# DEFERENCE AND DISAGREEMENT IN ADMINISTRATIVE LAW

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*Deference is a fundamental concept in legal discourse, in general, and in administrative law, in particular. Rivers of ink have been spilled over the meaning of Chevron deference, but only scant attention has been given to the meaning of the concept of deference—a subject worthy of discussion in its own right. This Article intends to fill this gap by explaining 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 court (the deferrer) and the administrative agency making the initial determination (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 the disagreement with it, to defer. I term this mode of decisionmaking "disagreement deference." In the other mode, when deciding to defer, the deferrer chooses to avoid examining the contents of the deferree's decision, either in whole or in part. I term this mode of deference "avoidance deference." Accordingly, in disagreement deference, content-independent considerations are weighed 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. Therefore, 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. I demonstrate this through two central themes regarding the doctrines of deference. The first is whether there is a distinction between Chevron and Skidmore deference. I argue that—notwithstanding doubts raised by*

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*judges and scholars—these doctrines reflect two clearly distinct modes of deference. While Skidmore deference is 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 is whether Chevron consists of two steps or only one step. I demonstrate that, as a typical process of avoidance disagreement, the Chevron test is inherently divided into two distinct steps.*

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## 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 administrative agencies. As such, it correlates with the other fundamental concept of administrative review—discretion. The wider the deference a reviewing court

1. *See* Ronald A. Cass, *Vive la Deference: Rethinking the Balance between Administrative and Judicial Discretion*, 83 GEO. WASH. L. REV. 1294, 1297, 1299 (2015); Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 657 (2000).

provides an administrative agency, the wider the discretion the law provides 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] Mountains of literature have been produced over the meaning of *Chevron* deference.[4] Almost all of this voluminous literature, however, is concentrated on the meaning of the "*Chevron* formula."[5] Only scant attention has been given to the meaning of *Chevron deference,* that is, to the meaning of the concept of deference—a subject worthy of this own discussion within this framework of administrative review.[6]

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2. *See, e.g.*, United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) ("[C]ongressional 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, 1100 (2008) (discussing this mode of deference); *see also* Cass, *supra* note 1, at 1315 (discussing the *Chevron* doctrine as providing "implicit grants of discretion" to administrative agencies); Cary Coglianese, Chevron*'s Interstitial Steps*, 85 GEO. WASH. L. REV. 1339, 1341 (2017) (articulating the *Chevron* doctrine's core concern "about constraining agency discretion."). The concept of deference is used 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) (noting 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) ("For all its pervasiveness, however . . . deference remains curiously undertheorized and misunderstood by the federal courts.").

4. *See generally* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (creating the *Chevron* doctrine). *Chevron* has been described as the most cited case in legal history. *See, e.g.*, Linda Jellum, Chevron*'s Demise: A Survey of* Chevron *from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 726, n.2 (2007) (noting that "*Chevron* has been cited in over 7,000 cases . . . ."); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2074–75 (1990) (describing *Chevron* as the most important Supreme Court administrative law decision); Connor N. Raso & 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) (stating that *Chevron* was "cited in over 5,000 law review articles"); Michael Herz, Chevron *is dead—Long Live* Chevron, 115 COLUM. L. REV. 1867, 1867 (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."); Nicholas R. Bednar & Kristine E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1393–94 (2017) (articulating that *Chevron* was cited by courts and scholars alike more than any other court case).

5. *See Chevron*, 467 U.S. at 842–43; *see also infra* note 73 (providing the *Chevron* formula).

6. *See* Horwitz, *supra* note 3, at 1070 ("What is generally missing from these treatments, however, is an effort to treat deference as a distinct subject worthy of discussion on its

This article intends 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 modes of deference.[7] The first is when the deferrer examines the contents of the deferree's decision on its merits and decides to defer, notwithstanding her disagreement with the deferree's decision. I term this mode of decisionmaking "disagreement deference." In the other mode, the deferrer, when deciding to defer, rather than examining the contents of the deferree's decision, chooses to wholly or partially *avoid* such an examination. I term this mode "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 distinction 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.

In Part I, I define deference and discuss its meaning and its relations with other fundamental legal concepts such as authority and obedience. I also assert that deference has no meaning in terms of agreement between deferrer and deferree. In Part II, 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, disagreement deference and avoidance deference.

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own . . . [F]ew 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, at 657; Horwitz, *supra* note 3, at 1095–96. For a general discussion of the concept of deference in law, *see generally* Stephen R. Perry, *Second-Order Reasons, Uncertainty and Legal Theory*, 62 S. CAL. L. REV. 913 (1989) (discussing the distinction between "first- and second-order reasons" for action); *see also* PHILIP SOPER, THE ETHICS OF DEFERENCE: LEARNING FROM LAW'S MORALS (2002) (contemplating the concept of deference and morality); Frederick Schauer, *Deferring*, 103 MICH. L. REV. 1567 (2005) (reviewing Soper's book and analyzing its discussion of deference); PAUL DALY, A THEORY OF DEFERENCE IN ADMINISTRATIVE LAW: BASIS, APPLICATION AND SCOPE (2012) (discussing deference).

7. I use the term "mode" to describe standards of deference because "[s]tandards of review are not precision instruments." Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1250 (2007); *see also* Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951) (describing these standards as "a mood" that a reviewing court should possess in evaluating the agency's decision).

Further, I argue that this distinction is inherent to any deference discussion. In Part III, I further develop this distinction and examine its theoretical implications. I suggest that, contrary to some suggestions in literature, the distinction between the 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 decisionmaking modes. 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 how the deferrer looks at all other considerations. I also take a closer look at the meaning of avoidance deference. In particular, I examine the implications of the possibility that the deferrer makes exceptions to the general principle of deference, such as deferring in all cases, save in cases of extreme unreasonableness.

In Part IV, I discuss the application of the above theoretical framework to current administrative law. As I will show, the proposed distinction is not a mere theoretical refinement; rather, it has far reaching implications for administrative law doctrine. Specifically, my proposed distinction suggests a new understanding of the *Chevron* and *Skidmore* cases and the differences between them. I argue that, contrary to the accepted academic and judicial lore, these doctrines reflect two analytically 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. I also examine the question whether *Chevron* consists of two steps or only one step and show that as a typical process of avoidance disagreement, the *Chevron* test is inherently divided into two distinct steps. Lastly, I demonstrate the difference between the two modes of deference by analyzing the recent Second Circuit Court of Appeals case in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*.[8]

## I. THE MEANING OF DEFERENCE

### *A. Deference: Definition and meaning*

For the purpose of this discussion, I use the definition of deference Robert Schapiro and Paul Horwitz developed in their work.[9] As Schapiro and

8. Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA (*Catskill IV*), 846 F.3d 492 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 1164–65 (2018).

9. *See* Schapiro, *supra* note 1, at 665 ("Judicial deference acknowledges that, based on the interpretation of another branch of government, a court might arrive at a conclusion different

Horwitz persuasively argued, deference means that the Deferrer (D1), when making her decision is "following a determination made by some other individual or institution . . . that [*she*] *might not otherwise have reached had* [*she*] *decided the same question independently*."[10] The other individual or institution impacting this decisiomaking process is the Deferree (D2). Accordingly, "[d]eference, then, involves a decisionmaker [] setting aside its own judgment and following the judgment of another decisionmaker [] in circumstances in which the decisionmaker [] *might* have reached a different decision."[11]

Importantly, deference is a process of decisionmaking in which the decisionmaker gives weight to content-independent (second-order) considerations.[12] As Mark Soper suggests: "Deference is justified by reasons that outweigh or override the normal reasons that bear on the action taken."[13] For example, when a city council defers to an opinion of an expert committee on a question of a new park's location, the council is giving special weight to the

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from one it would otherwise reach."); Horwitz, *supra* note 3, at 1072–73; *see also* SOPER, *supra* note 6, at 22; Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1363 (1997) ("[N]on-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.").

10. Horwitz, *supra* note 3, at 1072 (emphasis added).

11. *Id.*; *see also* Frank I. Michelman, *Political-Liberal Legitimacy and the Question of Judicial Restrain*t, HARV. L. SCH. (2019), https://ssrn.com/abstract=3308805 ("A *tolerant* court confirms as valid laws whose constitutional compatibility it finds to be reasonably sustainable, even though it independently would conclude to the contrary."). When using this definition, I set aside for now questions regarding the *scope* of deference, that is whether deferrer (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 defers to *any* decision by deferree (D2) or only under certain preconditions. For an answer to these questions, see *infra* Part III. 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*").

