THE HEBREW
UNIVERSITY
OF JERUSALEM

The Hebrew University of Jerusalem Faculty of Law

Mt. Scopus, Jerusalem 9765418

Israel

Deference and Disagreement in Administrative Law

Yoav Dotan

Hebrew University of Jerusalem Legal Studies Research Paper Series No. 18-5

Deference and Disagreement in Administrative Law

Yoav Dotan*

Edwin A. Goodman Professor

Faculty of Law, Hebrew University

Mount Scopus, Jerusalem, 91905, Israel

e-mail: yoav.dotan@mail.huji.ac.il

* I am indebted to Michael Asimow, David Enoch, Alon Harel, Kristine Hickman, Ram Rivlin and David Zaring for their comments to the draft. Gal Kiviti provided excellent help as research assistant.

Deference and Disagreement in Administrative Law

Yoav Dotan

ABSTRACT

Deference is a fundamental concept in legal discourse and in administrative law in particular. Despite its paramount importance, deference—as a concept of its own—remains largely understudied and undertheorized by courts and scholars alike. Oceans of ink have been spilled over the meaning of "*Chevron* deference," but only a small part of the literature has focused on the meaning of *Chevron deference,* that is, on the meaning of *the concept of deference*—as a subject worthy of discussion of its own. The purpose of this essay is to fill this gap by focusing on the meaning of deference as a key to understanding the principal doctrines of administrative law.

My main argument is that deference should be analyzed and understood in the context of the *disagreement* between the deferrer and the deferree. The analysis of the relations between deference and disagreement enables me to distinguish between two fundamental modes of deference. The first is when the deferrer examines the contents of the deferree's decision *on its merits* and decides, notwithstanding her disagreement with it, to defer. I term this mode of decision-making *disagreement* deference. In the other mode, the deferrer, when deciding to defer, rather than examining the contents of the deferree's decision chooses to *avoid* such an examination (wholly or partly). I term this mode of deference *avoidance* deference. Accordingly, in disagreement deference content-independent considerations are weighted and balanced against all other considerations *at the same time and on the same level*. In avoidance deference, on the other hand, content-independent considerations enter the scene in a preliminary stage and affect the way by which the deferrer looks at all other considerations . I argue that the distinction between these two modes of deference is inherent to the idea of deferring. Accordingly, this distinction is fundamental to the understanding of the concept of deference.

I further suggest that the division between these two modes of deference can serve as a key for understanding the developments of administrative law in this area. I demonstrate this on two central questions regarding the doctrines of deference. The first is the distinction between *Chevron* and *Skidmore* deference. I argue that – notwithstanding doubts raised by judges and scholars – these doctrines reflect two clearly distinct modes of deference. While *Skidmore* is a typical case of disagreement deference – *Chevron* deference should be understood as a typical process of avoidance deference. Hence, the distinction between *Chevron* and *Skidmore* deference cannot be blurred or underestimated. The second question is whether *Chevron* consists of two steps or only one step – as some in the literature argued. I demonstrate that, as a typical process of avoidance disagreement, *Chevron* test is inherently divided into two distinct steps.

PART I: INTRODUCTION

Deference is a fundamental concept in legal discourse. It is an inherent component in shaping the constitutional division of powers between the judiciary and the other branches of government, and is thus central to constitutional law, as it affects the discussion of judicial supremacy when the reading of the Constitution is at stake.[1] In administrative law, deference signifies the division of powers between the judiciary and all administrative agencies. As such, it correlates with the other fundamental concept of administrative review—discretion. The wider the deference allowed by the reviewing court to a given administrative agency, the wider the discretion acknowledged by law to the agency, and *vice versa.*[2]

Despite its paramount importance in both constitutional and administrative law, deference—as a concept of its own—remains largely understudied and undertheorized by legal courts and scholars alike.[3] Oceans of ink have been spilled over the meaning of "*Chevron* deference."[4] Almost all of this vast volume of literature, however,

---

[1] See Ronald A. Cass, VIVE LA DEFERENCE?: RETHINKING THE BALANCE BETWEEN ADMINISTRATIVE AND JUDICIAL DISCRETION, 83 *Geo. Wash. L. Rev.* 1294, 1297 and 1297 (2015); Robert A. Schapiro, JUDICIAL DEFERENCE AND INTERPRETIVE COORDINACY IN STATE AND FEDERAL CONSTITUTIONAL LAW, 85 *Cornell L. Rev.* 656, 657 (2000) (Hereinafter: Schapiro).

[2] See *e.g. United States v. Curtiss-Wright Exp. Corp*., 299 U.S. 304, 320 (1936) ("congressional legislation ... within the international field must often accord to the President.") to denote a particularly deferential standard of review in the fields of foreign affairs and national security (see William N. Eskridge & Lauren E. Baer, The Continuum of Deference: Supreme Court Treatments of Agency Statutory Interpretation, 96 Geo. L.J. 1083, 1091 (2008), at 1100 (discussing this mode of deference). See also Cass, *supra* note 1 at 1315 (discussing *Chevron* doctrine as an "implicit grants of discretion" to administrative agencies); Cary Coglianese, "*Chevron's* Interstitial Steps" 85 *Geo. Wash. L. Rev.* 101, 103 (2017) (discussing the *Chevron* doctrine's core concern "about constraining administrative discretion."). For the use of the concept of deference in various different areas of law see *e.g.* Jonathan S. Masur & Lisa Larrimore Ouellette, DEFERENCE MISTAKES, 82 *U. CHI L. REV* 643, 652-53 (2015) (discussing deference in different fields of law including criminal law, patent law etc.).

[3] See Paul Horwitz, THREE FACES OF DEFERENCE, 83 Notre Dame L. Rev. 1061, 1095 (2008) (hereinafter: Horwitz) ("For all its pervasiveness, however…deference remains curiously undertheorized and misunderstood by the federal courts.")

[4] See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,*467 U.S. 837 (1984) (hereinafter: *Chevron*). *Chevron* was described as the most cited case in legal history (see *e.g.* Linda Jellum, CHEVRON'S DEMISE: A SURVEY OF CHEVRON FROM INFANCY TO

concentrated on the meaning of the '*Chevron* formula.'[5] Only a scant attention was given to the meaning of Chevron *deference,* that is, on the meaning of *the concept of deference*—as a subject worthy of discussion of its own—within this framework of administrative review.[6]

It is the purpose of the current essay to fill this gap. I argue that one cannot understand the meaning of *Chevron,* without, first, thoroughly examining the meaning and contents of the concept of deference. My main argument is that deference should be analyzed and understood in the context of the *disagreement* between the deferrer and the deferree. The analysis of the relations between deference and disagreement enables me to distinguish between two fundamental

---

SENESCENCE, 59 *Admin. L. Rev.* 725, 726 and note 2 *id.* (2007); Cass R. Sunstein, Law and Administration After *Chevron*, 90 Colum. L. Rev. 2071, 2074 (1990) (describing *Chevron* as the most important Supreme Court administrative law decision); Connor N. Raso and William N. Eskridge, Jr., *CHEVRON* AS A CANON, NOT A PRECEDENT: AN EMPIRICAL STUDY OF WHAT MOTIVATES JUSTICES IN AGENCY DEFERENCE CASES, 110 *Colum. L. Rev.*1727, 1730 (2010)) (noting that *Chevron* was cited in over five thousand law review articles); Michael Herz, *CHEVRON* IS DEAD – LONG LIVE *CHEVRON*, 115 *Colum. L. Rev.* 1867 *id.* (2015) ("Everyone is sick to death of *Chevron*, and four gazillion other people have written about it, creating a huge pile of scholarship and precious little left to say."); Linda Bednar & Kristine E. Hickman, *CHEVRON'S INEVITABILITY*, 85 GEO. WASH. L. REV. 1392, 1393 (2017) (noting that *Chevron* was cited by courts and scholars alike more than any other court case).

[5] See *Chevron id.* at 842–43 (per Justice Stevens): "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

[6] See Horwitz, *id.* at 1069–70 ("What is generally missing from these treatments, however, is an effort to treat deference as a distinct subject worthy of discussion on its own… few scholars unpack and examine deference itself as a separate topic worthy of discussion. And fewer still have treated deference as a transsubstantive doctrine, unmooring it from specific areas of inquiry and looking at deference as a freestanding legal principle in constitutional law.") For notable exceptions see Schapiro, *supra* note 1; Horwitz *id.* For a general discussion of the concept of deference in law see Stephen R. Perry , SECOND-ORDER REASONS, UNCERTAINTY AND LEGAL THEORY, 62 S. *Cal. L. Rev.* 913; Philip Soper, THE ETHICS OF DEFERENCE: LEARNING FROM LAW'S MORALS (Cambridge Un. Press, 2002); Frederick Schauer, DEFERRING, 103 Mich. L. Rev. 1567 (2005) (Book review on Soper's book). See also Paul Daly, A THEORY OF DEFERENCE IN ADMINISTRATIVE LAW: BASIS, APPLICATION AND SCOPE (Cambridge Un. Press, 2012).

modes of deference.[7] The first is when the deferrer examines the contents of the deferree's decision *on its merits* and decides, notwithstanding her disagreement with it, to defer. I term this mode of decision-making *disagreement deference*. In the other mode, the deferrer, when deciding to defer, rather than examining the contents of the deferree's decision—chooses to *avoid* such an examination (wholly or partly). I term this mode of deference – *avoidance* deference. I argue that the distinction between these two modes of deference is inherent to the idea of deferring. I also argue that the division between these two modes of deference can serve as a key for understanding the developments of administrative law in this area—and most notably the development of the *Chevron* and *Skidmore* doctrines and the distinction between *Chevron* Steps One and Two.

The order of the discussion will proceed as follows. In *Part II*, I define deference and discuss its meaning and its relations with some other fundamental legal concepts such as authority and obedience.

Part III contains the main argument. I argue that deference should be understood, theorized and even measured in terms of the disagreement between the deferrer and the deferree. I also argue that when discussing deference, one should distinguish between two modes of deference: *disagreement deference* and *avoidance deference*, and that this distinction is inherent to any discussion of deference. I also suggest that in contrary to some suggestions in the literature, the distinction between these two modes of deference does *not* rest on the *reasons* underlying the decision to defer. Rather, the distinction rests on *the function of content-independent considerations* in each of these modes of decision-making. In disagreement deference, content-independent considerations are weighted and balanced against all other considerations *at the same time and on the same level*. In avoidance deference, on the other hand, content-independent considerations enter the scene in a preliminary stage and affect the way by which the

[7] I use the term 'mode' to describe standards of deference as "standards of review are not precision instruments" (see Kristin E. Hickman and Matthew D. Krueger, IN SEARCH OF THE MODERN SKIDMORE STANDARD, 107 Colum. L. Rev. 1235, 1250 (2007) (hereinafter: Hickman & Krueger)). See also Justice Frankfurter's description of these standards as "mood" which a reviewing court should possess in evaluating the agency's decision (*Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951)).

deferrer looks at all other considerations. I conclude this part by taking a closer look at the meaning of avoidance deference. In particular, I examine the meaning and implications of the possibility that the deferrer makes exceptions to the general principle of deference, such as that she would defer in all cases, save in case of extreme unreasonableness.

In *Part IV*, I discuss the implications of the suggested thesis for the discussion of current doctrines administrative law. Specifically, I discuss its relevance to the distinction between the two principal doctrines of deference: *Chevron* and *Skidmore.* I argue that – notwithstanding doubts raised by judges and scholars – these doctrines reflect two clearly distinct modes of deference. While *Skidmore* is a typical case of disagreement deference – *Chevron* deference should be understood as a typical process of avoidance deference. Hence, the distinction between *Chevron* and *Skidmore* deference cannot be blurred or underestimated. In addition, I examine the question whether *Chevron* consists of two steps or only one step – as some in the literature argued. I demonstrate that, as a typical process of avoidance disagreement, *Chevron* test is inherently divided into two distinct steps.

