RECENT DEVELOPMENTS

AGENCY-CENTERED OR COURT-CENTERED ADMINISTRATIVE LAW? A DIALOGUE WITH RICHARD PIERCE ON AGENCY STATUTORY INTERPRETATION

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INTRODUCTION

In an earlier Article in this Review, I attempted to jump-start a conversation about agency statutory interpretation.[1] I argued first for the importance of agency interpretive practice—asserting that agencies are "the primary official interpreters of federal statutes"[2]—and lamented the paucity of secondary literature analyzing agency statutory interpretation as an independent or autonomous enterprise.[3] The Article then investigated, in a very preliminary way, both the normative and positive features of agency statutory interpretation. I first asked what norms a responsible

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1. Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501 (2005).

2. *Id.* at 502-03.

3. *See id.* at 501-02 (positing queries such as how agencies interpret statutes, whether there are distinctive interpretive methodologies that appeal to administrators, and with what effects).

administrator should observe when interpreting statutes,[4] and second, how agencies interpret statutes in the actual practice of implementing the statutes in their charge.[5]

I limited the latter positive inquiry to a very brief foray into interpretive practices at the Environmental Protection Agency (EPA) and the Department of Health and Human Services (HHS) when issuing formal legislative rules.[6] But, as my prior Article noted, this was surely only the tip of the proverbial iceberg.[7] Most agency interpretation is much less formal and much less accessible than these two examples. Agencies interpret in a wide range of contexts, speak to multiple audiences, and promulgate their interpretations in myriad forms, including the silence of decisions not to act.[8]

Although little could be concluded from this limited empirical investigation, it did uncover some striking discontinuities between agency interpretive practice and the interpretive approaches of reviewing courts during judicial review. Although the EPA—the agency involved in the now iconic *Chevron* case[9]—constantly invoked *Chevron* and emphasized the "reasonableness" of its interpretations, both the EPA and HHS based much of their agency interpretation on past agency practice, technical or scientific understandings of statutory terms, and on legislative history.[10] Because some of the rules that I investigated had been subject to judicial review, it was possible in a few instances to directly compare agency and judicial interpretive methods in the same case. As the prior Article put it:

> Perhaps most striking are the cases in which an agency's highly nuanced interpretation—based on text, legislative history, statutory history, past agency practice, the balance of competing congressional purposes, and industry or scientific understandings—was rejected in favor of judicial approaches based on pure textual analysis, plain meaning or the invocation of grammatical rules.[11]

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4. *See id.* at 504-24 (bifurcating the analysis of interpretive norms into constitutional demands and prudential concerns).

5. *See id.* at 524-36 (querying the occasions, forms, and processes for agency statutory interpretation and the administrators' interpretive methodologies).

6. *See id.* at 527-36 (selecting these agencies because they each had a substantial number of issuances and engage in different administrative tasks and politico-legal contexts).

7. *See id.* at 528 (analogizing the Article's findings to the notes of an "explorer in uncharted territory").

8. *See id.* at 524-27 (discussing the difficulties of empirical investigation of agency interpretive practice).

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

10. *See* Mashaw, *supra* note 1, at 535 (observing the agencies' meager use of judicial precedent).

11. *Id.*

This practical divergence between agency and judicial styles of interpretation reinforced a concern more fully developed in the Article's normative analysis. Arguing largely from the standpoint of the institutional position of agencies in the American constitutional legal order, I developed a series of possible "canons of construction" for agency statutory interpretation.[12] Although I put forth these "canons" tentatively as the basis for further discussion, they revealed some substantial differences between our constitutional expectations for agency interpretive practice and the parallel normative expectations that we might have in relation to the judiciary.[13] For example, it seems normatively appropriate for agencies to give significant deference to presidential directions concerning how they should interpret their statutes. By contrast, a court would be perfectly justified in treating presidential pronouncements on statutory meaning as quite irrelevant to its interpretive task, save in those cases where the President is the direct administrator. Similarly, while we might think that agencies have a responsibility to interpret in order to give energy and effectiveness to the legislative programs for which they are responsible, courts have no parallel responsibility for implementation. Although courts often interpret to avoid raising constitutional questions, an agency taking this approach risks under-implementing its legislative programs and short-circuiting the constitutional conversation.[14]

These and other possible normative divergences between agency and court interpretive methodologies led me to conclude that deference to agencies' statutory interpretation, as mandated by the Supreme Court in *Chevron* and its progeny, might be a much more complicated task than previously imagined. As I put the matter in the prior Article:

