CHEVRON—COMPLICATED, START TO FINISH[*]

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A Review of Thomas W. Merrill, *The* Chevron *Doctrine: Its Rise and Fall, and the Future of the Administrative State* (Harvard Univ. Press 2022)

I. THE *CHEVRON* ATTRACTION

The Supreme Court's *Chevron* decision[1] is the most talked about, most written about, most cited administrative law decision of the Supreme Court. Ever.

Chevron has fierce defenders and implacable critics. It is credited with simplifying judicial review of administrative agency actions and blamed for complicating it. For many in the law-and-policy community, *Chevron* is synonymous with granting more leeway to agencies, thereby increasing deference to officials who are more expert respecting specific issues or more accountable to the public than life-tenured judges. For others, *Chevron* is notable for empowering unaccountable bureaucrats as their rulemaking supplants lawmaking by Congress and moves ever further afield from statutory directives.

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[*] Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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[1] For those who have stumbled onto this review by accident (perhaps coming from a non-legal background or from another planet), the reference is to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Chevron has prompted virtually every American administrative law professor—and more than a few commentators outside the academy as well—to offer opinions on how the decision and its progeny have violated or validated critical aspects of governance, especially governance in an era when a vast administrative apparatus controls or influences so much of our lives.[2] *Chevron* connects to so many different strands of administrative law that it provides an almost inexhaustible number of avenues for analysis and commentary on law, government, structure, and the legal and practical issues that touch on these topics.

Writings about the *Chevron* decision don't merely reveal different views of its benefits or detriments; they also display disparate views of what *Chevron*'s rule *is*. *Chevron* either provides one simple two-step rule for looking at a wide swath of administrative actions, a one-step rule, a three-step rule, or a sliding scale of different rules for different settings based on an expansive array of considerations. And it may be a durable precedent or one that is approaching the end of its reign.

II. ALONG COMES MERRILL

Professor Tom Merrill, along with so many others, has written about *Chevron*. Often. At this stage, one might ask, what's left to say and what's worth the saying?

It turns out, quite a bit remains to be said. And Merrill's book does an admirable job of saying a great deal of it. Not that I agree with all it says, but even for those who are thoroughly familiar with the decision, the book's

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[2] *See*, *e.g.*, Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392 (2017); Kent Barnett & Christopher J. Walker, Chevron *Step Two's Domain*, 93 NOTRE DAME L. REV. 1441 (2018); Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron*'s Step Two*, 2 ADMIN. L.J. AM. U. 255 (1988); Ronald A. Cass, *Vive la Deference? Rethinking the Balance Between Administrative and Judicial Discretion*, 83 GEO. WASH. L. REV. 1294 (2015); Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. AM. U. 187 (1992); Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931 (2021); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016); Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997); Richard J. Pierce, Jr., Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511; Kenneth W. Starr, *Judicial Review in the Post*-Chevron *Era*, 3 YALE J. ON REG. 283 (1986); Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight*,*"* 112 COLUM. L. REV. 1143 (2012).

peregrinations—through the law before and after *Chevron*, the way the *Chevron* doctrine relates to governmental decisionmaking, and the academic literature about these and cognate subjects—make for both a thoughtful and an interesting read. It has new insights for old hands but takes a long enough lens to be accessible to *Chevron* newbies, too. There is, in short, something here for everyone interested in how government works and how the roles of courts and agencies intersect.

The book covers several interrelated discourses about *Chevron* and judicial review.[3] At one level, Merrill's book is a history of judicial review of administrative actions. That is where an account of the book should start.

III. *CHEVRON* IN HISTORICAL PERSPECTIVE

The Chevron *Doctrine* takes readers through the background cases, giving an especially careful and edifying account of notable precedents decided in the years leading up to the adoption and initial implementation of the Administrative Procedure Act, which provides the basic rules for agency proceedings and for judicial review of them. Merrill also explains the prevailing attitude among leading administrative law scholars and judges between that era and the *Chevron* decision, discusses the decision itself, recounts the difference between what the Supreme Court actually said and what the case has been taken to mean, and suggests the most likely explanation for what the Justices understood about their disposition of the *Chevron* case.

