with dominant authority over their special policy-making area, courts retain some function over administrative policymaking. The complex questions concerning the proper allocation of authority between the courts and the agencies—and, indirectly, the legislatures—in policymaking needs attention. Administrative law has well-established principles to guide courts in carrying out this responsibility. Nonetheless, the opportunity remains for administrative law specialists to profitably modernize these principles, perhaps utilizing the massive body of work concerning review of statutory interpretation under the *Chevron* doctrine. Two very recent cases, *Christensen v. Harris County* and *United States v. Mead Corp.*, demonstrate the utility of such a transfer from review of statutory interpretation to review of policymaking.

The *Chevron* doctrine provides important insights into the allocation of authority to glean policy from legislation, the assignment of authority over statutory interpretation. Review of administrative policymaking, however, has not received commensurate attention, especially given its importance as a source of government policy. Just as Justice Stevens' opinion in *Chevron* influenced the development of the *Chevron* doctrine, it may also serve as a springboard for this inquiry. In his concluding summation Justice Stevens observed:

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7. See infra Part II.A.
When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibility in the political branches."¹⁰

What then is the proper judicial role with respect to the "wisdom of the agency's policy" rather than its interpretation of statutory language? As Justice Stevens and others have observed, this question implicates not only the allocation of policy-making authority between the courts and the agencies, but also indirectly between the courts and the political branches.¹¹ Following Justice Stevens' lead, administrative law needs to turn its attention to this issue.

I. A CATEGORIC DISTINCTION BETWEEN STATUTORY INTERPRETATION AND ADMINISTRATIVE POLICY

Because the administrative process provides an intermediate decision-making body between the creation of legislation and judicial review, it requires a review system that can deal with two separate categories of policy judgments: legislative and administrative policymaking. These categories share a primary characteristic. According to Professor Ronald Dworkin, the term "policy" encompasses a wide variety of decisions that advance or protect some collective goal of the entire community as opposed to those decisions that respect or secure some individual or group right.¹² For purposes of this Essay, policymaking is defined as those government decisions that promote and protect societal values. The legislative process, which involves participation by the legislative

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¹². Ronald Dworkin, *Hard Cases*, 88 Harv. L. Rev. 1057, 1069 (1975); *see also* HART & SACKS, supra note 6, at 141 ("A policy is simply a statement of objective.").
and executive branches, is the foundational source of policy. Courts in a common law system also participate in the policy-making process although, as Landis observed, the very creation of the administrative process was motivated by the desire to tailor policy-making institutions to a particular need.\textsuperscript{13} For this reason, the system has been forced to accept robust delegations and to find implicit as well as explicit policy-making delegations.\textsuperscript{14}

Our working definition might also help explain the common characteristic: both legislative policymaking and administrative policymaking share the objective of advancing or protecting societal or communal values and goals.\textsuperscript{15} To some extent, the \textit{Chevron} doctrine is founded on the notion that interpretation and policymaking are the same.\textsuperscript{16} Although at an abstract level this observation cannot be challenged, it has proven misleading as a guiding principle for developing a judicial review strategy.\textsuperscript{17}

Operationally, statutory interpretation and administrative policymaking must be distinguished. An optimum system for developing decisions which further community values and goals requires two quite distinct types of judicial involvement. Such an assignment of judicial function implicates both the proper allocation of authority, as Justice Stevens observed, and captures the full benefit of both judicial and administrative comparative advantages.

\textsuperscript{13} See LANDIS, supra note 3, at 39.
\textsuperscript{15} Levin, supra note 11, at 12-13 (distinguishing between law and “discretion,” a term that encompasses what is referred to here as administrative policymaking). Professor Levin has described the shared characteristic as “normative.” Id.
\textsuperscript{17} The relatively insignificant case of \textit{Lawrence v. Chater}, 516 U.S. 163 (1996), demonstrates the curious nature of presenting an agency policy change as a new reading of the statute. In \textit{Lawrence}, the authority of an agency to change its position related to a conflict regarding the niceties of the Grant of Certiorari Vacation and Remand device (GVR). The majority felt that GVR was proper in a case where “a new interpretation of a statute adopted by the agency charged with implementing it may be entitled to deference ....” Id. at 172. In dissent, Justice Scalia observed simply that “[t]he law is the law, whatever the parties, including the United States, may have argued.” Id. at 184 (Scalia, J., dissenting). Of course, an agency cannot change a statute even under the guise of “interpretation.” Casting the administrative policy-making authority in terms of the power to revise a statute made the \textit{Lawrence} majority’s analysis at least misleading if not a bit silly. But see SKF USA, Inc. v. United States, 254 F.3d 1022, 1030 (Fed. Cir. 2001) (applying \textit{Lawrence} faithfully).
Precision in conceptualizing the respective policy-making functions of the judiciary and the various administrative agencies is therefore vital to the search for the best use of both in the context of the administrative process.

The administrative process reaches policy conclusions in two basic ways: an agency either applies policy decisions created by another governmental institution or it creates the policy itself. When an agency applies policy created by another branch of government, the source is usually legislative, although it is sometimes judicial, and much of the law about this category of policy decision revolves around statutory interpretation. Interpretation of a statute involves gleaning policy from the legislation, a source independent from both the agency and the reviewing court. Depending upon the circumstances, courts may have as much, or more, interpretative authority than an agency. They should and traditionally have been given dominant authority because they are monitoring the agency to assure that the policy is true to the legislation. Furthermore, courts have some advantages in performing interpretative functions the system needs to capture.