> [M]y construction of parallel universes of interpretive discourse on the foundation of divergent institutional roles seems to undermine the very possibility of an authentically deferential judicial posture. How can a court's determination of "ambiguity" or "reasonableness" at *Chevron*'s famous two analytical "steps" be understood as deferential when that determination emerges from the normative commitments and epistemological presumptions of "judging" rather [than] "administering"? How could *Mead*'s resuscitation of *Skidmore* deference make sense as deference at all when the discourse, to be persuasive, would presumably have to be within the terms of a judicial conversation about meaning that ignores, if not falsifies, the grounds

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12. *See id.* at 521-24 (qualifying the canons as needing commentary, qualification, examples, and modification to reflect the complexity of the differences between judicial and agency statutory interpretation).

13. *See id.* at 522 (displaying the canons in tabular form).

14. *See id.* at 507-10, 518-21 (explaining that a "[c]onstitutionally timid administration . . . potentially usurps the role of the judiciary in harmonizing congressional power and constitutional command").

> upon which much administrative interpretive activity is appropriately and responsibly premised?[15]

These rhetorical queries, of course, state the issues in their starkest forms, for I intended to provoke discussion and serious inquiry. Several authors accepted this invitation, which formed the basis for a brief symposium in the *Administrative & Regulatory Law News*.[16] More recently Professor Richard Pierce challenged the basic premises of my original Article.[17] In the final paragraph of his essay, Pierce summarizes his objections to my position:

> I disagree with . . . Mashaw at the most fundamental level. Unlike . . . Mashaw, I do not believe that agencies are "the primary official interpreters of federal statutes." Rather, all agency statutory interpretations are subject to de novo review and potential rejection by a court through application of *Chevron* step one. Further, I do not believe that agencies should use methods of statutory interpretation that differ from the methods courts use. Accordingly, I do not see the conflicts between legitimate agency interpretations and legitimate court interpretations that trouble Mashaw. It is certainly true that agencies have the power to give meaning to ambiguous provisions in the statutes they administer, subject only to the deferential form of judicial review described in *Chevron* step two and *State Farm*. When agencies undertake that important task, however, they are not involved in the process of statutory interpretation. Instead, they are engaged in a policymaking process, the end result of which is to choose which of several linguistically plausible meanings to give ambiguous language to further the purposes of the statute the agency is implementing.[18]

Richard Pierce's entry into the conversation about agency statutory interpretation is particularly welcome. Pierce is one of the most knowledgeable and accomplished commentators on American administrative law and his critique of my position raises a broad, important, and generally neglected question: Should American administrative law be an agency-centered or a court-centered discipline? In Pierce's view, both

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15. *Id*. at 537-38 (referring to United States v. Mead Corp., 533 U.S. 218 (2001) and Skidmore v. Swift & Co., 323 U.S. 134 (1944)).

16. Symposium, *Roundtable: Statutory Interpretation in the Executive Branch*, 31 ADMIN. & REG. L. NEWS, Spring 2006, at 6.

17. *See* Richard J. Pierce, Jr., *How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss*, 59 ADMIN. L. REV. 197 (2007). Pierce also disagreed with an earlier article by Peter Strauss, which argued that, whatever the position of courts concerning the relevance of legislative history to statutory interpretation, legislative history is a critically important source of information for agency interpreters. *See* Peter L. Strauss, *When the Judge is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 322 (1990).

18. Pierce, *supra* note 17, at 204-05 (footnotes omitted).

courts and agencies should base legal interpretations on a judicial model.[19] Agency practice in construing statutes in the course of implementing them is not statutory interpretation—it is policymaking, a question perhaps best left to students of political science or public administration.[20]

Pierce's critique lies well within a long tradition in American administrative law scholarship. The emergence of administrative law as a separate field of study almost coincided with the transformation of American legal education by Langdell's case method. Since that time, notwithstanding the exhortations of legal realists, positive political theorists, and critical legal scholars of various stripes, we have studied administrative law primarily by looking at what judicial opinions say about it.[21] To be sure, there has been much recent attention to political control of administration in the Executive Branch, cost-benefit analysis, other clearance functions organized through the Office of Management and Budget, and so on. But my proposal goes beyond a focus on separation of powers questions as an integral part of administrative law. I am arguing for the study of agency statutory interpretation—and implicitly for the study of agency practice as a whole—as an autonomous enterprise. It seems to me not only odd, but perverse, that articles parsing the exquisite subtleties of *Chevron* or *Skidmore*[22] deference fill our law reviews, while virtually nothing is said about the ways in which agencies should and do interpret the statutes in their charge. On this point I remain unrepentant. Hence, I must grapple with Richard Pierce's criticisms.