Merrill takes care in going through the factual, statutory, and judicial background for *Chevron*, the attitudes of the Justices in voting on and working through the case—on which only six Justices participated—how the Justices coalesced on the opinion for the Court, and what the decision said. Looking, among other things, at notes from Justice Harry Blackmun on the draft opinion from Justice John Paul Stevens, Merrill paints a persuasive picture of a Court that was tentatively trying to resolve a difficult issue of statutory construction without intervening in the policy prerogatives committed to the EPA. Interestingly, the Justices were nearly all doubtful about resolution of the specific dispute in *Chevron*—the question whether the agency's "bubble concept" fit within the scope of its statutory authority in the particular part of the law concerned.

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[3] This review does not follow the exact order of Professor Merrill's book or mirror the divisions among topics presented in the book. It does, however, attempt faithfully to present the central arguments of the book and the issues raised by them.

The Justices were not, however, endeavoring to change the law respecting how judges decide such matters, although that is what *Chevron* has come to stand for. While much of this tracks Merrill's earlier scholarship, it is presented in a clearer and more accessible manner in this book.

Merrill also takes pains to walk readers through the decision's evolution from an uncertain Supreme Court's effort at applying *established rules* on judicial review to the centerpiece for debates over *what rules* should govern that review. As Merrill relates, the focus of the Justices' efforts is clear not only from their drafts and comments during the discussion of the disposition of the case but also from the opinion itself.

The *Chevron* decision spans 25 pages in the U.S. Reports. What is discussed in commentary about it, as Merrill emphasizes repeatedly, is almost entirely drawn from only two paragraphs (and a footnote).

Taken as a whole—as Merrill explains—*Chevron* expects courts to make their own decisions respecting the ambit of statutory commands and to determine the outer bounds of agency authority without deference to agency views unless the law specifically says to defer. But when a court finds that a statute, fairly read, gives discretion to an agency, the court should review agency exercises of discretion deferentially. *Chevron* says that courts, in that context, should ask if an agency action stays within the bounds of the law rather than if the action fits what a court would think is the best policy to implement the law. Put differently, properly delegated discretion is to be reviewed for *reasonableness*, not for *correctness* in the sense of the best exercise of discretion according to a judge's views.

Merrill's view of the decision is not merely reasonable. It accords with a wide array of scholarly accounts of what *Chevron* did.

IV. BECOMING *CHEVRON*—FROM CASE TO LEGEND AND BEYOND

The aftermath of *Chevron*, explained in the book, is also instructive, though not as free from question as the explanation of *Chevron* itself. As Gary Lawson and Steve Kam, Merrill himself (writing with and without Kristin Hickman), and others have recounted,[4] the *Chevron* doctrine as we know it is as much a creation of the D.C. Circuit of the U.S. Court of Appeals as of

[4] *See*, *e.g.*, Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1 (2013); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 833–34 (2001); Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, *in* ADMINISTRATIVE LAW STORIES 398, 398–402 (Peter L. Strauss ed., Foundation Press 2006).

the Supreme Court. The doctrine *followed*, rather than flowed directly from, the eponymous decision. That is, *Chevron*, as the term is used, is what was built around the decision, not what the decision itself did.

Merrill gives much of the credit—or, as explained in a moment, blame—for this development to former D.C. Circuit Judge, and then long-serving Supreme Court Justice, Antonin Scalia. Scalia and his colleagues on the D.C. Circuit found a version of the *Chevron* formula congenial, taking from the decision a particular vision of when courts would decide matters *de novo* and when they would defer to an agency's views. To his credit, Merrill, agreeing with Lawson and Kam's account of the rise of *Chevron*, does not make the story political. He notes that D.C. Circuit Judge Patricia Wald, a liberal Democrat appointee, was as much the progenitor of the *Chevron* doctrine as her conservative, Republican-appointed colleagues Scalia and Judge Ken Starr.[5]

As Merrill explains, making the *Chevron* doctrine a simple, two-step test served the interest of D.C. Circuit judges whose caseload includes a high proportion of appeals from agency decisions. The two-step reading of *Chevron* replaces the difficult task of plumbing a number of considerations respecting the agency's decision with two questions: (1) whether there is ambiguity in the statutory directive and, if so, (2) whether the agency construction of its mandate is reasonable.