PART II: THE MEANING OF DEFERENCE

For the purpose of the current essay, I use a definition of deference following the previous literature (notably the works of Robert Schapiro and Paul Horwitz).[8] According to this definition, deference means that the Deferrer (D1) when making her decision is following a determination made by some other individual or institution (the Deferree—D2) that *it might not otherwise have reached had it decided the same question independently.* Accordingly, deference involves a decisionmaker (D1) setting aside her own judgment and following the judgment of another

[8] See Schapiro, supra note 1 at 656 ("Judicial deference acknowledges that, based on the interpretation of another branch of government, a court might arrive at a conclusion different from one it would otherwise reach."); Horwitz, *supra* note 3 at 1072–73 (same); Soper, *supra* note 6 at 22. See also Larry Alexander Frederick Schauer, ON EXTRAJUDICIAL CONSTITUTIONAL INTERPRETATION, 110 Harv. L. Rev. 1359, 1363 (1997) ("non-deference means that an agent—in this context, a nonjudicial public official—should not take the decision of someone else as relevant, except insofar as it is persuasive on its own merits, to the agent's own decision.")

decisionmaker (D2) in circumstances in which the deferring decisionmaker, D1, might have reached a different decision.[9]

Importantly, deference is a process of decisionmaking in which the decisionmaker gives weight to *content-independent (second-order)* considerations.[10] As Mark Soper suggests: "Deference is justified by reasons that outweigh or override the normal (first order) reasons that bear on the action taken."[11] For example, when a city council defers to an opinion of an expert committee on a question of the location of a new park, this means that the council accords special weight to the fact that it is the expert judgment of the committee that the park should be constructed at this location, notwithstanding the views that the council members might have had regarding the preferred location of this park (i.e., their content-dependent, first-order views on this question). This means that the members of the council may have other views or considerations regarding the preferred location of the park, which might have well led them to decide on a different location, had they decided the question independently. When, however, the council defers to the expert committee's opinion, it sets aside (wholly or partly) its own first-order preferences, and accords extra weight to the expert opinion—as such.

Likewise, when an appellate court decides to defer to factual determinations made by trial court, it is the fact that these determinations were made by the trial court (who heard the testimonies of the witnesses etc.) that is accorded a special weight by the appellate

[9] Horwitz, *id.* at 1072. When using this definition I set aside, for now, question regarding the *scope* of deference, that is whether D1 is setting aside her judgment altogether, or only regarding certain questions, such as question of facts, etc. I also set aside, for now, questions regarding the *degree* of deference, that is whether D1 defer to *any* decision by D2 or only under certain preconditions, see Horwitz, *id.* at 1073 and see the discussion in Part III below. For a somewhat different definition of the term deference see Masur & Ouellette, *supra* note 2 at 652 (defining deference to include ("any situation in which a second decisionmaker is influenced by the judgment of some initial decisionmaker rather than examining an issue entirely de novo").

[10] For a discussion of the nature of content-independent reasons for action see Joseph Raz, THE MORALITY OF FREEDOM (OXFORD, CLARENDON, 1986) at 35-37. Accordingly, I use the terminology of 'second' and 'first' orders considerations (or reasons) following the well-known distinction suggested by Joseph Raz, see J. RAZ, THE AUTHORITY OF LAW 16-17 (1979). See also Perry, *supra* note 6 at 913–14 (discussing Raz's distinction between first order and second order reasons).

[11] See Soper, *supra* note 6 at 23. For a somewhat different definition see Daly, *supra* note 6 at 7 (suggesting that deference means according weight to the deferee's decision).

court. Had the appellate court conducted its own *de novo* factual analysis, it might have well reached different conclusions. When, however, it decides to defer, it accords special weight to the very fact that the determinations were made by the trial court.[12] This extra weight is given irrespective (at least to some extent) of its congruence with the appellate court's own views regarding the factual setting of the case.[13]

Deference and Obedience to Authority

The centrality of content-independent considerations for the concept of deference justifies an inquiry as to its relation with the concepts of authority and obedience. Indeed, there is considerable affinity between deference and these concepts. We normally 'defer' to the orders of our superiors.[14] And, while doing so, we regard such orders as sufficient—second-order—reasons for our actions. That is, when we act in accordance to authoritative orders (i.e., obey them) we do so because we view them as binding on us, and irrespective of other, first-order, considerations that we may have with regard to the prudence or utility of the action at stake. Accordingly, deference and obedience have much in common since in both cases the agent does not simply acts "on [her] own understanding of what the balance of reasons . . . supports,"[15] but

[12] Likewise, when a court defers to an agency's interpretation of a law, this means that it gives (at least) some weight to the very fact that the agency adopted a certain interpretation of the law. This means that the court does not consider the interpretative question *only* in terms of its merits, but gives weight to the identity of the sponsor of a certain view, i.e., the agency (see Hickman & Krueger, *supra* note 7 at 1251 ("Deference to an administrative interpretation is triggered by the interpretation's 'pedigree'—i.e., the fact that an agency holds the view. In contrast, a court exercising independent judgment is free to consider the merits of the agency's interpretation alone, or even to ignore the agency's interpretation altogether. For a court exercising independent judgment, the pedigree of an interpretation—that is, the identity of its sponsor or author—has no impact on the court's decision.") (internal quotations omitted); Colin S. Diver, Statutory Interpretation in the Administrative State, 133 U. Pa. L. Rev. 549, 559 (1985) (same).

[13] I shall deal with questions of the scope and degree of deference later on, see Part III below.

[14] See Soper, *supra* note 7 at 22–24. See also Clay Calvert & Justin B. Hayes, TO DEFER OR NOT TO DEFER? DEFERENCE AND ITS DIFFERENTIAL IMPACT ON FIRST AMENDMENT RIGHTS IN THE ROBERTS COURT, 63 *Case W. Res. L. Rev.* 13, 17 (2012) (citing Robert V. Presthus, Toward a Theory of Organizational Behavior, 3 Admin. Sci. Q. 48, 57 (1958) ("from infancy on the individual is trained to defer to authority. He develops over time a generalized deference to the authority of parenthood, experience, knowledge, power, and status.")

[15] See Horwitz *supra* note 3 at 1075 (citing Soper, *supra* note 6 at. 22.)

rather gives priority to second-order, content-independent, considerations.[16]

Deference, however, is not obedience. It differs from obedience in some important respects. First, the two concepts differ with regard to the relationships between the deferrer and the deferree. Obedience assumes authoritative power of the party that produces the order *vis-à-vis* the obeying party. Deference assumes no such relationships, and in fact, the hierarchical relationships between the parties are usually in reverse to those in the case of obedience. Accordingly, when a lower court follows a precedent of a higher court (in a system that acknowledges the principle of *stare decisis),* one can view the action as an act of obedience. This, however, is obviously not the case when a higher appellate court decides to defer to a determination made by the lower court (such as in the case of factual determinations discussed above).[17]

Second, and correspondingly, in obedience the agent is under a *duty* to follow the binding orders of her superiors. In deference, the deferrer is under no such duty, at least in the sense that she always has (at the minimum) *some choice* whether to defer or not. That is, the deferrer always holds the power to decide whether to displace her own judgment for that of the deferree. Otherwise, if D1 has no choice at all, but to follow the decision of D2, one cannot talk about deference as defining the relationships between the parties.[18]

The above point leads to a third important disparity between deference and obedience. Unlike obedience to authority, *deference is never absolute,* at least in the sense that the agent is devoid of any discretion with regard to her final judgment. The concept of deference assumes that D1 gives some special weight to the judgment of D2. At the same time, it also inherently assumes that the weight given to D2's judgment is not absolute, in the sense that it never denies at least some discretion, or some possibility, that D1 would decide, at the end of the

[16] Obedience is also similar to deference in the sense that it becomes relevant only if one assumes some sort of disagreement between D1 and D2, see Alexander & Schauer, *supra* note 8 at 1369 ("We may at times be guided or persuaded by the decisions of others, but obedience is different. To obey is to accept the decision of another as authoritative even when we disagree with its substance.")

[17] See Soper, *supra* note 6, at XIII ("Note how odd it would be to suggest that appellate courts, when they defer to the judgments of lower courts, are obeying the inferior court.")

[18] See Horwitz, *supra* note 3 at 1076 ("Thus, deference implies that D1 has some power of independent decisionmaking, but chooses to displace its own judgment with that of D2; obedience implies that D1 follows D2's judgment because it has no choice but to do so.")

day, not to defer.[19] In the words of Justice Frankfurter "Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry."[20] The possibility of an *exception* is, therefore, *inherently embedded* in the concept of deference.[21]

PART III: DEFERENCE AND DISAGREEMENT

Deference and Agreement

Assume that Jane is a high school principal and Bob is her assistant. Assume also that Jane assigns a task for Bob to prepare a plan for the establishment of a new chemistry lab for the school. Bob submits his plan to Jane and after a while, she addresses him as follows: "I read through your proposal and I think it is an excellent plan. I concur with every bit of it, and *therefore* I defer to your judgment of the issue." Obviously, the above statement of deference makes no sense. (Nor would it make any sense if I change the "therefore" above into "but" or any other preposition). Deference means nothing if the deferrer is in agreement with the deferree's views or positions on the issue at stake.[22] It only acquires meaning if there is some kind of *lack of agreement* (actual or potential, see below) between them. As Robert Schapiro's nicely put it, "deference implies difference."[23]

---

[19] Thus even the most deferential mode of deference leaves the decision whether to defer or not in the hands of D1. This point stresses the nature of deference as a tool of self-restraint, or '*self-regulation*', see Herz, *supra* note 4 at 1872–80 (2015) (stressing that *Chevron* and other doctrines of deference are self-imposed by the judiciary and therefore should be understood as self-regulation). See also Maureen B. Callahan, Must Federal Courts Defer to Agency Interpretations of Statutes? A New Doctrinal Basis for *Chevron U.S.A. v. Natural Resources Defense Council*, 1991 Wis. L. Rev. 1275, 1289 (labeling *Chevron* a "principle of self-restraint, related to the various well-established prudential limitations on justiciability in the federal courts"); Frederick Liu, *Chevron* as a Doctrine of Hard Cases, 66 Admin. L. Rev. 285, 318, 326-29 (2014) (labeling *Chevron* "a doctrine of judicial self-restraint" that has no basis in congressional command).

[20] *Universal Camera Corp. v. NLRB*, *supra* note 7 at 489.

[21] See the discussion in PART III below text near note 40 *infra.*

[22] See Horwitz at 1074: ("If the precondition for D1's application of deference is that it independently agrees with D2's determination, then following D2 in these circumstances does not amount to deference in any useful sense of the word..." It should also be noted that for the purpose of the current analysis, the way by which D1 reached to agreement with D2 is not important. That is, D1 might have reached the same conclusion independently, or she might have been *persuaded* by D2 positons while reviewing them (see note 23 *infra*). In both cases, the very agreement between these two parties denies the relevancy of the concept of deference.

[23] Schapiro *supra* note 1 at 665; Horwitz, *supra* note 3 at 1075. See also Alexander & Schauer, *supra* note 8 at 1363 and n. 15 *id.* "If an official agrees with a court decision,

This point regarding the irrelevancy of deference to situations of agreement between the deferrer and the deferree may seem trivial. It is, however, a source for some confusion and inaccuracies in both judicial statements and academic writings.[24] For example, many works that study patterns of judicial behavior in the field of administrative review from empirical (quantitative) perspectives use the term deference, or 'deference to agency interpretation' to denote situations in which the courts avoid reversals of agency determinations.[25] This terminology is inaccurate since the fact that a court did not *interfere* (or reversed) the agency's determinations does not necessarily mean that the court *deferred* to such determinations. In all likelihood, at least in some of these cases, that the judges on the bench simply accepted the agency determinations as correct, and thus the question of deference was not at stake.[26] This is even more the case, since many of these studies point to ideological congruency between the judges on the bench and the administrative agency whose interpretative determinations are at stake

---

deference is not an issue. The issue of deference arises only when an official contemplates following a decision that she believes erroneous." See also Hickman & Krueger, *supra* note 7 at 1272 ("At times, the [Supreme] Court has characterized the degree of deference to particular agency interpretations of statutes as depending on 'the extent that the interpretations have the "power to persuade"' … We are confident that the Court did not mean for that standard to reduce to the proposition that 'we defer if we agree.' If that were the guiding principle, *Skidmore* deference would entail no deference at all.") (internal quotations omitted); Michael Asimow, THE SCOPE OF JUDICIAL REVIEW OF DECISIONS OF CALIFORNIA ADMINSTRATIVE AGENCIES, 42 *UCLA L. Rev.* 1157, 1159 (1995) (discussing judicial review as the power of the court "to substitute its judgment for the rational judgment of agency decisionmakers with whom the court disagrees.")

[24] *See Kasten v. Saint-Gobain Performance Plastics Corp*., 131 S. Ct. 1325, 1340 n.6 (2011) (Scalia, J., dissenting) ("To defer is to subordinate one's own judgment to another's. If one has been persuaded by another, so that one's judgment accords with the other's, there is no room for deferral—only for agreement. Speaking of '*Skidmore* deference' to a persuasive agency position does nothing but confuse.")