Traditionally, therefore, the courts have enjoyed a form of "de novo" or "plenary" authority over statutory interpretation, but have also recognized reasons to give agency interpretations "deference." Courts today continue to express their basic role in terms of this form of de novo or plenary review. These expressions are

18. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").
20. See ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, 77TH Cong., REPORT ON ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES 90-91 (Comm. Print 1941) [hereinafter ATTORNEY GENERAL'S COMMITTEE REPORT].
21. Since Chevron, Justice Stevens seems to have found this standard applicable. See McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 493 (1991). Even recently, lower courts have applied the standard. See, e.g., Tang v. INS, 223 F.3d 713, 718-19 (8th Cir. 2000) (noting that courts review legal determinations de novo); Akiak Native Cmtv. v. Postal Serv., 213 F.3d 1140, 1144 (9th Cir. 2000); Splude v. Apfel, 165 F.3d 85, 88 (1st Cir. 1999) ("Thus, our review [of legal issues] is de novo, save as the Social Security Administration's view of the statute may be entitled to some deference."); Fergiste v. INS, 138 F.3d 14, 17 (1st Cir. 1998) ("As always, we review questions of law de novo."); Getahun v. Office of Chief Admin. Hearing Ofcier, 124 F.3d 591, 594 (3d Cir. 1997) ("We apply a de novo standard of review to an agency's conclusions of law ...."); Velasquez-Tabir v. INS, 127 F.3d 456, 459 n.9 (5th Cir. 1997).
commonplace because courts are compelled to conduct plenary review by the clear language of the Administrative Procedure Act (APA). While "Chevron deference" may be said to require more judicial respect for the agency interpretation than previously dictated, it fits generally within this well-established system. Operationally, Chevron has largely defined the extent of such deference. According to Professor Levin, it has "[t]he allure of a single unifying framework for review of agencies' statutory interpretations." The second method whereby the administrative process reaches policy conclusions is through its authority to make policy itself—"administrative policy." The restraint placed on judicial review of administrative policymaking differs in both degree and nature from that placed on review of statutory interpretation because administrative policymaking is a fundamentally different operation.

1997) ("Review of a question of law is de novo."); Forest Guardians v. Dombeck, 131 F.3d 1309, 1311 (9th Cir. 1997) ("The interpretation of a statute is a question of law which is ... reviewed de novo."); Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996) ("[W]e review questions of law de novo.").

22. "The reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... otherwise not in accordance of law; ... in excess of statutory jurisdiction, authority, or limitations, or short of statutory right ...." 5 U.S.C. § 706 (2000). Both the Senate and House Reports on the APA scope of review section explain that "[t]his subsection provides that questions of law are for courts rather than agencies to decide in the last analysis and it also lists the several categories of questions of law." S. REP. No. 79-752, at 214 (1946), reprinted in ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 1944-46, at 214 (1997); H.R. REP. No. 79-1980, at 278 (1946), reprinted in ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 1944-46, at 278 (1997).

23. Although prior to Chevron, agency interpretations received less deference, Justice Stevens relied upon a number of earlier cases to support the conclusion that statutory interpretation by agencies was entitled to greater judicial respect. See Chevron, 467 U.S. at 844 n.14 (collecting cases).

24. According to the Attorney General's Committee, the APA anticipated the Chevron doctrine by at least forty some years:

The question of statutory interpretation might be approached by the court de novo and given the answer which the court thinks to be the "right interpretation." Or the court might approach it ... to ascertain, not the "right interpretation," but only whether the administrative interpretation has substantial support .... Thus, where the statute is reasonably susceptible of more than one interpretation, the court may accept that of the administrative body.

ATTORNEY GENERAL'S COMMITTEE REPORT, supra note 20, at 90-91.

The classic statement of this notion was provided by Judge Leventhal in *Niagara Mohawk Power Corp. v. Federal Power Commission.* He recognized that "the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily ... to the fashioning of policies ...." More recently, the Third Circuit reiterated this well-established principle stating, "Absent such a [procedural] challenge, a court may not second-guess the policy choices made by an agency in a matter that Congress has committed to the agency's discretion." As a result, many courts have recognized that their ability to review administrative policy is extremely limited. The proper allocation of decision-making authority demands this restraint. According to the Supreme Court, "When Congress expressly delegates to an administrative agency the authority to make specific policy determinations, courts must give the agency's decision controlling weight unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" Courts continue to recognize their limited authority over administrative policymaking.
II. LONG ESTABLISHED REVIEW OF ADMINISTRATIVE POLICYMAKING

A. Classic Precedent

The foundational application of this review principle may be found in the classic opinion of SEC v. Chenery Corp. (Chenery I). At issue in Chenery I was the legality of insider trading under the then new Public Utility Holding Company Act. The Court said that if the SEC was interpreting prior law to prohibit that practice then the SEC's judgment was wrong and could not be upheld. If, however, it intended to create a new policy under the authority granted by Congress, the decision was beyond judicial power to correct. Two sentences are sufficient to exemplify the Court's adoption of this sound and workable system:

If the action rests upon an administrative determination—an exercise of judgement 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 misconstrued the law.

The Chenery I Court remanded the case so that the agency could determine whether it wished to rely on the former type of authority. On remand, the SEC made it clear that it was making administrative policy rather than interpreting judicially created law, and that it arrived at the policy itself and did not glean the policy from some external source. In SEC v. Chenery Corp. (Chenery II), the Court affirmed the SEC’s decision as a legitimate exercise of the agency’s policy-making authority.

32. 318 U.S. 80 (1943).
33. Id. at 94.
34. Id.
35. Id. at 94-95.
38. Id. at 209.
For generations, courts have conceded the dominant authority over administrative policymaking to the agencies. Even before *Chenery I*, the Supreme Court, in *Phelps Dodge Corp. v. NLRB*, recognized that “courts must not enter the allowable area of the 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.” Forty years later, the Supreme Court’s decision in *FCC v. WNCN Listeners Guild* was similarly founded on the distinction between statutory interpretation and administrative policymaking. At the beginning of the deregulation movement, many felt that administrative withdrawal from regulation violated the very essence of an agency’s statutory mandate. In this instance, the FCC issued a policy statement regarding license renewals and transfers in which it found that the public interest would be best served by promoting program diversity in broadcast entertainment through market forces and that regulatory review of format changes was not required by the Communications Act of 1934. A citizen group challenged the policy statement as a violation of the Act. The lower court found that the FCC’s decision was one of statutory interpretation “in which the judicial word is final.” The Supreme Court reversed, holding that the judicial function was extremely limited because the decision involved a question of policy left to the “broad discretion” of the FCC.