12. For a discussion of the nature of content-independent reasons for action, see JOSEPH RAZ, THE MORALITY OF FREEDOM 35–37 (1986). Accordingly, I use the terminology of "second" and "first" order considerations (or reasons) following the well-known distinction suggested by Joseph Raz. *See* JOSPEH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 17–18 (1979); *see also* Perry, *supra* note 6, at 913–14 (discussing Raz's distinction between first-order and second-order reasons). It should be noted that second order reasons are reasons "to act for a reason or to refrain from acting for a reason" and, as such, they are often content-independent (such as in the case of binding legal rules), but not necessarily so. JOSEPH RAZ, PRACTICAL REASON AND NORMS 38, 39–40 (1975).

13. SOPER, *supra* note 6, at 23 (explaining first order). For a somewhat different definition, *see* DALY, *supra* note 6, at 7 (suggesting that deference means according weight to the deferree's decision).

committee's expert judgment on where the park should be constructed, notwithstanding any council members' preferences regarding the location (i.e., the council's content-dependent, first-order views). This means that the council members may have other views or considerations regarding the preferred location of the park, which might have 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 partially, its content-dependent, first-order preferences and accords extra weight to the expert opinion.

Likewise, when an appellate court defers to factual determinations made by the trial court, the appellate court is according special weight to the fact that the trial court actually heard the testimonies of the witnesses. Had the appellate court conducted its own de novo factual analysis, it might have reached wholly 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.[14] This extra weight is given, at least to some extent, irrespective of its congruence with the appellate court's own views regarding the factual setting of the case.[15]

### *B. Deference and Obedience*

The centrality of content-independent considerations for the concept of deference justifies an inquiry into its relationship 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.[16]

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14. 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. 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) ("One party's position may, of course, be intrinsically more plausible or convincing than the other's. But the *pedigree* of an interpretation—that is, the identity of its sponsor or author—itself has no impact either on the method of analysis used by the Court or on the outcome of the case.").

15. I shall deal with questions of the scope and degree of deference later on. *See infra* Part III.

16. *See* SOPER, *supra* note 6, at 20–21; *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

And, while doing so, we regard such orders as sufficient, second-order reasons for our actions. That is, when we act in accordance with authoritative orders (i.e., obey them), we do so because we view them as binding on us, regardless of other first-order considerations that we may have regarding 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 act "on [her] own understanding of what the balance of reasons . . . supports,"[17] but rather gives priority to second-order, content-independent considerations.[18]

Deference, however, is not obedience. It differs from obedience in some important respects. First, the two concepts differ in regard to the relationship between the deferrer and the deferree. Obedience assumes the authoritative power of the party that produces the order *vis-à-vis* the obeying party. Deference assumes no such power, and in fact, the hierarchical relationship between the parties is usually reversed 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. However, this 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.[19]

Second and correspondingly, insofar as obedience is concerned, the agent is under a duty to follow the binding orders of her superiors. As for deference, the deferrer is under no such duty, at least in the sense that she always has—at a minimum—*some* choice regarding the decision of whether to defer or not.[20] The deferrer always holds the power to decide whether to replace

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CASE W. RES. L. REV. 13, 17 (2012) ("[F]rom 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.") (citing Robert V. Presthus, *Toward a Theory of Organizational Behavior*, 3 ADMIN. SCI. Q. 48, 57 (1958)).

17. *See* Horwitz, *supra* note 3, at 1075 (citing SOPER, *supra* note 6, at 22).

18. 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 9, 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.").

19. *See* SOPER, *supra* note 6, at xii ("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.").

20. *Id.* at xii–xiii (discussing the difference between the obligation to obey and actual deference when a court of first instance decides not to defer to a decision by an administrative agency and the court of appeals reverses this decision; arguably, this reflects that the lower court should have deferred to the agency's determination); *see, e.g.*, Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA (*Catskill IV*), 846 F.3d 492, 533 (2d Cir. 2017), *cert. denied*, 138

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 relationship between the parties.[21]

The previous point leads to a third important difference between deference and obedience: deference is never absolute. This is unlike obedience to authority, at least in the sense that the agent is devoid of any discretion concerning her final judgment.[22] 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 day to not defer.[23] In the words of Justice

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S. Ct. 1164–65 (2018) (pointing out that—ex post—the lower court breached its "duty" to defer to the agency). Still, it seems difficult to resonate the term deference with an *ex ante*, flat duty of the deferrer to defer in any particular situation. Since this would mean, in essence, that in such a case (or group of cases) the deferrer has no discretion whether or not to defer. As such, it seems awkward to refer to her decisionmaking mode as deference.

21. *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.").

22. Of course, obedience to legal rules is often also not considered to be absolute, in the sense that legal systems often acknowledge the right, even if residuary, of the subject to disobey in extreme or exceptional situations. *See generally* Richard A. Wasserstrom, *The Obligation to Obey the Law*, *in* ESSAYS IN THE PHILOSOPHY OF LAW 274–75 (Robert S. Summers ed., 1968) (reviewing various approaches regarding the duty to obey the law). However, from an analytical point of view, there is nothing odd in the idea of absolute obedience. To the contrary, in obedience to binding rules, the possibility of an absolute requirement for obedience represents the "ideal type" or the typical case of obedience; not so, in the case of deference. In addition, in obedience, the authority is acting with intent to affect the behavior of the subject to authority. *See, e.g.*, David Enoch, *Authority and Reason-Giving*, 89 PHIL. & PHENOMENOLOGICAL RES. 1, 6–9 (2014) (discussing authoritative orders as 'robust' reason-giving). In deference, the intentions of D2 are, of course, irrelevant for the decisions of D1. Accordingly, norms regarding deference are always embedded in "soft" standards and not in clear-cut, flat rules. *See, e.g.*, Eskridge & Baer, *supra* note 2, at 1120 (noting that "[c]ontrary to the conventional wisdom, *Chevron* is not the alpha and the omega of Supreme Court agency-deference jurisprudence").

23. Thus, even the most deferential mode of deference leaves the decision whether to defer or not in D1's hands. This point stresses the nature of deference as a tool of self-restraint, or *self-regulation*. *See* Herz, *supra* note 4, at 1872–78 (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 (1991) (labeling *Chevron* a "principle of self-restraint, related to the various well-established prudential limitations on justiciability in the federal courts"); Frederick

Frankfurter, "[s]ome 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."[24] The possibility of judicial discretion is, therefore, inherently embedded in the concept of deference.[25]

### *C. Deference and Agreement*

Assume that Jane is a high school principal and Bob is her assistant. Assume also that Jane directs Bob to prepare a plan for establishing 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 on the issue." Obviously, the above statement of deference makes no sense. Nor would it make any sense if I change the "therefore" into "but" or any other preposition. Jane would have reached the same decision in any case, had she "deferred" or not to Bob's considerations since she fully accepts his views on the merits. Hence, deference means nothing if the deferrer is in agreement with the deferree's views or positions on the issue at stake.[26] It only acquires meaning if there is some kind of *lack* of agreement (actual or potential) between them; as Robert Schapiro nicely put it, "deference implies difference."[27]

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Liu, Chevron *as a Doctrine of Hard Cases*, 66 ADMIN. L. REV. 285, 318, 326–29 (2014) (calling *Chevron* "a doctrine of judicial self-restraint" that has no basis in congressional command).

24. Universal Camera Corp. v. NLRB, 340 U.S. 474, 489 (1951).

25. *See infra* Part III.C and accompanying text.

26. *See* Horwitz, *supra* note 3, 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 this analysis, the way by which D1 reached agreement with D2 is not important. That is, D1 might have reached the same conclusion independently or have been *persuaded* by D2's positions while reviewing them. *See* Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 24 n.6 (2011) (Scalia, J., dissenting) (discussing deference between multiple decisionmakers). In both cases, the very agreement between these two parties denies the relevancy of the concept of deference.