[25] See *e.g.* Frank B. Cross & Emerson H. Tiller, JUDICIAL PARTISANSHIP AND OBEDIENCE TO LEGAL DOCTRINE: WHISTLEBLOWING ON THE FEDERAL COURTS OF APPEALS, 107 Yale L.J. 2155, 2170–71 (1998) (discussing the impact of ideological preferences on judicial behavior); Richard L. Revesz, ENVIRONMENTAL REGULATION, IDEOLOGY, AND THE D.C. CIRCUIT, 83 Va. L. Rev. 1717, 1728 (1997) (discussing 'deference' and reversal rates by D.C. Circuit judges as interchangeable); Joseph L. Smith, Emerson H. Tiller, THE STRATEGY OF JUDGING: EVIDENCE FROM ADMINISTRATIVE LAW, 31 J. Legal Stud. 61 at 78 and n. 42 *id.* (2002) (referring to deference as identical to reversals rate and submitting that "Overall, the courts in our study were no more likely to defer to the EPA after *Chevron* than before it.")

[26] See *e.g. Smith v. City of Jackson,* 544 U.S. 228, 239–40 (2005) (per Stevens J.) (confirming the Equal Employment Opportunity Commission (EEOC)'s interpretation of the Age Discrimination in Employment Act of 1967 (ADEA) in this case). See also Raso & Eskridge, *supra* note 4 at 1735–36 (discussing the difference between deferring and agreeing to the agency's interpretation).

as an explanation for the judicial behavior.[27] Thus, it would be mistaken (or at least inaccurate) to submit that "when the agency's policy outcome is consistent with the policy preferences of the panel's majority, the court is more likely to defer than if there is no such convergence."[28] This is because the more we are willing to assume congruence between the reviewing judges and the agency on the content based premises of the case—the less it is probable that the judges exerted *actual* deference while conducting judicial review.[29]

To sum up this point, if there is a complete agreement between the original decision-maker (D2) and the reviewing agent (D1) there is no point to speak about deference. To the extent that D1 does proclaim 'deference' in such circumstances, it seems that we can term it as *empty* deference.[30]

---

[27] See *e.g.* Jeffrey A. Segal and Harold J. Spaeth, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISED (Cambridge Un. Press 2002) (presenting the 'attitudinal model' according to which judicial decision-making can be best explained according to the ideological preferences of the judges); Frank B. Cross, Decision-making in the U.S. Court of Appeal, 91 Calif. Law Rev. 1457, 1471 (2003) (discussing 'the political theory' according to which "judges are dedicated to advancing their own personal ideological preferences, which generally fall along a conventional liberal-to-conservative continuum.")

[28] See Cross & Tyler, *supra* note 24 at 2170–71.

[29] I am not suggesting, of course, that such (presumed) ideological congruency denies a possibility of true deference. The relationships between judges' ideological convictions and their decisions are much more complex. It may be the case, for example, that a liberal judge would exert true deference in the face of liberal policy (or interpretative) determination by an agency. After all, judges often give up their ideological preferences in the face of an established judicial precedent or other legal constraints (see *e.g.* Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making,* 96 Am. Pol. Sci. Rev. 305(2002) (finding that legal constraints such as key precedents provide sound explanation for judicial behavior of Supreme Court justices); Herbert M. Kritzer and Mark J. Richards, "Jurisprudential Regimes and Supreme Court Decisionmaking: The Lemon Regime and Establishment Clause Cases.", 37 *Law & Soc'y Rev.* 82 (2003) (same) and this judicial behavior may, by itself, be considered as deference (in the face of pre-existing legal constraints). It is also evident that it is extremely difficult to gather accurate information about the true policy preferences of judges, even if one looks not only to the outcome of the judicial decision but also to the judicial reasoning, since judicial reasoning not always reflects the 'true' policy (or even legal) opinions of the presiding justices, and see also note 72 *infra.*

[30] Deference can also be described as 'empty' or 'fictional' in other circumstances that are actually the reverse of those presented in the text. Sometimes, D1, after reviewing D2's decision, finds that she completely disagrees with it and reverses it accordingly. In such a process, D1 sometimes may proclaim that it 'gave deference' to D2's decision, although, in reality, the weight given by her to second-order considerations was zero. I term this kind of deference as 'fake' deference, see the discussion in the text below near note 37 *infra*. These two meanings of deference differ considerably as to the outcome of the reviewing process, but they have one thing in common: in both, the second-order considerations are given zero weight by D1.

Deference and Disagreement

Let us now change our hypothetical. Suppose that Jane, after reviewing Bob's plan, tells him the following: "I went over your plan. I have many reservations about it and I think I would have done it very differently, had I prepared this myself. Nevertheless, I defer to your judgment on this." Obviously, in this case, Jane's deference seems genuine and significant. That is, here we witness a true disagreement, on the content-based considerations level, between the deferrer and the deferee. Accordingly, when the deferrer decides to suppress her own content-based preferences in favor of content-independent considerations based on reasons related to the existence of the deferree's determinations, then, we face a situation of real deference.

Not only does the disagreement between D1 and D2 serves as a valid condition for the existence of deference, but also, it enables us to evaluate and perhaps even *measure* the *intensity* of the deference exerted by D1. The strongest and the more comprehensive is the disagreement between their content-based views—the more significant should be D1's second-order reasons to defer.[31] In such situations, D1 is in essence balancing her own content-based preferences and content-independent reasons that justify deference. Obviously, if her disagreement with D2's content-based considerations is narrow or marginal, it would be easy for her to resort to deference. If however, her disagreement is deep and extensive, the second-order reasons that justify deference need to be powerful. Therefore, if we can evaluate and measure the difference or the distance—on the content-based level—between D1 and D2's views, we can also measure the intensity of the deference, in cases in which D1 decides not to interfere with in D2's determinations.[32]

[31] See Perry *supra* note 6, at 938 ("A judge who allows the decision of a tribunal which she thinks was mistaken to stand so long as she is able to regard the decision as *reasonable* is *deferring to the practical judgment of the tribunal, but only up to a point*. That point is determined mainly by reference to the strength of the judge's conviction that the tribunal has erred.")

[32] In fact, this is exactly what some empiricists do when study judicial behavior on the basis of ideological affiliation of the judges. For a typical example, see *e.g.* Jeffrey A. Segal, Chad Westerland and Stefanie A. Lindquist, CONGRESS, THE SUPREME COURT AND JUDICIAL REVIEW : TESTING A CONSTITUTIONAL SEPARATION OF POWERS MODEL, 55(1) *Am. J. Pol. Sci.* 89 (2011) (discussing judicial deference on the basis of the ideological 'distance' between the Supreme Court, Congress and the President).

Deference and Avoidance

As we have seen, deference has no meaning in conditions of agreement. This, however, does not mean that it only exists in conditions of disagreement. Note that, *lack of* agreement does not necessarily mean *dis*agreement. Consider a third scenario. Jane, after receiving the document containing Bob's plan, tells him as follows. "I really don't understand anything about chemistry labs and (or) I had no time to read through this document in detail. But, I trust your judgment (and will defer to it accordingly)." In this case, we don't really know what Jane would have thought had she got into the nuts and bolts of the plan. She might have agreed to it, wholly or partly, or she might have not. In any case, she deferred to Bob's judgment, since she acted upon content-independent reasons (her lack of expertise and/or lack of time) when deciding to go along with his plan.

This mode of deference that I shall term *avoidance deference* (AD) is very different from the above-discussed mode of deference due to disagreement (DD). The difference rests, first and foremost, with regard to the *function of the content-independent considerations* within the deferrer decision-making process. In the latter case (DD), the deferrer *balances* the content-independent considerations against the content-dependent considerations when considering the possibility of deference. That is, the decision-making process involves both content-dependent and content-independent considerations that are balanced against each other *on the same level*, and presumably, at the same time.[33] To the contrary, in AD, the content-independent considerations have a different function. Content-independent reasons are not balanced directly against the content-based considerations, but rather serve the deferrer as reasons to *avoid such balancing in the first place.*

Accordingly, it seems that these considerations function on a level that is quite distinct, and *preliminary* within the deferrer's decision-making process. To demonstrate this with our hypothetical case, in AD, Jane does not balance her doubts (or reservations) regarding Bob's plan vis-à-vis her lack of expertise (relative to Bob), but rather decides that due to her lack of expertise etc., she is not going to second-guess, or even to thoroughly examine, Bob's plan in the first place.[34]

[33] See *e.g.* Perry, *supra* note 6 at 938–39 (discussing the judicial review process under the reasonableness test as a balancing between the judges convictions regarding the reviewed tribunal expertise on the one hand, and the judge's estimation that the tribunal has erred in its judgment on the other).

[34] In this respect, in AD, the content independent considerations serve as classic 'exclusionary reasons' in Razian terms, see Perry *id.* at 913–14 and note 10 *supra.*

An additional difference between DD and AD refers to the status of content-based considerations for the deferrer. In the case of DD the deferrer must have at least *some* defined views about the content-based questions and issues that are at stake. When Jane tells Bob that she disagrees with his suggestions and that she would have done the job differently, she certainly has some defined ideas about what a chemistry lab in a high school should look like. Not so in the case of AD. In order to decide not to enter the content-based considerations in the first place, the deferrer need not have any idea about the subject matter at stake. When Jane tells Bob that she did not read the document (thoroughly, or at all) due to lack of time or expertise, in all likelihood, she does not have any ideas of her own about the right way to organize a chemistry lab. Or, at the very least, she needs not have any such defined ideas in order to take the decision to defer.

Deference modes – and Reasons for Deference

So far, I have distinguished between two basic modes of deference. Does the distinction depend on, or coincide with, the *reasons* underlying the decision to defer? In the literature, there is a tendency to distinguish between different types of deference on the basis of the reasons underlying it. Thus, for example, some writers distinguish between *epistemic* reasons for deference (those based on the deferrer's estimation of her inferior knowledge, or expertise with regard to the subject matter) and deference that is based on structural reasons, i.e., division of functions between the deferrer organ and the deferree (sometimes referred to as 'legal' or 'jurisdictional' deference).[35]

It seems, however, that the above-suggested distinction between the two modes of deference does not depend on the reasons underlying the decision to defer. There are infinite number of reasons why Jane may defer to Bob's position. Some of them may be related to structural considerations (for example, Bob is responsible, under the county superintendent's directives, and as part of his job, to master this kind of projects, etc.); others may be epistemic (Bob holds a degree in chemistry, or had acquired substantial experience in similar projects, etc.). And, there are, of course, many other possible reasons that are neither structural or epistemic. (Jane may defer to Bob's position since

[35] See Perry *id.* at 939–40 (discussing structural reasons for deference); Horwitz, *supra* note 3 at 1086 (discussing reasons for 'epistemic' deference). See also Daly, *supra* note 6 at 7–10 (distinguishing between epistemic deference and doctrinal deference that refers to division of authority between the deferrer and the deferree).

she knows that the school board of education expects her to do so, or she knows that Bob may be very upset if she disregards his suggestions and may even resign, and so forth.) None of these reasons I think carries an *inherent* connection to either of the above-defined modes of deference. This means, that, at least in principle, any of these reasons may serve as a basis for a decision following each of these two distinct modes of deference.

Indeed, one may argue that, on the face of the matter, structural reasons for deference seem more congruent with the framework of avoidance deference, since if, under a legal or bureaucratic framework the decision at stake is assigned primarily to Bob, it may seem more likely that Jane would treat his decision under AD. Likewise, one may assert that, normally, epistemic reasons for deference fit into the framework of DD.[36] These assertions, however, if true, hold only as empirical conjectures—not as analytical imperatives. There is nothing *inherent* in either DD or AD that negates the possibility that the deference exerted by the deferrer would rest on any type of the above-mentioned reasons. For example, lack of time or expertise, can, in principle, serve either as a reason for D1 to give up her own (content-based) views in face of D2's position (in DD) or as reasons to avoid developing such views in the first place (AD). The same can be said about structural reasons (such as division of functions within the relevant legal or bureaucratic framework).[37]

Disagreement Deference and 'Fake' Deference

DD is applied by weighting and balancing, on the merits, content-dependent considerations with content-independent considerations. The fluidity and amorphousness of the balancing process, and the lack of separation between the different categories of considerations, may raise doubts as to the classification of DD as true deference. Indeed, some of the literature on standards of deference in administrative law reflect such doubts regarding balancing-type standards of deference.[38]

---

[36] See *e.g.* Daly *id.* at 21–24 (discussing 'epistemic deference' as based primarily on rationales of expertise, experience and knowledge of the deferree).