The Supreme Court continues to recognize the limits on review of administrative policymaking. In *Arkansas v. Oklahoma*, for example, the Court reversed the Tenth Circuit because “the Court of Appeals made a policy choice that it was not authorized to make.” Additionally, in *Pauley v. BethEnergy Mines, Inc.*, the Court reiterated the traditional judicial approach to administrative policymaking stating, “When Congress, through express delegation

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39. 313 U.S. 177 (1941).
40. *Id.* at 194.
43. *WNCN Listeners Guild*, 450 U.S. at 594.
44. See *ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 324 (1994).
46. *Id.* at 113.
or the introduction of an interpretive gap in the statutory structure, has delegated policymaking authority to an administrative agency, the extent of judicial review of the agency's policy determination is limited.\textsuperscript{48}

Lower courts continue to apply this principle when they review administrative policymaking.\textsuperscript{49} For example, the Eleventh Circuit recently applied the distinction between review of interpretations of law and review of administrative policy in Gonzalez v. Reno.\textsuperscript{50} It found that when Congress had delegated policymaking authority to an agency, judicial review "must be very limited."\textsuperscript{51} Reading Chevron with Chenery, the Court found that "the policy selected by the agency must be a reasonable one in the light of the statutory scheme. To this end, the courts retain the authority to check agency policymaking for procedural compliance and for arbitrariness. But the courts cannot properly reexamine the wisdom of an agency-promulgated policy."\textsuperscript{52}

The current debate regarding the extent to which an agency may change policy illustrates the potency of this distinction. If the question is whether an agency can alter the plain language of a statute then the answer must be "of course not."\textsuperscript{53} On the other hand, if the question is whether an agency can change agency policy, the answer is certainly "yes." Admittedly, the former question is somewhat simplistic because agencies do change interpretations of statutes, even though that is conceptually tantamount to changing the legislation itself.\textsuperscript{54} To do so, however, the agency must in essence confess error. It must admit that its prior interpretation was wrong.\textsuperscript{55} On the other hand, an agency may change its own policy by citing such factors as a change in

\textsuperscript{48} Id. at 696.
\textsuperscript{49} See cases cited supra note 31.
\textsuperscript{50} 212 F.3d 1338 (11th Cir. 2000), cert. denied, 530 U.S. 1270 (2000).
\textsuperscript{51} Id. at 1349.
\textsuperscript{52} Id. (citations and footnote omitted).
\textsuperscript{53} See Chevron, 467 U.S. at 840-43 ("[T]he Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").
\textsuperscript{54} Id. at 840-42 (describing EPA's change in its interpretation of the statutory term "source").
\textsuperscript{55} See, e.g., FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (noting the FDA's contention that it erroneously interpreted various statutes controlling its powers as excluding the ability to regulate tobacco for over forty years).
circumstances, new information, or experience with the existing policy.  

In this regard, the Supreme Court's opinion in FDA v. Brown & Williamson Tobacco Corp. provides a recent example of the power of the policy-making distinction in allocating authority between the courts and the agencies. In 1996, the FDA attempted to regulate tobacco products despite a long history of disavowing such jurisdiction. In asserting jurisdiction, the then current FDA administration had to overcome what turned out to be an insurmountable burden of proving that generations of prior administrations were wrong. Justice O'Connor devoted much of the majority's opinion to the long interaction between the FDA and Congress in which the FDA consistently asserted that it did not have jurisdiction and Congress passed several laws that, in effect, "ratified" the agency's assertion that it lacked jurisdiction to regulate tobacco. The majority, as the dissent asserted, might be seen as taking a very narrow view of administrative authority to delve into new areas or adjust administrative policy to changing circumstances. The Court, however, recognized the need for general flexibility in evolving administrative policy stating that "an agency's initial interpretation of a statute that it is charged with administering is not 'carved in stone." It further accepted prior case law, noting that "agencies must be given ample latitude to adapt their rules and policies to the demands of changing circumstances.

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56. See, e.g., WNCN Listeners Guild v. FCC, 450 U.S. 582, 593-803; City of Dallas v. FCC, 165 F.3d 341, 355 (5th Cir. 1999) ("[W]e affirm the Commission's policy choice if it considered competing arguments and articulated a reasonable basis for its conclusion."); British Steel PLC v. United States, 127 F.3d 1471, 1475 (Fed. Cir. 1997) (holding that once the agency has justified its policy change, the new policy has the same force as that it replaced); Rainbow Broad. Co. v. FCC, 949 F.2d 405, 408 (D.C. Cir. 1991).


58. Id. at 146, 157. A plausible reading of the Brown & Williamson majority opinion limits it to this one very special industry:

Owing to its unique place in American history and society, tobacco has its own unique political history. Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products, squarely rejected proposals to give the FDA jurisdiction over tobacco, and repeatedly acted to preclude any agency from exercising significant policymaking authority in the area.

Id. at 161.

59. See id. at 162-64.

60. Id. at 157.
circumstances." Unfortunately, the majority in *Brown & Williamson* found that the FDA was not adapting *its* policy, but rather was trying to change the meaning of the statute from that recognized by the agency, as well as Congress, for generations—obviously, an ambitious, and in this case overly ambitious, undertaking.

The dissent could be characterized as saying this was not a question of statutory interpretation but a change in administrative policy caused by a change in the "record." Writing for the four-justice dissenting bloc, Justice Breyer contested the majority's conclusion that the FDA did not have authority to make new policy. He opined that the "literal language" and the "general purpose" of the FDA's enabling act did not support the majority's view. The dissent found a broad delegation of power that "could lead after many years to an assertion of jurisdiction that the 1938 legislators might not have expected." To reconcile the agency's prior position, Justice Breyer relied on the long line of cases supporting an agency's power to change its policies in light of new information or even political changes.

The majority also relied on the "clear" language of the Act which provides that in order to regulate, the FDA must find some benefit which justifies allowing the marketing of a product that presents some health risk. Because the FDA could identify no such benefit, the Court found that the statute required it to ban tobacco rather than regulate it and that such a ban would contravene congressional intent. The FDA understood the

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63. *Brown & Williamson*, 529 U.S. at 162-63 (Breyer, J., dissenting).
64. *Id.* at 165 (Breyer, J., dissenting).
65. *Id.* at 188 (Breyer, J., dissenting) (citing cases also relied on by the majority).
66. *Id.* at 142.
67. *See, e.g.*, 21 U.S.C. §§ 360(a) to 360(c) (2000). During the 2000 term the Supreme Court firmly reiterated the notion that where the statutory language is clear, the sole function of a court is to enforce the statute according to its terms. *See* Hartford Underwriters v. Union Planters Bank, 530 U.S. 1, 5 (2000).
68. *Brown & Williamson*, 529 U.S. at 142. The Court concluded:

