Judicial Review

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Chapter 4

Judicial Review

*Michael Herz*

The past year's developments with regard to judicial review of agency action have been important but not transformative. The federal courts have continued to wrestle with basic questions about the scope and availability of judicial review without making any abrupt or profound changes. (Note: this chapter covers only "Judicial Developments."

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PART I. SCOPE OF REVIEW

A. Chevron

The last year saw the usual large number of citations to and discussions of the Supreme Court's decision in *Chevron*, now 15 years old. No striking new ground was broken, but the courts' handling of the deference question had its interesting aspects.

1. When and Why Chevron Applies

In *United States v. Haggar Apparel Co.* a unanimous Supreme Court held that *Chevron* applies to the Court of International Trade in cases involving Customs Service regulations. In so holding, the Court reversed the Court of International Trade (CIT) and the Federal Circuit, both of

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* With the assistance of John Duffy.

1. Although various legislative proposals concerning judicial review have been considered, none have actually been adopted. The "administrative developments" category is by its nature inapplicable to this topic.


4. *Id.* at 1398. The case arose out of a dispute over customs duties on imported apparel; the regulations in question had to do with the customs classification of imported goods.
which had held that *Chevron* deference does not apply where a Customs Service regulation is challenged as inconsistent with statutory law. Beginning with a presumption that *Chevron* applies, absent some special indication that it should not, the Court rejected the argument that the CIT should not defer because the underlying statute granted it de novo review and the responsibility of reaching "the correct decision." There is no inconsistency between de novo review and *Chevron* deference; the regulations themselves establish legal norms that are *applied* by the reviewing court. As long as the regulation is valid under *Chevron*, the "correct decision," reached through de novo review, is the one dictated by the regulations.

*Haggar Apparel* could be viewed as a routine, unanimous decision refusing to recognize an exception to the *Chevron* principle, but it does indicate two important aspects of the Court's *Chevron* jurisprudence. Obviously, it shows the Court's continued commitment to the *Chevron* regime and disinclination to carve out exceptions from it.\(^5\)

More subtly, it is noteworthy that Justice Kennedy almost completely avoids references to the agency's "interpretation" or "construction" of the statute; he focuses instead on the regulations themselves as a source of law. That is, the Court's model is not one of the agency performing a quasi-judicial, interpretive task, but rather a quasi-legislative, law-making task. Furthermore, the Court stressed that the statute charges the Customs Service with the classification of imported goods, that it delegates to the Commissioner the authority to issue general regulations, and that the regulations themselves "establish legal norms." By explicitly tying deference to the rulemaking powers granted by statute, and not mere linguistic ambiguity, the Court took another step in identifying such powers as the basis for the *Chevron* doctrine.

In *National Federation of Federal Employees v. Department of the Interior*,\(^6\) the FLRA had ordered the Department of the Interior, as an employer, to bargain, at the union's request, over changes to the terms of the collective bargaining agreement while it was in force. The statute is

\(^5\) At least, disinclination to carve out official exceptions to it. It has often been observed that while the lower courts generally take *Chevron* seriously, the Supreme Court has been quite inconsistent in its application of *Chevron* deference. *See*, *e.g.*, RICHARD PIERCE, ET AL., *ADMINISTRATIVE LAW AND PROCESS* 379 (3d ed. 1999).

silent about such "midterm" bargaining; the relevant language simply says that a federal agency employer and a union representative "shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement," without saying when they shall do so. The D.C. Circuit had previously held that the statute required midterm bargaining; in this case, the Fourth Circuit held that the statute forbids it. In an opinion by Justice Breyer, a five-justice majority found that the statute was ambiguous, that *Chevron* applied, and that the FLRA was free to require or not to require midterm bargaining (or bargaining over midterm bargaining). Four justices, led by Justice O'Connor, argued that the statute unambiguously precluded midterm bargaining, and that even were it ambiguous, the agency's interpretation was unreasonable.

Whether the statute is ambiguous is not worth trying to figure out (though one might observe, for the umpteenth time, that if the D.C. Circuit thinks a statute clearly means X and the Fourth Circuit thinks it clearly means Y, it must be ambiguous). Two points about the case do bear mention, however. First, in invoking *Chevron*, Justice Breyer, like Justice Kennedy in *Haggar Apparel*, emphasized not just the ambiguity of the statute, but the fact that the agency had been expressly delegated rulemaking, adjudicatory, and policymaking powers. Second, although the Court found that the agency's interpretation was reasonable, it nonetheless remanded to the agency for reconsideration. The agency had concluded that employers must engage in, or bargain about, midterm bargaining in the wake of the D.C. Circuit's decision that the statute so required. That is, the agency saw its hands as tied. In fact, the Court concluded, the agency could have gone either way. In these circumstances, the agency had to be allowed the opportunity to reconsider and reach its own conclusion, to exercise the judgment and discretion the statute affords it. Under the circumstances, remand was clearly the appropriate order.

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9. See Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 228–30 (1992). One notable aspect of this part of the opinion was that the agency insisted that it had exercised its own independent judgment. The Court disagreed; as it read the background materials, the agency had felt constrained by the D.C. Circuit's decision. Though this rejection of the agency's assurances as to its own
INS v. Aguirre-Aguirre\textsuperscript{10} was a unanimous decision reversing the Ninth Circuit, handed down a mere two months after it was argued. The legal issue involved the standard for suspending the deportation of an alien whose political opinions would put his life in danger were he returned to his native country, but who had committed a serious nonpolitical crime before coming to the United States. The Board of Immigration Appeals sought to deport Aguirre-Aguirre, who had engaged in what he said was politically motivated criminal activity in Guatemala before coming to the United States; the Ninth Circuit set aside the deportation order, reading the statute to be much more lenient with regard to the disqualification by virtue of prior criminal activity. The Supreme Court reversed, invoking \textit{Chevron} and chastising the court of appeals for ignoring it. As in \textit{Haggar Apparel} and \textit{National Federation of Federal Employees}, the Court stressed the express delegation of authority to the agency rather than the ambiguity of the statute as the basis for deference. Along the way, it observed that "judicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'"\textsuperscript{11} Oddly, having rebuked the court of appeals for its failure to defer, the Court then met the Ninth Circuit on its own terms—that is, it rejected the Ninth Circuit’s interpretation of the statute based on its own reading thereof, without relying on the agency’s interpretation.