Of course, as those familiar with *Chevron*-in-practice know, those two questions are anything but straightforward, judgment-free, and self-defining. Even if it is true that D.C. Circuit judges aimed to use *Chevron* to simplify administrative law appeals, in practice the doctrine has proved complex. Merrill makes that point clear, carefully analyzing the test's ambiguity in his discussion of what is required to implement it.[6] Jack Beermann makes this point along with explaining other problems attending the *Chevron* doctrine, using a catchy and emphatic title imploring the Supreme Court to "End the Failed *Chevron* Experiment Now."[7] Many other scholars also, under less memorable cover, have criticized the doctrine for inevitably calling for judgments that are not easily made by judges or allowing leeway for deference to judgments not

[5] THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE 83–87 (2022) (hereinafter Merrill).

[6] *Id*. at 100–19.

[7] Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010).

properly made by agency officials.[8] Merrill's book adds to a voluminous body of scholarship exploring the twists and turns, debates and doctrinal puzzles that *Chevron* the legend (as opposed to *Chevron* the case) has generated.[9] Viewed as a body, the literature on *Chevron*-in-practice at a minimum demonstrates a solid basis for Professor Beermann's plea. And Merrill ably exposes much of the argument supporting the development of the *Chevron* doctrine and the reasons behind both sides of various strands of commentary. He also shows how at least some essential parts of the developing *Chevron* doctrine could have been characterized simply as elements of much earlier law, a point made, for example, in Merrill's discussion of the *Cardoza-Fonseca* decision.[10]

From my view, however, Merrill spends too much time critiquing Justice Scalia's position on *Chevron*, diverting attention from other aspects of *Chevron*'s development. He asserts that Scalia too boldly championed *Chevron* as a new panacea for judicial review, overlooked the ambiguity in the doctrine as articulated by D.C. Circuit opinions, too blatantly asserted his own views as a junior Justice, and too uncritically jettisoned the benefits of legislative history and administrative practice (consistency aside) as aids to interpretation.

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[8] For an able and accessible review of various criticisms, see Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103 (2018).

[9] In addition to the works cited in notes 2 and 4, *supra*, see Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611 (2009); Aditya Bamzai, *Judicial Deference and Doctrinal Clarity*, 82 OHIO ST. L. J. 585 (2021); Ronald A. Cass, *Is* Chevron*'s Game Worth the Candle? Burning Interpretation at Both Ends*, *in* LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE 57 (Dean Reuter & John Yoo eds. 2016); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from* Chevron *to* Hamdan, 96 GEO. L.J. 1083 (2008); Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673 (2007); Michael Healy, *Spurious Interpretation Redux:* Mead *and the Shrinking Domain of Statutory Ambiguity*, 54 ADMIN. L. REV. 673 (2002); Daniel J. Hemel & Aaron L. Nielson, Chevron *Step One-and-a-Half*, 84 U. Chi. L. Rev. 757 (2017); 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 (2010); Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006); Justin Walker, *The Kavanaugh Court and the* Schechter*-to-*Chevron *Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L.J. 923 (2020).

[10] *See* Merrill at 88–91, explaining how *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421 (1987), could be viewed either as an application of *Chevron* Step One or of the pre-*Chevron* understanding that courts as a rule do not give deference to agencies in pure questions of law.

So far as his *Chevron* jurisprudence goes, Scalia kept his eye on the difference between the exercise of delegated discretion and of arrogated power. And he also was among the most insistent of the judges and Justices in scrutinizing the language and context of a law before pronouncing on the scope of administrative discretion the law authorized. To be sure, Scalia admitted—along with virtually every careful jurist and scholar—that seeing in statutory ambiguity an implicit delegation of discretion was legal fiction. But he also understood that this fiction fit better with an understanding of constitutional command and legitimately assigned roles for government officials than most alternative conceptions of *Chevron* deference.