Consequently, if tobacco products were within the FDA's jurisdiction, the Act would require the FDA to remove them from the market entirely. But a ban
statutory requirements and identified several societal benefits to support regulation over a total ban. Despite this preemptive maneuver, the majority concluded that only health benefits would satisfy the statutory language.\textsuperscript{69} The dissenting Justices, in contrast, found that such a view interfered with the evolution of administrative policy and that Congress did not intend to restrict the FDA's powers to craft remedies.\textsuperscript{70} According to Justice Breyer, "The statute's language ... permits the agency to choose remedies consistent with its basic purpose—the overall protection of public health."\textsuperscript{71}

In the end, the tension between the majority and the dissent in \textit{Brown \& Williamson} can be characterized as a disagreement as to whether the Court faced an effort by the FDA to repudiate its long held statutory interpretation or whether the Court confronted an agency decision to change administrative policy. Unfortunately the FDA claimed, and the majority found, that the agency had changed statutory interpretation rather than independently creating administrative policy. The FDA's advocacy thus weakened its claim to regulatory authority over tobacco, authority the dissent asserted it had, in fact, been assigned by Congress. Perceived in terms of judicial power to review administrative policymaking, the fundamental principles expressed by Justice Breyer compel the conclusion that the Court was unduly arrogating agency authority.

\textit{New York v. FERC}\textsuperscript{72} presented the Court in the 2002 term with a similar controversy. FERC asserted jurisdiction over certain retail electricity sales in the face of statutory language arguably delegating that authority to state regulators.\textsuperscript{73} All nine Justices agreed with the agency's assertion of jurisdiction. The dissent, however, concluded that the agency had not gone far enough because it had a statutory duty to engage in even broader regu-

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\item would contradict Congress' clear intent as expressed in its more recent, tobacco-specific legislation. The inescapable conclusion is that there is no room for tobacco products within the FDCA's regulatory scheme.
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\textsuperscript{69} \textit{Id.} at 139-43.
\textsuperscript{70} \textit{Id.} at 179-81 (Breyer, J., dissenting).
\textsuperscript{71} \textit{Id.} at 177.
\textsuperscript{72} 122 S.Ct. 1012 (2002).
\textsuperscript{73} See 16 U.S.C. § 824(b) (2000).
On this issue, Justice Stevens, writing for the majority, concluded that, while FERC may have additional jurisdiction, it could choose "not to assert such jurisdiction." He found that the "agency had discretion to decline to assert such jurisdiction" and agreed with the D.C. Circuit that the agency's decision "represented a statutorily permissible policy choice." In his dissenting opinion, Justice Thomas found that the statute unambiguously imposed a duty to regulate stating, "the [Federal Power Act] does not give FERC discretion to base its decision not to remedy undue discrimination on a 'policy choice.'"

Like many recent Supreme Court efforts, both opinions fail to take advantage of well-established fundamental review principles in administrative law because they ignore or fail to fully exploit the administrative policy/statutory interpretation distinction. Justice Stevens' reasoning undoubtedly would have been crisper had he invoked the long-recognized philosophy of judicial restraint in cases involving administrative policymaking undertaken within an agency's statutory authority. Although he suggested as much, he could have been clearer that the Court was not reviewing agency statutory interpretation but rather legitimate policymaking. Indeed, not only would this have allowed him to rely on the traditional restraint in reviewing policymaking, but this approach would also have bolstered his opinion by incorporating the long line of cases granting agencies nearly absolute discretion to decline to act even if they have authority to do so.

Justice Thomas' opinion, however, suffers the most as he reached the startling conclusions that the agency was not free to make policy, and perhaps even more surprisingly, that agencies have no discretion in declining to exercise the full extent of their statutory authority. Justice Thomas could have stayed within well-established administrative law principles simply by applying the

74. New York v. FERC, 122 S. Ct. at 1032 (Thomas, J., dissenting).
75. Id. at 1027.
76. Id. at 1028 (citation omitted).
77. Id. at 1032 (Thomas, J., dissenting). Even assuming statutory ambiguity, Justice Thomas would have found that FERC failed to explain its exercise of such discretion and would have remanded the matter so that the agency could "engage in reasoned decisionmaking." Id. at 1036.
APA review standard mandating invalidation of agency actions “in excess of statutory jurisdiction, authority, or limitation, or short of statutory right ....” That is, he could have contested the threshold question about the agency’s statutory authority to engage in the “policy choice” and thus, consistent with Chevron, could have applied the clear language of the governing statutory provision. Furthermore, he could have supported his conclusions without violating generations of Supreme Court authority.

1. Effect of the Distinction on Judicial Remedies

The policy-making distinction carries forward in determining the remedies available to courts. A mistaken characterization of the agency action under review permits a court to arrogate power, not only in degree and nature of its review, but additionally in taking from the agency a decision assigned to it by Congress. When a court reviews a statutory interpretation, it is authorized to substitute judgment. Thus, it may choose remedies that replace the agency’s decision. If, on the other hand, a court reviews administrative policymaking, it is not authorized to substitute judgment. Its remedies must allow the agency to adjust the policy the court finds arbitrary or to cure an abuse of discretion. The court can do no more than advise the agency as to where it went wrong and then step back. Thus, the question of choice of remedies heightens the potency of the distinction between review of statutory interpretation and administrative policymaking.

In Chevron itself, the Court upheld the EPA’s policy choice —whether seen as the result of interpretation or its own

81. See supra notes 20-25 and accompanying text.
82. This admonishment applies to disagreement on questions of law but manifests itself differently from disagreements on policy. The Supreme Court ruled:

When an administrative agency has made an error of law, the duty of the Court is to “correct the error of law committed by that body, and, after doing so to remand the case to the [agency] so as to afford it the opportunity of examining the evidence and finding the facts as required by law.”

