## ARTICLES

# The Scope of Judicial Review in the German and U.S. Administrative Legal System

*Jan S. Oster**

### A. Introduction

The scope of judicial review of administrative decisions is one of the most important issues in administrative law. The question of the scope of judicial review is a typical problem of public law. Prior to the decision of an administrative law court, there is usually a decision of a public agency. In contrast to that, civil or criminal law cases begin without a state-run decision because these courts have to judge the behavior of private persons. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,[1] the Supreme Court held that if it determines Congress has not addressed the 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 [*emphasis added*]*."[2] Summarized in a simple formula, one can say that civil and criminal courts decide, while administrative and constitutional courts control.

The article focuses on the scope of judicial review in market regulation, which is a new field of administrative law in Germany, but a traditional field of state action in the U.S. The U.S. market regulation has been a role model for the European directives and hence for their domestic implementation.[3] The German regulatory agencies are working based on new laws modeled on the principles of the

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[1] *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

[2] *Id*., 843,.

[3] Johannes Masing, *Die US-amerikanische Tradition der Regulated Industries und die Herausbildung eines europäischen Regulierungsverwaltungsrechts*, 128 ARCHIV FÜR ÖFFENTLICHES RECHT 558 (2003).

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American economic regulation. If the substantive law has been a role model for Europe and Germany, consequently the procedural law needs adaption as well. The leading case regarding agency interpretation of statutory provision in the U.S. the *Chevron* case. This article is based on two assumptions: First, the *Chevron* test finds its functional equivalence in the German normative authorization doctrine. Second, the rationales for *Chevron* fit to the German system of market regulation. Hence, reviewing German courts have to grant deference to an agency's decisions in market regulation equivalent to the *Chevron* doctrine.

This article first introduces the scope of judicial review in German law in part B. Then, in part C, it discusses the *Chevron* doctrin. Finally in part D, it elaborates how *Chevron's* rationales can be made applicable in Germany.

## B. The German System of Judicial Review

The German system of judicial review is based on the structure of the statutory norms applied by the agencies. Most of the legal norms in Germany are written in conditional sentences. They consist of prerequisites on the one side and the legal consequences on the other. Examples are Section 46 of the Banking Act[4] or Section 35 of the Industrial Act[5]. Only a few legal norms in Germany are final clauses.

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[4] Section 46 of the *Kreditwesengesetz* [KWG, Banking Act] of 9 September 1998, BGBl. I at 2776, translated by German Law Archive, available at www.iuscomp.org, last accessed 25 September 2008:

> "Measures in cases of danger
>
> (1) If the discharge of an institution's obligations to its creditors, and especially the safety of the assets entrusted to it, is endangered or if there are grounds for suspecting that effective supervision of the institution is not possible …, the Federal Banking Supervisory Office (*Bundesanstalt für Finanzdienstleistungsaufsicht*) may take temporary measures to avert the danger. In particular, it may
>
> 1. issue instructions on the management of the institution's business,
>
> 2. prohibit the taking of deposits or funds or securities of customers and the granting of loans …,
>
> 3. prohibit proprietors and managers from carrying out their activities, or limit such activities, and
>
> 4. appoint supervisors."

[5] Section 35 (1) of the *Gewerbeordnung* [GewO, Industrial Act] of 22 February 1999, BGBl. I at 202:

"The agency has to interdict the exercise of a certain industry all or part, if facts displaying the unreliability of the industrialist … are available."

Those rules mainly exist in planning law, especially urban or regional development.[6]
According to those statutory structures, there are three forms of judicial deference to agency actions: agency discretion (*Ermessensspielräume*), legislative authorization to the agency to interpret rules (*Beurteilungsermächtigungen*), and the freedom of planning (*planerische Gestaltungsfreiheit*).

*I. Agency Discretion*

Agency discretion exists when there is a conditionally structured rule which allows, but does not force the agency to take measures, if certain prerequisites are fulfilled. Section 46 of the German Banking Act includes agency discretion, because if the discharge of an institution's obligations to its creditors is endangered or if there are grounds for suspecting that effective supervision of the institution is not possible, then the Supervisory Office *may* take temporary measures to avert the danger.[7] By contrast, Section 35 of the German Industrial Act does not include agency discretion.[8] If an industrialist is unreliable, the agency *has to* interdict the exercise of a certain industry. Agency discretion concerns the legal consequences of a rule and is relatively easy to handle. It is triggered by words like "can" or "may" and is excluded in case of "shall", "has to", and "must".

If the legislature grants discretion to the agency, courts may only control whether the agency's decision includes discretion mistakes (*Ermessensfehler*). Courts may not substitute agency's discretion with their own preferences. Discretion mistakes are: non-use of discretion (*Ermessensnichtgebrauch*), abuse of discretion (*Ermessensfehlgebrauch*), and exceedance of discretion (*Ermessensüberschreitung*).[9]

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[6] See, *e.g.*, Section 1 of the *Baugesetzbuch* [BauGB, Federal Building Code] of 23 Sept 2004, BGBl. I at 2414, translated by German Law Archive, available at www.iuscomp.org, last accessed 25 September 2008:

> "The Scope, Definition and Principles of Urban Land-Use Planning:
>
> (3) It is the responsibility of municipalities to prepare land-use plans (*Bauleitpläne*) as soon as and to the extent that these are required for urban development and regional policy planning.
>
> (7) In preparing land-use plans, public and private interests are to be duly weighed."

[7] Henning Lindemann, *§ 46*, in: KREDITWESENGESETZ (Karl-Heinz Boos, Reinfrid Fischer & Hermann Schulte-Mattler eds., 2nd ed. 2004), margin number 18.

[8] Peter J. Tettinger, *§ 35*, in: GEWERBEORDNUNG (Peter J. Tettinger & Rolf Wank eds., 7th ed. 2004), margin number 118.

[9] See Stefan Liebetanz, *§ 40*, in: KOMMENTAR ZUM VERWALTUNGSVERFAHRENSGESETZ (founded by Klaus Obermayer, ed. by Roland Fritz, 3rd ed. 1999), margin number 22. FRIEDHELM HUFEN,

*II. Freedom of Planning*

The agency is free to plan when there is a final-structured legal norm that sets only a purpose and a limited number of decision-making criteria to the agency.[10] For example, Section 1 of the Federal Building Code authorizes the administration to plan, but does not establish requirements of, when, and how to plan. Section 1(7) only requires that public and private interests be duly weighed. Other norms require further considerations, e.g. the protection of the environment or the right balance between housing and industrial areas. Nevertheless, a subsumption of certain facts under a legal norm as a syllogism is not possible with these types of rules. This would require a conditional structure. Planning rules require only procedures of balancing between different interests, which are often led by political considerations (e.g. how much industry does a city want to have? Does a certain area have to be reserved for sports facilities, health resorts, or for educational institutions?). The Highest Administrative Court has developed a test to consider if there has been a right balancing.[11]

Courts may review whether there was non-balancing (*Abwägungsausfall*), balancing deficit (*Abwägungsdefizit*), false estimation of relevant considerations (*Abwägungsfehleinschätzung*), or balancing disproportionality

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VERWALTUNGSPROZESSRECHT § 25 margin number 30 (6th ed. 2005); FERDINAND O. KOPP & WOLF-RÜDIGER SCHENKE, VERWALTUNGSGERICHTSORDNUNG § 114 margin number 5, 7 (14th ed. 2005). This test is derived from Section 40 of the German Administrative Procedure Act (*Verwaltungsverfahrensgesetz*) and Section 114 of the German Administrative Court Procedures Code (*Verwaltungsgerichtsordnung*).

Section 40 of the German Administrative Procedure Act states: "Where an authority is empowered to act at its discretion, it shall do so in accordance with the purpose of such empowerment and shall respect the legal limits to such discretionary powers."

Section 114 sentence 1 of the Administrative Court Procedures Code states: "As far as the authority is empowered to act at its discretion, the court also reviews whether the administrative act … is unlawful because the agency exceeds the legal limits of the discretionary power or because the agency did not use its discretion in accordance with the purpose of the empowerment."

[10] Fritz Ossenbühl, *Gedanken zur Kontrolldichte in der verwaltungsgerichtlichen Rechtsprechung*, *in* FESTSCHRIFT FÜR KONRAD REDEKER 55, 60 (Bernd Bender ed., 1993).