I. THE PIERCE CRITIQUE

Pierce disagrees with my position both with respect to the importance of agency statutory interpretation and with respect to its position as an autonomous legal enterprise. As to the former, Pierce believes that it is simply incorrect to describe agencies as "'the primary official interpreters

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19. *See id.* at 204 (stating that Pierce does not believe that agencies should use different methods of statutory interpretation than courts use).

20. *See id.* at 204-05 (explaining that when agencies interpret ambiguous provisions in the statutes that they administer, they are making policy by choosing one of several plausible meanings to further the statute's purposes).

21. *See generally* WILLIAM C. CHASE, THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT (1982) (arguing that the rise of the case method as the only respectable approach to professional training overwhelmed attempts of Ernst Freund and others to explore administrative law by looking at administrative practice and administrative decisions). Somewhat ironically, this case method also tended to suppress the approach of a Harvard scholar, Bruce Wyman, whose early lectures on administrative law emphasized agency practice, which Wyman conceptualized as the "internal law" of administration. *See* BRUCE WYMAN, THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS §§ 1-6 (1903) (explaining that the author devoted the most time in his lectures to the questions of what methods, practices, and processes the administration acts).

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

of federal statutes.'"[23] As articulated in the paragraph quoted above, Pierce believes that this is false because "all agency statutory interpretations are subject to de novo review and potential rejection by a court through application of *Chevron* step one."[24] This objection could, of course, be merely a linguistic quibble about whether "primary" refers to the quantity of interpretation done by agencies versus courts or to the relative finality of agency and judicial decisions about the meaning of statutes. But, it is not. As I shall explain below, my claim is that agencies are not only quantitatively more important interpreters, but they also interpret in the overwhelming number of contexts with complete finality.

The more interesting issue that divides us is the question of whether there is good reason to believe that agency and judicial interpretations should diverge because of their differing institutional positions in implementing statutory law. Pierce's position is that courts and agencies are doing essentially the same thing when they "interpret," and that when their roles diverge it is because the agency is no longer acting as an "interpreter."[25] This is an interesting and complex position that will require further unpacking.

In some sense our two positions are so fundamentally different that they are a bit like two ships passing in the night—and in a dense fog. Pierce begins his critique by stating that he believes that I have "gone astray" in my effort "to understand and to explain the roles of agencies in the process of applying the two-step test the Court announced in *Chevron*."[26] But, of course, that is exactly what my Article is *not* about. Courts apply the *Chevron* doctrine, at least some of the time,[27] but agencies have no responsibility to do so. At a conceptual level, a doctrine about judicial deference to agency interpretation is simply irrelevant to an agency's job. My prior Article was about the question of how agencies should and do carry out the task of statutory implementation, not about how agencies apply *Chevron*.

But this is an incomplete and uninteresting response to Pierce's basic claims. For in his view, if we organize the inquiry about agency statutory interpretation around the *Chevron* two-step process, we will see two

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23. Pierce, *supra* note 17, at 204 (quoting Mashaw, *supra* note 1, at 502-03).
24. *Id.* at 204.
25. *See id.* at 204-05 (reasoning that when agencies choose between several linguistically plausible meanings to a statute, they are policymaking).
26. *Id.* at 198.
27. *See* William N. Eskridge, Jr. & Lauren E. Baer, The Supreme Court's Deference Continuum, an Empirical Analysis (from *Chevron* to *Hamdan*) 33-36 (May 11, 2007) (unpublished manuscript, on file with author). William Eskridge and Lauren Baer find that in a majority of cases involving statutory interpretation between 1984 and 2006, the Supreme Court failed to apply the *Chevron* doctrine, used a host of deference doctrines other than *Chevron*, and applied none of them consistently.

important things. The first is practical and strategic. When seeking to determine the extent to which the statute speaks with clarity—the question at *Chevron* step one—Pierce argues that "an agency must do its best to replicate the interpretive process courts use."[28] This is not a conceptual or normative claim; it is a strategic one. As Pierce notes: "To the best of its ability, the agency should attempt to use exactly the same interpretive process a court would use—any intentional variation from that judicial interpretive process would be a self-defeating exercise in futility."[29]