Int’l Light Metals v. United States, 279 F.3d 999, 1003 (Fed. Cir. 2002) (quoting NLRB v. Enter. Ass’n of Steam, Local Union No. 638, 429 U.S. 507, 522 n.9 (1901)).
83. See supra notes 26-31 and accompanying text.
development—and hence it did not need to fashion a remedy.\textsuperscript{84} Similarly, the Court in \textit{Motor Vehicle Manufacturer's Ass'n of United States, Inc. v. State Farm Automobile Insurance Co.},\textsuperscript{85} which found that the change in policy was arbitrary, remanded the case to allow the agency to correct its decision.\textsuperscript{86} In contrast, the Court in \textit{MCI Telecommunications Corp. v. FCC},\textsuperscript{87} at the time referred to as \textit{Chevron II}, affirmed the D.C. Circuit, which had vacated the FCC's decision.\textsuperscript{88} In \textit{MCI}, the D.C. Circuit went so far as to affirmatively set limits on the options available to the agency.\textsuperscript{89} Similarly, in \textit{Brown v. Williamson}, the Court affirmed the Fourth Circuit's conclusion that it was not reviewing the merits of the tobacco regulation and therefore that the entire regulatory agenda could not stand.\textsuperscript{90} Thus, to the extent that a court casts its opinion as a review of statutory interpretation, as opposed to review of administrative policy, it not only assumes the power to substitute judgment, it also empowers itself to usurp the decision through its choice of remedies.

2. \textit{Effect of the Distinction on the Allocation of Authority}

Such judicial self-empowerment highlights the irony of the "\textit{Chevron revolution}." Despite being characterized as a reduction of judicial authority vis-a-vis the bureaucracy, the \textit{Chevron} doctrine in reality provides the vehicle for increasing judicial authority over administrative decisions and leads courts to inject themselves into decisions assigned to the agencies by Congress.\textsuperscript{91} This fact might

\begin{itemize}
\item\textsuperscript{84} \textit{See Chevron}, 467 U.S. at 866.
\item\textsuperscript{85} 403 U.S. 29 (1983).
\item\textsuperscript{86} \textit{See id. at 57}.
\item\textsuperscript{87} 512 U.S. 218 (1994).
\item\textsuperscript{88} \textit{Id}.
\item\textsuperscript{90} \textit{See FDA v. Brown & Williamson Tobacco Corp.}, 529 U.S. 120, 161 (2000).
\end{itemize}
explain why agencies are more often reversed after *Chevron*. At bottom, this trend might be what tugged at Justices Breyer, Scalia, and Stevens in *Christensen* and *Mead* as discussed below.

The review system should be designed around the allocation of decision-making authority between the courts and the agency. Application of the distinction between review of statutory interpretation and review of administrative policymaking furthers this goal. If controverted issues are characterized as agency policymaking, then both the proper division of power and the optimization of overall decision-making capabilities calls for judicial restraint. If a case involves statutory interpretation, both systemic values are best served by careful judicial monitoring. Even assuming the *Chevron* doctrine authorizes a more expansive deference, review of statutory interpretation remains hefty.

**B. Scope of Review of Policymaking**

This foundational division of responsibility is also manifest in the APA and the cases applying it. In accordance with the *Chevron* doctrine itself, the inquiry begins with the statute at issue—the APA. Although less clear than its provision regarding review of statutory interpretation, the APA prescription for review of administrative policymaking is reasonably clear when the language is read in accordance with the usage of the period during which the APA was enacted. The meaning of the term “discretion” in the period in which the APA was conceptualized and ultimately enacted is the key to understanding its commands for review of administrative policymaking. The term discretion, in its broadest sense, conveys some degree of decision-making freedom.

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92. Joseph L. Smith & Emerson H. Tiller, *The Strategy of Judging: Evidence from Administrative Law*, L. LEGAL. STUD. 61, 81 (2002). Smith and Tiller observed a thirty-two percent increase in reversals after *Chevron* and argued that *Chevron* merely resulted in a shift from judicial justifications for reversals based on statutory interpretation to reversals based on failure in reasoning. Their observations support the notion that a shift to agency advocacy based on *Chevron* deference from agency reliance on their own policy-making authority and expertise has actually made agencies more vulnerable. *See 3 KOCH, supra note 78, § 12.33 at 267-68.*

93. *See infra* Part III.

94. For a discussion of the various meanings the term “discretion” has in the review system, *see 3 KOCH, supra note 78, §§ 10.6, 13.3, 13.4.*
Traditionally, the exercise of discretion, in terms of government action at least, can be seen as encompassing policymaking. Chief Justice Marshall in *Marbury* used the term in that way stating:

> 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*. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

> But where [the officer] is directed by law to do a certain act affecting the absolute rights of individuals ... it is not perceived on what ground the courts of the country are further excused from the duty giving judgment ..."96

It is reasonably clear that those involved with the development of the APA meant administrative policymaking when they used the term discretion. For example, in discussing the object of rulemaking, the authors of the *Final Report of the Attorney General's Committee* observed that "[t]he situation is different in rule making or other discretionary determinations which involve, in effect, the formulation of new policies."96 Levin concluded that APA review had long recognized that administrative policy determinations should be reviewed only for "abuse of discretion."97 The terms and intent of the APA reflect the notion that administrative policymaking should be reviewed as the exercise of discretion. Under this standard, a court cannot hold agency policy

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96. ATTORNEY GENERAL'S COMMITTEE REPORT, supra note 20, at 117.
97. Levin, *supra* note 11, at 12-13. The jurisprudence that defines unreviewable "discretion" suggests that sense of the term. Both the APA legislative history and the key *Overton Park* decision define such discretion as encompassing those circumstances in which there is "no law to apply." See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1970) (quoting S. REP. NO. 79-752, at 26 (1945)). For example, the House report, relied on by the Court said, "Matters of discretion are necessarily exempted from the section, since otherwise courts would in effect supercede agency functioning. But that does not mean that questions of law properly presented are withdrawn from reviewing courts."H.R. REP. NO. 79-1980, at 275 (1946), reprinted in *ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 1944-46*, at 275 (1997).

One of the most effective means to assess arbitrariness in the review of administrative policymaking context is to determine whether the agency took a “hard look.”\footnote{99. See Cass Sunstein, \textit{Deregulation and the Hard-Look Doctrine}, 1983 SUP. CT. REV. 177, 181.} In \textit{Greater Boston Television Corp. v. FCC},\footnote{100. 444 F.2d 841 (D.C. Cir. 1970).} Judge Levanthal suggested that a court should overturn certain decisions only “if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a ‘hard look’ at the salient problems, and has not genuinely engaged in reasoned decision-making.”\footnote{101. Id. at 851 (emphasis added) (footnotes omitted); see also Harold Leventhal, \textit{Environmental Decisionmaking and the Role of the Courts}, 122 U. PA. L. REV. 509 (1974) (explaining the application of Judge Leventhal’s review framework in the environmental context).} Somehow, the phrase has taken on its own meaning and has been interpreted to require the court to take a hard look.\footnote{102. See \textit{infra} notes \textit{103-05} and accompanying text.} In its original form, as derived from application of the arbitrariness and abuse standards, the word formula serves as an instructive expression for the special judicial restraint in analyzing administrative policy decisions. It properly defines the division of authority over such policy decisions between the agency and the reviewing court.