2. \textit{Jurisdictional Questions}

One long-standing unsettled issue is whether \textit{Chevron} deference applies to an agency’s interpretation of its own jurisdiction.\textsuperscript{12} The reasoning process may look odd, it is a straightforward application of the basic \textit{Chenery} principle that an agency decision must be upheld on the rationale provided at the time it was made rather than on a post-hoc rationalization.

\textsuperscript{10} 526 U.S. 415 (1999) (9–0) (Kennedy, J.). \textit{Aguirre-Aguirre} is also discussed herein in \textit{Immigration and Naturalization} (Part I. A.)

\textsuperscript{11} 526 U.S. at ___, 119 S. Ct. at 1445 (quoting INS v. Abudu, 485 U.S. 94, 110 (1988)).

\textsuperscript{12} See Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 380–82, (1988) (Scalia, J., concurring); \textit{compare} Herz, \textit{supra} note 9, at 216–21 (arguing that \textit{Chevron} applies to agencies’ determination of their own
Supreme Court has never squarely ruled on this question, and it dodged it again last term in *California Dental Ass’n v. FTC.*\(^{13}\) One issue in the case was whether the Federal Trade Commission’s jurisdiction—which, under the relevant statute, extends to “corporations”—reaches nonprofit entities. The FTC took the position that it did and urged the Court to defer to that interpretation. In an opinion by Justice Souter, unanimous in this section, the Court noted that it had no need to determine whether deference was appropriate since the FTC’s interpretation was “clearly the better reading of the statute under ordinary principles of construction.”\(^{14}\) While one might quarrel as to whether *Chevron* really drops out because one of two possible readings is merely “clearly better,”\(^{15}\) the Court’s approach is simple enough—this was a step one case. Thus, the question of whether *Chevron* applies in this setting remains officially unresolved.

In *AT&T Corp. v. Iowa Utilities Board,*\(^{16}\) the Supreme Court considered two basic questions: a jurisdictional challenge to the FCC’s rulemaking authority and a direct attack on particular regulations. In reviewing the regulations themselves, the majority and the dissenter invoked *Chevron* more than once. However, in considering the jurisdictional question, neither the majority nor the dissenter mentioned *Chevron,* used the term “deference,” or even paused to consider whether the FCC’s own understanding of its authority might be relevant. The Court considered the issue entirely on the basis of its own understanding of the statute and (in the case of Justice Breyer in dissent) its history and purpose. The silence on the deference question in this part of the opinion is particularly striking not only because *Chevron* turns up later in the opinion, but because the government had explicitly argued (albeit in a single paragraph after many

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14. Id. at 1610.

15. See, e.g., Laurence H. Silberman, *Chevron—The Intersection of Law and Policy,* 58 GEO. WASH. L. REV. 821, 826–27 (1990) (admonishing that merely being able to identify the better of two readings, which will always be possible, does not keep the court in step one).

16. 525 U.S. 366, 119 S. Ct. 721 (1999) (Scalia, J.). The decision is discussed in more detail at infra notes 27–33 and accompanying text. It is also discussed herein in *Ratemaking* (infra 79–80) and in *Communications* (infra 193).
pages of direct statutory interpretation) that deference was due with regard to the Commission’s understanding of its jurisdiction. 17

Indeed, Justice Breyer, who joined a dissent by Justice Thomas but was here writing only for himself, not only ignored *Chevron* but invoked a different canon: “The most the FCC can claim is linguistic ambiguity. But such a claim does not help the FCC, for relevant precedent makes clear that, when faced with ambiguity, we are to interpret statutes of this kind on the assumption that Congress intended to preserve local authority.” 18 This comment implies two possible underlying *Chevron* principles. Perhaps *Chevron* does not apply to jurisdictional questions. Alternatively, when *Chevron* conflicts with another interpretive canon, it yields.

In any event, the Court may be unable to avoid this question much longer. It has granted certiorari in *FDA v. Brown & Williamson Tobacco Corp.*, 19 concerning the FDA’s jurisdiction to regulate tobacco and tobacco products as “drugs” or “devices.” In a 1996 regulation, the agency asserted such jurisdiction and imposed rules limiting the sale of tobacco and tobacco products to minors and restricting the advertising of such products. The Fourth Circuit struck down the regulations last year. 20 Its opinion cites *Chevron* frequently but grudgingly. It emphasizes step one and the *Chevron* opinion’s reference to “the ordinary tools of statutory construction.” Invoking those tools—which for the Fourth Circuit meant a wide-ranging examination not just of text, but of related provisions in the Act, statutory purpose, legislative history, related statutes, and administrative history—the court concluded that the Act did not grant the FDA authority to regulate tobacco products. It also explicitly observed that “ascertaining congressional intent [that is, deciding the case in step one]

17. *Id.*, Opening Brief for the Federal Petitioners at 42 (April 3, 1998) (“The jurisdictional question presented here is a question of authority to implement federal law and, at bottom, of the need for nationally consistent standards to ensure effective implementation of federal law. That question, if left unresolved by the relevant statutory provisions, should be answered by the agency in the best institutional position to answer it: the same agency to which Congress has always turned for interpretation of federal telecommunications law.”).