[37] Assuming, of course, that D1 holds the fundamental power to review D2's decisions within this framework, see the discussion at Part II above, near note 15 *infra.*

[38] See *e.g.* Abner S. Greene, The Fit Dimension, 75 *Fordham L. Rev.* 2921, 2928–29 (2007) (arguing that "Under *Skidmore*, courts look at agency constructions, listen to what the agency has to say, but then determine the meaning of a statutory term de novo. This is not real deference…"); John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 686–88 (1996) (describing *Skidmore*

It is true that in DD, the application of deference by D1 is contingent upon the specific circumstances of the case at hand. It is also true, given the indeterminacy of balancing processes, that it may be difficult to follow the deferrer's reasoning and to monitor the exact weight given by her to content-independent considerations.[39] Accordingly, to the extent that D1 does not aim to genuinely consider deference but only uses the language of deference to mask her ambitions to enforce her own content-dependent preferences on D2's decision, DD-type deference standards would make it much easier for her to do so than in the case of AD.[40]

This truism, however, does not entail that DD cannot serve as a basis for useful standards of deference or that decision-making under DD is always (or even commonly) a mere mask for practices under which D1 enforces her bare preferences while merely paying lip-service to the principle of deference. Indeed, as we shall see in the next part, empirical data regarding the impact of balancing-type deference standards suggest, at least in some cases, that their application serves as a significant restraint against such practices.[41] This means that deference under DD may be *contingent* but not necessarily fake or lacking in deferential impact.

Moreover, it may be argued that in some respect, assuming that D1 takes seriously her role in the decision-making process and genuinely

---

as "a nonbinding version of deference" from "a court exercising independent judgment.") See also the discussion in Part IV below text near note 56 *infra*.

[39] See *e.g.* T. Alexander Aleinikoff, CONSTITUTIONAL LAW IN THE AGE OF BALANCING, 96 *Yale L.J.* 943, 992–95 (1987) (criticizing the 'objectivity' of balancing and its 'scientific' allure as false pretense); Niels Petersen, HOW TO COMPARE THE LENGTH OF LINES TO THE WEIGHT OF STONES: BALANCING AND THE RESOLUTION OF VALUE CONFLICTS IN CONSTITUTIONAL LAW, 14 German L.J. 1387, 1392 (2013)(same). See also Raanan Sulitzeanu-Kenan, Mordechai Kremnitzer and Sharon Alon, "Facts, Preferences, and Doctrine: An Empirical Analysis of Proportionality Judgment", 50(2) *Law & Soc. Rev.* 348 (2016) (providing experimental findings that balancing judgments by experts are influenced by policy preferences of the decision-maker).

[40] See Antonin Scalia, JUDICIAL DEFERENCE TO ADMINISTRATIVE INTERPRETATIONS OF LAW, 1989 *Duke L.J.* 511, 513-14 (1989) ("I suppose it is harmless enough to speak about 'giving deference to the views of the Executive' concerning the meaning of a statute, just as we speak of 'giving deference to the views of the Congress' concerning the constitutionality of particular legislation—the mealy-mouthed word 'deference' not necessarily meaning anything more than considering those views with attentiveness and profound respect, before we reject *them*."), See also the discussion of the difference between the two standards from empirical perspectives at note 72 *infra.*

[41] See *e.g.* Hickman & Krueger, *supra* note 7 at 1280 (finding that "the *Skidmore* doctrine represents a bona fide standard of review, rather than merely an excuse for reviewing courts to follow their own interpretive preferences." See the discussion at Part IV below, and note 72 *infra.*

strives to avoid unnecessary intervention in D2's decisions, deference under DD may be even more meaningful than under AD. After all, it is much more difficult (or even painful) for Jane to defer to Bob's views, after she had examined them on the merits and found that she disagrees with them than if she did not even bother to read through the relevant document in the first place. This, of course, may indicate that, as an empirical contingency, Jane is less likely to defer in DD. However, had she genuinely deferred, we can view her deference as more meaningful (or even in some sense 'stronger') than in the case of AD. In AD, D1's disagreement with D2's content-based views is largely *hypothetical*. In DD, the disagreement is real (and possibly intense). Consequently, from the point of view of deference as disagreement, DD may signify a mode of deference that is sometimes no less strong and meaningful than AD.

Avoidance Deference—and Exceptions

In the course of the discussion above, I distinguished between two modes of deference. I argued that avoidance deference (AD) differs from disagreement deference (DD), since in AD, content-independent reasons serve the deferrer as a reason to avoid entering the process of balancing of content-dependent considerations altogether. On the other hand, I suggested that deference—even in AD—is never absolute. That is, the very concept of deference inherently acknowledges the power of the deferrer to qualify her deference to the deferee's judgment.[42] In reality, such qualifications are often presented as *exceptions* that the deferrer may apply while exercising deference. To return to our high-school example, Jane may adopt a practice under which she would defer to Bob's plans unless they are in contrast to the Board of Education's directives, or if they are clearly mistaken, or 'flatly unreasonable' in her view. The discussion of exceptions is of utmost importance to the understanding of the concept of deference. This is not only because exceptions are inherently embedded in the concept of AD, and practically common, but also because they bear potential relevance to the distinction between the two modes of deference.

The important question in this respect is whether the use of exceptions by the deferrer in AD does not blur the lines between AD and DD. Suppose, for example, that Jane follows a practice under which she defers, in principle, to Bob's plans, but only as long as she thinks that they are not 'clearly erroneous' or 'flatly unreasonable'. Does the existence of the above exceptions within the practice of deference mean

[42] See Part II above in the text near note 19 *infra.*

that Jane is not actually operating under AD? Or, that operating under such mode of deference is, in essence, identical to DD? I think that the answer for these questions is in the negative for a number of reasons.

First, I suggested that the main difference between AD and DD has to do with the function of the content-independent considerations within the decision-making process in the two modes, and the question of whether they are considered by the deferrer separately from the consideration of content-based considerations. It seems that even when D1's deference in AD is qualified by this kind of exceptions, still, the function of content-independent considerations, and their operation *vis-à-vis* content-based considerations remains largely the same. The fact that Jane may not defer in the face of clear mistakes or flat unreasonableness on the part of Bob, does not mean that she weights all content-based and content-independent considerations *on the same level* and at the same time (as in DD). In fact, it seems that such a decision-making process is clearly divided into two distinct phases: In the first, the decision-maker identifies the fundamental conditions for deference (which is done on the basis of content-independent reasons). Only then, at a separate phase, D1 examines the question of whether or not, D2's decision is inflicted by clear mistake or flat unreasonableness.

Second, and correspondingly, this point can be further illustrated by looking at the level of intensity, or the 'resolution' in which D1 needs to deal with content-based considerations when pursuing each mode of decision-making. I pointed above that in DD, the deferrer, while balancing all the content-based and the content-independent considerations, needs to have some defined knowledge and views about the subject matter at stake.[43] For example, if Jane balances Bob's expertise (as a content-independent reason for deference) against all kind of content-dependent reasons (such as the quality of his plan, the correctness of its details, budgetary aspects etc.), apparently, she needs to have some defined knowledge of the subject matter, and some defined ideas as to how the preferred plan should look like (in her view). Not so, in the case of AD, even when it is subject to the above exception of flat unreasonableness etc. One needs not be an expert on the subject matter (say, how a chemistry lab in a high school should be organized) in order to identify some fundamental flaws in the plan that constitute flat unreasonableness (for example: disregard of school board instructions, grave encroachment of budgetary limits, or disregard of a rule relating

[43] See the discussion at Part II above, in the text near note 29 *supra.*

to the maximum number of students that are expected to use the lab, etc.).[44]

A way to illustrate the above difference is to say that in DD, Jane needs to have at least some defined ideas about how a chemistry lab should look like in order to conduct the relatively complex process of balancing of all content-based and content-independent considerations. In contrary, in AD, in order to apply the 'flat unreasonableness' type exceptions, Jane does not need to have an idea of how such a lab should look like. Rather, she needs to have some basic notion of how such a plan *should not* look like. This means that in order to apply some narrow exceptions, limited to extreme and exceptional circumstances or with regard to some clear pre-established rules, the deferrer need not have detailed knowledge of the subject matter and need not enter a comprehensive process of balancing all considerations when reviewing the deferree's decision.[45] Rather, she resorts to these exceptions only when there is some grave and paramount failure, which usually exists *on the face of the matter,* and can be detected even without profound investigation into all the particularities of the case.[46]

An additional difference between these two modes of deference is related to the way by which the various considerations are examined and weighted by the deferrer. In DD, the decision-making is based on the continuing and persisting process of weighting and balancing all of the considerations. The heavier the weight given content-based considerations against D2's decision, the strongest should the content-independent considerations for deference should be, and *vice versa*.

---

[44] Admittedly, however, the level of expertise of D1 may influence her perceptions regarding what constitutes a 'clear mistake.' The greater her knowledge in the subject matter, the greater are the chances that she would identify mistakes in D2's decision. This, however, does not mean that non-experts cannot sometimes identify such mistakes in defined areas of decision-making. It is somewhat paradoxical that the less the knowledge by D1, the more extreme the mistakes she would be expected to react to. This is also because the rational deferrer always needs to bring into consideration, that, due to her inferior knowledge and expertise, she may be the wrong party, when identifying a presumed mistake by D2. See Horwitz, *supra* note 3 at 1098–1100.

[45] See Perry, at 934–35 ("Now the central case of a clear mistake has two features: (1) its nature is such that it is relatively easy to discover that a mistake has possibly been made; and (2) once that possibility has come to light the alleged mistake will be *known* to be a mistake with some degree of certainty.")

[46] The discussion in the text assumes that the exceptions are narrowly defined and relate to exceptional or extreme circumstances. If D1 defines a principle of deference that would be discarded by any leniently defined exception (such as "I defer unless D2's decision is mistaken (in my view)") not only the distinction between the two modes of deference collapse, but also this may be a situation of no deference at all (see the discussion above in Part II in the text near note 29 *infra.*

Every additional piece of information and every new piece of analysis can, in principle, tip the balance, at any moment, from one side to the other. In contrast, in AD the process of applying the exceptions is a process of using *thresholds* as a basis for the decision-making process.[47] That is, the deferrer does not conduct a continuing 'sliding scale' (or 'fine-tuning') balancing of all competing considerations. Unless and until the solution adopted by the deferree crosses some line, or meets some (usually high and clearly defined) *threshold* introduced by the relevant exception—the changes in the balance of considerations is largely transparent for the deferrer and bear no relevance from her point of view.[48]

Avoidance and Disagreement Deference – A Flat Distinction of A Continuum?

I argued above that when discussing deference we must distinguish two separate modes: disagreement and avoidance deference. How sharp, however, is this distinction? Should we view it as a clear-cut distinction between two completely distinct modes of decision-making, or should we view those two modes as no more than two points – albeit perhaps remote –on the same continuum?

I should clarify at the outset that I do not discuss this question, at this stage, from a practical point of view. Standards of judicial deference are notorious for being malleable and vague. Accordingly, their application by courts is often inflicted by inconsistency, fuzziness, and

[47] See Hickman and Krueger, *supra* note 7 at 1250 ("one can readily discern that Chevron deference involves two binary inquiries, while Skidmore requires courts to evaluate several factors." See also the discussion in Part IV below text near note 67 *infra.*

[48] Accordingly, the decision-making process under such mode of deference can also be described as related to some 'zone' in which the deferree's decision is immune from intervention, see Peter L. Strauss, "DEFERENCE" IS TOO CONFUSING--LET'S CALL THEM "*CHEVRON* SPACE" AND "*SKIDMORE* WEIGHT", 112 *Colum. L. Rev.* 1143, at 1145 (2012)
(discussing '*Chevron* space' as "the area within which an administrative agency has been statutorily empowered to act in a manner that creates legal obligations or constraints—that is, its delegated or allocated authority" and as opposed to '*Skidmore* weight'); see also Herz 2015, 1880-81 (echoing Strauss' distinction.) See also Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 754 (1994) [using "boundary maintenance" to refer to the court's role in maintaining a proper allocation of authority among different governmental institutions, and specifically the court's ability to "resolve disputes over the scope of agency authority."] For a critique of the 'boundary' metaphor to explain the function of reasonableness review see Anya Bernstein, DIFFERENTIATING DEFERENCE, 33 Yale J. on Reg. 1, 11 (2016) ("[C]ourts review agency interpretations not as one point plotted against others on a comparative interpretive continuum, but individually and in isolation.")

disagreement among judges and commentators alike.[49] I shall deal with these practical difficulties and their implications later on.[50] Here, I strive to answer this question from purely analytical perspective.