The leading Supreme Court case actually striking down an agency decision under the arbitrariness test, \textit{State Farm}, is the best example of the hard look test in application. In this case, the Court reviewed the National Highway Traffic Safety Administration’s abandonment of seatbelt regulations. Although the Court did not use the term hard look, its decision can best be characterized as a hard look approach to applying the arbitrariness standard. The Court did not reject the agency’s policy change through a judicial hard look, but it did find danger signals suggesting that the agency had not taken a hard look at the issues involved in making that change. From this conclusion, it determined that the agency
policymaking failed the arbitrariness test. In applying the arbitrariness word formula, it observed that an agency's decision is "arbitrary and capricious if the agency has ... entirely failed to consider an important aspect of the problem ...." The Court was particularly disturbed by the agency's failure to explain some curious choices and, after noting several danger signals, concluded that the agency had not conscientiously undertaken its responsibilities.

III. TOWARDS A NEW GENERATION: CHRISTENSEN AND MEAD AS CASE STUDIES

Accepting the significance, under the APA and generations of judicial authority, of a categorical distinction between the questions of review of statutory interpretation and review of administrative policymaking, administrative law needs to correct the huge imbalance between the recent scholarly treatment of the two review functions. An effort to adapt some of the thinking and experience regarding statutory interpretation might advance the development of administrative policymaking review. Christensen and Mead, as very recent cases, might provide fruitful examples for the adaptation of Chevron doctrine jurisprudence to the question of review of administrative policymaking.

This Essay will address Mead first because its two opinions adapt more easily to the review of agency policymaking and the impact of such review on the allocation of authority between the courts, the agencies, and ultimately, the legislature. The Court considered the force of Customs "ruling letters." In a ruling letter, the Customs Service changed its classification of Mead's day planner from duty-free status to bound diaries subject to tariff. The Federal Circuit found that ruling letters did not have the force of law and hence, were entitled to no judicial deference. The Supreme Court reasoned from the premise that the ruling letters were statutory interpretations, and therefore, it ultimately found that

103. See State Farm, 463 U.S. at 46-56.
104. Id. at 43.
105. Id. at 52-57. The Court undertook the same sort of analysis in Arkansas v. Oklahoma, 503 U.S. 91, 113 (1992).
106. Mead, 553 U.S. at 222.
these decisions did not justify *Chevron* deference but did warrant the deference given in *Skidmore v. Swift & Co.*,\textsuperscript{107} in other words, consideration of their persuasive power.\textsuperscript{108}

Assume that the agency ruling letter decisions were not statutory interpretations but rather expressions of an administrative policy. This characterization is made more plausible by the fact that the ruling was based on a Customs regulation or “schedule,” the Harmonized Tariff Schedule of the United States (HTSUS), and not directly on an interpretation of a statute as in *Skidmore*.\textsuperscript{109} The ruling letters thus were interpretations of the legislative rule.\textsuperscript{110} Assuming that the ruling letters announced a change in policy, the opinions would not change but would rest more comfortably on the appropriate allocation of authority between the courts and the agencies. That is, the reasoning, even the debate among the Justices, has different implications for the overarching operation of the administrative system. From that perspective, a recasting of the ruling letter opinions might reveal the systemic impact of the distinction between review of administrative interpretations of law and review of administrative policymaking.\textsuperscript{111}

\textsuperscript{107} 323 U.S. 134 (1944).
\textsuperscript{108} See *Mead*, 533 U.S. at 234.
\textsuperscript{109} See id. at 221.
\textsuperscript{110} Id. In our system HTSUS must be characterized as a set of legislative rules. HTSUS is “recommended” by the International Trade Commission and issued by presidential decree. 19 U.S.C. § 3004 (2000). After promulgation, it is incorporated by reference into the statute itself. 19 U.S.C. § 1202 (2000). It is our system’s closest relation to “delegated legislation” in a parliamentary system. Delegated legislation is literally legislation made by the executive, which is part of the legislature. See WILLIAM WADE & CHRISTOPHER FORSYTH, ADMINISTRATIVE LAW 859 (1994). In our system, however, in which the legislature and the executive are constitutionally separate, Congress cannot delegate actual legislative authority and hence, rulemaking may not be considered “legislation.” Thus, the HTSUS must be seen as legislative rules made pursuant to delegated authority. See *Chrysler v. Brown*, 441 U.S. 281, 304-06 (1979) (inquiring into whether an executive order represents sufficient delegation to be “law”).
\textsuperscript{111} The circumstances in this particular regulatory scheme are more complicated than most. The Act delegates to the President the authority to set the tariffs upon the recommendations of the ITC. See *supra* note 110 and accompanying text. The ITC is an independent agency. 19 U.S.C. § 1330 (2000). Its authorization, however, requires it to “cooperate” with the Treasury Department among others. 19 U.S.C. § 1334 (2000). The Service is housed within the Department of Treasury. 19 U.S.C. § 2071 (2000). The Service, on behalf of the Secretary of Treasury, was providing its interpretation of the ITC recommended tariff schedule. The Treasury Department has delegated authority to make rules. 19 U.S.C. § 1624 (2000). Procedures for modifying interpretative rulings are
The analytical value of the distinction might be demonstrated by converting Justice Souter’s reasoning in Mead into review of a policy judgment by the Service rather than an administrative attempt at statutory interpretation. This view is not actually too far afield because he was in fact reviewing “implementation of a particular statutory provision.” Indeed, review of implementation may easily be expressed as review of the “wisdom of the agency’s policy”—to use Justice Stevens’ language in Chevron—especially because it involved the interpretation of a regulation. Justice Souter conceded that the agency had such policy-making responsibility. For example, he distinguished the ruling letter from “the legislative type activity that would naturally bind more than the parties to the ruling.” The very expression “legislative type activity” does not seem consistent with an interpretative activity, but rather fits more closely into Justice Stevens’ category of administrative policymaking. Similarly, Justice Souter asserted that the rulings did not have precedential force as would the results of formal adjudication. The evolution of “rules” in the form of precedent is the adjudicative form of administrative policymaking. As with policymaking in quasi-legislative processes, it is not truly interpretation although it must be done within the boundaries of the statute.