[11] Bundesverwaltungsgericht, 12 December 1969, 34 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 301, 309; Bundesverwaltungsgericht, 5 July 1974, 45 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 309, 316; Bundesverwaltungsgericht, 7 July 1978, 56 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 110, 119; Werner Hoppe, *Die Schranken der planerischen Gestaltungsfreiheit (§ 1 Abs. 4 und 5 BBauG), Das Urteil des Bundesverwaltungsgerichts vom 12. Dezember 1969 zum Abwägungsgebot (§ 1 Abs. 4 Satz 2 BBauG) und seiner Rechtskontrolle*, 1970 BAURECHT 15.

(*Abwägungsdisproportionalität*). This test is similar to the judicial review of discretion.

*III. Authorization to Interpret Rules*

The authorization to interpret rules refers to the prerequisites of a legal norm in contrast to discretion, which concerns the legal consequences of a norm. For example, the requirement whether the discharge of an institution's obligations to its creditors is "endangered" according to Section 46 of the Banking Act: is the agency authorized to decide as a last instance whether there is a danger for the discharge of an institution's obligation to its creditors? Under Section 35 of the Industrial Act, may a court review an agency's assumption that an industrialist is unreliable?

Scholars and courts have developed the so-called "normative authorization doctrine" (*normative Ermächtigungslehre*).[12] This doctrine states that if the legislative grants deference to the agency's decision, courts can only review the agency's decision to a certain extent. The functional equivalence to *Chevron* is oblivious.[13] Courts may control whether:

- the agency abided by the rules of procedure,
- the facts are correctly investigated,
- the agency did not violate the principle of equality,[14]
- the agency kept general standards of evaluation, and
- the agency did not consider irrelevant elements.[15]

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[12] Otto Bachof, *Beurteilungsspielraum, Ermessen und unbestimmter Rechtsbegriff im Verwaltungsrecht*, 1955 JURISTENZEITUNG 97; Eberhard Schmidt-Aßmann, *Einleitung*, in: VERWALTUNGSGERICHTSORDNUNG - KOMMENTAR (Friedrich Schoch, Eberhard Schmidt-Aßmann & Rainer Pietzner eds., 12th ed. 2005), margin number 189; JAN ZIEKOW, VERWALTUNGSVERFAHRENSGESETZ, § 40 margin number 47 (2006).

[13] See, *infra*, C.

[14] The general norm for equality is Art. 3 of the Basic Law, translated by :

(1) All persons shall be equal before the law.

(2) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.

(3) No person shall be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavored because of disability.

[15] HUFEN, *supra* note 9, § 25 margin number 56.

There are only a few legal rules in which the legislation explicitly has granted deference to an agency's decision concerning the interpretation of the prerequisites of a norm. The most important ones are Section 71(5) sentence 2 of the German Act against Restraints on Competition[16] and, since 2004, Section 10(2) sentence 2 of the German Telecommunications Act.[17] Both norms concern the definition of the relevant markets for regulation. Besides that, it has to be interpreted to which extent courts must defer to agency's decision. The normative authorization doctrine has two requirements.[18] First, there has to be an indefinite legal term (see 1.). Second, the legislature must have granted deference to the agency to define the legal term (see 2.).

*1. Indefinite Legal Term*

Indefinite legal terms (*unbestimmte Rechtsbegriffe*) are terms that require a valuation. Mostly there is no assured scientific knowledge to conclude if a certain statutory requirement is met or not, *e.g.*, whether air pollution is dangerous for people according to Section 3 of the Federal Immission Control Act (*Bundesimmissionsschutzgesetz*) or whether an industrialist is not reliable in the sense of Section 35 of the Industrial Act. The title "indefinite legal term" is misleading. Strictly speaking, these are not legal terms, but terms from natural, economic or other sciences used in a statute. So the renaming of the term to "indefinite *statutory* term" would be adequate.[19] However, German jurisprudence institutionalized this problem under the name "indefinite legal term".

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[16] "The appraisal by the cartel authority of the general economic situation and trends shall not be subject to review by the court."

[17] "Warranting regulation in accordance with the provisions of this Part are markets with high, non-transitory entry barriers of a structural or legal nature, markets which do not tend towards effective competition within the relevant time horizon and markets in respect of which the application of competition law alone would not adequately address the market failure(s) concerned. Such markets shall be identified by the Regulatory Authority within the limits of its power of interpretation."

[18] KOPP & SCHENKE, *supra* note 9, § 114 margin number 23-24; Stefan Liebetanz, *supra* note 9, § 40 margin number 61, 63.

[19] Otto Bachof, *supra* note 12, 98; HARTMUT MAURER, ALLGEMEINES VERWALTUNGSRECHT § 7 margin number 28 (15th ed. 2004).

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The requirement of an indefinite legal term is functionally equivalent to the ambiguous statute as one requirement for the application of *Chevron*.[20] Even though the terms may differ, the problems are the same.

*2. Legislative Authorization*

Due to constitutional reasons, there has to be an additional (explicit or implicit) legislative authorization to the agency to find a valuation which is not reviewable by courts (see a.). This is the most complicated challenge of the normative authorization doctrine. As mentioned above, there are only a few statutes in which the parliament explicitly granted deference to the agency. In all other cases, it has to be investigated whether there is a legislative authorization (see b).[21]

a) Constitutional Background

The question of the scope of judicial review in German law must be seen as a collision between separation of powers concerns on the one hand,[22] and Art. 19(4) sentence 1 Basic Law on the other hand. The separation of powers doctrine requires that administrative agencies be given some latitude not only against the legislative, but also against the judicative.[23] A full judicial review of agency's

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[20] See, *infra*, C.I.2.

[21] KOPP & SCHENKE, supra note 9, § 114 margin number 24.

[22] The separation of powers principle is included in Art. 1(3) and Art. 20(2) and (3) of the Basic Law.

Art. 1(3) of the Basic Law states:

> "The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law."

Art. 20 of the Basic Law states:

> "(2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies.
>
> (3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice."

[23] Bundesverfassungsgericht, 3 February 1959, 9 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 137, 149.

actions through courts is incompatible with the separation of powers as a principle of checks and balances. It would give the judicial branch too much power. On the other hand, Art. 19(4) of the Basic Law basically requires that all the agencies' actions be controlled concerning questions of fact and questions of law.[24] Art. 19(4) provides in its first sentence: "Should any person's rights be violated by public authority, he may have recourse to the courts."

The normative authorization doctrine is a result of a coherent interpretation of Art. 19(4) sentence 1 of the Basic Law and the separation of powers principle. Art. 19(4) sentence 1 requires implementation by the legislative. The norm includes that if any "person's rights" are violated by public authority, there has to be a "recourse to the courts". The norm does not state what the rights are and how the recourse to the courts has to be.[25] It is the duty of the legislative to shape these requirements. Thus, it is the legislative which decides whether the courts must grant deference to an agency's decisions.

Furthermore, the normative authorization doctrine is based on Art. 20(3) of the Basic Law as a characteristic of the separation of powers principle. Art. 20(3) states that the legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.[26] Whereas the legislative is only bound by the constitutional order, the executive and the judiciary are also bound by the (statutory) law which is made by the legislative. As a consequence, it is the legislature which assigns the competence to the agencies and the courts. Finally, Art. 97(1) of the Basic Law states that "Judges shall be independent and subject *only to the [statutory] law*."[27] Hence, the courts have to accept the standards of control as imposed by a legislative statute.[28]

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[24] Bundesverfassungsgericht, 5 February 1963, 15 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 275, 282; Bundesverfassungsgericht, 17 April 1991, 84 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 34, 49.

[25] Eberhard Schmidt-Aßmann & Thomas Groß, *Zur verwaltungsgerichtlichen Kontrolldichte nach der Privatgrundschul-Entscheidung des BVerfG*, 1993 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 617 (619).

[26] "Law" in the sense of Art. 20(3) means statutory law. Law as a principle is here translated with the word "justice". See GEORGE P. FLETCHER & STEVE SHEPPARD, AMERICAN LAW IN A GLOBAL CONTEXT 56-57 (2005) (explaining the dichotomic translation of the word "law").

[27] Emphasis added. Regarding the translation of the word "law", see, *supra*, note 26.