More broadly, Scalia had a profound effect on interpretive practices and administrative law, from my perspective far more to the good than the bad.[11] He certainly deserves better than he is given in this book. That is especially true as others, such as Judge Wald, are given more credit for the evolution of *Chevron* from a modest exercise in applying existing deference doctrines to the creation of a new doctrine, divorced from clear statutory directive.

Nonetheless, Merrill's treatment of the history of deference and of the brand now associated with *Chevron* is overall thoughtful, meticulous, and enlightening on the way law unfolds as well as on both the problems and the benefits that came with this particular chapter in administrative law. These qualities are evident in his analysis of the run-up to *Chevron*, its adoption, and its establishment as a widely recognized doctrine. They are evident, too, in Merrill's discussions of the problems and complexities of *Chevron*'s implementation over time.

Merrill recounts the history of post-*Chevron* decisions—including the Supreme Court Justices' interpretation and application of *Chevron* in the *Brand X* case,[12] *Chevron*'s reformulation and complication in the Supreme Court's *Mead* decision,[13] and its general affirmation in *City of Arlington*[14]—at sufficient length and in sufficient detail (and across a sufficiently large cross-section of cases) to cover numerous strands of deference-and-review analysis.[15] In what is the mark of an able scholar, Merrill also presents each subpart of

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[11] *See* Ronald A. Cass, *Administrative Law in Nino's Wake: The Scalia Effect on Method and Doctrine*, 32 J. L. & POL'Y 277 (2017).

[12] National Cable & Telecoms. Assn. v. Brand X Internet Servs., 545 U.S. 967 (2005).

[13] United States v. Mead Corp., 533 U.S. 218 (2001).

[14] City of Arlington v. Federal Communications Comm'n, 569 U.S. 290 (2013).

[15] Merrill weaves the history of *Chevron*'s aftermath through most of chapters 5 through 11, liberally using discussion of deference problems and judicial decisions across a range of cases to make his points.

his discussions in sufficiently parsimonious fashion (picking and choosing among the cases and details of analysis) to maintain readers' attention without compromising his care in respect of numerous details regarding the Court's treatment of the essential arguments respecting judicial review. The same is true in much of Merrill's interlineated discussion of the unfolding scholarship on *Chevron* and deference. All in all, readers should find much to appreciate and to learn from in these discussions.

V. BROADER JURISPRUDENTIAL MUSINGS ON *CHEVRON*'S PLACE IN THE LAW

From the outset, Merrill makes clear that his book is about more than *Chevron*. It presents the doctrine of *Chevron* and the developments leading up to and following the *Chevron* decision as vehicles for understanding what judicial decisions in particular and actions articulating or implementing law more generally should do. Merrill's understanding of the yardsticks that should be used to measure the success of law and of legal decisionmaking provides the framework for his critiques of the *Chevron* doctrine and other approaches to deference and interpretation.

In exploring broader themes, Merrill posits four values that should be used to assess "institutional practices," including doctrines respecting judicial review.

First, he references "rule of law values." So far as the book goes, rule of law mainly denotes the ability of individuals to rely on settled expectations respecting law and its enforcement. The term "rule of law" is used in different ways by different people—and in public parlance often means only something that directs conversation toward a particular, desired outcome, even if the something is a mere catchphrase such as "no one is above the law." Merrill is right to focus invocation of rule of law values on predictability of governing rules. I have advocated a version of this under the label "principled predictability," distinguishing predictability based on considerations such as personal animus or personal preferences from predictability based on rules accessible to those who would be bound by them.[16] I take Merrill's more general