27. Horwitz, *supra* note 3, at 1075; Schapiro, *supra* note 1, at 665; *see also* Alexander & Schauer, *supra* note 9, at 1363 n.15 ("If an official agrees with a court decision, deference is not an issue. The issue of deference arises only when an official contemplates following a decision that she believes erroneous."); 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.'" [citing *Christensen*] 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,

This point regarding the irrelevance of deference in situations of agreement between the deferrer and the deferree may seem trivial. It is, however, a source of some confusion and inaccuracies in both judicial statements and academic writing.[28] For example, many works that study patterns of judicial behavior in the field of administrative review from an empirical perspective use the term deference or "deference to agency interpretation" to denote situations in which the courts avoid reversing agency determinations.[29] This terminology is inaccurate since the fact that a court did not *interfere* with, or reverse, the agency's determinations does not necessarily mean that the court *deferred* to such determinations. In all likelihood, in at least some of these cases, the judges on the bench simply accepted the agency determinations as correct, and thus, the question of deference did not arise.[30] Worse yet, many of these studies point to ideological congruency between the judges on the bench and the administrative agency whose interpretative determinations are at issue as an explanation for the judicial behavior.[31] Thus, it would be mistaken, or at

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*Skidmore* deference would entail no deference at all.") (quoting Cathedral Candle Co. v. U.S. Int'l Trade Comm'n, 400 F.3d 1352, 1366 (Fed. Cir. 2005)); Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative 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").

28. *See* Kasten, 563 U.S. at 24 n.6 (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.").

29. *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, 78 and n.42 (2002) (referring to deference as identical to reversal rates and submitting that "[o]verall, the courts in our study were no more likely to defer to the EPA after *Chevron* than before it").

30. *See, e.g.*, Smith v. City of Jackson, 544 U.S. 228, 239–40 (2005) (confirming the Equal Employment Opportunity Commission's (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 with the agency's interpretation).

31. *See* Frank B. Cross, *Decision-making in the U.S. Court of Appeal*, 91 CAL. L. 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"). *See generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002) (presenting the "attitudinal model" from which judicial decisionmaking can be best explained according to the ideological preferences of the judges).

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."[32] 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.[33]

In sum, if there is a complete agreement between the original decisionmaker and the reviewing agent, then deference is irrelevant. To the extent that the decisionmaker does proclaim deference in such circumstances, it seems that we can term it as empty deference.[34]

## II. DISAGREEMENT VERSUS AVOIDANCE DEFERENCE

### *A. 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 that I would have done it very differently

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32. *See* Cross & Tiller, *supra* note 29, at 2171.

33. I am not suggesting, of course, that such (presumed) ideological congruency denies any 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, 305–10 (2002) (finding that legal constraints such as key precedents provide sound explanation for judicial behavior of Supreme Court justices); Herbert M. Kritzer & Mark J. Richards, *Jurisprudential Regimes and Supreme Court Decisionmaking: The* Lemon *Regime and Establishment Clause Cases*, 37 L. & SOC'Y REV. 827, 828 (2003) (same). 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 when looking to a judicial decision's outcome and also to the judicial reasoning, since judicial reasoning does not always reflect the true policy (or even legal) opinions of the presiding justices. *See also infra* note 122.

34. Deference can also be described as empty or fictional in other circumstances that are actually the reverse of those presented above. Sometimes D1, after reviewing D2's decision, finds that she completely disagrees with it and reverses it accordingly. In this process, D1 sometimes may proclaim that it "gave deference" to D2's decision, although in reality, she gave zero weight to second-order considerations. I term this kind of deference as "fake" deference. *See infra* note 42 and accompanying text. These two meanings of deference differ considerably as to the outcome of the reviewing process, but they have one thing in common; in both, D1 gives zero weight to the second-order considerations.

had I prepared this myself. Nevertheless, I defer to your judgment on this." In this case, Jane's deference seems genuine and significant. Here, we witness a true content-based disagreement between the deferrer and the deferree. 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 serve as a valid condition for the existence of deference, but it also enables us to evaluate, and perhaps even measure, the intensity of the deference exerted by D1. The stronger and more comprehensive the disagreement is between their content-based views, the more significant D1's second-order reasons to defer become.[35] In such situations, D1 is, essentially, balancing her own content-based preferences against the content-independent reasons that justify deference. 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 where D1 decides not to interfere with D2's determinations.[36]

### *B. Deference and Avoidance*

Deference has no meaning in conditions of agreement. Yet, this 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 receives the document containing Bob's plan and tells him, "I really do not understand anything about chemistry labs" or "I had no time to read through this document in detail" and continues by saying, "However, I trust your judgment, and accordingly, I will defer to it." Here, we do not really know what Jane would have thought had she got into the nuts and bolts of the plan. She may or may not have agreed to it, either as a whole or in part. In any case, she

35. *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.") (emphasis added).

36. In fact, this is exactly what some empiricists do when studying judicial behavior on the basis of judges' ideological affiliation. *See generally* Jeffrey A. Segal, Chad Westerland & Stefanie A. Lindquist, *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model*, 55 AM. J. POL. SCI. 89 (2011) (discussing judicial deference on the basis of the ideological "distance" between the Supreme Court, Congress, and the President).

deferred to Bob's judgment since she acted upon content-independent reasons (her lack of expertise or lack of time) when deciding to go along with his plan.

This mode of deference, that I term avoidance deference (AD), is very different from the previously discussed mode of disagreement deference (DD). The difference rests first, with regard to the function of the content-independent considerations within the deferrer decisionmaking 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 decisionmaking 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.[37] 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 as reasons for the deferrer 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 decisionmaking process. To demonstrate this with our hypothetical AD case, Jane does not balance her doubts (or reservations) regarding Bob's plan against her lack of expertise (relative to Bob), but rather decides that due to her lack of expertise or lack of time, she is not going to second-guess or even to thoroughly examine Bob's plan in the first place.[38]

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—this is not so with AD. 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, 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 to take the decision to defer.

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37. *See* Perry, *supra* note 6, at 938–39 (framing 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).

38. In this respect, in avoidance deference (AD), the content-independent considerations serve as classic "exclusionary reasons" in "Razian" terms. *See id.* at 913–14 (discussing Raz's theories); *supra* note 12 (citing to Raz's works).

## III. ANALYZING THE TWO TYPES OF DEFERENCE

### *A. 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 legal literature, there is a tendency to distinguish between different types of deference on the basis of the reasons underlying the decision to defer. For example, some writers distinguish between epistemic reasons for deference (those based on the deferrer's estimation of her inferior knowledge or expertise relating to the subject matter) and deference that is based on structural reasons, i.e., division of functions between the deferrer and the deferree (sometimes referred to as legal or jurisdictional deference).[39]

It seems, however, that the distinction between the two modes of deference does not depend on the reasons underlying the decision to defer. There is an 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 supervises these kinds of projects as part of his job. Other reasons may be epistemic, such as relying on Bob's opinion because of his education or past experiences. However, there are many other possible reasons that are neither structural nor epistemic. For example, Jane may defer to Bob's position since she knows that the school board expects her to do so, or she knows that Bob may be upset if she disregards his suggestions and may even resign, and so forth. None of these reasons 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, structural reasons for deference may seem more congruent with the framework of AD. As 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 DD framework.[40] If true, these assertions 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 the deferrer exerts would rest on any type of the above-

39. *See* Perry *supra* note 6, at 939–40 (discussing structural reasons for deference); Horwitz, *supra* note 3, at 1085–86 (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).

40. *See, e.g.*, DALY *supra* note 6, at 21–24 (discussing "epistemic deference" as based primarily on rationales of expertise, experience, and knowledge of the deferree).

mentioned reasons. For example, a lack of time or expertise can, in principle, serve either as a reason for D1 to give up her own content-based views when faced with D2's position (in DD), or as reasons to avoid developing such views in the first place (in AD). The same can be said about structural reasons, such as division of functions within the relevant legal or bureaucratic framework.[41]

### *B. Disagreement Deference and "Fake" Deference*

DD is applied by weighing, on the merits, content-dependent considerations with content-independent considerations and balancing them against each other. The balancing process's fluidity and amorphousness, 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 these doubts regarding balancing-type standards of deference.[42]

In DD, it is true that D1 applying deference 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 she gives to content-independent considerations.[43] 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, rather than AD, would make it much easier for her to do so.[44]

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41. Assuming, of course, that D1 holds the fundamental power to review D2's decisions within this framework, see the discussion at *supra* note 21.