[28] Bundesverfassungsgericht, 31 May 1988, 78 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 214, 226; Bundesverwaltungsgericht, 25 November 1993, 94 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 307, 309; Bachof, *supra* note 12, 100; Liebetanz, *supra* note 9, § 40 margin number 63; KOPP & SCHENKE, *supra* note 9, § 114 margin note 23.

b) The Normative Authorization Doctrine in Practice

Due to the fact that there is rarely an explicit authorization to the agencies, it is difficult to decide when the doctrine is applicable. The courts have decided several cases in which they granted deference to the agency because of the normative authorization doctrine. However, in the vast majority of cases, the courts do not grant deference to agency interpretations.

One reason for granting deference is the special characteristic of the procedure or the deciding organ. Such peculiar deciding organs are, for instance, expert commissions issuing recommendations to agencies which are exempt from executive orders.[29]Another line of cases concerns the capability of the courts to review agency decisions. Some agency decisions are too complex and are based on dynamic developments, such that the courts reach the functional limits of jurisdiction, e.g. in a licensing procedure for a nuclear power plant.[30] Furthermore, courts grant deference in cases of examinations or situations similar to examinations.[31] Finally, judicial deference is granted when agencies assess civil servants.[32]

## C. The *Chevron* Doctrine

The *Chevron* case established the relevant standard to be used by courts to determine whether they should grant deference to an agency's interpretation of a

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[29] Bundesverwaltungsgericht, 16 December 1971, 39 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 197; Bundesverwaltungsgericht, 28 August 1996, 1997 NEUE JURISTISCHE WOCHENSCHRIFT 602. See Konrad Redeker, *Fragen der Kontrolldichte verwaltungsgerichtlicher Rechtsprechung*, 1971 DIE ÖFFENTLICHE VERWALTUNG 757 (760); HUFEN, *supra* note 9, § 25 margin number 51.

[30] Bundesverfassungsgericht, 8 July 1982, 61 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 82, 114; Bundesverwaltungsgericht, 15 April 1988, 79 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 208, 213; Bundesverwaltungsgericht, 9 September 1989, 82 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 295, 299; Bundesverwaltungsgericht, 19 December 1985, 72 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 300, 316. See also SUSAN ROSE-ACKERMAN, CONTROLLING ENVIRONMENTAL POLICY 73-74 (1995).

[31] Bundesverwaltungsgericht, 24 April 1959, 8 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 272; Bundesverwaltungsgericht, 18 May 1982, 73 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 376.

[32] Bundesverwaltungsgericht 13 May 1965, 21 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 127, 129; Bundesverwaltungsgericht, 26 June 1980, 60 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 245.

statute. In this case, Justice Stevens established the so-called *Chevron* two-step test: "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[33]

*I. The Chevron Test*

*Chevron* merged two divergent lines of Supreme Court decisions. Prior to the *Chevron* decision, the Supreme Court did not have a consistent doctrine for determining whether or not and to what extent to defer to agency interpretations of statutes.[34] On the one hand, many decisions supported the view that great deference must be given to agency interpretations.[35] On the other hand, other decisions granted weak deference or did not grant any deference to agency decisions.[36]

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[33] *Chevron*, 467 U.S. at 842-43.

[34] See, e.g., RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 382-85 (4th ed., 2004); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUMBIA LAW REVIEW (COLUM. L. REV.) 452, 453-54 (1989); Cass R. Sunstein, *Law and Administration after* Chevron, 90 COLUM. L. REV. 2071, 2082 (1990); Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1 (1983); Richard J. Pierce, Jr., Chevron *and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VANDERBILT LAW REVIEW (VAND. L. REV.) 301 (1988); Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE JOURNAL ON REGULATION (YALE J. ON REG.) 1, 6 (1990); Thomas W. Merill, *Judicial Deference to Executive Precedent*, 101 YALE LAW JOURNAL (YALE L.J.) 969, 971 (1992); Stephen M. Lynch, *A framework for judicial review of an agency's statutory interpretation*: Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 1985 DUKE LAW JOURNAL (DUKE L.J.) 469, 470-72.

[35] *National Labor Relations Board v. Hearst Publications*, 322 U.S. 111 (1944); *Mitchell v. Budd*, 350 U.S. 473, 480 (1956); *Gray v. Powell*, 314 U.S. 402, 412 (1941); *Federal Sec. Adm'r v. Quaker Oats Co.*, 318 U.S. 218, 227-28 (1943).

[36] *National Labor Relations Board v. Bell Aerospace*, 416 U.S. 267 (1974); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

In *Chevron*, the Court evaluated the Environmental Protection Agency's (EPA) interpretation of the Clean Air Act. The EPA promulgated rules that defined the term "stationary source" as an entire plant, containing many different kinds of polluting facilities. This so-called "bubble solution" allowed a firm to increase the emissions of one unit of the whole plant, as long as the entire plant, considered as a single source, complied with the emission standard.

The Supreme Court in *Chevron* prescribed a two-step test to determine whether to defer to agency interpretations. Commentators and subsequent Supreme Court decisions suggest a new rigorous three-step test should be followed. This test includes the traditional *Chevron* steps one (see 2.) and two (see 3.), and the so-called *Chevron* step zero (see 1.).

*1. Chevron Step Zero*

"*Chevron* step zero"[37] concerns the question of whether the *Chevron* test is applicable at all. In *INS v. Cardoza-Fonseca*[38], the Supreme Court decided that the *Chevron* standard was inapplicable because the issue for decision was a "pure question of statutory construction."[39] Justice Stevens stated that *Chevron* deference would only be appropriate if the case concerned the application of law to the facts.[40]

Justice Scalia in his concurring opinion[41] as well as scholars[42] protested against this decision. The distinction between pure questions of law and questions of the application of law to facts had been abandoned before *Chevron* was decided.[43]

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[37] Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEORGETOWN LAW JOURNAL (GEO. L.J.) 833, 836 (2001); Cass R. Sunstein, Chevron *Step Zero*, 92 VIRGINIA LAW REVIEW (VA. L. REV.) 187 (2006).

[38] *Immigration & Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

[39] *Id.*, 446.

[40] *Id.*; 448.

[41] *Id.*, 454-55 (Scalia, J., concurring in judgment).

[42] Merill, *supra* note 34, 986; Anthony, *supra* note 34, 21-23.

[43] *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27 (1981); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980); Merill (note 34), 986.

Indeed, the *Chevron* decision itself concerned a pure interpretation of law, namely the interpretation of the legal term "statutory source."[44] After that, the Court silently abandoned the *Cardoza-Fonseca* decision.[45]

The *Chevron* test is not applicable when the agency is party in litigation,[46] or when the agency wrote its opinion in an amicus brief.[47] Furthermore, *Chevron* is not applicable when an agency interprets its own regulations and not statutes.[48] In this case, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation".[49]

Courts do not grant deference to agencies when the agency is not directed to enforce the statute.[50] Two agencies might interpret the same statute differently. If courts granted deference to both interpretations, then the same statute would have

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[44] *Cardoza-Fonseca*, 480 U.S. at 455 (Scalia, J., concurring in judgment); Sunstein, *supra* note 34, 2095.

[45] *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 133-34 (1984) (Scalia, J., concurring); see *Mead Corp. v. Tilley*, 490 U.S. 714 (1989); *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988); *K Mart Corp v. Cartier*, Inc. 486 U.S. 281 (1988); Sunstein, *supra* note 34, 2084-85; Merill, *supra* note 34, 986; Elizabeth Garrett, *Step One of* Chevron v. Natural Resources Defense Council, in: A Guide to Judicial and Political Review of Federal Agencies 55, 57 (John F. Duffy & Michael Herz eds., 2005); STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN & ADRIAN VERMEULE, ADMINISTRATIVE LAW AND REGULATORY POLICY 343 (6th ed. 2006).

[46] *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212; Steven Croley, *The Applicability of the* Chevron *Doctrine*, *in*: A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 103 (111) (John F. Duffy & Michael Herz eds., 2005).

[47] *Motor Vehicle Mfrs. Assn. v. New York State Dept. of Envtl. Conversation*, 17 F.3d 521, 535 (2d Cir. 1994).