Even though Justice Souter seems to treat the decision as policymaking, he was forced to reason in terms of statutory interpretation because that is what the Service claimed to have done. Nonetheless,

established by 19 U.S.C. § 1625 (2000). Thus, the Service was not interpreting or implementing its own regulation. If it had been, the Court might have applied the well established principle that a court should give special weight to an agency’s interpretation of its own rule. See FEC v. Nat’l Rifle Ass’n, 254 F.3d 173, 182 (D.C. Cir. 2001). Instead, the Service was interpreting another agency’s policy, that of the ITC. The Service was not interpreting statutory law. The conceptual difference between the Service’s policy if made pursuant to delegated authority and the pronouncement here, without such authority, remains.

112. Mead, 533 U.S. at 226.
113. Chevron, 467 U.S. at 866.
114. Mead, 533 U.S. at 232 (emphasis added).
115. Id. at 231-40. Under the APA, the action in which this policy was expressed may best be classified as a “declaratory order” authorized by § 554(e) and thus is related, at least, to adjudication. See 5 U.S.C. § 554(e) (2000). Generations of opinions have established the principle that agencies may create and announce policy in adjudications as they may find it necessary to interpret the relevant statutory language.
Justice Souter alternately saw the core question as: Did Congress delegate authority to make policy to the Customs Service, although it certainly did not delegate authority to change the statute? He answered that question, as did Justice Stevens in *Chevron*, in the affirmative.\(^{117}\) True to established administrative law principles, however, he asked whether the Service intended to exercise this policy-making function. Again using traditional analysis, he found it did not.\(^{118}\) Having done so, he shifted to the *Skidmore* test\(^{119}\) as courts have done for generations.\(^{120}\) This test recognizes that even if an agency does not rely on its delegated policy-making authority—the exercise of which would make the agency's decision dominant—its policy decisions should be given respect consistent with "the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position."\(^{121}\)

Justice Scalia, with the instincts of an administrative law scholar, recognized the systemic values at issue, despite the need to couch his opinion in the language of *Chevron*.\(^{122}\) Expressed in terms of appropriate review of administrative policymaking, he saw the need to guard against judicial arrogation of authority. Because the Customs Service was established to make customs policy, he distrusted judicial efforts to substitute judicial policymaking for that of the agency.\(^{123}\) Thus, to Justice Scalia, the question of the proper judicial function properly revolved around whether the agency made an authoritative policy decision. That is, the true question was whether the agency itself, according to its decision-making hierarchy, made the policy as opposed to some lesser authority within the agency. Consistent with this analysis, even if the policy is made at the lower level, for generations the proper judicial function has been to return the matter to the agency for it

\(^{117}\) See *Mead*, 533 U.S. at 230-31.
\(^{118}\) Id. at 231-32; see *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1109 (D.C. Cir. 1993) (conducting a similar analysis).
\(^{119}\) *Mead*, 533 U.S. at 234-35.
\(^{121}\) *Mead*, 533 U.S. at 228 (footnotes omitted).
\(^{122}\) See *id.* at 239 (Scalia, J., dissenting).
\(^{123}\) See *id.* at 243 (Scalia, J., dissenting).
Because he saw the actual question as the allocation of authority between the courts and "executive officers," Justice Scalia began with the foundational understanding derived from the evolution of the mandamus remedy. Mandamus, of course, cannot be used to question a "discretionary" act of an executive officer, or any discretionary act. At base, the application of that mundane doctrine guided the now hallowed Marbury opinion. Justice Scalia thus could be seen as worrying about the same systemic values as those expressed by Chief Justice Marshall.

As a forerunner to Mead, Christensen may also be read in terms of the difference between review of an agency's assertion of statutory authority to make policy and review of the policy itself. In Christensen, the Court was reading the statute to determine whether the agency policymaking at issue was within the statutory grant of authority. The Department of Labor (DOL) asserted authority under an amendment to the Fair Labor Standards Act that brought public employees within the Act but allowed public employers, unlike private employers, to compensate employees for overtime with leave time, "comp-time." The County sought to reduce accumulated comp-time by requiring employees to use that time because it was afraid that its budget could not handle the cash equivalent. It sought guidance from the DOL. In an opinion letter, the Acting Administrator of DOL's Wage and Hour Division took the position that public employers may compel employees to accept comp-time only if the employees agreed in advance to such a practice.

Again the Court found that the opinion letter was an incorrect interpretation of the Wage and Hour rules, rather than of the statute directly. It also clearly decided, however, that the Division's policy was inconsistent with the statute. Thus, it seems that the DOL could not have prohibited a policy such as the
County’s even in a legislative rule. As such, Christensen is a conceptually different opinion from Mead or even Chevron. The contrast highlights the potency of the distinction between policy gleaned from statutory interpretation and policy created within delegated authority. That is, the majority was saying that the policy itself violated the statute and the agency could not adopt that policy even as an exercise of its authority to make policy, even if promulgated through legislative rulemaking.

It is not clear that the Christensen majority actually meant to go this far. Nonetheless, dissenting in Christensen, Justice Breyer suggested that had the policy been embodied in a legislative rule would have survived even under the majority’s review principles. Yet, he suggested that legislative rulemaking was not necessary to make policy authoritative. He noted that Skidmore was a useful test to apply to an agency’s “views” “even if they do not constitute an exercise of delegated lawmaking authority.” By distinguishing this case from Chevron, one might reasonably expect that Justice Breyer would accept such policy decisions if pursuant to delegated authority and that at least some members of the majority would have upheld it under that delegation. After all, Justice Thomas made something of the fact that the letter misinterpreted the legislative rule as well as the statute.