42. *See, e.g.*, Abner S. Greene, *The Fit Dimension*, 75 FORDHAM L. REV. 2921, 2929 (2007) (arguing that "[u]nder *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* as "a nonbinding version of deference" from "a court exercising independent judgment"); *see also infra* note 63 and accompanying text.

43. *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 being a 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, 1392–93 (2013) (same); *see also* Raanan Sulitzeanu-Kenan, Mordechai Kremnitzer & Sharon Alon, *Facts, Preferences, and Doctrine: An Empirical Analysis of Proportionality Judgment*, 50 L. & SOC. REV. 348 (2016) (providing experimental findings that balancing judgments by experts are influenced by policy preferences of the decisionmaker).

44. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J.

However, this truism does not entail that DD cannot serve as a basis for useful standards of deference or that decisionmaking 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.[45] This means that deference under DD may be *contingent* but not necessarily insincere or lacking deferential impact.

Moreover, it may be argued that in some respect, assuming that D1 takes seriously her role in the decisionmaking process and genuinely 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 disagreed with them than if she did not even bother to read through the relevant document in the first place. This 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.

### *C. Avoidance Deference—and Exceptions*

In the course of the preceding discussion, I distinguished between two modes of deference. On one hand, 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

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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 infra* note 122 (discussing of the difference between the two standards from empirical perspectives).

45. *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 also infra* note 122 and Part IV.

qualify her deference to the deferree's judgment.[46] 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 contradict the school board's directives, are clearly mistaken, or flatly unreasonable in her view. The discussion of exceptions is of the utmost importance to understanding 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 that Jane is not actually operating under AD? Or, that operating under such a mode of deference is essentially identical to DD? I think that the answer to these questions is negative for several 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 decisionmaking process and the question of whether they are weighed by the deferrer separately from the contemplation of content-based considerations. It seems that even when D1's deference in AD is qualified by these kinds of exceptions, 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 Bob's clear mistakes or flat unreasonableness does *not* mean that she weighs all content-based and content-independent considerations at the same time and on the same level, as in DD. In fact, it seems that such a decisionmaking process is clearly divided into two distinct phases. In the initial phase, the decisionmaker identifies the fundamental conditions for deference. This is done on the basis of content-independent reasons. Only then, at a subsequent, separate phase, D1 examines the question of whether or not D2's decision is inflicted by clear mistake or flat unreasonableness.

*Second*, this point can be further illustrated by looking at the level of intensity, in which D1 needs to deal with content-based considerations when pursuing each mode of decisionmaking. In DD, the deferrer needs to have some defined knowledge and views about the subject matter at issue while balancing all the content-based and the content-independent considerations.[47] For

46. *See supra* note 23 and accompanying text.

47. *See supra* note 35 and accompanying text.

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, and budgetary aspects, 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 clear error or flat unreasonableness. One need not be an expert on the subject matter (for example, 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 (such as disregard of school board instructions, grave encroachment of budgetary limits, or disregard of a rule relating to the maximum number of students that are expected to use the lab).[48]

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 in order to conduct the relatively complex process of balancing of all content-based and content-independent considerations. On the contrary, in AD, to apply the "flat unreasonableness" type exceptions, Jane does not need to have an idea of what such a lab should look like. Rather, she needs to have some basic notion of how such a plan should *not* look. This means that in order to apply some narrow exceptions, limited to extreme and exceptional circumstances or in regard to some clear pre-established rules, the deferrer need not have detailed knowledge of the subject matter and need not engage in a comprehensive process of balancing all considerations when reviewing the deferree's decision.[49] 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.[50]

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48. Admittedly, however, D1's level of expertise may influence her perceptions regarding what constitutes a "clear mistake." The greater her knowledge in the subject matter, the greater the chances that she would identify mistakes in D2's decision. Yet, this does not mean that non-experts cannot sometimes identify such mistakes in defined areas of decisionmaking. It is somewhat paradoxical that the less knowledge D1 has, the more extreme the mistakes she would be expected to recognize. 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 to identify a presumed mistake by D2. *See* Horwitz, *supra* note 3, at 1098–100.

49. *See* Perry, *supra* note 6, 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.").

50. The discussion in the text assumes that the exceptions are narrowly defined and relate

An additional difference between these two modes of deference is related to the way by which the various considerations are examined and weighed by the deferrer. In DD, the decisionmaking is based on the continuing and persisting process of weighing and balancing all of the considerations. The heavier the weight given to content-based considerations against D2's decision, the stronger the content-independent considerations should be to justify a decision to defer, and vice versa. 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 decisionmaking.[51] That is, the deferrer does not conduct a continuing sliding scale (or "fine-tuning") to balance all of the competing considerations. Unless, and until, the solution adopted by the deferree crosses some line or meets some high and clearly defined threshold introduced by the relevant exception, the changes in the balance of considerations are largely transparent for the deferrer and bear no relevance from her point of view.[52]

### *D. Avoidance and Disagreement Deference—A Flat Distinction or a Continuum?*

I argued above that when discussing deference, we must distinguish two separate modes: disagreement and avoidance deference. How sharp is this

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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 does the distinction between the two modes of deference collapse, but this may also be a situation of no deference at all. *See supra* note 30 and accompanying text.

51. *See* Hickman & Krueger, *supra* note 7, at 1250 ("[O]ne can readily discern that *Chevron* deference involves two binary inquiries, while *Skidmore* requires courts to evaluate several factors."); *see also infra* note 79 and accompanying text.

52. Accordingly, the decisionmaking 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, 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, *supra* note 4, at 1880–81 (echoing Strauss' distinction); Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 753, 753–54 (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.").

distinction? Should we view it as a clear-cut distinction between two completely distinct modes of decisionmaking? Or should we view those two modes as no more than two points—albeit perhaps remote—on the same continuum?

I should clarify that, at this stage, I do not discuss this question from a practical point of view. Standards of judicial deference are notorious for being malleable and vague. Accordingly, courts often apply them in a manner beset by inconsistency, fuzziness, and disagreement among judges and commentators alike.[53] I shall deal with these practical difficulties and their implications later on.[54] Here, I strive to answer this question from a purely analytical perspective.

The vagueness and indeterminacy of deference standards can explain why modes of deference are often discussed in the literature in terms of a "continuum."[55] Nevertheless, from the analytical perspective discussed herein, 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 decisionmaking. In essence, the question is 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 just some of the considerations weighed and processed by D1, among all other factors on the same level and at the same stage of the decisionmaking process. In AD, on the other hand, these considerations are brought into play at a preliminary stage, *before* D1 weighs 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 is illustrated by returning to our high school example. Suppose that Bob submits his plan for a 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 about it and therefore, I shall only give it a quick look . . . ." (i.e., AD). Alternatively, she can say, "Let's take a

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53. *See, e.g.*, Bednar & Hickman, *supra* note 4, at 1444 ("[S]tandards of review are not bright-line rules, nor do they even represent fixed points on an attitudinal continuum. Rather, they are malleable."); *see also infra* notes 120–122 and accompanying text.

54. *See infra* notes 120–122 and accompanying text.

55. *See, e.g.*, Eskridge & Baer, *supra* note 2, at 1091–92 (studying empirically the "continuum of deference"); Bednar & Hickman, *supra* note 4, at 1444 ("[S]tandards of review are not bright-line rules, nor do they even represent fixed points on an attitudinal continuum."). For an argument that raises 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).

look at this plan *first* and *only then* make up my mind how much weight I will 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 looked at the plan and her preliminary decision defined the way in which she read throughout the whole document at the second stage. In the case of DD, no such preliminary decision is made. Instead, Jane weighs and considers Bob's expertise as just one among many considerations while 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 toward *all other* considerations as it does AD.

To be sure, in real life, it is not always easy or even possible to identify the exact choice of mode made by the deferrer. Moreover, decisionmakers may confuse or combine these two modes. Sometimes, the decisionmaker may make a preliminary decision to defer (in principle—as in AD) but relinquish it at a later stage, due to grave discrepancies between her views and the deferree's views on the merits arising during the second stage of considering the exceptions.[56] In other cases, no such preliminary determination is made, but the deferrer may ultimately give critical weight to content-independent considerations *vis-à-vis* all content-dependent considerations. However, the fact that in practice decisionmakers may mix these two modes of deference—or even go back and forth from one to the other—should not obscure the fundamental analytical difference between them.