18. 119 S. Ct. at 749–50 (Breyer, J., dissenting).


is of particular importance where, as here, an agency is attempting to expand the scope of its jurisdiction." The opinion is a good example of a court wary of deference and applying a very broad step one.

The Fourth Circuit's opinion in the *Brown & Williamson* case can be contrasted with the D.C. Circuit's treatment of a different jurisdictional issue in *National Mining Association v. Army Corps of Engineers*. In the so-called "Tulloch Rule," the Corps of Engineers had defined the "discharge of dredged material," which requires a permit under Section 404 of the Clean Water Act, to include the redeposit of small amounts of dredged material that fall back into the water when dredging is taking place. A district court had set aside the regulation, and the court of appeals affirmed. Although it noted that *Chevron* applies and that "[t]he 'jurisdictional' character of the issue has no effect on the level of deference," the regulation conflicted with the unambiguous terms of the statute.

Where do these cases leave us? Officially, the application of *Chevron* to questions of jurisdiction remains an open question, with language in opinions cutting both ways. However, in practice the courts' tendency is to resolve such issues on their own, explicitly or implicitly staying within step one. This may reflect an intuition that jurisdictional issues are more likely to have been resolved by Congress, and less likely to have been left to the agency itself to resolve—in other words, that ambiguity as to jurisdiction does not amount to a delegation to the agency in the way similar ambiguity on a matter of regulatory policy might.

It is certainly possible that when it decides *Brown & Williamson*, the Supreme Court will find it unnecessary to determine whether *Chevron* applies to jurisdictional issues by ruling that the outcome would be the same whether it defers or not. However, it seems more likely that the tobacco case will be the occasion for final resolution of this question.

21. *Id.* at 162.
23. *Id.* at 1403.
24. The Clean Water Act defines a "discharge" as "the addition of any pollutant to navigable waters." 33 U.S.C. §1362(12) (emphasis added). The court concluded that the incidental fallback of debris as part of a dredging operation, which involved the net withdrawal of material, simply could not be characterized as the "addition" of anything.
3. Reversing the Agency in Step Two

In general, one of two things happen in a *Chevron* case: either the court concludes that the statute contains the answer, in which case the agency’s interpretation becomes irrelevant, or it determines that the statute does not, in which case the agency’s interpretation becomes, for all intents and purposes, dispositive. Thus, while step one cases may uphold or set aside an agency interpretation, the step two case striking down a regulation as unreasonable is fairly rare. However, *AT&T Corp. v. Iowa Utilities Board* was a such a case.

This case involved a host of challenges to FCC rules implementing the complex and confusing Telecommunications Act of 1996. The Act fundamentally restructured local telephone markets, ending the monopolies historically enjoyed by local exchange carriers (LECs) and imposing on them an obligation to share their networks with competitors so as to facilitate market entry. The rules under review concerned what access to their networks the LECs had to provide to competitors. Ruling 8–1 on the substantive issues, the Court upheld most but not all of the FCC’s requirements.

The statute requires local carriers to make available to competitors “network elements,” that is, “feature[s], function[s], and capability[ies] . . . provided by means of a facility or equipment used in the provision of a telecommunications service.” The FCC identified operator services, directory assistance, operational support systems, and “vertical switching functions” such as caller I.D., call forwarding, and call waiting as features that LECs must provide to competitors. The question was whether these fell within the statutory definition of “network elements.”

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26. A recent empirical study of court of appeals decisions citing *Chevron* found that agency interpretations were upheld 73 percent of the time. In the cases setting aside agency interpretations, 59 percent did so within step one; 18 percent found the statute ambiguous but held that the agency’s interpretation of it was unreasonable; 23 percent rejected the agency interpretation on a “reasonableness” test that combined steps one and two. Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. REG. 1 (1998).

27. 525 U.S. 366, 119 S. Ct. 721 (1999). The *AT&T* case is also discussed herein in *Ratemaking* (infra 79–80) and in *Communications* (infra 193).

Chevron—perhaps unnecessarily, given the clarity it found in the statute—the Court found the agency’s definition “eminently reasonable.”

The challenged regulation also allowed competitors “blanket access” to seven of these elements, with requests for access to additional elements to be determined case-by-case. The statute provides:

In determining what network elements should be made available . . ., the Commission shall consider, at a minimum, whether—

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

Thus, before requiring access to particular elements of a network, the Commission must determine that such access is “necessary” and that failure to provide such access would “impair” the competitor’s ability to compete or succeed in the market. In granting blanket access, the Commission’s theory was that the very fact that a competitor wants access establishes that access was “necessary” and that its denial would “impair.” The majority reasoned that this effectively writes Section 251(d)(2) out of the statute, allowing the determination of necessity and impairment to be made by the putative entrants rather than the Commission. Although the two terms are ambiguous, and although the Court was apparently willing to apply Chevron deference (although it does not mention Chevron directly in this part of the opinion), it nonetheless set aside the regulation because it did not reflect a reasonable interpretation of the statute:

We cannot avoid the conclusion that, if Congress had wanted to give blanket access to incumbents’ networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included § 251(d)(2) in the statute at all. It would simply have said (as the Commission in effect has) that whatever requested element can be provided must be provided.

29. 119 S. Ct. at 854.
31. 119 S. Ct. at 735. Justice Souter dissented on this point; Justice Breyer joined the majority opinion but also wrote separately. Justice Breyer’s opinion is not
There are three important points about *Chevron* to be drawn from this part of the decision. The first is self-evident: just because a statute is sufficiently ambiguous to bring a court into step two does not mean that the agency action will necessarily be upheld. Courts do sometimes find agency interpretations unreasonable.