In its recent Barnhart v. Walton opinion, the Court again looked to see if the policy was within the agency’s authority. In an opinion by Justice Breyer, it found that the agency’s policy was due substantial deference because it was within the agency’s authority. Hence, this opinion provides a useful comparison with Christensen. Walton filed for Social Security disability benefits. The Act provided that in order to receive such benefits the disability must prevent or be expected to prevent a person from engaging in substantial gainful employment for at least twelve months. Walton returned to work within eleven months of the loss of his teaching job for severe mental illness. The Social Security Administration (SSA) found that an impairment that did not in fact last twelve months

132. Id. at 596-97 (Breyer, J., dissenting).
133. Id. at 596 (Breyer, J., dissenting).
134. See id. at 588.
135. 122 S. Ct 1265 (2002).
did not entitle a person to benefits. The Court concluded that the
Act did not prohibit the agency's interpretation and that the
interpretation was permissible under the Act. Thus, the agency
acted within its permissible policy-making authority. Barnhart
also solidified Breyer's position in Christensen that policymaking
within the agency's delegated authority would have special force
even if not developed through notice and comment rulemaking, i.e.
not embodied in a legislative rule. In sum, once a reviewing court
finds that the agency has crossed the threshold into authorized
policymaking, a court must accept the agency's policy choices unless
they are arbitrary or an abuse of the policy-making discretion
delegated to the agency by Congress.

The distinction between review of statutory interpretation and
review of authorized administrative policymaking may also provide
insight into the tension between the opinions in MCI, which has
been seen as an embellishment of the Chevron doctrine. Section
203 of the Communications Act requires communications common
carriers to file tariffs with the FCC but authorizes the Commission
to "modify any requirement made by or under ... this section ...."
Relying on the latter provision, the FCC adopted a policy in which
tariff filings would be optional for all nondominant long distance
carriers. AT&T, the only dominant long distance carrier, objected,
claiming that such a rule did more than "modify" the statutory
language. The Supreme Court agreed. To reach its conclusion, the
majority engaged in a survey of the definition of "modify" in
various dictionaries. It decided against the agency because
"[v]irtually every dictionary" defined the term as limited to mod-

137. Barnhart, 122 S. Ct. at 1270.
138. Id. at 1273 ("The statute's complexity, the vast number of claims that it engenders,
and the consequent need for agency expertise and administrative experience lead us to
read the statute as delegating to the Agency considerable authority to fill in, through
interpretation, matters of detail related to its administration.").
139. Id. at 1271. Justice Scalia, concurring, correctly admonishes the Court, however, that
once it accepts that legislative rulemaking is not necessary to make binding policy it "should
state why those interpretations were authoritative enough (or whatever-else-enough Mead
requires) to qualify for deference." Id. at 1274 (Scalia, J., concurring).
140. See supra notes 87-89 and accompanying text.
142. MCI, 512 U.S. at 221.
143. Id. at 225-26.
erate or incremental change. The rule here, it felt, constituted a fundamental change and therefore went "beyond the meaning that the statute can bear ...."

Justice Stevens, with Justices Blackmun and Souter, dissented. The dissent began by observing that "the communications industry has an unusually dynamic character." In that context, the dissenters thought that Congress did not intend the statute to be interpreted through "a rigid literalism." Such an approach "deprives the FCC of the flexibility Congress meant it to have in order to implement the core policies of the Act in rapidly changing conditions." Under the circumstances, the dissenters opined that, rather than testing the agency's action against that dictated by the majority of dictionaries, the court should have asked whether the new policy was "consistent with the purposes of the statute." Whether they were correct in finding that the FCC's policy met that test, their approach might be preferred if the FCC is seen as making communication policy consistent with Congress's expectations. Moreover, leaving that policy decision to the agency constitutes the best, as well as the intended, allocation of authority between the courts and the agencies.

As discussed above, proper characterization of the source of the policy avoids the danger of overly intrusive judicial remedies aggravating the systemic damage to the proper allocation of authority. The Court in both Christensen and Mead, having asserted authority over statutory interpretation undertook the intrusive remedies appropriate to substitution of judgment review. Thus, in Mead, it returned the matter to the lower court mandating that the court conduct de novo review of the agency decision. In Christensen, the Court affirmed the Fifth Circuit's grant of

144. Id. at 225.
145. Id. at 229.
146. Id. at 235 (Stevens, J., dissenting).
147. Id. (Stevens, J., dissenting).
148. Id. (Stevens, J., dissenting).
149. Id. at 242 (Stevens, J., dissenting).
summary judgment in favor of Harris County and hence, negated the Wage and Hour Division's decision. Yet, the Court said, "[t]o defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation." Under traditional administrative law principles, when a court finds that the agency's interpretation is actually an amendment to a legislative rule, it typically remands for notice and comment rulemaking rather than taking on the rulemaking authority itself. That is, courts have felt compelled to remand and order the agency to make the authoritative policy decisions through the appropriate procedures.

CONCLUSION

In this Essay, I have tried to reintroduce the question of review of administrative policy into discussions about the design of the judicial review system. Interpretation of unclear statutory language has much of the character of policymaking. But treating interpretation and policymaking in the same manner robs the judicial review system of a fundamental strategy. The review system suffers by ignoring the instrumental difference between deriving policy from a statute and making policy under statutory authorization. Again, agencies undeniably find policy from other sources, particularly by gleaning policy from statutory language, including filling legislative gaps. They are, however, generally in some fashion also assigned the task of extending the legislative process. The review system is enriched by recognizing the two different decision-making tasks. A review system incorporating this fundamental distinction better allocates decision-making resources and capacity between the courts and the agencies (and hence indirectly the legislatures).

The distinction is more than instrumental, however. The very authorization of this independent policy-making function has implications for the legitimacy of the assumption of decision-

151. Moreau v. Harris County, 158 F.3d 241, 247 (5th Cir. 1998).
152. Christensen, 529 U.S. at 588.
153. Id. (emphasis added).
154. 2 KOCH, supra note 78, § 8.32, at 537.
making authority. As Justice Stevens recognized in *Chevron*: "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 the gap left open by Congress, the challenge must fail."155 This is an overstatement because both the APA and traditional law recognize some judicial function even in review of administrative policymaking. But that function differs in nature as well as degree from review of statutory interpretation.

Here, I assert that administrative law needs to return to that category of judicial review. While some thinking surrounding the *Chevron* doctrine will certainly be of use, the questions, when seen in terms of the proper and best allocations of authority, are fundamentally different.