[16] RONALD A. CASS, THE RULE OF LAW IN AMERICA 4–5, 7–12 (2001). Similar views have been expressed by, among others, RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 89–90 (1998); F. A. HAYEK, THE ROAD TO SERFDOM 80–81 (1994); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989). *See also* LON L. FULLER, THE MORALITY OF LAW 38–39 (rev. ed. 1969); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 14–17, 19 (1959).

terminology as meaning exactly the same thing. Merrill also rightly explains that these values are not the only ones a society should pursue, as predictability of rules does not guarantee the justice of the rules themselves. Yet, it is better to keep a meaningful definition of the rule of law, as Merrill does, than to warp it into meaning other things as well (a failing that describes much "rule of law" discourse). Here, as in many other details, Merrill is to be commended.

Second, Merrill advocates grounding evaluation of particular practices and doctrines in their consistency with what he calls "constitutional values." It is difficult to conceive of a basis for disagreement with this point. That is, until one gets into the details of what Merrill means.

After articulating potential categories of constitutional values and addressing what each might entail, Merrill focuses on the category most important to *Chevron* deference analysis: separation of powers values.[17] In his discussion of these values, Merrill sides with those who take the view that the U.S. Constitution does not prohibit delegations of authority to the President and administrative agencies to make broad decisions of policy, including policy choices that constrain acts of private citizens.[18] This decidedly revisionist view of the Constitution and the history of its implementation has profound implications for rules respecting both administrators' authority and judicial review of their determinations. It puts a very large rabbit in the hat of any decisionmaker respecting the rules for judicial review.

My view is decidedly to the contrary, as are the views of many thoughtful scholars and jurists.[19] Moreover, as Merrill notes, his view runs counter to

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[17] Merrill refers to "federalism values"—those addressing the spheres of national and state authority—as a separate category, though noting that they could be seen as a subcategory of separation of powers values. Given that the original Constitution had Senators selected by state legislatures and the President selected largely by state officials as well, it is obvious why the Constitution did not spend much time elaborating on devices to secure federalism values in the same way it addressed separation of powers among the branches of the national government.

[18] Merrill at 22–23. *See* Merrill at 198–233 (discussion consistent with legislative authority to delegate virtually any powers of its choosing to executive officers and, similarly, to constrain judicial review of those decisions). *See also* CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE at chap. 3 (2020); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

[19] *See, e.g.*, Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1042–43 (2007); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1311–12 (2003); Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, forthcoming in 84 OHIO ST. L. REV. (2023); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 141–61 (2016); Christopher C. DeMuth,

that held by what is likely to be a majority of current Supreme Court Justices. Conclusive proof of this last point, however, still lies ahead.

Third, Merrill urges adopting approaches that place decisions—including decisions on interpretation of legal instructions—in the hands of more politically accountable officials. He defends this value as consistent with democratic ideals. After exploring the ways in which neither agency officials nor judges are directly accountable to the public and the ways in which there is some form of accountability, Merrill concludes, "if we want interpretations that involve discretionary interpretive choice to be made by the relatively more accountable decision maker, and the relevant choice is between an agency and a court, the agency wins hands down."[20] This is a completely defensible statement if democratic accountability is an appropriate value in deciding what a law means. Yet Merrill does relatively little to satisfy skeptical readers on that score. If one is looking for consistency with *law* as a value, rather than consistency with current *political judgments*, the opposite conclusion would hold. I return to this matter below.

The fourth value Merrill says should guide selecting which entity should have primacy in interpreting law is identified as "better agency decisions."[21] That is, who will make the better decision and under what decision rules. Here, Merrill is not asking what the law says about these *who* and *how* questions. Instead, he is asking for a much more practical set of judgments. His answers are fairly simple and will appeal to many readers.