Accordingly, the crucial question is whether the deferrer made a 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 weighing all other considerations. If such a 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, we can still use them as two distinct basic models which enable us to evaluate the nature of the relevant decisionmaking process adopted by the deferrer.

## IV. IMPLICATIONS FOR ADMINISTRATIVE 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 the 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

56. *See supra* text after note 45.

doctrines of deference in contemporary administrative law, *Chevron* and *Skidmore*. Then, I shall review the implications of the current discussion on the meaning of the *Chevron* formula, specifically on the question of whether *Chevron* should be understood as a one- or two-step process for judicial decisionmaking.

### *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*[57] and *Skidmore*.[58] Both in case law and academic literature, there is considerable ambiguity as to the content of each standard and the distinction between them.[59] As Hickman and Kruger point out: "All agree that *Skidmore* is less deferential than *Chevron*, but how much less and in what way remain[s] [an] open question[]."[60] Moreover, there is a tendency among some Supreme Court Justices (most notably Justice Breyer) to blur the distinction between the two standards or even to deny the difference between them.[61]

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57. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

58. Skidmore v. Swift & Co., 323 U.S. 134 (1944); *see infra* note 6262 and accompanying text. 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* Barnhart v. Walton, 535 U.S. 212 (2002); United States v. Mead Corp., 533 U.S. 218 (2001); Christensen v. Harris Cty., 529 U.S. 576 (2000)*; see also infra* note 124. However, *Chevron* and *Skidmore* are by no means the only doctrines that serve this purpose in case law*; see, e.g.*, Eskridge & Baer, *supra* note 2, at 1098–120 (discussing a "continuum" of different deference regimes in the case law); Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 78–83 (2011) (articulating six different doctrines of deference applied by the courts); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 143–53 (2010) (noting six different standards of review). Nor does the current status of *Chevron* as the prevailing doctrine of deference remain unchallenged. *See, e.g.*, Coglianese, *supra* note 2, at 1340 (noting that "today the decision finds itself at the center of an intensive debate over its legitimacy and even its continued existence").

59. *See, e.g.*, Richard J. Pierce, Jr., *The Future of Deference*, 84 GEO WASH. L. REV. 1293, 1299–305 (2016) (discussing the confusion in the Supreme Court opinions regarding the interpretation, applicability, and scope of the deference doctrines laid out in *Chevron* and *Skidmore*).

60. *See* Hickman & Krueger, *supra* note 7, at 1237, 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.").

61. *See Christensen*, 529 U.S. 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 v. F.C.C., 569 U.S. 290, 309 (2013) (Breyer, J., concurring) (stating that the application of the *Chevron* test should depend on a complex set of considerations such as "the interstitial nature of the legal question,

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

> the 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.[62]

Courts have yet to determine the exact meaning of the *Skidmore* test. This is because the Supreme Court has yet to provide a conclusive list of the factors that should be weighed against each other while applying the *Skidmore* test,[63] let alone provide clear directives as to how much weight should be

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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*, 535 U.S 212, 222 (2002)); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372–73, 379–81 (1986); Hickman & Krueger, *supra* note 7, at 1248 ("Justice Breyer has long adopted the 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."); Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *within the Architecture of* Chevron, 42 WM. & MARY L. REV. 1105, 1129 (2001) ("Justice Breyer implies that *Skidmore* deference is a type of *Chevron* step two reasonableness inquiry."); 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*). Other judges have endorsed this approach. *See* Sunstein, *supra*, 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 . . . .'") (internal quotation marks omitted) (referring to Krzalic v. Republic Title Co., 314 F.3d 875, 879 (7th Cir. 2002)); *see also* Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103, 119 (2018) ("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.") (quoting Judulang v. Holder, 132 S. Ct. 476, 483 n.7 (2011)) (internal quotation marks omitted).

62. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

63. *See Mead*, 533 U.S. at 235 (permitting courts to consider "any other sources of weight"); *Skidmore*, 323 U.S. at 140 (directing courts to consider "all those factors which give [the agency] power to persuade"); *see also* Hickman & Krueger, *supra* note 7, at 1257 (noting that "the 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.").

given to each factor.[64] It is evident from the way that the *Skidmore* test is discussed that it is a typical DD mode of deference. Some of the factors that 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."[65] Other factors, such as the agency's "expertise" and the "experience" embodied by its "informed judgment" are seemingly content-independent.[66]

The most important point for the purpose of the current analysis, however, is that all these factors are being examined, processed, and weighed together on the same level and at the same phase of the judicial analysis, as is the case of a typical DD mode of decisionmaking.[67] 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.[68] 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."[69] The extent to which the court is willing to defer to an agency's determinations depends—albeit not exclusively—on the degree

64. *See* Hickman & Krueger, *supra* note 7, at 1257 ("[N]either *Skidmore* nor *Mead* explain how these factors relate to each other or whether certain factors are more important than others."); *see also* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 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) (same); Rossi, *supra* note 61, at 1127–30 (discussing *Christensen* and analyzing three different approaches expressed by the justices as to the way *Skidmore* approach should be applied).

65. *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.") (first quoting *Skidmore*, 323 U.S. at 140, and then quoting *Mead*, 533 U.S. at 235); *see also Mead*, 533 U.S. at 228 (counting "the degree of the agency's care" as a factor to be considered when applying the *Skidmore* test) (citing Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 142 (1976)) (discussing the "thoroughness evident in [the agency's] consideration").

66. *See supra* notes 35–38 and accompanying text.

67. *See supra* text accompanying note 47 and accompanying text in Part IV.

68. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 855 (2001) ("*Skidmore* is properly regarded as a deference doctrine because the court cannot ignore the agency interpretation—the court must assess that interpretation against multiple factors and determine what weight they should be given.").

69. *See* Eskridge & Baer, *supra* note 2, at 1088, 1098–99, 1109 (discussing the "power to persuade" standard in *Skidmore*); *see also* Rossi, *supra* note 61, at 1127 (discussing the majority opinion's emphasis 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 . . . ").

to which the court acknowledges the degree of persuasiveness in the agency's determinations on their merits.

Moreover, the *Skidmore* test is often presented in the literature by using the descriptor of a "sliding scale."[70] 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.[71] 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.[72]

Let us examine the *Chevron* standard. The *Chevron* standard is best expressed in the following well-known words of 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

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70. *See Mead*, 533 U.S. at 228. For other examples of the sliding scale approach to *Skidmore*, see Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 487–88 (2004); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 256–58 (1991); Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141–43 (1976). For discussions in the literature, see Hickman & Krueger, *supra* note 7, at 1255–56 n.116, 1271–72 (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 § 29:16 400 (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."); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 972 (1992) (describing pre-*Chevron* deference as a sliding scale, "from 'great' to 'some' to 'little'"); Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 810 (2002) (quoting Justice Scalia's dissent on the use of the sliding scale term in *Mead*); Merrill & Hickman, *supra* note 68, 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").

71. *See Mead*, 533 U.S at 228 ("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.") (citations omitted); *see also* Hickman & Krueger, *supra* note 7, at 1256.

72. *See* Herz, *supra* note 4, at 1880–81 (discussing Justice Ginsburg's opinion in Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 487–88 (2004), applying the *Skidmore* test and pointing out that, while "[t]he Court agreed with the agency, but it did not defer in the strong sense").

> 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.[73]

As we can see, and in contrast to *Skidmore*, *Chevron*'s formula constitutes a typical AD mode of deference. Justice Stevens's formula divides the judicial analysis into two "steps." In Step One, the court needs to answer a seemingly simple, straightforward question: whether "the intent of Congress is clear."[74] If the answer to this question is yes, "that is the end of the matter."[75] 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.[76] At this second step, Step Two, judicial deference reigns over the court's analysis. It is conditioned only on exceptional circumstances in which the court finds the agency's position unreasonable.[77] *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 intent of

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73. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

74. *See id.* 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. *See*, *e.g.*, Carcieri v. Salazar, 555 U.S. 379, 395–96 (2009) (finding the language of the statute "unambiguous") (Breyer, J., concurring) (noting that he cannot find the language of the statute itself as "determinative"); *see also* Hickman & Krueger, *supra* note 7, at 1248, 1265 ("Of course, whether a given statute is clear is often a close call . . . . 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*, 129 HARV. L. REV. 2118, 2152 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) ("[T]he fundamental problem . . . is that different judges have wildly different conceptions of whether a particular statute is clear or ambiguous.").