The second point is subtler, but perhaps more important. It is this: the fact that Congress used ambiguous terms and did not decide everything does not mean it did not decide anything. Even with a highly ambiguous term, a reviewing court must determine what it "cannot mean, and some of what it must mean." A vague statute may support *many* readings; that does not mean it will support *any* reading. In *AT&T*, the Court quite properly avoided the trap of concluding that Congress decided nothing just because it did not decide everything. This is an important lesson for an advocate.

The third lesson lies in the way in which *Chevron*’s two steps ultimately collapse into one another. One can say that the FCC was unreasonable, or that it went beyond the boundaries of ambiguity, or that it conflicted with the statute—it all amounts to the same thing. Congress may have been unclear and indecisive in many ways, but it at least determined that a potential competitor cannot simply show up and say to the existing LEC: “Give me access to your network.” While the FCC had many regulatory options, it chose one that the statute actually foreclosed.

4. *Flip-Flops*

Most commentators agree that under *Chevron* deference is not diminished because an agency has changed its position over time. After all, *Chevron* itself accorded "*Chevron* deference" to a new EPA interpretation that reversed a prior, relatively long-standing position. Given *Chevron*’s

all that helpful in sorting out *Chevron* or the scope of judicial review generally. He cites the airbags case, which applied an arbitrary and capricious standard to an inadequately explained shift in agency position, invokes the Act’s basic purposes, acknowledges the need to grant the FCC substantial leeway in the exercise of its judgment, and implies that the FCC’s approach just is not very sensible. *Id.* at 753–54.


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premises, the age or consistency of an agency interpretation should have no bearing on its weight. 34 Nonetheless, courts continue to repeat pre-Chevron platitudes about the particular deference owed to long-standing interpretations. For example, Justice O’Connor did so last term in her dissent in the FLRA case. 35 Similarly, in the census case, in which the Department of Commerce adopted a reading of the statute at odds with its historical position, Chief Justice Rehnquist described the Department’s shifts and then observed: “In light of this history, appellants make no claim to deference under Chevron.” 36 For two reasons, the Chief Justice was too hasty in dismissing the applicability of Chevron. First, as noted, newly minted agency positions merit the same deference in step two as long-standing positions. Second, the Solicitor General had made “no claim to deference under Chevron” not because the agency’s position had changed, but because the position argued to the Court was articulated for the first time in the briefs in this litigation. 37 Chief Justice Rehnquist instead made it seem that the government was conceding that no deference is due any inconsistent

34. See Herz, supra note 9, at 197–98. To be precise, age and consistency are irrelevant in step two. They do affect the weight to be accorded an agency interpretation that is being consulted as one of “the ordinary tools of statutory construction” used within step one.


37. The section of the government’s reply brief cited by Chief Justice Rehnquist states: “Because the statutory analysis set forth in our briefs in this case is concededly a departure from prior Commerce and Justice Department positions, we have not invoked the principle that the Secretary’s interpretation of the Census Act is entitled to deference under” Chevron. United States House of Representatives, 119 S. Ct. 765, Reply Brief for the Appellants at 11, n.10 (emphasis added). It would seem that the government was invoking the reasonably well-settled principle that an agency interpretation that is first put forth during litigation does not merit deference. See Bowen v. Georgetown University Hospital, 488 U.S. 204, 212 (1988); but see Gardebring v. Jenkins, 485 U.S. 415, 429–30 (1988).
agency position—a stance that would be mistaken both strategically and legally.

If members of the Supreme Court seem hopelessly inconsistent with regard to whether flip-flops undermine an agency interpretation, judges on the courts of appeals are clearer on the matter. At least three court of appeals cases from the last year are careful to point out that new, changed interpretations receive full deference.\(^{38}\)

### B. Standard of Review

In *Dickinson v. Zurko*,\(^{39}\) the Supreme Court held that factual determinations of the Patent and Trademark Office (PTO) are to be reviewed under the generally applicable standards of judicial review set forth in the APA,\(^{40}\) rather than under the “clearly erroneous” standard that the Federal Circuit had long applied in patent cases. In a unanimous en banc opinion, the Federal Circuit had stuck to its test; the PTO had sought application of the (in theory more deferential) “substantial evidence” test of the APA. The Federal Circuit justified its clear error standard on the basis of the APA’s savings clause, which states that the APA does “not limit or repeal additional requirements . . . recognized by law.”\(^{41}\) The clear error standard, the Federal Circuit held, was an additional requirement of the “common law” that had been recognized by courts reviewing patent decisions prior to enactment of the APA.\(^{42}\)

In reversing, 6–3, the Supreme Court held that “common-law variations” to the APA’s “uniform approach to administrative action” could be grandfathered by the savings clause only where the evidence of the additional requirement is “clear,” which the Court defined as requiring “more than a bare preponderance of evidence.”\(^{43}\) The Court reasoned that because “[t]he APA was meant to bring uniformity to a field full of varia-

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38. Branch Banking & Trust Co. v. FDIC, 172 F.3d 317, 328 n.13 (4th Cir. 1999); Independent Bankers Ass’n v. Farm Credit Admin., 164 F.3d 661, 668 (D.C. Cir. 1999); City of New York v. Slater, 145 F.3d 568, 570 (2d Cir. 1998).
42. *In Re Zurko*, 142 F.3d 1447, 1457 (Fed. Cir. 1998) (en banc).
43. 119 S. Ct. at 1819.
tion and diversity,” “[i]t would frustrate that purpose to permit divergence on the basis of a requirement ‘recognized’ only as ambiguous.” The Court then surveyed the pre-APA cases reviewing decisions of the Patent Office and concluded that those cases did not reflect a “well-established” or “clear” standard of judicial review that was stricter than the APA’s standards. Chief Justice Rehnquist’s dissent argued that the Court owed deference to the Federal Circuit’s understanding of pre-APA law and rejected any heightened standard for determining whether there was in fact a pre-existing “requirement.”