As Merrill says, agency officials generally have expertise in subjects that come before them, sometimes in quite abstruse technical and scientific matters. Merrill does not posit a strong form of the agency-officials-as-disinterested-experts argument. He recognizes that agency officials operate in a politically constrained and influenced milieu. But he argues that agency officials

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Can the Administrative State Be Tamed?, 8 J. LEGAL ANALYSIS 121 (2016); Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475 (2016); PHILIP A. HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 83–110 (2014); Philip A. Hamburger, *Delegating or Divesting?*, 115 NW. U. L. REV. ONLINE 88, 91–101 (2021); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 335–53 (2002); Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235 (2005); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463 (2015); David Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355 (1987); PETER J. WALLISON, JUDICIAL FORTITUDE: THE LAST CHANCE TO REIN IN THE ADMINISTRATIVE STATE 109-136 (2018); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021).

[20] Merrill at 26.

[21] *Id.* at 28.

nonetheless tend to have greater expertise than judges or others on the subjects their agencies address and that these officials' decisions generally are influenced more by that expertise than by political directives.

Merrill further asserts that two procedures should be required for agencies to benefit from a strong form of deference: public participation (preceding agency decision on what its interpretation of a given statutory command will be) and reason giving (explaining why the agency chose a given interpretation).

Merrill surely is right that such procedures often can improve agency decisionmaking. But why is that the test for deference? If a statute assigns unreviewable authority over a matter to an agency—say, authority to make decisions in light of national security considerations that may be known to the head of the CIA but not to judges—should courts determine whether the process the official used suffices to make it a substantively better decision than if a different process was employed? And better by whose lights?[22] Merrill recognizes that courts cannot command agencies to employ procedures that are not legislatively mandated or, in some instances, voluntarily selected, but he still finds it appropriate to tailor deference rules to the attractiveness of agency decision processes.

If congressional assignment of unreviewable authority is to be respected—and I can't see why it would not be so long as the assignment does not transgress limits on delegation—it is by no means clear what reason would support denying whatever measure of deference is consistent with statutory commands. If the argument is over what should be done when statutes are ambiguous as to what level of deference should be given to particular decisions, shouldn't the answer depend on what the *best reading of the statute* is as to the scope of deference assigned?

Putting that question off the table and turning directly to questions about what seems (or is predicted) to produce substantively better outcomes looks like a softer form of substituting *judicial* judgment for *congressional* judgment. If congressional judgment is paramount, the right inquiry isn't how to balance different values for decisionmaking, however normatively attractive those values are. Instead, it's how to decide what boundaries the *law* puts around official judgment, what degree of discretion the *law* grants, and what standards for review accord with those statutory rules.

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[22] The hypothetical, of course, is based on the legal provision at issue in *Webster v. Doe*, 486 U.S. 592 (1988).

Merrill is too smart, too modulated, and too knowledgeable boldly to stake out territory that substitutes judicial weighing and balancing of personally held values in place of adherence to legislative directives. He also is too familiar with the difficulties of plumbing statutory meaning to choose either the simple narrative that ambiguity invariably *equals* delegated discretion or the polar opposite view that *any* delegation of discretion must be given in unequivocal terms. But his third and fourth values necessarily smuggle into the deference calculus a substantial degree of judges' personal preferences disguised as thoughtful consideration of legal commands.

In some measure, this may be an accusation properly leveled at any of us who endeavor to parse what courts rightfully can derive from statutes. But from my vantage, that charge is minimized by keeping courts' focus on what discretion a law actually grants by its terms—explicitly or implicitly—and then asking if an agency has exceeded the bounds of its discretion by going outside the scope of its authority or by exercising that authority unreasonably. And, of course, keeping within the law also means asking whether the discretion granted exceeds what Congress constitutionally can give.

Those questions can be made consistent with *Chevron*, particularly if it is coupled with a non-delegation doctrine. But it is better to ask courts to focus on the *language of the relevant law* setting the bounds and terms of review authority than to focus on the language of the *Chevron* decision. Generally, the relevant law respecting review authority will be the APA, though in *Chevron*'s case it was the Clean Air Act's restated version of APA review authority. *Chevron*-the-case became *Chevron*-the-legend largely because judges failed to focus as clearly on the *statutory language* respecting *review* as on the *substantive* question: the meaning of statutory commands respecting emissions from stationary sources. Merrill makes this clear in his discussion of the decision, but his prescriptions for moving forward—with an improved *Chevron* or a substitute for *Chevron*—also are grounded more on value judgments than on exploration of legal language. He does not hide this, but he also does not fully justify it, much as that seems to be a primary aim of the book.