75. *Chevron*, 467 U.S. at 842.

76. *Id.* at 843.

77. *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 61, at 1112 (discussing the *Chevron* Step Two reasonableness inquiry); *see also* Kent Barnett & Christopher J. Walker, Chevron *Step Two's Domain*, 93 NOTRE DAME L. REV. 1441, 1448–50 (2018) (noting that the Supreme Court has so far struck down agency interpretations under *Chevron* Step Two in only three cases (i.e., AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366 (1999); Util. Air Regulatory Grp. v. EPA, 573 U.S. 302 (2014) and Michigan v. EPA, 135 S. Ct. 2699 (2015))). For a discussion of the place of reasonableness in *Chevron* analysis, see Zaring, *supra* note 58, at 155, 190–91.

Congress as extracted from the statutory language and other interpretative tools. Thus, unlike the *Skidmore* test, the court does not exercise a complicated, multifactor, 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.[78]

Moreover, unlike the sliding scale nature of *Skidmore's* multifactor analysis, *Chevron* Step Two is based on a threshold analysis.[79] That is, unless and until the agency's determinations meet a certain (relatively demanding) threshold of unreasonableness, the court defers to the agency. Not every additional piece of information can tip the balance within a continuous process of weighing 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 defers, and regardless of how much "power to persuade" the agency interpretation of the law carries.[80]

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

As noted above, *Chevron*'s formula divides the review process into two separate steps.[81] Despite its seemingly plain language, the meaning of the *Chevron* test is far from clear. Ever since it was presented, the content of *Chevron*'s formula, and each of its components, have been the subject of different interpretations and ample controversies have arisen as to their meaning.[82] One such notable controversy refers to the distinction between *Chevron*'s two

78. *See* Hickman & Krueger, *supra* note 7, 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.J. 605, 609–19 (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).

79. *See* discussion *supra* Part IV text and accompanying notes 51–52.

80. *Cf.* Rossi, *supra* note 61, 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* Step Two); Strauss, *supra* note 52, at 1145 (discussing *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, 83–84 (1994) (stressing that while applying *Chevron* Step Two, courts will defer to agency interpretation unless "wholly unreasonable"). *But see* Rossi, *supra* note 61, at 1142 n.186 (pointing to some exceptions in the case law).

81. *See supra* note 5 and discussion in text after *supra* note 74.

82. *See supra* note 4.

steps.[83] In a thought-provoking article, Stephenson and Vermeule argued that *Chevron* analysis contains, in essence, only one step and not two.[84] This is because both *Chevron* steps refer to the question of the soundness of the agency's interpretation. 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."[85] 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.[86]

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.[87] This assumption, however, stands in contrast to 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,[88] ordinary understanding of this formula, by both

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83. It should be noted in the proliferated literature on *Chevron*, there have been suggestions that *Chevron* has more than two steps. *See* Coglianese, *supra* note 2, at 1361–65 (describing six interstitial steps of *Chevron*). In addition to the well-known argument that *Chevron* contains a preliminary stage, Step Zero, it has also been suggested that there is an additional stage in the analysis between Steps One and Two. *See infra* note 124 and accompanying text (reviewing *Chevron* Step Zero); Coglianese, *supra* note 2, at 1344–45 ("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 generally* Daniel J. Hemel & Aaron L Nielson, Chevron *Step One-and-a-Half*, 84 U. CHI. L. REV. 757 (2017) (reviewing *Chevron* Step one-and-a-half). The discussion here will focus only on the two main steps of *Chevron*.

84. Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009); *see also* Zaring, *supra* note 58, at 157 ("I think Stephenson and Vermeule are probably correct . . . .").

85. Stephenson & Vermeule, *supra* note 84, at 599 (citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)).

86. *Id.*; *see also* 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 170–71 (4th ed. 2002); Levin, *supra* note 80, 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 n.10 (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.").

87. *But see* Re, *supra* note 78, 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).

88. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc. 467 U.S. 837 (1984).

courts and commentators, is that in *Chevron* Step Two, the reviewing court examines not only agency determinations of law, but also administrative policy determinations.[89] In fact, one of *Chevron*'s most notable innovations was recognizing 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."[90] Accordingly, both courts and commentators equate judicial analysis under *Chevron* Step Two to the traditional "arbitrary and capricious" standard of review under § 706 of the Administrative Procedure Act (APA).[91]

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89. In *Chevron* itself, the Court referred to Step Two's analysis as a reasonableness analysis. *See id.* at 844–45, 865–66; *see also* Levin, *supra* note 80, at 1260 (noting the Court's reference to "step two as a test of reasonableness[]" in passages of *Chevron*); Catherine M. Sharkey, *Cutting in on the* Chevron *Two-Step*, 86 FORDHAM L. REV. 2359, 2364 (2018) (criticizing courts for ignoring the fact that agencies often present their policy choices as legal interpretation in order to enjoy deferential review under *Chevron* Step Two).

90. *See* Sunstein, *supra* note 4, at 2086; *see also* Laurence 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, 1286 (2008) ("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.").

91. *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 Utilities 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)); Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016) (blending Chevron and State Farm analysis); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)); *see also* Levin, *supra* note 80, at 1263–66 (discussing the development of Step Two in the case law as arbitrariness review); Silberman, *supra* note 90, 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 (2009) ("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

For the purpose of the current analysis, however, I need not take sides in the debate concerning the exact nature of *Chevron*'s Step Two test. This is because either way, according to the theoretical framework presented here, *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 noted above, 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 combine legal interpretation with policymaking.[92] To the extent that this is the correct understanding of *Chevron*, it is plain that *Chevron* exemplifies a typical AD process of deferential review. As such, it is composed of two separate steps. In Step One, the court is called to answer a seemingly simple question: whether the intent of Congress is clear.[93] 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.[94] Any content-dependent considerations, such as the court's opinion on the agency's policy preferences, 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 reverses the agency decision, or it identifies ambiguity in the statute and, accordingly, moves to Step Two.

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COUNCIL, IN A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 85, 99 (John F. Duffy & Michael Herz eds., 2005); Pierce, *infra* note 122, at 453; Levin, supra note 80, at 1268; Peter L. Strauss, *Overseers or "The Deciders"—The Courts in Administrative Law*, 75 U. CHI. L. REV. 815, 826 (2008); Herz, *supra* note 4, at 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."); Sharkey, *supra* note 89, at 2378–84 (arguing that Chevron Step Two should incorporate the "reasoned decision-making" demand of State Farm and discussing several court cases and academic works that adopted the same view).

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 and capricious standard of review, which makes it redundant. *See* Stephenson & Vermeule, *supra* note 84, at 602–04. *But cf.* Coglianese, *supra* note 2, at 144–45 (arguing that Step Two is distinct from the arbitrary and capricious standard since it deals with "interpretative reasonableness" while the arbitrary and capricious standards refers to policy judgments).

92. *See supra* note 89 and accompanying text.

93. This question may, however, raise difficulties and controversies. *See supra* note 74.

94. *See supra* text after note 74.

In Step Two, the court is required to conduct an on-the-merits inquiry, but only under the very deferential reasonableness standard (which is a threshold standard), in order to identify the need for an exception to the deferential treatment.[95] This means that unlike in Step One, content-based considerations may be relevant in Step Two, but only to the extent that they render the administrative policy determinations unreasonable.

Let us now assume that—contrary to the mainstream view—Step Two focuses mainly, or exclusively, on agency determinations of law. In the face of statutory ambiguity, the judicial analysis becomes much more complex than cases involving clear congressional intent. Still, the reviewing court is required to consider 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 based on the merits, as well as policy implications or the practical outcomes of each interpretative option.[96] Sure enough, all of 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.[97]

Accordingly, it seems that even if we insist on a hardline 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 fact that, in real life, such strict separation between legal interpretation and policy determination is difficult to make (if not completely impossible) and 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, as well as 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 are

95. *See supra* notes 79–80 and accompanying text.