Though hardly a watershed, the Court’s decision may be important in three ways. First, it does determine an unsettled issue of law: the default judicial review provisions found in the APA apply to the PTO, as they do to any other agency absent a more specific provision in another statute. The distinction between “clearly erroneous” and “substantial evidence” is fine in the extreme and is likely to make little practical difference. The Court itself described the difference as “subtle” and noted that it could find no case other than *Zurko* itself in which a reviewing court thought the different formulations would lead to a different outcome. As Ron Levin has pointed out, however, the patent bar (and the Federal Circuit, one might add) saw the case as highly significant, which “suggests . . . that a contrary result [in the Federal Circuit] would at least have been seen as a ‘signal’ that the court was moving toward a more deferential posture.” Of course, the contrary result from the Supreme Court, imposed upon the Federal Circuit, is less likely to result in a more deferential posture than would have been the case had the Federal Circuit adopted the APA standard on its own.

The second important aspect of the case is the Court’s narrow reading of Section 559. That section has never had much importance; the Court’s decision ensures that it is unlikely to develop much now. As noted, the Court placed strong emphasis on the need for uniformity and made clear that, at least as to the “otherwise recognized by law” prong of Section 559, the threshold of recognition is pretty high, along the lines of “clear and convincing evidence” rather than a mere preponderance. Thus, Section 559 can be used to supplement the APA only in situations where the additional

44. *Id.*
45. *Id.* at 1823.
requirements reflect well-settled, pre-APA law. Section 559's 15 minutes of fame may have passed.

The third important aspect of the case is the strong emphasis on uniformity across the federal administrative state. Whereas the Federal Circuit saw a shift in the standard as enormously disruptive within the world of patent law and emphasized the need for stability, the Court pointed to a countervailing policy concern: "The Federal Circuit's standard would require us to create § 559 precedent that itself could prove disruptive by too readily permitting other agencies to depart from uniform APA requirements." The opinion indicates a strong preference for consistent and uniform APA requirements.

PART II. AVAILABILITY OF REVIEW

A. Standing

The Supreme Court had no important standing decisions during the most recent term. The lower courts addressed standing issues with the usual frequency, but without especially notable discussions, results, or trends.

47. Zurko, 119 S. Ct. at 1823.
48. Department of Commerce v. U. S. House of Representatives raised the interesting question of whether the House of Representatives had standing to challenge the methodology for conducting the decennial census—which in turn becomes the basis for the allocation of seats in the House and the redrawing of district lines. The three-judge district court had held that the House did have standing, 11 F. Supp. 2d at 83–90, but the Court did not reach the question because other plaintiffs unquestionably had standing. Justices Stevens and Breyer would have ruled that the House does have standing given its interest in preserving its institutional integrity and the institutional interest in preventing its unlawful composition. 119 S. Ct. at 786–89 (Stevens, J., dissenting).
49. Interesting discussions of the prudential zone of interests requirement can be found in American Federation of Gov't Employees v. Cohen, 171 F.3d 460, 468–75 (7th Cir. 1999) (employees at government arsenal seeking to challenge Army's award of contracts to particular private contractors were not within zone of interests of procurement laws but were within the zone of interests of the Arsenal Act, which requires Army to have supplies produced by government facilities so far as possible), TAP Pharmaceuticals v. Dep't of
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In a recent article, Professor Richard Pierce points out that Supreme Court and court of appeals decisions regarding standing are almost completely predictable according to the ideology or political party of individual judges. That is, in the long-standing debate as to whether judges find law or make it—whether they are neutral, apolitical dispute resolvers applying external, relatively fixed and knowable norms or politicians in robes who vote according to ideology and policy preference and invent post hoc rationalizations after they know the outcome—the law of standing should be exhibit A for those holding to the latter description. The ideological correlation is especially strong on the D.C. Circuit. As Pierce describes his study:

In order to determine whether circuit court judges manipulate standing doctrines to obtain outcomes they prefer, I read the opinions issued in each of the thirty-three cases in which a circuit court decided whether an environmental plaintiff had standing [between] ... 1992 and May 1, 1998. During that five and one-half year period, circuit courts denied standing to environmental plaintiffs in 29% of cases, but there was a large disparity in outcomes depending on each judge’s political affiliation. Republican judges voted to deny standing to environmental plaintiffs in 43.5% of cases, while Democratic judges voted to deny standing to environmental plaintiffs in only 11.1% of cases. In other words, a Republican judge was almost four times as likely as a Democratic judge to vote to deny an environmental plaintiff standing during the period January 1, 1993, to May 1, 1998. The disparity among D.C. Circuit judges was even larger. Republican judges voted to deny standing to environmental plaintiffs in 79.2% of cases, while Democratic judges voted to deny standing to environmental plaintiffs in only 18.2% of cases. I was able to reject the hypothesis that decisionmaking in standing cases is not

Health & Human Servs., 163 F.3d 199, 202–08 (4th Cir. 1998) (drug manufacturer lacks standing to challenge agency’s Medicare reimbursement policy under which amount paid for its drug is limited to the amount paid for a competitor’s drug), and Animal Legal Defense Fund v. Glickman, 154 F.3d 426, 444–45 (D.C. Cir. 1998) (person who views animals in inhumane conditions is within the zone of interests of the Animal Welfare Act).

influenced by a judge’s political affiliation at the 99% confidence level.\textsuperscript{51}

Suffice it to say that my much less systematic review of cases since May 1998 would do nothing to shake Professor Pierce’s confidence.