So much for *Chevron* step one. With respect to *Chevron* step two—that is, adopting policies that embody reasonable constructions of the relevant statutes—Pierce agrees with me that courts and agencies are engaged in quite separate endeavors.[30] Indeed, he goes much further. Because considerations that go well beyond disputes about the proper interpretation of the governing statutory language are likely to dominate the policy process, Pierce claims that agencies should not here be viewed as "involved in the process of statutory interpretation."[31] In his words:

> There is only one link between this policymaking process and the process of statutory interpretation. In the course of explaining why it made the decisions it made, the agency must refer to decisional factors that the underlying statute makes permissible. For that purpose, the agency must engage in statutory interpretation to the extent necessary to explain why it believes that a decisional factor it applies is statutorily permissible.[32]

From this perspective there is no "paradox of deference" as I suggested in my earlier Article. Because the agency and the court are doing fundamentally different things—the court interpreting the statute, the agency adopting a policy position—review for reasonableness at *Chevron* step two could not place agencies and courts in the awkward position of providing divergent interpretations based on their divergent institutional roles in the legal order.

II. A RESPONSE TO PIERCE'S OBJECTIONS

I will not spend much time on the question of whether agencies are the "primary" interpreters of federal statutes. Whether one views "primary" as referring to "first," "quantitatively most significant," or "interpreting with final authority," I do not believe that treating agencies as the primary

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28. Pierce, *supra* note 17, at 203.
29. *Id*.
30. *See id.* at 203-04 (explaining that agencies' efforts to minimize the risk of judicial reversal in *Chevron* step two has less to do with statutory interpretation than with implementation of a comprehensive and transparent policymaking process).
31. *Id.* at 205.
32. *Id*. at 204.

interpreters of federal statutes is controversial. A number of other commentators have said as much.[33] Moreover, although courts can, as Pierce notes, decide individual cases with finality, courts never review the vast majority of administrative interpretive actions. This is not only because courts do not challenge most agency interpretations; many of them cannot be challenged. Lower level agency personnel receive a constant stream of interpretive advice from their superiors in the form of manuals, field letters, memoranda, and the like. Because these interpretations do not become the explicit basis for agency actions affecting private parties, courts almost never review them.

Similarly, a large proportion of agency interpretations are embedded in decisions not to act. These occasionally rise to the level of an explicit justification for agency inaction, as in the recent case of *Massachusetts v. EPA*.[34] But much more is buried in internal memoranda, unrecorded meetings, settlement agreements, consent orders, or the mental operations of responsible officials. Conventional administrative law doctrines of standing, reviewability, ripeness, and so on, will make most of these interpretive decisions unreviewable. And an unreviewable administrative decision is a final one.

Pierce may object to this account based on his view of what should properly be understood as "interpretation." For him, only the abstract question of whether a statute speaks with clarity can be described properly as interpretive. But this seems an unjustifiably restrictive view. Pierce, for example, quotes the Supreme Court's language in *Chevron*, stating that "'the EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives [of the Clean Air Act].'"[35] For him, this is evidence that the proper way to describe the Court's conclusion is as a determination that the agency has made a reasonable policy choice. But, of course, it is equally appropriate to describe the Court as having decided that the EPA made a reasonable, purposive interpretation of the Clean Air Act. For it is surely the Supreme Court's view that the *Chevron* doctrine is about statutory interpretation. The Court's position is

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33. *See, e.g.*, Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 373 (1989) (arguing for abandoning the philosophical conception of law as rules of conduct in a world where much of the legislative landscape is populated with statutes that merely confer authority on agencies); Michael W. Spicer & Larry D. Terry, *Administrative Interpretation of Statutes: A Constitutional View on the "New World Order" of Public Administration*, 56 PUB. ADMIN. REV. 38 (1996); Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1019-20, 1068 (1998) (arguing that administrative agencies are the principle interpreters of statutes and, as a matter of practice, have taken on the role of updating statutes that was long the providence of the common law court).

34. 127 S. Ct. 1438, 1462-63 (2007).

35. Pierce, *supra* note 17, at 200 (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 863 (1984)).

not that interpretation disappears when policy intrudes, but that the connection between interpretation and policy choice is sufficiently close that courts should defer to the agency's interpretation. It seems to mischaracterize the process of interpretation, and the Supreme Court's view of it in *Chevron*, to treat agency decisions about policy choice, within the constraints of their governing statutes, as not involving statutory interpretation.