[48] *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989); *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Christensen v. Harris County*, 529 U.S. 576, 588 (2000); see also John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996); Scott H. Angstreich, *Shoring Up* Chevron: *A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS LAW REVIEW (U.C. DAVIS L. REV.) 49 (2000).

[49] *Seminole Rock*, 325 U.S. at 414.

[50] *Chevron*, 467 U.S. at 842; *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n9 (1997) (regarding the APA); *Prof'l Reactor Operator Society v. NRC*, F.2d 1047, 1051 (D.C. Cir. 1991) (regarding the APA); *DuBois v. United States Department of Agriculture*, 102 F.3d 1273, 1285 n.15 (1st Cir. 1996); *The Reporters Committee for Freedom of the Press v. United States Department of Justice*, 816 F.2d 730, 734 (D.C. Cir. 1987) (regarding the FOIA); *Federal Labor Relations Authority v. United States Department of Defense*, 984 F.2d 370, 373-374 (10th Cir. 1993) (regarding the FOIA).

two different meanings.[51] Furthermore, one rationale for the *Chevron* doctrine is the agency's experience and expertise.[52] If the agency is not alone entitled to administer a statute, then it cannot claim a special expertise.[53]

Before courts consider *Chevron* deference, they must consider whether the *Chevron* clause is applicable as opposed to the so-called *Skidmore*[54] deference. Originally, *Skidmore v. Swift & Co.* distinguished between interpretative rules and legislative rules. If there was an interpretative rule, then courts granted minimal deference. *Chevron*, on the other hand, does not distinguish between interpretative and legislative rules, so it seems that *Chevron* overrules *Skidmore*. But *Chevron*'s scope has been narrowed by later cases,[55] hence the distinction between interpretative and legislative rule is still applicable. On the one hand, there is the *Mead*[56] test which continued the *Christensen*[57] test and the *Barnhart v. Walton*[58] test. The *Mead* test can be divided into two steps. First, courts ask whether Congress delegated the authority to act with the force of law to the agency. Second, the agency has to use that authority. This is the case in rulemaking and adjudication, but not if there is an interpretative rule, a policy statement, or a guidance opinion letter.

Only if both of these *Mead* requirements are fulfilled, the agency gets the stronger *Chevron* deference. If the requirements are not fulfilled, the agency gets *Skidmore* deference. The deference granted in *Skidmore* depends upon the thoroughness evident in the agency's consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all factors which give it power to

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[51] John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEXAS LAW REVIEW (TEX. L. REV.) 113, 208 (1998).

[52] See, *infra*, C.II.

[53] See, *infra*, C.II.2.

[54] *Skidmore*, 323 U.S. 134; see also Jamie A.Yavelberg, *The Revival of* Skidmore v. Swift: *Judicial Deference to Agency Interpretations after* EEOC v. Aramco, 42 DUKE L.J. 166 (1992); Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *within the Architecture of* Chevron, 42 WILLIAM AND MARY LAW REVIEW (WM AND MARY L. REV.) 1105 (2001).

[55] *Christensen*, 529 U.S. at 586-88; *United States v. Mead Corp.*, 533 U.S. 218, 226 (2001); *National Cable & Telecommunications Assn. v. Brand X*, 545 U.S. 967, 980-81 (2005); see also Angstreich, *supra* note 48, 49.

[56] *Mead*, 533 U.S. 218.

[57] *Christensen*, 529 U.S. 576.

[58] *Barnhart v. Walton,* 535 U.S. 212 (2002).

persuade.[59] *Mead* is justified by the fact that if there is no legal enactment, then there is no Congressional authorization either. In this case, the agency lacks the authority to issue binding rules. Furthermore, opinion letters and other informal administrative actions have no procedural requirements, hence there is little or no opportunity for citizen participation.[60] Section 553(b)(3)(A) of the APA explicitly declares that the norms on rule making procedure are inapplicable *inter alia* for interpretative rules, or general statements of policy.

As an alternative test for interpretative regulations, a few courts operate with the *Barnhart v. Walton* multi-factor test.[61] This test considers the interstitial nature and the importance of the legal question, the related expertise of agency, the complexity to administer the statute and agency's consistency.[62] An agency decision is especially inconsistent in case of a policy shift. Hence, under the *Barnhart v. Walton* test, the *Chevron* case would have been decided in a different way, because the "bubble solution" was a shift in policy.

*2. Chevron Step One*

In *Chevron*, the Court asked "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[63] The court should use "the traditional tools of statutory construction"[64] to determine whether the meaning of the statute is clear with respect to the precise issue before it. These tools include examination of the statutory text, dictionary definitions, canons of construction, statutory structure, legislative purpose, and legislative history.[65]

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[59] *Skidmore*, 323 U.S. at 140; *Christensen*, 529 U.S. at 587; *Mead*, 533 U.S. at 228.

[60] Sunstein (note 37), 193; Croley, *supra* note 46, 119; RUTH ANN WATRY, ADMINISTRATIVE STATUTORY INTERPRETATION 88 (2002).

[61] *Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49, 59 (2nd Cir. 2004); *Krzalic v. Republic Title Co.*, 314 F.3d 875, 879 (7th Cir. 2002).

[62] *Barnhart v. Walton*, 535 U.S. at 222.

[63] *Chevron*, 467 U.S. at 842-43 (emphasis added); *Mobil Oil Exploration & Producing Southeast Inc. v. United Distribution Cos.*, 111 S. Ct. 615, 623 (1991); *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

[64] *Chevron*, 467 U.S. at 843 n. 9; *Cardoza-Fonseca*, 480 U.S. at 448.

[65] See, *e.g.*, Russell L. Weaver, *Some Realism about* Chevron, 58 MISSOURI LAW REVIEW (MO. L. REV.) 129 (1993).

The primary source of statutory meaning is its language. To illuminate the language, the Supreme Court often refers to dictionary definitions.[66] Furthermore, judicial interpreters take into account the statutory structure. This does not only include other provisions of the relevant statute as a whole,[67] but also related statutes in order to interpret the meaning of the relevant terms "with a view to their place in the overall statutory scheme."[68] Congress' general purpose when enacting a regulatory statute may prove the legislative intent which meanings should be permissible under the statute.[69]

Canons of statutory construction are for example textual canons like *expressio unius est exclusio alterius*,[70] or the requirement to avoid serious constitutional questions.[71] The most controversial tool of statutory construction is legislative history. This issue reflects a movement from intentionalism to textualism that *Chevron* has experienced at step one.[72] Intentionalism has been the dominant interpretive tool of the courts for a long time.[73] Intentionalists like Justice Stevens consider legislative history to illuminate statutory meaning and Congressional intent.[74] To investigate legislative history, they refer to legislative materials such as committee reports and

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[66] See, *e.g.*, *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218, 226 (1994); see also Ellen Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZONA STATE LAW JOURNAL (ARIZ.ST. L.J.) 275 (1998).

[67] *K Mart*, 486 U.S. at 291; *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *Sullivan v. Stroop*, 496 U.S. at 482.

[68] *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989); *Federal Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

[69] *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 412 (1999) (The Chief Justice, Thomas, and Breyer, JJ., concurring in part and dissenting in part); *CSX Transp. v. United States*, 867 F.2d 1439, 1443 (D.C. Cir. 1989); Weaver, *supra* note 65, 151-53.

[70] See, *e.g.*, *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 80 (2002); *United States v. Vonn*, 535 U.S. 55, 65 (2002).

[71] See, *e.g.*, *Solid Waste Agencies of Northern Cook County v. Corps of Engineers*, 531 U.S. 159, 172-73 (2001); *Kent v. Dulles*, 357 U.S. 116, 129-30 (1958); *DeBartolo Corp. v. Florida Gulf Coast*, 485 U.S. 568, 575 (1988).

[72] William N. Eskridge, Jr., *The New Textualism*, 37 UCLA LAW REVIEW (UCLA L. REV.) 621, 623 (1990); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AMERICAN UNIVERSITY LAW REVIEW (AM. U. L. REV.) 277 (1990); Merill, *supra* note 34, 991-92.

[73] Garrett, *supra* note 45, 63.