The vagueness and indeterminacy of standards of deference can explain why modes of deference are often discussed in the literature in terms of 'continuum'. [51] Nevertheless, from the analytical perspective here-discussed, I think, the difference between avoidance deference and disagreement deference is *not* a difference of degree, but rather a categorical difference between two separate modes of decision-making. The question is, in essence, what is *the function of the content-independent considerations* (underlying the decision to defer) and at what stage do they come into play. In DD such content-independent considerations function as yet some considerations weighted and processed by D1 among all other factors *on the same level* and at the same stage of the decision-making process. In AD, on the other hand, these considerations are brought into play at a preliminary stage, *before* D1 weights all other considerations. Accordingly, in AD, this preliminary analysis defines how D1 is to conduct the analysis of all other factors in the following stages of the process.

This point can be illustrated by returning to our high school example. Suppose that Bob submits his plan for new chemistry lab to Jane in a format of a paper booklet. Now, Jane has to make up her mind *how* she is going to read this booklet. On the one hand, she can say to herself "Bob is the expert on this subject while I know very little of it (etc.), and therefore I shall only give it a quick look…" (i.e. AD). Alternatively, she can say, "let's take a look at this plan *first*, and *only then* make up my mind how much weight do I give to Bob's expertise" (as in DD). In the first case, the content-independent considerations (Bob's expertise) are taken into consideration *before* Jane even started looking at the plan, and her preliminary decision *defined the way by which she read throughout the whole document* at the second stage. In the latter case, no such preliminary decision is made. Instead, Jane

---

[49] See *e.g.* Bednar & Hickman, *supra* note 4 at 1444 ("standards of review are not bright-line rules, nor do they even represent fixed points on an attitudinal continuum. Rather, they are malleable"). See also notes 78-80 *infra* and accompanying test.

[50] See PART IV below, text near notes78-80 *infra.*

[51] See *e.g.* Eskridge & Baer, *supra* note 2 (studying empirically the "continuum of deference"); Bednar & Hickman, *supra* note 4 at 1444 ("standards of review are not bright-line rules, nor do they even represent fixed points on an attitudinal continuum"). For an argument that raise doubts as to the possibility of constructing such continuum regarding standards of review see Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 14 (1994).

weights and considers Bob's expertise as just one, among many considerations, during the stage of reading the document. That is, Bob's expertise serves as just one factor in Jane's overall assessment, but it does not affect her attitude towards *all other* considerations (as in AD).

To be sure, in real life, it is not always easy or even possible to identify the exact choice made by the deferrer. Moreover, these two modes may be mixed by decision-makers. Sometimes, the decision-maker may make a preliminary decision to defer (in principal – as in AD) but relinquish it at a later stage due to grave discrepancies evolving during the second stage of weighting all considerations.[52] In other cases, no such preliminary determination is made, but the deferrer may ultimately give crucial weight to content-independent considerations *vis-à-vis* all content-dependent considerations. However, the fact that, in practice, decision-makers may mix between these two modes of deference, or even revert from one to the other back and forth – should not obscure the fundamental analytical difference between them.

Accordingly, the crucial question is whether or not the deferrer made any determination – on the basis of content independent considerations – as to how she intends to conduct the review process – before she reached the stage of overall assessment and weighting all other considerations. If such preliminary consideration is made – one is entertaining avoidance deference. If not, we face a process of disagreement deference. Even if, in reality, the lines between these two modes may blur, still, we can use them as two distinct basic *models* which enable us to evaluate the nature of the relevant decision-making process adopted by the deferrer.

PART IV: IMPLICATIONS FOR ADMINSTRATIVE LAW

In the course of the discussion above, I examined the meaning of the term 'deference' and suggested a distinction between two modes of deference that differ fundamentally from each other. I shall now consider potential implications of the above discussion for current administrative law doctrine. First, I shall examine whether, and to what extent, the distinction between DD and AD can serve as a vehicle to clarify the distinction between the two main doctrines of deference in contemporary administrative law: *Chevron* and *Skidmore*. Then, I shall review the implications of the current discussion on the meaning of *Chevron* formula, and specifically on the question of whether *Chevron*

[52] See the discussion at PART III above, text after note 41 *supra* [The Exceptions part]

should be understood as a one- or two-step process for judicial decision-making.

A. The Distinction between the *Chevron* and *Skidmore* Tests

The two principal Supreme Court doctrines of deference for judicial review of agency interpretations of law are *Chevron*[53] and *Skidmore.*[54,55] Both in the case law and academic literature there is much ambiguity as to the content of each standard and the distinction between them.[56] As Hickman and Kruger point out: "[a]ll agree that *Skidmore* is less deferential than *Chevron*, but how much less and in what way remain open questions."[57] Moreover, there is a tendency among some justices (most notably Justice Breyer) to blur the distinction between the two standards or even to deny the difference between them.[58]

---

[53] See note 5 *supra.*

[54] 323 U.S. 134, 140 (1944). See text near note 54 *infra.* The criteria determining which of the two modes of deference should be applied to which administrative determination have been established by the Court in a series of cases at the early 2000s, see *United States v. Mead Corp.,* 533 U.S. 218 (2001) (hereinafter *Mead*); *Christensen v. Harris County,* 529 U.S. 576 (2000) (hereinafter: *Christensen*); *Barnhart v. Walton,* 535 U.S. 212 (2002) (hereinafter: *Barnhart*). See also text near note 73 *infra.*

[55] However, *Chevron* and *Skidmore* are by no means the only doctrines that serve for this purpose in the case law. See *e.g.* Richard J. Pierce, WHAT DO STDUDIES OF JUDICIAL REVIEW OF AGENCY ACTION MEAN? 63 *Adm. L. Rev.* 77, 78-83 (2011) (discussing six different doctrines of deference applied by the courts); David Zaring, REASONABLE AGENCIES, 96 *VA. L. REV.* 135, 143–52 (2010) (discussing six different standards of review); Eskridge & Baer, *supra* note 2 at 1098–1120 (discussing a 'continuum' of different deference regimes in the case law). Nor does the current status of *Chevron* as the prevailing doctrine of deference remain unchallenged (see *e.g.* Coglianese, *supra* note 2 at 102 (noting that "today the decision finds itself at the center of an intensive debate over its legitimacy and even its continued existence.")

[56] For a review of the development of the confusion in the case law with regard to the meaning of *Chevron* and *Skidmore* and the distinction between them see *e.g.* Richard J. Pierce, THE FUTURE OF DEFERENCE, *Geo Wash. L. Rev.* 1293, 1300–03 (2016) (discussing the confusion in the Supreme Court opinions regarding the interpretation, applicability and scope of its deference doctrines).

[57] See Hickman & Krueger, *supra* note 7 at 1237, and see also *id.* at 1250 ("*Skidmore* is less deferential than Chevron. What remains unclear, at least from the Supreme Court's opinions, is precisely how much less deferential *Skidmore* is and in what way this is so.")

[58] See *Christensen, supra* note 49 at 596-97 (Breyer, J., dissenting) ("*Chevron* made no relevant change" to *Skidmore* analysis but rather "simply focused upon an additional, separate legal reason for deferring to certain agency determinations"); *City of Arlington*, 133 S. Ct. at 1875 (Breyer J. concurring) (stating that the application of the *Chevron* test should depend on complex set of considerations such as "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time. [quoting *Barnhart v. Walton*, 535 U.S. 212, 222 (2002)]". See also Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 198–202 (2006) (describing Justice Breyer's conception of relationship between *Chevron* and *Skidmore*); Hickman & Krueger, *supra* note 7 at 1248 ("Justice Breyer has long adopted the

Let us now examine each of these two doctrines of deference in accordance with the theoretical framework here presented. In *Skidmorev. Swift*, the Court stated that:

> [t]he rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[59]

The exact meaning of *Skidmore* test is yet to be determined by the courts. This is because the Supreme Court has yet to provide a conclusive list of the factors which should be weighed against each other while applying the *Skidmore* test,[60] and let alone provide clear directives as to how much weight should be given to each factor.[61] It is evident

---

view that *Chevron* and *Skidmore* are functionally similar, with *Chevron*'s emphasis on delegation representing merely another factor for a reviewing court to evaluate in deciding whether to defer to an administrative interpretation."); Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, at 372–73, 379–81 (1986); Jim Rossi, RESPECTING DEFERENCE: CONCEPTUALIZING SKIDMORE WITHIN THE ARCHITECTURE OF CHEVRON, 42 *Wm. & Mary L. Rev*. 1105, 1128 (2001) (discussing Justice Breyer's dissent in *Christiansen*: ("Justice Breyer implies that *Skidmore* deference is a type of *Chevron* Step Two reasonableness inquiry). This approach was endorsed by other justices, see Sunstein *id.* at 219: ("And in an important opinion, Judge Posner appeared to endorse such a reading when he wrote that Barnhart 'suggests a merger between *Chevron* deference and *Skidmore*'s approach of varying the deference that agency decisions receive in accordance with the circumstances [referring to *Krzalic v. Republic Title Co*., 314 F.3d 875, 879 (7th Cir. 2002)].'") See also Kent Barnett & Christopher J. Walker, CHEVRON IN THE CIRCUIT COURTS, 116 *Mich. L. Rev.* 1, 19 (2017) (Justice Kagan, writing for the Court in *Judulang v. Holder*, apparently embraced this view of Step Two, noting that "our analysis would be the same [under Step Two or APA arbitrary and capricious review], because under *Chevron* Step Two, we ask whether an agency interpretation is arbitrary or capricious in substance [*Judulang v. Holder*, 132 S. Ct. 476, 483 n.7 (2011) (internal quotation marks omitted)].

[59] *Skidmore, id.* at 140.

[60] See Mead, *supra* note 49, 533 U.S. at 235 (permitting courts to consider "any other sources of weight"); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (directing courts to consider "all those factors which give [the agency view] power to persuade"). See also Hickman & Krueger, *supra* note 7 at 1257 (noting that "[T]he Court has not precisely delineated which contextual factors the courts should evaluate in applying the sliding scale. Neither *Skidmore* nor *Mead* purports to provide a conclusive list of factors.")

[61] See Hickman and Krueger *id.* at 1256 ("neither *Skidmore* nor *Mead* explain how these factors relate to each other or whether certain factors are more important than others."). See

from the way that the *Skidmore* test is disucssed, however, that it is a typical DD mode of deference. Some of the factors that the courts mention when applying this test are clearly content-dependent, such as the "thoroughness" and "logic" of the agency's determination, as well as its "power to persuade."[62] Other factors, such as the agency's "expertise" and the "experience" embodied by its "informed judgment" are seemingly content-independent.[63]

The most important point for the purpose of the current analysis, however, is that all these factors are being examined, processed and weighted *together, on the same level, and at the same (unified) phase of the judicial analysis*, i.e., as in the case of a typical DD mode of decision-making.[64] Unlike in the case of AD, content-independent considerations do not preclude the court from considering the validity of an agency's determinations on its merits. To the contrary, a central factor in any application of the *Skidmore* test is whether, and to what extent, the agency determination of both law and facts carry the "power to persuade."[65] The extent to which the court is willing to defer to an agency's determinations depends—albeit not exclusively—on the degree to which the court acknowledges the degree of persuasiveness in the agency's determinations on their merits.

---

also Robert A. Anthony, Which Agency Interpretations Should Bind Citizens and the Courts?, 7 Yale J. on Reg. 1, at 14–15 (1990) (noting that pre-*Chevron* opinions did not explain "which 'factors' were to be heeded, and how they were to be used"); David R. Woodward & Ronald M. Levin, In Defense of Deference: Judicial Review of Agency Action, 31 *Admin. L. Rev*. 329, 332–35 (1979). See also Rossi, *supra* note 53 at 1126-30 (discussing *Christiansen* and analyzing three different approaches expressed by the justices as to the way *Skidmore* approach should be applied)

[62] See Eskridge & Baer, supra note 2 at 1109 ("Under the *Skidmore* standard of deference, an agency interpretation is entitled to "respect proportional to its power to persuade," with such power determined by the interpretation's "thoroughness, logic and expertness"; its "fit with prior interpretations"; and "any other sources of weight" the court chooses to consider." (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), followed and quoted in United States v. Mead Corp., 533 U.S. 218, 235 (2001); see also United States v. Mead Corp., 533 U.S. 218, 228 (2001), citing *General Elec. Co. v. Gilbert,* 429 U.S. 125, 142, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), which counts "the degree of the agency's care" as a factor to be considered when applying the *Skidmore* test.)