96. *See, e.g.*, United States v. Eurodif S.A., 555 U.S. 305, 314–19 (2009) (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 was permissible under *Chevron* Step-Two); Household Credit Servs., 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 Interstate Commerce Commission (ICC) interpretation was permissible under *Chevron* Step Two); Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 59–60 (2011) (examining and dismissing plaintiff's interpretation to conclude that the IRS ruling constitutes a reasonable reading of the statute under *Chevron* Step Two).

97. *See supra* notes 65–66.

prudential advantages to separating the judicial analysis into two distinct phases. The first would rest on strict legal interpretation of the statute and the second would use the canons of deference to evaluate this mix of determinations of law and policy. 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. This logic is manifested by the division of the judicial analysis into two distinct steps. In the first step, 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 step, the court is called upon to apply a 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 the *Chevron* doctrine at Step Two applies 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.

### *C. An Example of Avoidance versus Disagreement Deference*

The analysis above stresses the significant difference between *Chevron* and *Skidmore*.[98] It demonstrates that the difference between these standards is not a matter of mere linguistic articulation nor is it merely a difference in *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 reflects, in essence, a mode of deference that is analytically distinct from the other. Accordingly, the difference between them is manifested in the process of decisionmaking by which the reviewing court applies each standard of deference and with no regard to the question of whether or not, in the end, the court decides to intervene in the agency's determination.[99]

A good illustration of the difference between how *Chevron* and *Skidmore* standards operate is the recent decision of the Second Circuit in *Catskill*

98. *Cf.* 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."); Herz, *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 . . . .").

99. For the discussion of the limitations of empirical evidence in this respect, see *infra* note 122 and accompanying text.

*Mountains Chapter of Trout Unlimited, Inc. v. EPA* (*Catskill IV*).[100] This decision is the last episode in a longstanding dispute over whether the Environmental Protection Agency (EPA) must issue water pollution permits for systems that transport water from one body of water to another.[101]

Since the passage of the Clean Water Act (CWA) in 1972, which prohibits "the discharge of any pollutant by any person,"[102] the EPA has taken the position that water transfers—which it defined as activities that "convey[] or connect[] waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use"—were exempt from National Pollutant Discharge Elimination System requirements.[103] The EPA, however, did not formalize its position until 2008, when it promulgated the Water Transfers Rule.[104] Before the agency promulgated this rule, environmental conservation groups challenged the EPA's policy in the Second Circuit.[105] According to the Supreme Court rulings, when agency policy is not formalized into a rule through notice-and-comment proceedings,[106] it normally does not merit *Chevron* deference by the reviewing court.[107] Accordingly, in the early cases (*Catskill I* and *II*),[108] the court reviewed the EPA policy under the less deferential *Skidmore* standard, while in *Catskill IV* it reviewed the policy, as formalized in the new rule, under the *Chevron* framework. Therefore, the *Catskill* saga provides a useful opportunity to compare the way the same court applied the two standards with regard to the same administrative policy, under the same statutory framework.

In *Catskill I* and *Catskill II*, the court first established that the administrative policy should be reviewed under the *Skidmore* framework, and then thoroughly examined the EPA's reasoning for its policy.[109] It considered several

100. Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA (*Catskill IV*), 846 F.3d 492 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 1164–65 (2018). The Second Circuit reversed the decision of the district court in Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA (*Catskill III*), 8 F. Supp. 3d 500 (S.D.N.Y. 2014).

101. *See* Sharkey, *supra* note 89, at 2369–71 (providing an overview of the EPA dispute).

102. 33 U.S.C. § 1311(a) (2012). "[D]ischarge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12) (2012).

103. 40 C.F.R. § 122.3(i) (2018).

104. *Id.*

105. Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York (*Catskill I*), 273 F.3d 481, 490 (2d Cir. 2001); Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York (*Catskill II*), 451 F.3d 77 (2d Cir. 2006), *cert. denied*, 549 U.S. 1252 (2007).

106. Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559, 561–570a, 701–706 (2012).

107. *See supra* note 58 (discussing the cases from the early 2000s that guided courts when viewing deference issues).

108. *See Catskill I*, 273 F.3d at 481; *Catskill II*, 451 F.3d at 77.

109. *See Catskill I*, 273 F.3d at 490–91; *Catskill II*, 451 F.3d at 82.

factors, such as the thoroughness of the EPA's reasoning, its conformity with the framework set by Congress, and its "power to persuade."[110] The court also examined other factors, such as the practical implications of each interpretative option and the costs of implementing the current EPA policy (*vis-à-vis* the expected costs if the court imposes on the agency a duty to require pollution permits for water transport systems).[111] Based on this multifactor analysis the court decided to interfere and quash the EPA's interpretation.[112]

About a decade later, the EPA's policy was again brought before the court in *Catskill IV*, but this time, after its interpretation was formalized into a rule. The court changed its standard review accordingly, as well as its analysis and the bottom-line result. Under *Chevron*'s Step One, the court first stated that the Clean Air Act did not "unambiguously foreclose[] the EPA's interpretation in the Water Transfers Rule."[113] Once this threshold determination was made, the court continued to examine the EPA's interpretation under the rather minimal reasonableness standard of the *Chevron* Step Two framework. It emphasized that, while the EPA's approach "may not be the best or most faithful interpretation of the Act," it still deserved ample deference by the court as the Water Transfers Rule "seems to us to be precisely the kind of policymaking decision that *Chevron* is designed to protect from overly intrusive judicial review."[114] Accordingly, the court rejected the suggestion that under *Chevron*'s Step Two it should conduct a comprehensive, multifactor analysis of the agency's policy and reasoning.[115] Instead, it concluded that

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110. *See Catskill I*, 273 F.3d at 492–94 (declining to find the EPA's position to be persuasive); *Catskill II*, 451 F.3d at 82–84 (holding the same).

111. *Catskill II*, 451 F.3d at 86 ("We find the City's position, that federal regulation of interbasin water transfers will lead to the termination of those transfers in contravention of the rights explicitly reserved to the states, to be alarmist and unwarranted."); *Catskill II*, 451 F.3d at 87 ("While we recognize the incremental administrative burden our interpretation entails, we have little doubt that it nevertheless permits the City to deliver drinking water to its citizens while furthering the [Clean Water Act's (CWA's)] goal . . . .").

112. *Catskill I*, 273 F.3d at 494 (reversing the decision of the district court and remanding with proper directives to the EPA).

113. Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA (*Catskill IV)*, 846 F.3d 492, 516 (2nd Cir. 2017), *cert. denied*, 138 S. Ct. 1164–65 (2018). Interestingly, the dissenting opinion stated that the statutory language and structure of the CWA was unambiguous and that the EPA rule should be quashed on *Chevron* Step One terms. *Id.* at 534.

114. *Id.* at 520.

115. The Second Circuit rejected the district court's approach. *See id.* at 520–24 ("[T]he plaintiffs' challenge to the Water Transfers Rule is properly analyzed under the *Chevron* framework, which does not incorporate the *State Farm* standard."); Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA (*Catskill III*), 8 F. Supp. 3d 500, 534–35 (S.D.N.Y. 2014) (finding

the EPA's interpretation was not arbitrary or capricious, and deferred to it accordingly, despite its apparent reservations regarding its correctness.[116]

What is important in *Catskill IV*, for the sake of the current analysis, is that—as a typical case of avoidance deference—the whole judicial analysis was influenced by an *initial* determination based on a content-independent consideration (i.e., the lack of unambiguous congressional expression in *Chevron* Step One) that dictated a strong commitment to deference to the EPA's rule. Unlike *Catskill I* and *II*, the court did not *first* examine the EPA policy and *then* decide how much deference it should accord to it. Rather, the court's whole analysis under *Chevron* was controlled by the notion that—due to structural content-independent considerations—it should examine the agency's determination under a strong commitment to deference. The court's own discussion of its role in forming public policy was clear:

> Only last, in case of a challenge to the Legislative Branch's authority to pass the law, or to the Executive Branch's authority to administer it in the manner that it has chosen to adopt, may we in the Judicial Branch become involved in the process. When we do so, though, we are not only last, we are least: We must defer . . . .[117]

I should emphasize that I do not claim that the categorical division, identified here between *Chevron* and *Skidmore* as representing two distinct modes of deference, is reflected in every court case that applies these standards.[118] Nor do I suggest that the application of one standard necessarily yields different

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the *Chevron* Step Two analysis is similar to the thorough "arbitrary and capricious" requirement developed by the Supreme Court in Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29 (1983)); *see also infra* note 124.