VI. CONCLUDING OBSERVATIONS—BELL, BOOK, AND CANDLE

Despite the attention to and disagreement over it, *Chevron*'s rule may not have made that much of a difference to how agencies behave and what decisions courts reach. One well-known study of *Chevron*'s impact concluded that it slightly increased prospects for judicial affirmance of agency decisions

before the win-lose rate settled back to roughly its pre-*Chevron* level.[23] In contrast, another study determined that *Chevron*'s implementation not only increased the rate of affirmance but also encouraged more aggressive assertions of agency authority in anticipation of greater judicial deference.[24] Yet another empirical study concluded that *Chevron*, whatever its impact, has functioned more or less as a guide for courts to make fair (apolitical) judgments separately on the ambit of discretion given to an agency respecting its decisions and on the reasonableness of its exercise of discretion.[25]

Overall, it is far from clear how much the decision itself changed agency and court behavior, as opposed to altering the language used to reach similar results—that is, *Chevron* may have changed the lyrics but not the song. Still, the decision should be seen as important for what it has been taken to mean, what it has facilitated, and what the law respecting judicial review should be going forward.

In the same vein, Tom Merrill's book should be appreciated as a vastly instructive, well-considered, and scholarly examination of what rules for deference have been, how they were evolving before *Chevron*, what *Chevron*-the-case did, how *Chevron*-the-doctrine evolved, and where the trends of that evolution may lead. It is a thoughtful plea for many subtle changes in our understanding of deference, of the ambit of judicial authority over interpretation of law, and of the ways in which the scope of judges' and administrators' judgments should be divided. It is a call that some will want to heed and others will want to resist.

Despite my admiration for Merrill as a scholar, I depart from Merrill's formula for changing how judges, lawyers, scholars, and others think about the intersection of governing and legal doctrine. His preference for moving from more legal-doctrinal approaches to comparative analytical approaches seems to me to be heading in the wrong direction, even if his explanations on each point and on the reasons for choosing his preferred guideposts are anything but dogmatic and excessively certain.

In the end, however, the book should be judged not by whether one would answer this bell but by the caliber of the research, thinking, and writing

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[23] Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: Am Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984.

[24] E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1 (2005).

[25] Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1 (1998).

the work represents. No matter what happens to *Chevron*—whether it survives as the lodestar for deference decisions, or is modified, abandoned, or replaced—Professor Merrill has provided anyone interested in the topics associated with that decision an informative, careful, subtle, and wide-ranging exploration of deference and governance from thought-provoking angles. The judgments offered may not light the way to a better future, but Merrill's understanding and analysis more than justify paying attention to the book's critical inquiries into the past and its descriptions of where the decisions that have been made and are being made might yet lead. I recommend this book enthusiastically for the sympathetic reader and the skeptical reader as well.

Other Views:

- Cass R. Sunstein, *Who Should Regulate?*, N.Y. REV., May 26, 2022, https://www.nybooks.com/articles/2022/05/26/who-should-regulate-the-chevron-doctrine-thomas-merrill/.
- Jennifer L. Mascott & Eli Nachmany, *'The "Chevron" Doctrine' Review: Federal Agencies and the Law*, WALL ST. J., Aug. 23, 2021, https://www.wsj.com/articles/the-chevron-doctrine-review-federal-agencies-and-the-law-11661292087.
- Adam White & Jace Lington, *Major Questions About the Future of the Chevron Doctrine*, GRAY MATTERS PODCAST, July 20, 2022, *available at* https://administrativestate.gmu.edu/podcasts/.
- James Kunhardt & Anne Joseph O'Connell, *Judicial Deference and the Future of Regulation*, BROOKINGS, Aug. 18, 2022, https://www.brookings.edu/research/judicial-deference-and-the-future-of-regulation/.