[63] See the discussion above at Part II, in text near note 34 *infra.*

[64] See the discussion above at Part II, in text after note 41 *supra*.

[65] See Eskridge & Baer, supra note 57, *id.* See also Rossi, *supra* note 53 at 1130–31 (discussing the majority opinion emphasize on the 'power to persuade' factor and arguing that "… in its application of *Skidmore* the majority summarily dismisses any notion of deference to the agency…")

Moreover, the *Skidmore* test is often presented in the literature by using the descriptor of a *sliding scale.*[66] This means that the reviewing court examines the various factors, including the degree to which it accepts the agency's interpretation as correct on the merits, and decides, on an *ad hoc* basis, the degree of deference it is willing to accord the agency's position.[67] This sliding scale type of analysis, by which the reviewing court considers the relative weight of a number of (content-dependent and content-independent) factors and decides the degree to which it is willing to defer to the agency determinations, is typical of the DD mode of deference.[68]

In contrary to *Skidmore*, *Chevron's* well-known formula constitutes a typical AD mode of deference. Justice Stevens' formula divides the judicial analysis into two stages. In the first stage, the court needs to answer a seemingly simple, straight forward, question: whether "the

[66] See *United States v. Mead Corp.*, 533 U.S. 218, 228-29 (2001). For other examples of the sliding-scale approach to Skidmore, see *EEOC v. Arabian Am. Oil Co. (ARAMCO)*, 499 U.S. 244, 256–58 (1991) and *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141–43 (1976). See also *Alaska Department of Environmental Conservation v. EPA* 540 U.S. 461, 487–88 (2004). For discussions in the literature see Hickman & Krueger, *supra* note 7 at 1255–56, n.116 *id.*, and at 1271–72 *id.* (finding that the adoption of the sliding scale model constituted almost 75% of appellate court decisions that applied the *Skidmore* standard). See, also 5 Kenneth Culp Davis, Administrative Law Treatise § 29:16, at 400 (2d ed. 1984) (describing pre-*Chevron* deference as "variable; it can be stronger or weaker"); Kenneth Culp Davis , Administrative Rules--Interpretative, Legislative, and Retroactive, 57 Yale L.J. 919, 934 (1948) ("Legislative rules normally have greater authoritative weight than interpretative rules, but the authoritative weight of interpretative rules varies considerably."). See also Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 Yale L.J. 969, 972 (1992), (describing pre-*Chevron* deference as sliding scale, "from 'great' to 'some' to 'little'" (citing 5 Davis, supra, § 29:16, at 400)); Thomas W. Merrill, The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards, 54 Admin. L. Rev. 807, (2002)at 810 (quoting Justice Scalia's use of the sliding-scale term in United States v. Mead Corp., 533 U.S. 218, 250 (2001) (Scalia, J., dissenting)); Thomas W. Merrill & Kristin E. Hickman, *Chevron*'s Domain, 89 Geo. L.J. 833, (2001), at 855 (describing *Skidmore* as a sliding scale in which "agency interpretations receive various degrees of deference, ranging from none, to slight, to great, depending on the court's assessment of the strength of the agency interpretation under consideration"). See also Herz, *supra* note 4 at 1881.

[67] See *Mead*, 533 U.S at 528 ("The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances ... The approach has produced a spectrum of judicial responses, from great respect at one end, to near indifference at the other.") and see Hickman & Krueger, *supra* note 7 at 1256.

[68] See Herz, *supra* note 4 at 1880-81 (discussing Justice Ginsburg's opinion in *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461, 487 (2004) and pointing out that, while applying *Skidmore* test "The Court *agreed* with the agency, but it did not *defer* in the strong sense." (emphasis in the original)).

intent of Congress is clear."[69] If the answer to this question is in the positive, "that is the end of the matter."[70] Once, however, the court identifies ambiguity in the statute at stake, it is required to exert strong deference to any "permissible" construction of the statute by the agency.[71] At this second step, judicial deference reigns over the court's analysis. It is conditioned only by exceptional circumstances in which the court finds the agency's position unreasonable.[72] *Chevron*'s Step Two deference is triggered by the relatively simple analysis at Step One, which is based on content-independent considerations, i.e., the language of the statutory mandate of the agency as specified by Congress. Thus, unlike the *Skidmore* test, the court does not exercise a complicated, multi-factor, *ad hoc* analysis of all relevant content-dependent and content-independent considerations; instead, the test has two steps, based on two separate inquiries, both binary in nature.[73]

---

[69] *Chevron*, *supra* note 4 at 842. Of course, the question whether or not the statutory language is ambiguous, and whether or not the intent of Congress is clear, may prove much less simple and straightforward than one may discern from the language of the formula itself (see *e.g. Carcieri v. Salazar,* 555 U.S. 379, 395–96 (2009): the Court opinion (per J. Thomas) finds the language of the statute "unambiguous" while J. Breyer (concurring) notes that he cannot find the language of the statute itself as "determinative.") See also Hickman & Krueger, *supra* note 7 at 1248 ("Of course, whether a given statute is clear is often a close call") and at 1265 *id.* ("The scope of Chevron step one analysis is a matter of extensive debate over, among other things, how clear is clear enough and which methods and tools of statutory construction are permissible in the inquiry."); Brett M. Kavanaugh, FIXING STATUTORY INTERPRETATION (Book Review on JUDGING STATUTES BY ROBERT A. KATZMANN), 129 Harv. L. Rev. 2118, 2152 (2016) ("the fundamental problem … is that different judges have wildly different conceptions of whether a particular statute is clear or ambiguous.").

[70] See *Chevron*, *supra* note 4 *id.*

[71] *Id.*

[72] See Hickman & Krueger, *supra* note 7, at 1252 ("In general, scholars agree that *Chevron*'s Step Two nears the fully deferential end of the spectrum: Courts employing this standard retain little discretion and are required to defer to the agency's view unless it is unreasonable."); Rossi, *supra* note 53 at 1112 (discussing *Chevron* Step Two reasonableness inquiry). See also Kent Barnett & Christopher J. Walker, CHEVRON STEP TWO'S DOMAIN, 93 *NOTRE DAME LAW REV.* (forthcoming 2018) at 8-11 noting that the Supreme Court has so far struck down agency interpretations under Chevron step-two only in 3 cases (referring to *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366 (1999); *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014) and *Michigan v. EPA,* 135 S. Ct. 2699 (2015)). For a discussion of the place of reasonableness in *Chevron* analysis see Zaring, note 50 *supra.*

[73] See Hickman & Krueger, *id.* at 1250 ("[F]rom the Court's articulation of the two standards, one can readily discern that *Chevron* deference involves two binary inquiries, while *Skidmore* requires courts to evaluate several factors."). But *cf.* Richard M. Re, SHOULD CHEVRON HAVE TWO STEPS, 89 *Ind. L. Rev.* 605, 608–18 (2014) (arguing that as a matter of logic different readings of *Chevron* tests may imply that there are more than two possible options for each step).

Moreover, unlike the sliding scale nature of *Skidmore* multi-factor analysis, Chevron Step Two is based on a *threshold* analysis.[74] That is, unless and until the agency's determinations meet some (relatively demanding) threshold of unreasonableness, the court would defer to the agency. Not every additional piece of information can tip the balance within a continuous process of weighting all factors on an *ad hoc* basis. Rather, there is a strong presumption against interference in the administrative determination until some (demanding) threshold is met. As long as the agency remains within the (relatively wide) 'zone' of reasonableness, the court would defer, and regardless of whether of how much 'power to persuade' is carried by the agency interpretation of the law.[75]

The above-presented analysis stresses the significant difference between *Chevron* and *Skidmore*.[76] It demonstrates that the difference between these two standards is not a matter of mere linguistic articulation, nor is it merely a difference of *degree* between two standards that are similar in principle. Rather, the difference between these standards is *categorical*. This difference is embedded in the nature and function of content-based and content-independent considerations within each mode of deference, and therefore it is fundamental. Each of these standards reflect, in essence, a mode of deference that is analytically distinct from the other. Accordingly, the difference between them is manifested in the process of decision-making by which each standard of deference is applied by the reviewing court, and regardless of the question whether or not, at the bottom line, the court decides to intervene in the agency's determination.[77]

---

[74] See the discussion in Part II text after note 45 *supra.*

[75] *Cf.* Strauss, *supra* note 47, discussion of *Chevron* 'space' as opposed to *Skidmore* weight. See also Mark Seidenfeld, A Syncopated *Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes, 73 Tex. L. Rev. 83, 84 (1994) (stressing that while applying *Chevron* Step Two courts would defer to agency interpretation unless "wholly unreasonable"). See also Rossi, note 53 *supra* at 1142 (pointing to the fact that some scholars argue that *Chevron* Step Two "is so lenient that it is almost meaningless"); Ronald Levin, The Anatomy of Chevron: Step Two Reconsidered, 72 Chi.-Kent L. Rev. 1253, 1261 (1997) (noting that as of 1997 the Supreme Court had never struck down an agency interpretation by relying squarely on *Chevron*'s step two). But see Rossi, *id.* at note 186 (pointing to some exceptions in the case law).

[76] *c.f* Lisa Schultz Bressman, HOW *MEAD* HAS MUDDLED JUDICIAL REVIEW OF AGENCY ACTION, 58 *VAND. L. REV.* 1443, 1446 (2005) ("While *Chevron* deference means that an agency, not a court, exercises interpretive control, Skidmore deference means just the opposite."); Hetz, *supra* note 4 at 1880 ("Under *Skidmore*, at the end of the day the decisionmaker is the court… Under *Chevron*, the decisionmaker is the agency…").

[77] For the discussion of the limitations of empirical evidence in this respect see note 81 *infra*

I should emphasize that I do not claim, of course, that the categorical division here identified between *Chevron* and *Skidmore* as representing two distinct modes of deference is reflected in every court case that applied these standards.[78] Nor do I suggest that, at the bottom line, the application of one standard or another necessarily yields different outcomes at the bottom line of litigation. Standards of judicial review (and modes of deference accordingly) are notorious for being malleable, ambiguous and indeterminate.[79] Given the vague and uncertain nature of verbal formulas aiming to represent modes of deference, some skepticism as to the true relations between any such formula and real life, bottom line, results, is almost inevitable.[80] Likewise, it is almost inevitable that judges would differ, disagree and argue about the application of these modes of deference, even when the do agree about the standard that should be applied.[81] Accordingly,

---

and text.

[78] Indeed, in various cases, courts applying *Chevron,* exerted strong deference demonstrated by little effort to closely examine the content-based considerations underlying agencies' determinations of law and policy (See *e.g. Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680 (1991) (deferring to the agency's interpretation simply because the relevant statutory provisions of the Black Lung Benefits Act "produced a complex and highly technical regulatory program" that "require[d] significant expertise" to administer, (*id.* at 697) (and see also *Helen Mining Co. v. Elliott,* 859 F.3d 226, 238 (3d Cir. 2017)(same)); *National Railroad Passenger Corp. v. Boston & Maine*, 503 U.S. 407 (declaring the agency's interpretation "permissible" simply because it was "not in conflict with the plain language of the statute." (*id.* at 417-18); *Yellow Transportation, Inc. v. Michigan*, 532 U.S. 36 (2002) (deferring to the agency's interpretation on the basis of cursory reading of the statute and stating that the relevant subprovision did not "foreclose" the agency's approach). This deferential approach, however, was not consistent over all cases that applied *Chevron,* as judges continued to disagree over the term of the doctrine's application, see Bednar & Hickman, *supra* note 4 at 1406-1407.

[79] See *e.g.* Universal Camera Corp. v. NLRB, *supra note* 7 at 489 (per Justice Frankfurter)("Since the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words, new formulas attempting to rephrase the old are not likely to be more helpful than the old."); Bednar & Hickman, *supra* note 4 at 1444 ("standards of review are not bright-line rules, nor do they even represent fixed points on an attitudinal continuum. Rather, they are malleable."); Kunsch, *supra* note 48 at 15 (same); DAVIS, *supra* note 65, § 29:2 (discussing standards of judicial review as "typically vague, abstract, uncertain, and conflicting".

[80] See *e.g.* Eskridge & Baer, *supra* note 2 at 1120 (noting that "Contrary to the conventional wisdom, *Chevron* is not the alpha and the omega of Supreme Court agency-deference jurisprudence."); Bednar & Hickman, *supra* note 4 at 1445-46 (discussing the inconsistencies in the application of *Chevron* doctrine). For a discussion of the importance of deference regimes from legal-realist point of view see Masur & Quellette, *supra* note 2, at 658-59 ("legal realists who believe that judicial outcomes are determined primarily by the facts may be skeptical of the relevance of deference regimes.").