116. *See Catskill IV*, 846 F.3d at 520 ("We conclude that the EPA's interpretation of the Clean Water Act is reasonable and neither arbitrary nor capricious. Although the Rule may or may not be the best or most faithful interpretation of the Act . . . .").

117. *Id.* at 507.

118. Indeed, in various cases, courts applying *Chevron* have exerted strong deference, as demonstrated by the minimal efforts directed towards closely examining the content-based considerations underlying agencies' determinations of law and policy. *See, e.g.*, Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 697 (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); *see also* Yellow Transp., Inc. v. Michigan, 532 U.S. 36, 45 (2002) (deferring to the agency's interpretation on the basis of a cursory reading of the statute and stating that the relevant subsection did not "foreclose" the agency's approach); Nat'l R.R. Passenger Corp. v. Boston & Maine, 503 U.S. 407, 417–18 (1992) (declaring the agency's interpretation "permissible" simply because it was "not in conflict with the plain language of the statute"); Helen Mining Co. v. Elliott, 859 F.3d 226, 238 (3d Cir. 2017) (holding the same). This deferential approach, however, was not consistent over all cases applying *Chevron*, as judges continued to disagree over the terms of the doctrine's application. *See* Bednar & Hickman, *supra* note 4, at 1406–07.

outcomes at the bottom line of litigation. Standards of judicial review (and modes of deference accordingly) are notorious for being malleable, ambiguous, and indeterminate.[119] 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 results is almost inevitable.[120] Likewise, it is almost inevitable that judges would differ, disagree, and argue about how to apply these modes of deference, even when they do agree on what standard to apply.[121] Accordingly, any attempt to analyze and measure the impact of the application of any such standards in terms of actual outcomes in litigation from an empirical, quantitative perspective is doomed to encounter serious conceptual and methodological difficulties.[122]

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119. *See, e.g.*, Universal Camera Corp. v. NLRB, 340 U.S. 474, 489 (1951) ("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 ("[S]tandards 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 55, at 15 (discussing the same); DAVIS, *supra* note 70 (discussing standards of judicial review as "typically vague, abstract, uncertain, and conflicting").

120. *See, e.g.*, Eskridge & Baer, *supra* note 2, at 1120 ("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 & Ouellette, *supra* note 2, at 658–59 ("[L]egal realists who believe that judicial outcomes are determined primarily by the facts may be skeptical of the relevance of deference regimes . . . .").

121. *See supra* note 119; *see also* Bednar & Hickman *supra* note 4, at 1445 (noting that given the vagueness and complexity of *Chevron* and the fact that it has been applied in thousands of cases by different courts regarding different situations such inconsistency in application "is both understandable and predictable").

122. 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 studies' findings varied. Some studies of the Supreme Court decisions suggested that the difference between the two standards was marginal. *See* Eskridge & Baer, *supra* note 2, at 1141–42 and Table 15; *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); Pierce, *supra* note 58, 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) ("[A]gency 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 77, at 1448–50 (finding agency win rates in circuit courts significantly higher under *Chevron* Step Two than

Those difficulties notwithstanding, it is still important to analyze the true nature of the two central doctrines of judicial deference. The argument

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under *Skidmore*). However, other studies have noted that these differences do not yield conclusive evidence that the choice of standard of review is detrimental to outcomes in litigation. *See* Pierce, *supra* note 59, at 85 (summarizing the results of different studies and concluding that "[w]ith 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 can serve as meaningful (let alone conclusive) evidence for the true difference between those standards of deference. First, as noted above, reversal does not say much about deference; likewise, approval of agency determinations does not tell us much about actual deference. *See, e.g.*, Raso & Eskridge, *supra* note 4, at 1736 ("[A]pplying a deference *regime* does not require a judge to *defer*."); *see also supra* note 29 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 self-evident. It may well be the case that judges proclaim they apply a certain standard of review but, in reality, they 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*, 3 Univ. Chi., Pub. Law & Legal Theory Paper Series, Working Paper No. 618 (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, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 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 Bressman, *supra* note 98, at 1445 (discussing the inconsistency and unpredictability in the application of *Chevron*); Christine Kexel Chabot, *Selling* Chevron, 67 ADMIN. L. REV. 481, 491–92 (2015) (holding the same); Bednar & Hickman, *supra* note 4, at 1407 (noting that "[s]ome 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 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, Chevron *In The Circuit Courts*, 116 MICH. L. REV. 1, 43 (suggesting that rule drafters may become more aggressive when operating under the assumption that courts would apply the *Chevron* standard); Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 722–25 (2014) (discussing the same). In any case, the current analysis focuses exclusively on the differences between the two standards on the analytical level, not on any hypothesis regarding the influence of such differences on judicial behavior on the empirical level.

presented here should not be understood as suggesting that the proposed distinction between the two modes is reflected in every case in which courts applied *Chevron* or *Skidmore*. Rather, I argue that this distinction is the only one that can make sense of these two doctrines. From an 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 decisionmaking 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 the true mode of deference the court applies in a given case. And indeed, courts may sometimes knowingly or inadvertently confuse these two models, using one mode at one point of the analysis and then revert to the other at another point or demonstrating inconsistency regarding the choice between them.[123] These practical difficulties 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 about which of the two standards of review the reviewing court should apply. 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.[124] 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, and even historical points of view.[125] 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 influence the policy choices in this respect.

When making the *Chevron* Step Zero decision, one should take into account this difference in nature between the two standards. Since the main difference between the standards is the *place*, *function*, and *importance of content-*

123. *See supra* note 119 and accompanying text.

124. For an overview, *see* Merrill & Hickman, *supra* note 68, at 873–89; Sunstein, *supra* note 61, at 207–31; *see also supra* note 58 and accompanying text.

125. For a discussion of the considerations underlying the choice of deference doctrines, *see* Merrill & Hickman, *supra* note 68, at 860–62 (discussing political accountability, expertise and uniformity in federal law as possible rationales for such a judicial choice); *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"); Raso & Eskridge, *supra* note 4 (discussing different models of judicial behavior in this respect); Sunstein, *supra* note 4, at 2087–90 (discussing regulatory effectiveness and flexibility in this respect).

*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 an administrative determination means according almost conclusive weight to some content-independent considerations, such as the congressional intent underlying the delegation of power to the agency. 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 decisionmaking process 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 *United States v. Mead Corp*.[126] 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."[127] This means that the Court viewed a *clear Congressional mandate* to an agency to make determinations that carry the force of law, as a strong enough content-independent consideration to accord *Chevron*-type deference to such agency determinations.[128] 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.[129]

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126. 533 U.S. 218 (2001); *see supra* note 58.

127. *Mead*, 553 U.S. at 229 (citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)).

128. 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.* (citing EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257, 111 (1991)).

129. *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (stating 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") (citing Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014)). *But cf.* Barnhart v. Walton, 535 U.S. 212, 222–23 (2002) (providing a list of seemingly content-independent, but diverse, considerations including "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

Accordingly, such considerations serve as factors that courts should weigh within the balancing process under *Skidmore* deference.[130] They do not, however, carry the status of strong preliminary considerations that would justify avoidance by courts of entering into a balancing-type analysis of all relevant content-based and content-independent considerations as reflected in the AD mode. The question of whether the Court's position in *Mead* reflects a sound judicial policy is subject to a debate that is beyond the scope of this article.[131] The current analysis introduces an analytical framework within which such discussions should be conducted to clarify the meaning of each choice in this respect.

## CONCLUSION

In this article, I argued that one cannot understand the doctrine of deference without first studying the meaning of the very concept of deference. I suggested that the key for understanding this concept is looking into the relations between deference and agreement (or disagreement) between the deferrer and the deferree. 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 deferrer's process of decisionmaking.

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 presented here 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.

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long period of time" that justified an accordance of *Chevron* deference); Christopher J. Walker, *Toward a Context-Specific* Chevron *Deference*, 81 MO. L. REV. 1095, 1100 (2016) (reading the Court's recent cases as implying that "*Chevron* deference does not apply to certain major questions unless there is clear congressional intent").

130. *See supra* note 62 and accompanying text.

131. *See Mead*, 533 U.S. at 241 (Scalia, J., dissenting) ("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 . . . .").