One good example is the D.C. Circuit’s en banc decision in \textit{Animal Legal Defense Fund v. Glickman}.\textsuperscript{52} This was a challenge to the adequacy of regulations issued by the Secretary of Agriculture under the Animal Welfare Act,\textsuperscript{53} concerning the handling, care, and transportation of animals. The original panel had held, 2–1, that none of the plaintiffs had standing.\textsuperscript{54} The en banc court reversed, holding that at least one of the plaintiffs, an individual who made frequent visits to the Long Island Game Farm where he observed primates housed in allegedly inhumane conditions, did have standing. The opinion for the court was written by Judge Wald and joined by Judges Williams, Randolph, Rogers, Tatel, and Garland; Judge Sentelle wrote a dissent, which was joined by Judges Silberman, Ginsburg, and Henderson. The majority and dissent disagreed about all three constitutional standing requirements: injury, causation, and redressability.

Three brief points about the decision. First, as a matter of standing doctrine, the opinion provides strong support for a broad understanding of what constitutes an injury in fact and is a particular endorsement of the idea of "aesthetic" injuries. Second, the majority is fairly accepting, and the dissent highly critical, of a somewhat attenuated causal chain. Plaintiff’s injury was directly caused by the actions of a regulated party, not of the defendant; the tie to the defendant agency was that if the agency imposed stricter regulations, the third party would not house primates in inhumane conditions. The majority accepted this causal chain; the dissent


\textsuperscript{52} 154 F.3d 426 (D.C. Cir. 1998) (en banc).


\textsuperscript{54} 130 F.3d 464 (D.C. Cir. 1997) (2–1).
would have distinguished actions that the government actually requires from those that it does not prevent.

Third, not surprisingly, the underlying dispute here is really about the role of the courts and, indeed, the role of government regulation generally. That is precisely why ideology figures so prominently in the voting patterns in this and similar cases.

B. State Action

American Manufacturers Mutual Insurance Co. v. Sullivan\(^\text{55}\) presented an interesting question of state action: whether private insurers become state actors by providing workers’ compensation insurance. Reversing the Third Circuit, the Supreme Court held that they do not. In the traditional administrative system for workers’ compensation, a government agency collects premiums from employers and awards benefits to injured employees. Pennsylvania’s workers’ compensation scheme differs from that model because it allows employers to insure either through a traditional state agency or through private insurers. Moreover, where a private insurer believes that a payment is not for reasonable and necessary medical treatment, it may withhold the payment from the affected employee, pending review of the necessity and reasonableness of the treatment by a “Utilization Review Organization.” The employees in American Manufacturers Mutual sought judicial review of decisions by private insurers to withhold payments, arguing that the due process clause required predeprivation notice and an opportunity to be heard. The Third Circuit sustained the claim. In reversing, the Supreme Court made a narrow but significant holding: While the Court assumed that the ultimate decisions of Utilization Review Organizations would be state action,\(^\text{56}\) the decisions of the private insurers to request review are not. The significance of this holding is apparent if it is compared to the Third Circuit’s opinion, which had viewed Pennsylvania’s workers’ compensation system as an integrated whole, designed to “fulfill a uniquely governmental obligation under an entirely state-created, self-contained public benefit system.”\(^\text{57}\) The Supreme Court’s holding opens opportunities for governments to “privatize” at least some public benefits systems, even those traditionally

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56. Id. at 987.
run by administrative agencies, and thereby to narrow the opportunities for judicial review and so the province of administrative law.

C. Ripeness

The ripeness doctrine continues to grow in importance. Early in 1998, the Supreme Court decided Ohio Forestry Association v. Sierra Club,58 "one of the Court's most complete discussions of ripeness in recent years."59 That unanimous, relatively uncontroversial decision did "not seem to mark a major turning point in ripeness doctrine."60 Nonetheless, it may have had some impact, if only by advertising the doctrine among lower court judges. I have not done a systematic survey, and certainly there are many instances in which an agency's ripeness objections have been set aside, but my impression is that the past year has seen more than the usual number of dismissals for lack of ripeness.61

59. Levin, supra note 46, at 391.
60. Id. at 392.
61. Ripeness cases tend to be highly fact-specific and resist generalization, and it is not worth going into details here. Even if there has been an increase in dismissals for lack of ripeness, that could reflect bolder litigants rather than stricter judges, or it may simply reflect a greater judicial reliance on the language of ripeness in dismissing cases that might previously have been dismissed anyway, say for lack of final agency action. In any event, recent cases dismissing claims for lack of ripeness include: AT&T Corp. v. Iowa Utilities Board, 119 S. Ct. 721, 733 (1999) (challenge to FCC's statement that it had jurisdiction, as yet unexercised, to review telephone companies' agreements that had been approved by state public utility commissions); Pfizer Inc. v. Shalala, 182 F.3d 975 (D.C. Cir. 1999) (challenge to the FDA's acceptance for processing of competitor's request for a drug approval); Mobil Exploration & Producing U.S., Inc. v. Dep't of Interior, 180 F.3d 1192 (10th Cir. 1999) (challenge to agency's document request and to administrative subpoena that had not been judicially enforced); Air Espana v. Brien, 165 F.3d 148 (2d Cir. 1999) (challenges to INS fines); Wyoming Outdoor Council v. United States Forest Service, 165 F.3d 43 (D.C. Cir. 1999) (challenge to failure to prepare an Environmental Impact Statement for planned lease of federal land for timbering when no such leases had yet been issued); West Virginia Highlands Conservancy, Inc. v. Babbitt, 161 F.3d 797 (D.C. Cir. 1998) (question of whether Office of Surface Mining's jurisdiction over a
This is perhaps part of a general trend in the federal judiciary. Although there are numerous individual counterexamples, overall it would seem that the courts are increasingly inhospitable to petitions for judicial review, and a whole series of justiciability doctrines, most notably standing, have grown somewhat tighter in recent years.