[81] See note 68 *supra* and see also Bednar & Hickman *id.* at 1445 (noting that given the vagueness and complexity of Chevron and the fact that it has been applied in thousands of

any attempt to analyze and measure the impact of the application any such standards on actual outcomes in litigation from empirical, quantitative perspective is doomed to encounter serious conceptual and methodological difficulties.[82]

---

cases by different courts regarding different situations such inconsistency in application "is both understandable and predictable").

[82] Several empirical studies were conducted to test the impact of *Chevron* and *Skidmore* doctrines on the outcomes of litigation challenging administrative decisions in the federal courts. The findings of these studies varied. Some studies of the Supreme Court decisions suggested that the different between the two standards was marginal (see Eskridge & Baer, *supra* note 2 at 1142 and table 15 *id.*; See also Thomas J. Miles & Cass R. Sunstein, Do Judges Make Regulatory Policy? An Empirical Investigation of *Chevron*, 73 *U. Chi. L. Rev.* 823, 825–26 (2006); and see Pierce, *supra* note 49 at 83–84 (summarizing the outcomes of different studies). Studies of outcomes of litigation in the circuit courts suggest that, in general, affirmance rates under *Chevron* tend to be higher than under *Skidmore*, (see Kent Barnett & Christopher J. Walker, CHEVRON IN THE CIRCUIT COURTS, 116 *Mich. L. Rev.* 1, 6 (2017)(("… agency interpretations were significantly more likely to prevail under *Chevron* deference (77.4%) than *Skidmore* deference (56.0%) or, especially, de novo review (38.5%)."); Barnett & Walker, *supra* note 72 at 22 (finding agency win rates in circuit courts significantly higher under Chevron Step-two than under Skidmore). However, other studies have noted that these differences do not yield conclusive evidence that the choice of standard of review is a detriment to outcomes in litigation (see Pierce *id.* at 85 (summarizing the results of different studies and concluding that "With one notable exception, the studies suggest that a court's choice of which doctrine to apply in reviewing an agency action is not an important determinant of outcomes in the Supreme Court or the circuit courts."). There are several reasons, however, to doubt whether empirical evidence regarding rate of reversals by the courts can serve as meaningful (let alone conclusive) evidence for the true difference between those standards of deference. First, as noted above, 'reversal' does not tell much about 'deference' as much as approval of agency determinations does not tell us much about actual deference (see *e.g.* Raso & Eskridge, *supra* note 4 at 1736 (2010) ("…[A]pplying a deference *regime* does not require a judge to *defer."*) and see note 27 and accompanying text). Second, all empirical studies that tested the impact of standards of review based their findings on the assumption that when judges *say* that they apply a certain standard they actually apply this standard in reality. This assumption is far from being self-evident. It may well be the case that judges may proclaim they apply a certain standard of review but in reality apply a different standard (or do something else altogether). This may be done knowingly, due to political or strategic considerations (See Lee Epstein & Eric A. Posner, THE DECLINE OF SUPREME COURT DEFERENCE TO THE PRESIDENT (Univ. Chicago Working Paper (March 2017) ("There is some evidence that the *Chevron* doctrine has been applied opportunistically—when a majority of the Court agrees with the president and not when it disagrees with him.") See also Linda R. Cohen & Matthew L. Spitzer, Judicial Deference to Agency Action: A Rational Choice Theory and An Empirical Test, 69 *S. Cal. L. Rev.* 431 (1996); Eskridge & Baer, *supra* note 2 at 1091; Miles & Sunstein *id.* at 825–26 (providing substantial evidence that *Chevron* is invoked opportunistically in some cases, and that judicial ideology plays a role.). This can also be done unknowingly or inadvertently. Due to the complexity and indeterminacy of these standards and the lack of sufficient guidance by the Supreme Court in this respect (see *e.g.* Schultz, *supra* note 71, at 1445 (discussing the inconsistency and unpredictability in the application of *Chevron*); Christine Kexel Chabot, SELLING *CHEVRON*, 67 *Adm. L. Rev.* 481, 491–92 (2015) (same); Bednar & Hickman, *supra* note (noting that "Some members of the Supreme Court continued to rely on the contextual factors outlined in the Court's pre-*Chevron* jurisprudence, even as they applied *Chevron*'s two-step framework"). In addition, there are serious methodological constraints on the ability to draw valid conclusions as to the

Those difficulties notwithstanding, it is still important to analyze the true nature of each of these two central doctrines of judicial deference. The argument here presented does not aim to provide that the proposed distinction between the two modes is reflected in any case in which the courts applied *Chevron* or *Skidmore*. Rather, I argue that this is the distinction that *should* be made, if we seek to make sense of these two doctrines. From analytical point of view, there are two distinct options that the reviewing court faces when called to choose the relevant mode of deference. The choice between these two distinct options depends on the function of the content-independent considerations within the deferrer's decision-making process. Accordingly, it is beneficial to use these two categories as the key for contemplating this process.

To be sure, it is not always easy to extract from judicial opinions what was the true mode of deference applied by the court in a given case. And indeed, courts may sometimes (knowingly or inadvertently) mix between these two models, gear towards one mode at one point of the analysis and then revert to the other at another point, or be inconsistent regarding the choice between them within in any other way. [83] These practical difficulties, however, do not diminish the value of this fundamental distinction as a key to understanding the process of review.

The current analysis points to the importance of the decision which of the two standards of review should be applied by the reviewing court. The question when and under what circumstances the reviewing court should apply each of the different standards of review (also known as '*Chevron* Step Zero') has been the subject of voluminous discussions for courts and academics alike.[84] The answer to this question may be influenced by numerous arguments and considerations and can be discussed from a variety of constitutional, utilitarian, strategic, practical

impact of different standards of review and to compare them. For example, it is difficult to measure and control for the possible reaction of administrative agencies to judicial policy in this respect (see *e.g.* Barnett & Walker, *id.* at 43 (suggesting that rule drafters may become more aggressive when operating under the assumption that *Chevron* standard would be applied); Christopher J. Walker, *CHEVRON* INSIDE THE REGULATORY STATE: AN EMPIRICAL ASSESSMENT, 83 Fordham L. Rev. 703, 722–25 (2014) (same). In any case, the current analysis focuses exclusively on the differences between the two standards on the analytical differences, not on any hypothesis regarding the influence of such differences on judicial behavior on the empirical level.

[83] See references in not 79 *infra.*

[84] For an overview see Merrill & Hickman, *supra* note 61 at 873–89; Cass R. Sunstein, *Chevron*, *supra* note 53 at 207–31. See also other references in notes 53 and 64 *supra*.

and even historical points of view.[85] These considerations are far beyond the scope of the current discussion. My purpose here is only to clarify the analytical framework within which this decision takes place, which may bear influence on the policy choices in this respect.

When making the 'Step Zero' decision one should take into account this difference in nature between the two standards. Since the main difference between them is *the place, function, and importance of content-independent considerations*, one should accommodate the legal analysis proceeding the choice between them accordingly. That is, one should bear in mind that according *Chevron* deference to a given administrative determination means, in essence, according (almost) conclusive weight to some content-independent considerations (such as the congressional intent underlying the delegation of power to the agency see below). Thus, the relevant policy question should be whether, and to what extent, there are valid justifications to accord such decisive weight to these content-independent considerations in the relevant administrative settings.

Likewise, when the court decides to forgo *Chevron* deference in favor of the weaker deference of *Skidmore*, it should bear in mind that by so deciding, this means that the following process of decision-making would be devoid of according any special status to content-independent considerations. A good illustration of the above is the Supreme Court's decision in *US v. Mead Corp.*[86] There, the Court emphasized that *Chevron* deference should be accorded to agencies' interpretative determinations only in circumstances in which "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law".[87] This means that the Court viewed *clear congressional mandate* to an agency to make determinations that carry the force of law,[88] as a strong enough

---

[85] For a discussion of the considerations underlying the choice of deference doctrines see *e.g.* Merrill & Hickman *id.* at 860–62 (discussing political accountability, expertise and uniformity in federal law as possible rationales for such a judicial choice); Sunstein, *supra* note 4 at 2087–90 (discussing regulatory effectiveness and flexibility in this respect); Raso & Eskridge, *supra* note 4 (discussing different models of judicial behavior in this respect). See also John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretation of Agency Rules, 96 *Colum. L. Rev.* 612, 623–24 (1996) (discussing *Chevron* as a "constitutionally-inspired canon of construction").

[86] 533 U.S. 218 (2001).

[87] *Id.* at 229 (citing *Chevron,* 467 U.S., at 844).

[88] Such determinations are, as the Court emphasized, cases in which Congress authorized the agency "to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed" (*id.* at 229, citing *EEOC v. Arabian American Oil Co.,* 499 U.S. 244, 257, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991)).

content-independent consideration to accord *Chevron*-type deference to such agency determinations. To the contrary, other content-independent considerations, such as the agency's expertise on the subject matters under its responsibility, were not viewed by the Court as strong enough reasons to accord its determinations such strong (AD-type) deference.[89]

Accordingly, such considerations serve as factors that courts should weigh, within the balancing process under *Skidmore* deference.[90] They do not, however, carry the status of strong preliminary considerations that would justify avoidance by courts of entering a balancing-type analysis of all relevant content-based and content-independent considerations (as under the AD mode of deference). The question of whether or not the Court's position in *Mead* reflects a sound judicial policy, is subject to a debate that is beyond the scope here.[91] The current analysis introduces an analytical framework within which such discussions should be conducted to clarify the meaning of each choice in this respect.

B. The Nature of *Chevron's* Two Steps

As noted above, *Chevron*'s 'formula' divides the review process into two separate steps.[92] Despite its seemingly plain language, the meaning of *Chevron* test is far from being clear. Ever since it was presented, the content of *Chevron's* formula and each of its components have been the subject to different interpretations and ample controversies have arisen as to their meaning.[93] One such notable controversy refers to the

[89] See *e.g. King v. Burwell,* 135 S. Ct. 2480 (2015) (in which the Court stated that in cases of deep economic and political significance that are central to the statutory scheme "had Congress wished to assign that question to an agency, it surely would have done so expressly" (quoting *Utility Air Regulatory Group v. EPA,*134 S.Ct. 2427, 2444, 189 L.Ed.2d 372 (2014)). But *cf. Barnhart v. Walton,* 535 U.S. 212 (2002) (in which the Court provided a list of seemingly content-independent, but diverse, considerations ("**…**the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time…") that justified an accordance of *Chevron* deference.). See also Christopher J. Walker, TOWARD A CONTEXT-SPECIFIC CHEVRON DEFERENCE, 81 *MO. L. REV.* 1095, 1100 (2016) (reading the Court's recent cases to imply that "*Chevron* deference does not apply to certain major questions unless there is clear congressional intent.")

[90] See text near note 54 *infra.*

[91] See *e.g.* Justice Scalia's dissent in *Mead, id.* at 241. ("The Court has largely replaced *Chevron,* in other words, with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect…)")

[92] See note 5 *supra* and the discussion near in text near note 64 above.

[93] See references at note 4 *infra*.

distinction between Chevron's two steps.[94] In a provoking article, Stephenson and Vermeule have argued that *Chevron* analysis contains in essence only one step and not two.[95] This is because both *Chevron* steps refer to the question of the soundness of the agency's interpretation of law. In Step One the question is whether the agency interpretation is "contrary to clear congressional intent", and in Step Two the question is whether the agency interpretation is a "permissible construction of the statute."[96] Accordingly, as goes the argument, Step One is "nothing more than a special case of Step Two", and therefore the distinction between the two steps collapses. [97]

The cornerstone of this unitary understanding of *Chevron* is the assumption that in both steps the court reviews interpretative determinations by the agency. If this were the case, the argument would seem to carry some intuitive appeal.[98] This assumption, however, stands in contrast with the mainstream understanding of *Chevron*. Notwithstanding the fact that the language of Justice Stevens' famous formula deals with agencies' interpretation (or construction) of the law,[99] ordinary understanding of this formula, by both courts and commentators, is that in *Chevron* Step Two, the reviewing court examines not only agency determinations of law but also (and even

---

[94] It should be noted in the proliferated literature on *Chevron* there were suggestions that *Chevron* has *more* than two steps. In addition to the well-known argument that *Chevron* contains a preliminary stage (Step Zero) (see text and note 73 *supra*) it was also suggested that there is an additional stage in the analysis between Steps One and Two, see Daniel J. Hemel & Aaron L Nielson, "*CHEVRON* STEP ONE-AND-A-HALF", 84 Un. Chi. L. Rev. 757 (2017); Coglianese, *supra* note 2 at 106 ("Before judges can reach the second floor, where *Chevron* deference takes hold, they must ascend a staircase comprising several further steps of structured inquiry." See also at 122–5 *id.,* describing six interstitial steps of *Chevron*). The discussion here will focus only on the two main steps of *Chevron*.