[74] Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 SOUTHERN CALIFORNIA LAW REVIEW (S. CAL. L. REV.) 845 (1992).

floor debates. Textualism means that the interpretation of a statute should be objective rather than subjective; that is, the judge should consider how a reasonable reader of a statute would understand the words.[75] Once a court has ascertained the plain meaning of a statute, legislative history may not be considered.[76] An argument for the disregard of legislative history is that legislators often use legislative materials to influence the Executive and courts.[77] Furthermore, textualists contend that using legislative materials violates the constitutional bicameralism and presentment requirements prescribed by Article I section 7 of the U.S. Constitution, because this raises non-statutory materials on the same level as statutes.[78] As a consequence, textualists like Justices Scalia and Thomas do not only inquire the intent of Congress; but they do emphasize more whether the language of the statute is ambiguous or unclear.[79] Since textualists also investigate Congressional intent, but do not refer to legislative history, the term "historicalism" instead of "intentionalism" seems more accurate.[80]

In many decisions, the Supreme Court asks at *Chevron* step one whether the statute has a plain meaning or a plain language.[81] Other decisions as well as concurring or

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[75] WATRY, *supra* note 60, 54; Thomas W. Merill, *Textualism and the Future of the Chevron Doctrine*, 72 WASHINGTON UNIVERSITY LAW QUARTERLY (WASH. U. L.Q.) 351 (1994); Daniel A. Farber & Brett H. McDonnell, *New Perspective on Statutory Interpretation: "Is There a Text in this Class?" The Conflict Between Textualism and Antitrust*, 14 THE JOURNAL OF CONTEMPORARY LEGAL ISSUES (J. CONTEMP. LEGAL ISSUES) 619, 621 (2005).

[76] Eskridge, *supra* note 72, 623-24; *INS v. Cadoza-Fonseca*, 480 U.S. at 452 (Scalia, J., concurring).

[77] Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. LAW REVIEW (N.Y.U. L. REV.) 74, 84 (2000); Michael A. Fitts, *Retaining the Rule of Law in a* Chevron *World*, 66 CHICAGO-KENT LAW REVIEW (CHI.-KENT. L. REV.) 355, 362 (1990); Larry Evans, Jarrell Wright & Neal Devins, *Congressional Procedure and Statutory Interpretation*, 45 ADMINISTRATIVE LAW REVIEW (ADMIN. L. REV.) 239, 244 (1993).

[78] John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 696 (1997); Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 533; BREYER, STEWART, SUNSTEIN & VERMEULE, *supra* note 45, 336.

[79] See, *e.g.*, *Pittston Coal Group v. Sebben*, 488 U.S. at 113; *Honig, California Superintendent of Public Instruction v. Doe*, 484 U.S. 305, 326 (1988); *Young, Commissioner of Food and Drug Administration v. Community Nutrition Inst.*, 476 U.S. 974, 981 (1986); *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 465-70 (2002) (Stevens, J., dissenting, referred to written explanations placed in the Congresional Record); *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 295 (1995).

[80] WATRY, *supra* note 60, 8.

[81] See, *e.g.*, *K Mart*, 486 U.S. at 291-92; *Sullivan v. Stroop*, 496 U.S. at 482; *Public Employees Retirement Sytem of Ohio v. Betts*, 492 U.S. 158, 171 (1989); *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992).

dissenting opinions, however, upheld the inquiry for legislative history,[82] but more and more judgments of the Supreme Court are characterized by the "new textualism" or "plain meaning rule".[83]

To illustrate the importance of this question, consider two short examples in which this question played an important role. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,[84] the Secretary of the Interior issued a regulation that interpreted the term "harm" as a legal definition of the term "take" within Section 9(a)(1) of the Endangered Species Act to contain "significant habitat modification or degradation where it actually kills or injures wildlife". The majority opinion, written by Justice Stevens, held that this definition was a permissible construction of the Endangered Species Act and referred therefore, *inter alia*, to the legislative history of the Act.[85] Justice Scalia, joined by the Chief Justice and Justice Thomas, stated in his dissenting opinion that the agency's definition "makes nonsense of the word that 'harm' defines".[86] Filling his opinion with dictionary citations, Justice Scalia held that "harm" in context with "take" can only mean an affirmative conduct intentionally directed against a particular animal or animals.[87] Thus, Justice Scalia does not see an ambiguous statutory term, and hence would not grant *Chevron* deference to the agency.

An example for "new textualism" in market regulation is *MCI Telecommunications Corp. v. AT&T*, written by Justice Antonin Scalia.[88] Section 203 of the Telecommunications Act requires long-distance telephone carriers to file tariffs for

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[82] See, *e.g., Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 649 (1990); *Mead v. Tilley*, 490 U.S. at 722; *K Mart*, 486 U.S. at 303-05 (Brennan, J., concurring); *Rust v. Sullivan*, 500 U.S. 173, 186 (1991).

[83] Eskridge (note 72), 623; Merill (note 34), 992; Merill (note 75), 357; Wald (note 72), 280; Richard J. Pierce, *The Supreme Court's New Hypertextualism: A Precription for Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995); see Daniel A. Farber, *Legal Realism and Legal Process: Statutory Interpretation and the Idea of Progress*, 94 MICHIGAN LAW REVIEW (MICH. L. REV.) 1546 (1996) (elaborating the arguments pro and con new textualism and dynamic interpretation).

[84] *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). See Simona Papazian, Sweet Home's *Effect on the* Chevron *Doctrine and the Increased Role of the Judiciary in Reviewing Agency Statutory Interpretations*, 7 FORDHAM ENVIRONMENTAL LAW JOURNAL (FORDHAM ENVTL. LAW J.) 543 (1996).

[85] *Sweet Home*, 515 U.S. at 704-05.

[86] *Id.*, 719.

[87] *Id.*

[88] *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218.

services and rates with the FCC and charge customers in accordance with filed tariffs. Section 203(b)(2) authorizes the FCC to "modify any requirement made by or under the authority of this section." The Supreme Court, referring to several dictionaries, decided that the term "modify" does not include basic and fundamental changes.[89]

This shift in the jurisprudence of the Supreme Court has consequences for the scope of the judicial deference granted to agencies. Congress rarely expresses its intent regarding a precise issue. Thus, according to the former inquiry under step one courts granted more deference to agency's decision than under the new textualism.[90]

The new textual understanding of *Chevron* step one matches the German investigation of an indefinite legal term. However, there seems to be a difference between *Chevron* step one and the indefinite legal term, because it requires a certain interpretive effort to investigate whether the statute is ambiguous. In contrast, the indefinite legal term is relatively easy to elaborate on. The reason is that a significant part of the investigation *Chevron* requires at step one, the normative authorization doctrine ponders in connection with the question whether there is a legislative authorization, i.e. at the German "step two". Since *Chevron* is based on the assumption that the use of an ambiguous statute *is* a legislative authorization, the difference between the German and the U.S. approach is gradual rather than fundamental. Both doctrines use very similar methods of statutory interpretation. Moreover, both doctrines face the same problem: in very rare cases, the legislature speaks in explicit terms on the question of deference.[91] Hence, the statute must be interpreted concerning whether courts must abstain from second-guessing an agency's reasonable interpretation of an ambiguous statutory term. Thus, in spite of the different legal background, German and U.S. courts and scholars use similar methods to inquire the deference question.

*3. Chevron Step Two*

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[89] *Id*.

[90] Scalia, *supra* note 63, 521; Merill, *supra* note 34, 991; Merill, *supra* note 75, 354; BREYER, STEWART, SUNSTEIN & VERMEULE, *supra* note 45, 298.

[91] Sunstein, *supra* note 34, 2086.

When the statute is silent or ambiguous concerning the relevant issue, the court asks whether the agency's interpretation is reasonable and permissible.[92] Even if the reviewing court assumes that an agency's interpretation is not the one the court would have chosen, the court has to affirm when it is reasonable and permissible.[93] Relevant factors for the reasonability are the language, legislative history, policies, and interpretative conventions that govern the interpretation of a statute by a court.[94] The agency's interpretation may not fall outside the bounds of the ambiguity. Since there is an overlap between the arbitrary and capricious test in the Section 706(2)(A) APA test and the *Chevron* test,[95] one might state that *Chevron* step two is superfluous. However, this assumption is wrong since *Chevron* is applicable to the legal interpretation of a statute, whereas the arbitrary and capricious test is relevant for agency's policy judgment.[96] However, the similarity between *Chevron* and the arbitrary and capricious test demonstrates that the interpretation of a statute also contains policy making.[97] As a matter of fact, the Supreme Court seldom strikes down an agency interpretation at *Chevron* step two.[98]

*II. Foundations of Chevron*

The two main rationales for *Chevron* are the higher political accountability of agencies as compared to courts and the agencies expertise and experience.