D. Primary Jurisdiction

A notoriously slippery doctrine, the principle of primary jurisdiction holds that a court may stay its hand in a lawsuit—one to which, almost by definition, the relevant agency is not a party—to allow the agency the first crack at the legal issue or the particular dispute. The underlying idea is akin to exhaustion of administrative remedies; both are prudential doctrines serving similar purposes. Decisions in which the doctrine is mentioned but found inapplicable are not uncommon; cases actually invoking agency primary jurisdiction are few and far between.62

particular mine had terminated was not ripe for review because OSM was attempting to reassert jurisdiction and would likely do so); Grand Canyon Air Tour Coalition v. FAA, 154 F.3d 455 (D.C. Cir. 1998) (challenge to first of three rules implementing a plan to reduce aircraft noise in the Grand Canyon); Clean Air Implementation Project v. EPA, 150 F.3d 1200 (D.C. Cir. 1998) (challenges to EPA’s “credible evidence” rule under the Clean Air Act); Florida Power & Light Co. v. EPA, 145 F.3d 1414 (D.C. Cir. 1998) (statements in regulatory preamble neither final action nor ripe, where they might never be applied to petitioner and manner of their operation unclear).

62. See, e.g., United States v. Dan Caputo Co., 152 F.3d 1060 (9th Cir. 1998).

63. The Supreme Court had such a case this past term. Marquez v. Screen Actors Guild, 523 U.S. 33 (1998) (affirming lower court’s dismissal of complaint because NLRB had primary jurisdiction over claim that provision in union security clause violated the National Labor Relations Act). This unanimous decision was a straightforward application of precedent, and a case in which the Court affirmed the Ninth Circuit. The only twist was that the plaintiff attempted to characterize her claim as resting on the union’s duty of fair representation—in which case it would not, the Court acknowledged, fall within the NLRB’s primary jurisdiction. However, the Court found that this characterization was inaccurate; because the plaintiff’s argument was really that the particular clause was invalid under the statute, and not that the union had breached its duty of fair representation, the case was within the NLRB’s primary jurisdiction.
The doctrine received a striking and creative application in *American Automobile Mfrs. Ass'n v. Massachusetts Dept. of Environmental Protection*, the latest in a series of cases about preemption of state motor vehicle emissions requirements. Massachusetts had required auto manufacturers to sell a certain percentage of Zero Emission Vehicles (ZEVs—in essence, electric cars) in the state. In doing so, it duplicated California’s identical requirement; this duplication provides a shield against Clean Air Act preemption. However, California subsequently abandoned its ZEV mandate, and the automakers argued that Massachusetts had to follow suit. The issue thus involved interpretation solely of Clean Air Act provisions over which the EPA has little administrative authority. But, as the court noted, the *Chevron* doctrine requires deference to administrative interpretations, and the agency’s views on the matter could be relevant to the judicial proceedings. Invoking the doctrine of primary jurisdiction, the First Circuit stayed further proceedings for 180 days to allow the Massachusetts agency to obtain a “ruling” from EPA on the preemption issue. The decision illustrates how far *Chevron* and its underlying principles have infiltrated administrative law.

**PART III. REMEDIES AND THE EQUITABLE POWERS OF THE JUDICIARY**

In determining the legality of agency action, a reviewing court is bound, of course, by Congress’s enactments. In determining an appropriate remedy, however, courts have traditionally asserted a fairly broad equitable authority to tailor appropriate relief. This authority is captured in the well-settled principle that an injunction does not flow automatically from

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64. 163 F.3d 74 (1st Cir. 1998). This case is also discussed herein in *Environmental and Natural Resources Regulation* (infra 279).

65. One other example of such infiltration, I think, is the D.C. Circuit’s decision in *American Trucking Ass’ns v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), which held that certain provisions of the Clean Air Act, *as interpreted by EPA*, were unconstitutional under the nondelegation doctrine. The court’s willingness to accept greater specificity from the agency rather than from Congress as a cure to excessive delegation—a willingness that must confound most proponents of a strong nondelegation doctrine—may well reflect the frank acceptance of agency law making under *Chevron*.
a finding of illegality. Congress can of course limit this discretion by legislating directly on the question of remedy, but absent such a provision, the courts have always asserted an inherent equitable authority to craft an appropriate remedy.

Section 706 of the APA states that a reviewing court "shall compel agency action unlawfully withheld or unreasonably delayed" and "shall . . . hold unlawful and set aside agency action" that is illegal. The question arises whether these provisions are the sort of direct instruction as to remedy that overrides the courts' inherent equitable powers.

A. Remand without Vacation

Traditionally, if a reviewing court determines that an agency action is defective, it has set the action aside. Since its 1993 decision in Allied Signal, Inc. v. NRC, if not before, the D.C. Circuit has at times remanded a regulation without vacating it. It does so if "there is at least a serious possibility that the [agency] will be able to substantiate its decision" given an opportunity to do so and vacating would be "disruptive." This practice has been controversial on the court and subject to some harsh criticism off it.

In 1997, the ABA House of Delegates adopted a recommendation that, in general, courts vacate an agency action when remanding. The recommendation observed that courts should "exercise discretion" with regard to remedy, but "a reviewing court should normally strike the balance in favor of vacating the agency's action unless special circumstances exist." If remanding without reversing, the court should "give serious consideration to specifying a time frame within which the agency is to comply," maintain

68. 988 F.2d 146 (D.C. Cir. 1993).
69. Id. at 151.
70. See Checkosky v. SEC, 23 F.3d 452 (D.C. Cir. 1994). Checkosky was decided with a two-sentence per curiam opinion, followed by lengthy individual opinions by Judge Silberman defending the practice of remand without vacation (and listing 29 D.C. Circuit cases from 1991 to 1993 in which it had been followed), id. at 452, and by Judge Randolph assailing it, id. at 466.
71. See, e.g., Frank Wu, D.C. Circuit Should Not Remand, Without Reversing, Flawed Agency Decisions, LEGAL TIMES (March 8, 1999), at 23.
the status quo in the interim, and "encourage parties to address remedial issues." 72