Contrary to Pierce's claim, agencies do more than merely refer to their statutes as a way of indicating, *á la State Farm*,[36] that they have used legitimate statutory considerations when making policy.[37] If agencies must explain to reviewing courts why their policy choices carry out the purposes of the statutes that they administer, they unavoidably must explain their interpretation of the statute. A statute's legislatively specified decision criteria are not self-interpreting. If the decision involved in *Massachusetts v. EPA*,[38] for example, returns to the Supreme Court, as I suspect that it will, an EPA decision that the Clean Air Act does not demand that it regulate carbon emissions from motor vehicles, would be an EPA interpretation of the statute. It will have determined that although the Clean Air Act authorizes such regulation, as the Supreme Court held in *Massachusetts v. EPA*, it does not demand it. And, if that is the EPA's determination, the Court may sustain it, not because no interpretation was involved, but because the interpretation was a reasonable one.

From the foregoing it seems that Pierce's initial claim that agencies are not primary interpreters of federal statutes is tightly connected to his further argument that policy choice is not properly understood as interpretive. The latter position goes directly to his claim that no paradox of deference exists. If agency policy choice never counts as statutory interpretation, then agency decisions and judicial review for reasonableness are entirely different activities. Hence, I need to say something more about what counts as interpretation.

From an agency's perspective, the first step in any process of policy implementation is to ask a basic interpretive question: What is it that we are meant to do? Further questions will follow in rapid succession, such as, what legal techniques are available to us for implementation, through what processes are we required to make our decisions, and so on. Only interpreting the statute's language within the context of the agency's understanding of the general purposes of the statute and the current state of the world can answer these questions. For an agency to adopt a policy that

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36. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983).
37. *See* Pierce, *supra* note 17, at 204.
38. 127 S. Ct. 1438 (2007).

it believes carries out the purposes of its statute—given its statutory powers, required statutory processes, available regulatory techniques, and understanding of the facts of the matter—is precisely to give concrete meaning to the abstract commands of the statute. And any explanation of how its action implements the statutory purposes for which it has responsibility will necessarily provide, or perhaps assume, an interpretation of the statute.

Let me put this point slightly differently. Agency implementing action is an instrumentally rational exercise. Administrative agency personnel must ask and answer at least five basic questions: (1) What are the goals of the statute that we are implementing? (2) How does the current state of the world differ from those goals? (3) What policy choices are likely to move the future state of the world closer to our statutorily specified goals? (4) What instruments have we been given with which to articulate and implement our chosen policies? (5) What constraints—procedural, analytic, temporal, etc.—have been placed on our development and implementation of our policies? Although questions two and three can be addressed without interpreting the agency's statute, the remaining questions are all saturated with interpretive issues. The notion that policy choice is not interpretive simply ignores many of the necessary mental operations involved in administrative implementation.

Let us now turn to Pierce's final, and in many ways, most interesting claim: When agencies are authentically interpreting statutes—that is, when determining whether the statute is sufficiently vague or ambiguous as to bear multiple meanings—they should and do use precisely the same interpretive methodology as reviewing courts. Indeed, from Pierce's perspective, the positive and normative questions seem to be subsumed in a strategic one: how to avoid reversal at the hands of reviewing courts. Hence, in some sense, our arguments are once again flowing past each other without any necessary point of contact. My prior Article was about "oughts" and "ises," not about legal strategies, but I want to take Pierce's claim seriously. I argue that his strategic judgment is unwarranted and that, even if it were sound, taking a defensive, strategic approach to statutory interpretation would be normatively inappropriate for implementing agencies.

Imagine yourself in the position of an administrative agency, or the agency's general counsel, confronted with an interpretive issue. Assume further that you predict that the sort of decision that will be made will very likely be one of those minority occasions in which the agency's interpretation will be subjected to judicial oversight. You ask yourself a

strategic question: How should I predict the outcome of a judicial review proceeding in which a claim is made that the agency has violated its statutory mandate?

In approaching this question, a good first line of inquiry would be to ask under what standard the agency's interpretation of its mandate is likely to be tested. Pierce's assumption seems to be that the standard will be the one articulated in *Chevron*, starting with the step one inquiry. To the extent that the agency's action is neither § 553 legislative rulemaking nor formal adjudication, there is the question of whether *Chevron* applies. But, let us for the moment put that question aside. The more interesting initial question is whether the reviewing court will in fact even use *Chevron* in circumstances in which it is uncontroversially applicable.