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[92] *Chevron*, 467 U.S. at 843; *Rust v. Sullivan*, 500 U.S. at 186 (1991); *Auer*, 519 U.S. at 457; *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 699 (1991); *Skandalis v. Rowe*, 14 F.3d 173, 179 (2d Cir. 1994).

[93] *Chevron*, 467 U.S. at 843; *Brand X*, 545 U.S. at 980; Laurence H. Silberman, Chevron – *The Intersection of Law & Policy*, 58 GEORGE WASHINGTON LAW REVIEW (GEO. WASH. L. REV.) 821, 825 (1990); Philip J. Weiser, Chevron, *Cooperative Federalism, and Telecommunications Reform*, 52 VAND. L. REV. 1, 8 (1999).

[94] *Chevron*, 467 U.S. at 843-45; *Pauley v. Bethenergy Mines*, 501 U.S. at 699; *Rust v. Sullivan*, 500 U.S. at 186 (1991); *Sullivan v. Stroop*, 496 U.S. at 482; *K Mart*, 486 U.S. at 291-292; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985); Merill (note 34), 977.

[95] *Animal Legal Def. Fund v. Glickman*, 204 F.3d 229, 234 (D.C. Cir. 2000); *Arent v. Shalala*, 70 F.3d 610, 616 (D.C. Cir. 1995); Ronald M. Levin, *The Anatomy of* Chevron*: Step 2 Reconsidered*, 72 CHI.-KENT. L. REV. 1253, 1254 (1997); Sunstein (note 34), 2105; M. Elizabeth Magill, *Step Two of* Chevron v. Natural Resources Defense Council, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 85, 97 (John F. Duffy & Michael Herz eds., 2005); BREYER, STEWART, SUNSTEIN & VERMEULE (note 45), 328.

[96] *Chevron*, 467 U.S. at 865-66; *Republican National Comm. v. Federal Election Comm.*, 76 F.3d 400, 407 (D.C. Cir. 1996); *Continental Air Lines v. Department of Transportation*, 843 F.2d 1444, 1451-52 (D.C. Cir. 1988).

[97] See, *infra*, C.II.1.

[98] See *Whitman v. American Trucking*, 531 U.S. 457, 481 (2001); *AT&T Corp. v. Iowa Utilities*, 525 U.S. at 387-92.

*1. Agencies as Policy-Making Institutions*

The interpretation of an ambiguous statute necessarily involves policy judgment. Agency decisions involve reconciling conflicting policies.[99] The resolution of ambiguity in a statutory text is mostly a question of policy and not of law.[100] Hence, *Chevron* step one investigates whether the issue of statutory interpretation is a question of law or a question of policy.[101] If the statute is ambiguous, then it is a question of policy.[102] The resolution of a policy issue cannot be a question of "right" or "wrong", but rather only of "reasonable" or "unreasonable".

Judges are not part of either branch of the government, and therefore may not reconcile competing political interests on their own personal policy preferences.[103] By contrast, the Chief Executive is directly accountable to the people. Judges, who do not have constituencies, have a duty to respect legitimate policy choices made by those who do.[104] The exercise of policy is the duty of the executive, and not of courts.[105] Agency decision-making is more democratic than judicial decision-making because the agencies are subject to the oversight and supervision of the President, who has been elected by the people and who is politically accountable.[106] Thus, agencies are more politically accountable than courts. One example is the *Chevron* case itself: the new interpretation of the Clean Air Act resulted from the presidential shift from Carter to Reagan.[107]

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[99] *Chevron*, 467 U.S. at 865; *Brand X*, 545 U.S. at 980; Sunstein, *supra* note 37, 194; Silberman, *supra* note 93, 822; Weiser, *supra* note 93, 28.

[100] *Pauley v. Bethenergy Mines*, 501 U.S. at 699; Pierce, *supra* note 34, 304; Sunstein, *supra* note 34, 2086.

[101] Pierce, *supra* note 34, 304.

[102] *Id*.

[103] *Chevron*, 467 U.S. at 865; *Brand X*, 545 U.S. at 982.

[104] *Chevron*, 467 U.S. at 866.

[105] *Chevron*, 467 U.S. at 844-45; *Brown & Williamson*, 529 U.S. at 132; Scalia, *supra* note 63, 515; Farina, *supra* note 34, 466.

[106] Merill, *supra* note 34, 978-79. Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-*Chevron *Era*, 32 BOSTON COLLEGE LAW REVIEW (B.C. L. REV.) 757 (1991) criticizes this argument.

[107] *Chevron*, 467 U.S. at 838.

A decision in which the Supreme Court explicitly applied the *Chevron* doctrine to a policy choice is *New York v. FERC*.[108] In its Order No. 888, the FERC decided, inter alia, not to regulate bundled retail transmissions, because it did not have jurisdiction over those transmissions. The Supreme Court held that this "was a statutorily permissible policy choice."[109] Hence, the characteristic of agencies as policy-making institutions is one rationale for the application of the *Chevron* doctrine.[110]

*2. Agency Expertise*

As stated in the introduction, in contrast to private and criminal law cases, prior to the decision of an administrative law court there is an agency's decision. This leads to another rationale of *Chevron*: the agency expertise and experience.[111] The Supreme Court often emphasizes the advance of the agencies as compared to the courts when the subject matter is technical, complex, and dynamic.[112] In *Chevron*, the Supreme Court noted: "When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."[113] Especially in the complex field of telecommunications and energy regulation, the Supreme Court often refers to the *Chevron* doctrine.

In *AT&T v. Iowa Utilities Board*,[114] the Supreme Court had to decide, *inter alia*, about the FCC's interpretation of the term "network elements" in Section 251(c) of the

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[108] *New York v. Federal Energy Regulatory Commission*, 535 U.S. 1 (2002). See Jerome Nelson, *The* Chevron *Deference Rule and Judicial Review of FERC Orders*, 9 ENERGY LAW REVIEW (ENERGY L.J.) 59, 62 (1988), providing further examples for the application of the *Chevron* doctrine in the field of energy regulation.

[109] *New York v. FERC*, 535 U.S. at 3.

[110] Garrett, *supra* note 44, 56.

[111] Pierce, *supra* note 34, 303; Nelson, *supra* note 108, 62; Weiser, *supra* note 93, 9-10; ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 467 (1993); Magill, *supra* note 95, 85.

[112] *Chevron*, 467 U.S. at 863; *National Cable & Telecommunications Association v. Gulf Power Co.*, 534 U.S. 327, 339 (2002); *Brand X*, 545 U.S. at 1002-03; *Brown & Williamson*, 529 U.S. at 132; *Reporters Committee for Freedom of the Press*, 816 F.2d at 734; *Pauley v. Bethenergy Mines*, 501 U.S. at 697; *Mead*, 533 U.S. at 228; *Barnhart v. Walton*, 535 U.S. at 222; *Rust v. Sullivan*, 500 U.S. at 187; see also Richard A. Posner, *Theories of Economic Regulation*, 5 BELL JOURNAL OF ECONOMICS AND MANAGEMENT SCIENCE (BELL J. ECON. & MAG. SCI.) 350 (1974); Silberman, *supra* note 93, 823; Weiser, *supra* note 93, 27.

[113] *Chevron*, 467 U.S. at 843-845, 866; see also *Rust v. Sullivan*, 500 U.S. at 186.

[114] *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366.