In a striking recent case, the D.C. Circuit again left in place regulations that it refused to uphold. In Radio-Television News Directors Association v. FCC, 73 the court considered the FCC’s "personal attack" and "political editorial" rules. These 1967 rules impose an obligation on broadcast licensees to grant opportunities to respond to individuals or representatives of viewpoints that have been attacked in certain of the station’s broadcasts. The underlying policy question is whether the rules ought to remain in place given the FCC’s abandonment of the fairness doctrine, from which they were derived. The FCC itself had begun proceedings to repeal the rules, issuing a Notice of Proposed Rulemaking announcing such an undertaking in 1983. However, the ensuing years saw mainly inaction, leading ultimately to a 1998 "Joint Statement" from the Commission announcing that it was deadlocked 2-2 as to whether to maintain or repeal the rules and that it would accordingly leave them in place.

Treating the Joint Statement as reviewable final agency action (the action being the denial of petitions by private parties to repeal the rules), and at least purporting to defer to the views expressed in the statement from the two commissioners who wanted to retain the rules, the court found the actual explanation for retaining them completely inadequate. However, it did not order the Commission to repeal the rules. It simply remanded to the FCC with instructions to provide, if it could, a better explanation of its decision to retain them.

Note the rather unusual posture of this case, which makes the decision to remand without vacation significantly less controversial than in the ordinary setting. The rules had been in place for three decades, and the agency action being challenged was not the adoption of new rules but the maintenance of the status quo (in essence, inaction).

The D.C. Circuit similarly embraced great flexibility as to possible remedies in the well-known American Trucking case. 74 There the court upheld challenges to EPA’s new ambient air quality standards for ozone and particulate matter, concluding that the relevant provisions of the Clean Air Act amounted to an unconstitutional delegation of power to the

73. 184 F.3d 872 (D.C. Cir. 1999) (Rogers, J., joined by Edwards and Wald, JJ.).
agency. It remanded to EPA “for further consideration” of each of the air quality standards under review, but took three different approaches to vacation. It left the ozone standard in place, because for technical reasons it was unenforceable and so would not “engender costly compliance activities.” It vacated the coarse particulate standard, which it had found to be arbitrary and capricious and simply could not be repromulgated in its original form. As for the fine particulate standards, the court sought further briefing as to an appropriate remedy, noting that “possibilities include but are not limited to vacatur, non-vacatur subject to application to vacate, and non-vacatur.” It is hard to know exactly what the additional possibilities might be; the identified ones seem to cover the waterfront. In any event, the court does indicate a strong sense of flexibility as to remedy.

A third example of remand without vacation is Sierra Club v. U.S. Environmental Protection Agency, in which environmentalists challenged EPA’s new emissions regulations for medical waste incinerators. Most of the petitioners’ arguments were rejected. However, the court had serious doubts about the adequacy of the agency’s explanation for how it established the minimum level of stringency for the regulations. Indeed, given the available data, it thought that “EPA’s method looks hopelessly irrational.” Accordingly, a remand was required; the regulation could not stand without a better explanation. However, the court did not vacate the standard. As it noted, “[i]t is possible that EPA may be able to explain it, and the Sierra Club has expressly requested that we leave the current regulations in place during any remand, rather than eliminate any federal control at all.”

The D.C. Circuit’s increasing reliance on remands without vacation is salutary. The costs and disruption of vacating the result of a lengthy administrative process, requiring the agency to recommence from scratch, and eliminating any regulation whatever—particularly in circumstances when the agency, its opponents, and the court all agree that some regulation is warranted and is better than none—is disruptive, time-consuming, and potentially harmful to the public welfare. If it appears that the agency may well be able to salvage the challenged regulation by explaining it more adequately, then it should be allowed to do so without incurring these substantial costs.

75. Id. at 1057 (emphasis added).
76. 167 F.3d 658 (D.C. Cir. 1999).
77. Id. at 664.
78. Id.
B. Statutory Deadlines

A significant decision on the ability of courts to enforce statutory time limits, issued by the Tenth Circuit, has created a conflict with the D.C. Circuit. In *Forest Guardians v. Babbitt*, the court held that mandatory statutory time limits must be enforced against an agency by a reviewing court. "Through § 706 Congress has stated unequivocally that courts must compel agency action unlawfully withheld or unreasonably delayed." The statutory deadline having expired, the court ordered Secretary Babbitt to complete nondiscretionary duties under the Endangered Species Act "as soon as possible" and without regard to his preferred priorities.

The Tenth Circuit acknowledged that its approach conflicts with the D.C. Circuit’s decision in *In re Barr Laboratories, Inc.*, where the court held that it had equitable discretion allowing it to refuse a remedy even where an agency has violated a mandatory statutory time limit. The D.C. Circuit reaffirmed that approach in a recent case under the Mine Safety and Health Act. The Mine Safety and Health Administration had issued a Notice of Proposed Rulemaking in 1989 announcing plans to update its regulations of hazardous gaseous emissions in mines, including those from diesel engines. Almost ten years later, it had taken no further action. The D.C. Circuit concluded that this inaction violated the express rulemaking timetable set by Congress in the Act. However, it refused to order immediate action. To the contrary, it observed that the Administration was working on several regulations that are more important to miners’ health and safety than are regulations of emissions from diesel engines, and thus it would be inappropriate to move this particular rulemaking to the top of the list. Accordingly, it enjoined the agency to complete the rulemaking, but not on a particular timetable, retained jurisdiction, and required the agency to keep the court informed of its progress.

79. 164 F.3d 1261 (10th Cir. 1998), modified, 174 F.3d 1178 (1999). The *Forest Guardians* case is also discussed herein in *Environmental and Natural Resources Regulation* (Part I. C. 2.).
80. 174 F.3d at 1187.