The answer to this question is far from straightforward. My colleague, William Eskridge, and his co-author Lauren Baer, have undertaken a mammoth project to analyze the 1,014 Supreme Court decisions between 1984 and 2006 where a question of agency statutory interpretation was at issue.[39] Their preliminary findings demonstrate in a more rigorous way what many administrative lawyers have suspected from their own observations—there is only slightly more than a chance probability that the Supreme Court will mention and apply *Chevron* in cases raising issues of agency statutory interpretation. The only observed decisional regularity in the Eskridge and Baer study is that the Court will more likely cite and apply *Chevron* in cases in which the Court agrees with the agency's interpretation. The only doctrinal regularity, somewhat surprisingly, is that the Court almost always consults legislative history on the question of whether Congress has delegated interpretive authority to the agency or considered the precise question at issue. From earlier research on circuit courts' applications of *Chevron*, we also know that these courts seem quite confused about when *Chevron* applies, not to mention what it means.[40] In short, we can have little confidence that we could predict when *Chevron* step one would be relevant in judicial review. From this perspective alone, the failure of an agency to approach statutory interpretation from the perspective of what it anticipates a court's interpretive methodology will be can hardly be said to be "a self-defeating exercise in futility."[41]

But, even if the agency were assured that a reviewing court would decide interpretive issues, once raised, using the *Chevron* format, exactly what interpretive process should the agency imagine that the reviewing court will use? Over the past several decades no methodological issue has been

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39. *See* Eskridge & Baer, *supra* note 27, at 34.

40. *See generally* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005).

41. Pierce, *supra* note 17, at 203.

so contentious amongst commentators or judges than the appropriate way to approach the interpretation of statutes. When the members of an appellate court panel agree that the issue before them is one of statutory interpretation, that *Chevron* applies, and that they will apply it in preference to some other ground of decision, they often differ notoriously and heatedly concerning the appropriate interpretive method. Nor is there any reason to predict that an agreement on interpretive methodology will necessarily lead to agreement on substantive interpretation. Interpretive issues do not normally make their way to an appellate court, and certainly not to the Supreme Court, unless those questions are in considerable doubt. Given all these uncertainties, I am tempted to conclude that an agency attempting to anticipate the method of interpretation that a reviewing court will use when interpreting its governing statute might itself face "a self-defeating exercise in futility."[42]

But, that is not my primary objection to Pierce's idea that agencies simply must act like courts when interpreting the statutes in their charge. The more basic problem is that he gives no normative justification for that claim, only a problematic strategic assessment.

Of course if we agree with Pierce that agency statutory interpretation is an exercise in applying the *Chevron* doctrine, then his claim would follow from that assertion alone. But, as I have said, agencies do not apply *Chevron*; reviewing courts do. Agencies simply must interpret those statutes in the course of applying them. What would justify their taking the extreme, possibly self-defeating, and risk-averse position that Pierce counsels? Or put another way, why should agencies, when given deference under the *Chevron* doctrine precisely because they are Congress's chosen delegate for implementing statutory policies, constrain themselves to act like courts when going about their quite separate business?

I have no good answer to these questions. Indeed, as I explained in my prior Article, it seems that agencies have good reasons *not* to act like courts. One of those reasons is that agencies are politically accountable in ways that courts are not. For example, in the well-known *FDA v. Brown & Williamson Tobacco Corp.* case,[43] it was utterly irrelevant to the Supreme Court that the protection of children's health through the regulation of the marketing of tobacco was a high priority for the Clinton administration.[44] But in a constitutional order that presumes some

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42. *Id.*

43. 529 U.S. 120 (2000).

44. *See* William J. Clinton, Remarks by President on FDA Rule on Children and Tobacco, (Aug. 23, 1996), http://www.clintonfoundation.org/legacy/082396-remarks-by-president-on-fda-rule-on-children-and-tobacco.htm (last visited Aug. 8, 2007) (announcing the creation of a "comprehensive strategy to kick tobacco out of the lives of children" and the President's support of the FDA's proposed rule).

executive control of administration (the President has the constitutional duty to see that the laws are faithfully executed), ignoring presidential preferences is surely not responsible agency behavior. It is perfectly appropriate, and indeed required by his or her oath of office, for an agency head to decline to carry out a President's instructions on the ground that the agency has no plausible legal arguments in support of the desired policy. But, it hardly seems appropriate for an agency head to decline to pursue presidential priorities on the grounds that, "If I were a court I might well not accept this interpretation of our statutory authority." Agencies who never lose in court are probably not doing their jobs.