Telecommunications Act. The term "network elements" is defined in Section 153(29). Section 251(c) entitles companies seeking to enter local markets to gain access to the incumbent monopolistic carrier's local telephone service. A requesting carrier can obtain such access by purchasing local telephone services for resale to end users. It then interconnects its own facilities and equipment with the incumbent's network, and leases network elements of the incumbent's network on an unbundled basis. The FCC issued a rule in which it applied the definition of "network elements" to include items such as operator services and directory assistance, operational support systems, and vertical switching functions. The incumbent local carrier argued that a network element must be part of the physical facilities and equipment used to provide local phone service. The Supreme Court granted *Chevron* deference to the FCC's interpretation and affirmed the FCC in this part of its decision.[115]

*Verizon v. FCC*[116] concerned the regulation of rates charged by incumbent telephone local exchange carriers (ILECs). Section 252(d) of the Telecommunications Act directs the FCC to prescribe methods for state utility commissions to use in setting rates for the sharing of those elements as provided in Section 251(c). According to Section 252(d) of the Telecommunications Act, those rates have to be "just and reasonable", and, *inter alia*, shall be based on the cost … of providing the interconnection or network element, Section 252(d)(1)(A)(i). The FCC treated those costs as "forward-looking economic cost." This is the sum of the total element long-run incremental cost (TELRIC) and a reasonable allocation of forward-looking common costs. The Supreme Court cited a decision reiterating that "the breadth and complexity of the Commission's responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties."[117]

In *National Cable & Telecommunications Association v. Brand X Internet Services*[118], the FCC concluded that cable companies selling broadband Internet service do not provide "telecommunications servic[e]" in the sense of Title II of the Communications Act. The Supreme Court upheld the decision of the FCC, stating

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[115] *Id.* at 387. However, the Supreme Court rejected the FCC's interpretation regarding the requirements that access to proprietary elements was "necessary" and whether lack of access to nonproprietary elements would "impair" an entrant's ability to provide local service. See Section 251(d)(2).

[116] *Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002).

[117] *Verizon*, 535 U.S. 467, citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968).

[118] *Brand X*, 545 U.S. at 31.

that the Commission is in a far better position than the Court to decide this question.[119] It held that "[n]othing in the Communications Act or the Administrative Procedure Act makes unlawful the Commission's use of its expert policy judgment to resolve these difficult questions."[120]

Section 5 of the Flood Control Act of 1944 authorizes the Secretary of Energy, acting through Administrators of regional Power Marketing Administrations, to fix rates for the sale of hydroelectric power generated at federally owned dams. The norm provides that "the rate schedules [shall] become effective upon confirmation and approval by the Secretary." The FERC as the Secretary's delegate approved and placed into effect new schedules increasing rates on an interim basis. Respondent cities, who had entered into power purchase contracts with the Government, filed suit, contending that interim rates violated Section 5 of the Flood Control Act. The Supreme Court, in *U.S. v. City of Fulton*, granted *Chevron* deference[121] and upheld the decision of the FERC.

## D. Comparison Between the *Chevron* Rationales and the Normative Authorization Doctrine

### *I. Constitutional and Administrative Legal Backgrounds*

Congress is the primary lawmaking institution.[122] Hence the onus is on Congress to solve the conflict of competence between agencies and courts. When Congress has not decided the issue, but has delegated the authority to act with the force of law to the agencies, then it can be assumed that the interpretative authority has been

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[119] *Id*.

[120] *Id*.

[121] *United States v. City of Fulton*, 475 U.S. 657, 666 (1986).

[122] Merill, *supra* note 34, 979.

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delegated to the agency as well.[123] This rationale is similar to the German foundation of the normative authorization doctrine. As shown above, Art. 19(4), 20(3) and 97(1) of the Basic Law require the parliament to decide whether the courts have to grant deference to an agency's decision or not. Furthermore, Congress as well as the German parliament – the Bundestag – are familiar with the jurisprudence on the scope of judicial review.[124] If they desired to abolish it, they would have to enact a law to that effect.

A constitutional tenet that has to be considered when applying *Chevron* is the non-delegation doctrine. According to *Chevron*, Congress delegates law-interpreting authority to agencies. However, Congress itself must decide basic questions of "great economic and political" significance, especially the question whether to regulate or not, and may not leave it to agency's discretion.[125] This requirement finds its equivalence in the German "reservation of law doctrine" (*Grundsatz vom Vorbehalt des Gesetzes*) and the "essentials theory" (*Wesentlichkeitstheorie*). According to those doctrines, parliament has to decide basic questions itself and may not delegate them to the executive.[126]

The difference between independent regulatory agencies in the U.S. and the non-independent agencies in Germany is not of significant importance in this context. Recall that in the U.S., market regulation is enforced by independent regulatory commissions,[127] e.g. the Federal Railroad Commission (FRC), the Federal Energy Regulatory Commission (FERC), or the Federal Communications Commission (FCC). German agencies may not be independent. However, the *Chevron* doctrine is relevant for every agency and not only for independent regulatory commissions. The *Chevron* case itself effected a decision of the EPA, which is not an independent regulatory commission.

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[123] *Brown & Wiliamson*, 529 U.S. at 159; Merill, *supra* note 34, 979; BREYER, STEWART, SUNSTEIN & VERMEULE, *supra* note 45, 343; Sunstein, *supra* note 37, 198.

[124] Scalia, *supra* note 63, 517.

[125] *Brown & Williamson*, 529 U.S. at 160; *MCI Telecommunications v. AT&T*, 512 U.S. at 231.

[126] KOPP & SCHENKE, *supra* note 9, § 42 margin number 125; Thomas von Danwitz, *Was ist eigentlich Regulierung?*, 2004 DIE ÖFFENTLICHE VERWALTUNG 977, 983. See Art. 87f(1)of the Basic Law, explicitly requiring a federal law: "In accordance with a federal law requiring the consent of the Bundesrat, the Federation shall ensure the availability of adequate and appropriate postal and telecommunications services throughout the federal territory."

[127] See *Humphrey's Executor*, 295 U.S. 602 (1935).

*II. Applicability of Chevron's Rationales in Germany*

*1. Agencies as Policy-Making Institutions*

A significant question in the contemporary German administrative legal system is whether courts have to grant deference to an agency's interpretation of statutes in the field of market regulation. At the end of the 20th century, the European Union obligated the member states to establish so-called regulatory agencies which are to pursue the creation of effective competition and the supply of the population with universal services at affordable prices. The Federal Communications Commission (FCC) or the Federal Energy Regulatory Commission (FERC) served as role-models for the European directives and hence for their domestic implementation.[128] The German law hitherto did not know such agencies. The most important German regulatory agency is the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway (FNA – *Bundesnetzagentur*).

Due to the principle of democracy, only the ministers are politically accountable in Germany, whereas agencies generally are only law enforcing institutes. Several facts indicate, however, that the FNA has a special role in the German executive branch. It is a separate higher federal authority within the scope of business of the Federal Ministry of Economics and Technology.[129] Since 2005, the FNA regulates network infrastructures in multiple sectors. Its task is to support, by liberalization and deregulation, the further development of competition in the electricity, gas, telecommunications, postal, and railway infrastructure market.[130] There are many reasons to assume that the FNA is not only a law-enforcing, but also a policy-making authority.

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[128] Masing, *supra* note 3, 559; Martin Bulinger, *Regulierung als modernes Instrument zur Ordnung liberalisierter Wirtschaftszweige*, 2003 DEUTSCHES VERWALTUNGSBLATT 1355 (1356); Hans-Heinrich Trute, *Regulierung – am Beispiel des Telekommunikationsrechts*, in: DER WANDEL DES STAATES VOR DEN HERAUSFORDERUNGEN DER GEGENWART – FESTSCHRIFT FÜR WINFRIED BROHM ZUM 70. GEBURTSTAG 169 (170) (Carl-Eugen Eberle, Martin Ibler & Dieter Lorenz eds., 2002); Karl-Heinz Ladeur, *Regulierung nach dem TKG*, 1998 KOMMUNIKATION UND RECHT 479.

[129] Section 1 of the Gesetz über die Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen [Act on the Federal Network Agency] of 7 July 2005, BGBl. I at 1970.

[130] See Section 1 of the Telecommunications Act, Section 1(2) of the Energiewirtschaftsgesetz [EnWG, Energy Industry Act] of 7 July 2005, BGBl. I at 1970, Section 1 of the Postgesetz [PostG, Postal Act] of 22 December 1997, BGBl. I at 3294, and Section 1(1) of the Allgemeines Eisenbahngesetz [AEG, Railroad Act] of 27 December 1993, BGBl. I at 2378.