[95] See Matthew C. Stephenson & Adrian Vermeule, *Chevron* Has Only One Step, 95 Va. L. Rev. 593 (2009) (hereinafter Stephenson & Vermeule); See also Zaring, *supra* note 50 at 157 ("I think Stephenson and Vermeule are probably correct…")

[96] See Stephenson & Vermeule, *id.* at 599 (citing 467 U.S. 837 at 843).

[97] *Id.* And see also 1 Richard J. Pierce, Jr., Administrative Law Treatise 170–71 (4th ed. 2002); see also Levin, *supra* note 70 at 1282–83 (noting how judicial opinions that invalidate an agency's interpretation under Step Two could easily have been written as Step One opinions); Clark Byse, Judicial Review of Administrative Interpretation of Statutes: An Analysis of *Chevron*'s Step Two, 2 Admin. L.J. 255, 256 and note 10 *id.* (1988) ("[O]ne could, with considerable logic, conflate the two steps of *Chevron* into one ... because if the intent of Congress is clear, a nonconforming interpretation would necessarily be unreasonable.").

[98] But see Re, *supra* note 68 at 608–18 (explaining that in Step One the question is whether the agency's interpretation is *mandatory,* while in Step Two the question is whether the agency's construction is *reasonable*, and pointing to the fact that—as a logical matter—these two questions are distinct).

[99] See *Chevron* supra note 5.

mainly) administrative policy determinations.[100] In fact, one of *Chevron*'s most notable innovations was the recognition that the line between legal interpretation and administrative policymaking is blurred, as "the resolution of ambiguities in statutes is sometimes a question of policy as much as it is one of law, narrowly understood."[101] Accordingly, both courts and commentators equated judicial analysis under *Chevron* Step Two to the traditional 'Arbitrary and Capricious' standard of review under Sec. 706 of the APA.[102]

---

[100] In *Chevron* itself the Court referred to the analysis of Step Two as a reasonableness analysis in a number of places; see *Chevron,* id. at 844, 845, 865, 866 and see Levin, *supra* note 70 at 1260.

[101] See Sunstein, *supra* note 4 at 2086. See also H. Silberman, *CHEVRON*—THE INTERSECTION OF LAW & POLICY, 58 *Geo. Wash. L. Rev.* 821, 823 (1990) ("[W]hoever interprets the statute will often have room to choose between two or more plausible interpretations. That sort of choice implicates and sometimes squarely involves policy making"); Evan J. Criddle, Chevron's *Consensus*, 88 B.U. L. REV.1271, (2008) at 1286 ("Administrative agencies' superior experience and expertise in particular regulatory fields offers a ... justification for *Chevron* deference"); Jeffrey A. Pojanowski, WITHOUT DEFERENCE, 81 *Mo. L. Rev.* 1075, 1085 (2016) ("Part of *Chevron's* justification is that resolving statutory uncertainty implicates policy choices.")

[102] See, e.g., *Judulang v. Holder*, 132 S. Ct. 476, 483 n.7 (2011) ("[U]nder Chevron Step Two, we ask whether an agency interpretation is 'arbitrary or capricious in substance.'") (citation and internal quotation marks omitted); *AT&T Corp. v. Iowa Utils Bd.*, 525 U.S. 366, 391–92 (1999); *Chamber of Commerce of the U.S. v. FEC*, 76 F.3d 1234, 1235 (D.C. Cir. 1996) ("[T]he second step of *Chevron* . . . overlaps with the arbitrary and capricious standard"); *Astrue v. Capato* ex rel. *B.N.C.*, 132 S.Ct. 2021, 2034 (2012) (deferring under Step Two because relevant agency regulations were "neither arbitrary or capricious in substance, [n]or manifestly contrary to the statute" (alteration in original; internal quotation marks omitted) (quoting *Mayo Found. for Med. Educ. and Research v. United States*, 131 S. Ct. 704, 711 (2011))); *Mayo*, 131 S. Ct. at 711 ("[U]nder [*Chevron* step two] we may not disturb an agency rule unless it is 'arbitrary or capricious in substance, or manifestly contrary to the statute"' (citations omitted)). *Encino Motorcars, LLC v. Navarro,* 136 S. Ct. 2117, 2125 (2016) (blending *Chevron* and *State Farm* analysis. See also Levin, supra note 70 at 1263–66 (discussing the development of Step Two in the case law as arbitrariness review); Silberman, *id.* at 827 ("It may well be that the second step of *Chevron* is not all that different analytically from the APA's arbitrary and capricious review"); Kenneth A. Bamberger & Peter L. Strauss, *CHEVRON*'S TWO STEPS, 95 *VA. L. Rev.* 611, 621 (and note 39 *id.*) ("Courts and commentators have converged on an emerging consensus that the 'arbitrary, capricious, and abuse of discretion' standard set forth in Section 706(2)(A) supplies the metric for judicial oversight at Chevron's second step"); M. Elizabeth Magill, Step Two of *Chevron v. Natural Resources Defense Council*, in A Guide to Judicial and Political Review of Federal Agencies 85, 99 (John F. Duffy & Michael Herz eds., 2005); see also 1 Richard J. Pierce, Jr., Administrative Law Treatise §7.4, at 453 (4th ed. 2002); Levin, supra note , at 1268; Peter L. Strauss, Overseers or "The Deciders"—The Courts in Administrative Law, 75 U.Chi.L.Rev. 815, 826 (2008); Michael Herz, *CHEVRON* IS DEAD; LONG LIVE *CHEVRON*, 115 *Colum. L. Rev.* 1867, 1873 (2015) ("What exactly happens in Step Two is disputed, though the dominant judicial and academic formulation is that there, the court asks (a) whether the statute clearly precludes the agency's reading (in which case the inquiry largely, if not completely, overlaps with step one) and (b) whether the agency's determination is arbitrary and capricious.")

For the purpose of the current analysis, however, I need not take side in the debate concerning the exact nature of *Chevron* Step Two test. This is because, according to the theoretical framework here presented, in either case, *Chevron* should be understood as a typical AD mode of deference. As such, any judicial analysis under *Chevron* is analytically divided into two separate stages.

As above noted, mainstream understanding of Step Two regards it as containing a reasonableness analysis exerted by the court with regard to administrative policy determinations or to administrative determinations that combines legal interpretation with policymaking.[103] To the extent that this is the correct understanding of *Chevron*, it is plain that *Chevron* exemplifies a typical AD process of deferential review by the court. As such, it is composed of two separate stages. In the first stage, the court is called to answer a seemingly simple question: whether the intent of Congress is clear.[104] The answer to this question is based exclusively on analysis of content-independent considerations (i.e., the intent of Congress as extracted from the statutory language and other interpretative tools).[105] Any content-dependent considerations (such as the Court's opinion on the agency's policy preferences etc.) are completely irrelevant to the analysis at this stage. The product of the judicial analysis at Step One is straightforward. Either the court decides that the congressional intent is clear (and thus it approves or reverse the agency decision) or it identifies ambiguity in the statute and moves to Step Two accordingly. In Step Two, the court is required to conduct an on-the-merits inquiry, but only under the very deferential standard of reasonableness (which is, as is above explained, a threshold type of standard), in order to identify the need for exception to the deferential treatment.[106] This means that in Step Two (contrary to Step One) content-based considerations may be relevant, but only to the extent that they render the administrative policy determinations unreasonable.

It should be noted that Stephenson and Vermeule were well aware that Chevron Step Two can be understood as directed to policy in its reasonableness analysis, but they rejected this possibility, arguing that under this understanding of *Chevron*, Step Two is identical to the Arbitrary & Capricious standard of review, which makes it redundant, See Stephenson and Vermeule, *supra* note 84 at 602–604. And *cf.* Coglianese, *supra* note 2 at 144–145 (arguing that Step Two is distinct from the Arbitrary & Capricious standard since it deals with 'interpretative reasonableness' while Arbitrary & Capricious standards refers to policy judgments).

[103] See note 90 *supra* and text.

[104] This question may, however, raise difficulties and controversies, see note 64 *supra.*

[105] See the discussion above at Part III, text near note 64–69.

[106] See text near note 69–70 above.

Let us now assume that—contrary to the mainstream view—Step Two focuses mainly (or exclusively) on agency determinations of law (i.e., interpretation). In the face of statutory ambiguity, the judicial analysis becomes much more complex than in the case of clear congressional intent. The reviewing court is required to bring into consideration some factors, not all of which are content-independent. For example, the court cannot completely avoid taking into account the correctness of the agency's interpretation on the merits, as well as policy implications or the practical outcomes of each interpretative option.[107] Sure enough, all this is done under the strict deferential standard of unreasonableness. Still, the role played by content-dependent considerations in such a case is not negligible, since such considerations may well be the ground on which the court would examine the reasonableness of the agency's determinations.[108]

Accordingly, it seems that even if we insist on 'hard line' separation between legal interpretations and policy determinations, there is no way to understand *Chevron*'s doctrine but as a typical AD mode of review that is composed of two—analytically distinct—phases. If we add to the above the fact that, in real life, such strict separation between legal interpretation and policy determination is difficult to make (if not completely impossible) and the fact that *Chevron* is celebrated for acknowledging this reality, then, obviously it becomes even less plausible to disregard the difference between the two phases of the analysis (and in accordance to the different role of content-based and content-independent considerations in each of them). That is, since in reality, administrative determinations of law and policy are often intertwined, there is much prudence in separating the judicial analysis into two distinct phases. One, in which strict legal interpretation of the statute would be in the center; and another, which would evaluate this mix of determinations of law and policy under the canons of deference.

---

[107] See *e.g. United States v. Eurodif S.A*., 555 U.S. 305, 314–19 (2009) (the court conducting an in-depth analysis of the reading of the Commerce Department of the Tariff Act of 1930 to reach the conclusion that the Department's reading is permissible under Chevron Step-Two); Household *Credit Services, Inc. v. Pfennig*, 541 U.S. 232, 239–42 (2004) (conducting a thorough interpretative analysis of the Truth in Lending Act to conclude that the agency's regulations adopted a reasonable reading of the law); *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 45–46 (2002) (interpreting the Intermodal Surface Transportation Efficiency Act of 1991 to conclude that the ICC interpretation was permissible under *Chevron* Step Two); *Mayo Foundation for Medical Education & Research v. United States* 131 S. Ct. 704, 715 (2011) (examining and dismissing plaintiff's interpretation to conclude that the IRS ruling consists a reasonable reading of the statute under *Chevron* Step Two).

[108] See references in note 96 *supra.*

Thus, there is no reason to assume that the language of *Chevron*'s formula, which solemnly espouses such a distinction, should be read otherwise.

To sum up this point: *Chevron* doctrine is based on the logic of AD deference. This logic is manifested by the division of the judicial analysis into two different phases. In the first phase, the court identifies the conditions for deference on the basis of some strong content-independent considerations (i.e., the existence of clear congressional intent). In the second stage, the court is called to apply this deferential standard, while exerting some (relatively minimal) review of various (content-dependent and content-independent) considerations – under the threshold requirement of reasonableness to identify the possibility of exceptions. Whether *Chevron* doctrine applies (at Step Two) purely to questions of law or to questions of policymaking, or to some combination of both—it should be understood as a two-step AD process of judicial scrutiny.

CONCLUSION

In this essay, I argued that one cannot understand the meaning of doctrines of deference without first studying the meaning of the very concept of deference. I suggested that the key for understanding this concept is by looking into the relations between deference and agreement (or disagreement) between the deferrer and the deferee. This investigation yielded a distinction between two distinct modes of deference: disagreement deference and avoidance deference. The distinction is based on the status and function of certain content-independent considerations within the process of decision-making by the deferrer.

This conceptual analysis served as an analytical framework to study and compare the two central doctrines of deference in administrative law: *Chevron* and *Skidmore.* It pointed to the categorical differences between these two doctrines and to the importance of the distinction between them. The jurisprudence of deference in administrative law is notorious for its elusiveness and indeterminacy. The analytical framework here presented would surely not provide the ultimate answers to all the difficult questions in this field. It can, however, serve as a useful starting point for a more systematic inquiry in this respect.