Similarly, agencies are responsible politically to the Congress that empowers, funds, and oversees them. *Chevron* recognizes that agencies should be given deference precisely because they are the chosen agents of Congress. Moreover, because agencies are often involved in the drafting of the statutes that they implement, they have privileged access to understanding which aspects of congressional legislative history they should take seriously. Hence, even if we counterfactually assumed that all courts all the time declined to consider legislative history in interpreting statutes, strong normative and prudential grounds for claiming that agencies should do so still exist—as Peter Strauss has argued.[45] It simply will not do for "faithful agents" of the Congress to redefine their jobs as being courts—the institutions to which Congress might have delegated primary interpretive responsibility, but did not.

Numerous other approaches to the interpretation of statutes, as I detail in my prior Article, can produce legitimate divergence between agency and judicial interpretive methodologies. I need not retrace that ground here in order to further illustrate my basic position: Agencies have a different institutional role in our legal order than do courts. That institutional position generates plausible understandings of responsible agency behavior when interpreting the statutes that they implement. And many of those plausible interpretive positions point in directions that judicial bodies, who have a quite different institutional role, do not necessarily follow. Moreover, it would be inappropriate for them to do so.

I certainly agree with Richard Pierce that an agency without plausible legal arguments for its preferred interpretation of its statute should not attempt to implement that interpretation. That would be a counsel of irresponsibility, and, where judicial review was likely, of folly as well. Indeed, beyond strategic judgments, an agency that believes a particular action is not justified under the terms of its statutory authority should desist, even if a court might approve of its interpretation, or if the action is

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45. *See* Strauss, *supra* note 17, at 322, 352.

not susceptible to judicial review. Agencies have an independent obligation to obey the law as they understand it. But, I strongly object to the notion that agencies should turn themselves into—or attempt to turn themselves into—shadow judiciaries when interpreting and implementing their statutory programs. For, in my view, this carries the traditional court-centered approach of American administrative law to an extreme of constitutional inappropriateness.

Aphorisms, like metaphors, are dangerous in the law. It seems to me that we have taken too seriously for too long one of Chief Justice John Marshall's most famous ones, that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[46] Courts surely have that responsibility when deciding particular cases. But, administrative agencies share the responsibility of determining the law involving national programs. Because agencies are responsible for agenda setting, policy development, enforcement, and maintenance of the political legitimacy of their programs, the agencies' responsibilities far outstrip reviewing courts' responsibilities in relation to those same statutory provisions. We would do well to remember that agencies are not inferior courts. Court rulings are binding on an agency only in the litigated case, leaving the agency legally free to maintain its prior position and to litigate the matter further.[47] American administrative agencies have often declined to acquiesce to judicial rulings and have taken varying positions on how to manage this inevitable conflict with a fragmented appellate court system. Most lawyers probably believe that a Supreme Court decision would provide a final resolution to such conflicts; but even that is not free from doubt.[48]

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46. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

47. *See* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 681 (1989) (defining agency nonacquiescence as an agency's selective refusal to conduct administrative proceedings according to adverse appellate rulings); *see also* Samuel Estreicher & Richard L. Revesz, *The Uneasy Case Against Intracircuit Nonacquiescence: A Reply*, 99 YALE L.J. 831, 831 (1990) (discussing how agency nonacquiesence results from subjecting agencies' policymaking authority to regional court review across the country). *But see* Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801, 803 (1990) (critiquing legal scholars' acceptance of agency nonacquiescence).

48. *See* H. JEFFERSON POWELL, THE CONSTITUTION AND THE ATTORNEYS GENERAL xv (1999) (arguing that the Attorney General has the duty to give independent legal advice to the President and the heads of the executive branches); *see also* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 264-67 (3d ed. 2000) (asserting that "a judicial decree contrary to the Constitution arguably should not be given effect by the executive when exercising the power to take care that the laws be faithfully executed"); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1359-61 (1997) (discussing the debate among constitutional scholars whether nonjudicial officials must follow Supreme Court interpretations of the Constitution); Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 348 (1994) (recommending "comparative institutional competence," whereby each institution has the authority to determine how much deference it must give to

This is one of those open and much-debated questions about the appropriate legal roles of courts and agencies that makes a positive contribution to our legal order. A system of separated powers and checks and balances better tolerates ambiguity about final legal authority, and accommodates multiple approaches to legal interpretation, than it could countenance the interpretive tyranny of either the executive or the judicial branches. What I have characterized as the paradox of deference is a signal of the strength of our legal order, not a weakness to be remedied by making the focus of administrative law even more judicio-centric than it currently is.

III. A CODA ON RECONCILIATION

My position is straightforward: Agencies are responsible for implementing statutes; they are not responsible for applying judicial decisions, which, like *Chevron*, are directed to reviewing courts. In the process of implementation, federal administrative agencies are constantly engaged in statutory interpretation within the contexts of their unique institutional roles. This position makes them the primary interpreters of federal law, whose practices and normative commitments are worthy of independent study. Finally, because judicial and agency roles in the legal order diverge, their responsibilities may lead them to emphasize or employ divergent interpretive methodologies. Where methodology matters to substantive outcomes, this sets the stage for a paradox of deference where responsible judging may reject an interpretation generated by responsible administration.

But this final step in the argument is its least important practical implication. For the genius of American law—perhaps all law—is its capacity to reconcile logical antinomies through practical judgment. As I detailed in the last few pages of my prior Article, courts have a remarkable

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other institutions interpretations of the Constitution); John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371, 372 (1988) (arguing that the Executive and Legislative Branches are not required to follow judicial precedent when there is no binding judgment in a situation, but that doing so facilitates the smooth operation of government); Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373, 373-74 (1994) (stating that all institutional players should monitor their own behavior as well as the behavior of other institutional actors to ensure constitutional compliance); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 217 (1994) (suggesting that the Executive Branch has equivalent interpretive power to the judicial branch); Neal Devins, Foreword, *Elected Branch Influences in Constitutional Decisionmaking*, LAW & CONTEMP. PROBS., Autumn 1993, at 1 (discussing the role of elected branch officials in constitutional decisionmaking); John. McGinnis, Introduction, *Executive Branch Interpretation of the Law*, 15 CARDOZO L. REV. 21, 21 (1993) (addressing executive branch interpretation of judicial branch decisions).

range of "paradox avoidance" techniques.[49] They used them long before *Chevro*n entered the scene. In 1933, for example, the Supreme Court stated as a truism: "[A]dministrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction. [And] . . . administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful."[50]

The 1933 *Norwegian Nitrogen* formula is similar to the *Chevron* formula. The difference is that under the *Norwegian Nitrogen* formula the Supreme Court gave administrative practice almost conclusive weight in its otherwise "independent" interpretation of the statute. The Court harmonized agency and judicial construction by treating agency practices as a construction that should inform judicial construction and that courts should reject only for "cogent reasons." The Court gave particular credence to agency construction because those that adopted it were "the men charged with the responsibility of setting [the statute's] machinery in motion, of making the parts work efficiently and smoothly . . . ."[51]

We now view the *Norwegian Nitrogen* formula as less deferential than *Chevron*, and more in the line of cases now summarized as "*Skidmore* deference." But in many ways, it seems to me that the *Norwegian Nitrogen* formula is the better, and more deferential, approach. It treated agency construction as grounded in the separate imperatives of effective administration. And although the Court found confirming evidence in the legislative and statutory history of the program, the *Norwegian Nitrogen* formula treated agency practice as presumptively persuasive of the proper construction of the relevant tariff act. This formula both gave weight to agency statutory construction as an autonomous enterprise, and left the courts free to disagree with agencies' construction of statutes.

I agree with Richard Pierce that, in practice, the reconciling of agency and court interpretations must occur through a respectful consideration of the institutional roles of each. But my preference is to achieve that reconciliation by recognizing the differences between courts and administrators as interpreters and, like the *Norwegian Nitrogen* Court, by giving focused attention to how agency interpretation proceeds and how it is justified. For only through attention to those matters can we have a serious conversation about when judicial deference to agency action is appropriate. Formulaic incantations of the *Chevron* doctrine by reviewing courts are unlikely to decide cases, and that formula certainly should not guide agency statutory interpretation.

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49. *See* Mashaw, *supra* note 1, at 538-42.
50. Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933).
51. *Id.*