First, there is an organizational specialty. In most of its decisions, especially in market regulation, the FNA decides through ruling chambers. Those ruling chambers are similar to the deciding boards of the independent regulatory commissions in the U.S. This is a novum in German administrative law. Even though Sections 88 ff. of the German APA include provisions concerning committees, those provisions are rarely ever used. Administrative acts are normally issued by a single official, who represents the agency. As shown,[131] one rationale for the normative authorization doctrine is the special embodiment of the procedure or the deciding organ, such as the Federal Review Board for Publications Harmful to Young Persons. This rationale is applicable here as well, as the trial-like[132] ruling chamber procedure is new in Germany. It finds its role-model in the complex U.S. adjudication and rulemaking procedure.

Second, the trial procedure as prescribed in Section 137 of the Telecommunications Act[133] underlines the importance of the FNA. In case of a ruling chamber decision in telecommunications, only appeals to the trial court (*Verwaltungsgericht*)[134] and the revision to the Federal Administrative Court (*Bundesverwaltungsgericht*) are possible. The trial court is authorized to review questions of fact and law, the Federal Constitutional Court may only review questions of law. An appeal against the decision of the trial court to the court of appeals (*Oberverwaltungsgericht*), which also may review facts and law, is ruled out. Thus there is only one rather than two

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[131] See, *supra*, B.III.2.b).

[132] See Section 135 of the Telecommunications Act:

> "Hearings, Oral Proceedings
>
> (1) The Chamber is to give parties concerned the opportunity to state their views.
>
> (2) Where appropriate, the Chamber may give persons representing business circles affected by the proceedings the opportunity to state their views.
>
> (3) The Chamber shall decide on the matter in question on the basis of public oral proceedings; subject to the agreement of the parties concerned, it can take its decision without oral proceedings. At the request of any of the parties concerned or on the Chamber's own initiative the public is to be excluded from part or all of the proceedings if it poses a threat to public order, specifically to national security, or to an important trade or operating secret."

133 See Section 137(3) of the Telecommunications Act:

"(3) [A]ppeals (on issues of fact and law) against judgments and appeals (on procedural issues) against other decisions of the administrative court shall be ruled out."

[134] Responsible lower court for actions against decisions of the FNA is the Trial Court of Cologne (*Verwaltungsgericht Köln*).

instances of reviewing the fact-finding. The reason for the shortening of the procedure is to facilitate decisions to invest in telecommunication markets.[135] Otherwise, investors may be scared by lengthy and cumbersome administrative trials.[136]

Last, even though the FNA is not an independent agency, it is a separate agency within the scope of business of the ministry.[137] In contrast to the provisions of the Act Against Restraints of Competition, a so-called ministerial decision is not foreseen.[138] In case of a legal dispute, neither the head of the FNA nor the Federal Ministry of Economics and Technology can quash the decision made by the ruling chambers. Furthermore, Section 61 of the German Energy Industry Act and Section 117 of the German Telecommunications Act provide that all directives issued by the Federal Ministry of Economics and Technology shall be published in the Federal Gazette (*Bundesanzeiger*). In the case of the Energy Industry Act, the publication must even include the reasons. The so-caused transparency may increase the inhibition threshold of the ministry to issue such orders.[139] In addition to that, according to Section 3(1) of the Act on the Federal Network Agency it is the president of the FNA – and not, as usual, the ministry – who shall lay down the administration and order of business by rules of procedure. However, the rule of procedure shall require confirmation by the Federal Ministry of Economics and Technology.

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[135] BERND HOLZNAGEL, CHRISTOPH ENAUX & CHRISTIAN NIENHAUS, TELEKOMMUNIKATIONSRECHT 67 (2nd ed. 2006).

[136] The situation in the field of energy regulation is similar. Here, the Higher Court of Appeals (*Oberlandesgericht*) is the first instance. An appeal against the decisions of the Higher Court of Appeals is only possible at the Federal Court of Justice (*Bundesgerichtshof*).

[137] Section 1 of the Act establishing the Federal Network Agency.

[138] See Section 42(1) of the Gesetz gegen Wettbewerbsbeschränkungen [GWB, Act against Restraints on Competition] of 15 July 2005, BGBl. I at 2114:

"Ministerial Authorization

(1) The Federal Minister of Economics and Technology shall, upon application, authorize a concentration prohibited by the *Bundeskartellamt* if, in a specific case, the restraint of competition is outweighed by advantages to the economy as a whole following from the concentration, or if the concentration is justified by an overriding public interest. In this context the competitiveness of the participating undertakings in markets outside the scope of application of this Act shall also be taken into account. Authorization may be granted only if the scope of the restraint of competition does not jeopardize the market economy system."

[139] CHRISTIAN KOENIG, JÜRGEN KÜHLING & WINFRIED RASBACH, ENERGIERECHT 196 (2006); CHRISTIAN KOENIG, SASCHA LOETZ & ANDREAS NEUMANN, TELEKOMMUNIKATIONSRECHT 218 (2004).

The special expertise of the FNA is underlined by the fact that there is an Advisory Council constituted at the FNA.[140] It consists of 16 members of the German Bundestag and 16 representatives of the German Bundesrat. According to Section 120 of the Telecommunications Act, the Advisory Council shall participate in certain regulatory decisions, especially concerning award proceedings for requiring telecommunication frequency assignment. The Advisory Council is entitled to request measures to implement the aims of regulation and to secure universal service and to obtain information and comments.

*2. Agency Expertise*

The expertise rationale matches the German normative authorization doctrine. According to the normative authorization doctrine,[141] one of the reasons to grant deference to agencies' decisions is given when courts reach the functional limits of adjudication, i.e. when agencies' decisions are too complex and based on a dynamic development. The argument of agency expertise also applies to some German agencies, e.g. the FNA. The FNA in Germany is concerned with highly technical and economic issues. Market-regulating agencies use economic theory to predict the consequences of a particular action and to determine whether the action is in accordance to the statute.[142] Therefore, the FNA is furnished with many experts in these fields and has a technical advantage compared to courts. This distinguishes the FNA as an agency for economic regulation from other agencies concerned with the prevention of danger.

The substantial law also reveals that the FNA has latitude not reviewable by courts. It is not clear in every case whether the agency enjoys discretion, freedom of planning, or authority to interpret. As shown above, *Chevron* step two is very similar to the arbitrary and capricious test in Section 706 APA.[143] Thus, even *Chevron* may not clearly distinguish between discretion and interpretation.

**E. Summary and Conclusion**

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[140] Section 5 of the Act on the Federal Network Agency.

[141] See, *supra*, B.III.2.b).

[142] Patricia M. Wald, *Judicial Review of Economic Analyses*, 1 YALE J. ON REG. 43, 44 (1983).

[143] See, *supra*, C.I.3.

A comparative legal investigation requires that both the factual problem and the proposed legal solution are functionally equivalent. In the U.S., the *Chevron* doctrine is the relevant standard on whether courts have to grant deference to agency's interpretations. According to German courts and scholars, the normative authorization doctrine decides whether courts have to grant deference to an agency's interpretation of statutes. Both doctrines are based on the assumption that it is the legislature who decides whether courts have to grant deference. However, the normative authorization theory has a further prerequisite compared to the *Chevron* doctrine. According to *Chevron*, the authorization of the agency lies in the ambiguity of the statute. German courts require an indefinite legal term and in addition an explicit or implicit legislative authorization to interpret the term. They have decided certain cases with the assumption that the legislation authorized the agency to make a final interpretation. The difference between the second requirement of the German normative authorization doctrine and the U.S. *Chevron* doctrine is marginal, because many of the requirements of the German "step two" are already included in the rationales of *Chevron*, e.g. the agency expertise or the procedure.

As a conclusion, there are many similarities between the *Chevron* doctrine and the German normative authorization doctrine. Both doctrines facilitate changes in agency interpretation.[144] This is necessary in a time of increasing technological progress and economic interdependence. Due to more and more complex technological and economic development, broad delegation to the Executive is a characteristic of the modern state. *Chevron* and the German normative authorization doctrine did not form the increasing power of the administration, but are a reaction to it. It is the duty of legal scholars and courts to deliver a framework and justification to handle this occurrence. When a statute uses an ambiguous or indefinite legal term, there is not one correct legal interpretation but rather a whole spectrum of correct decisions.[145]

An implementation of *Chevron* in Germany would shift the balance of powers towards the executive. What would be the alternative? Either the legislative enacts "excruciatingly detailed statutes",[146] or the court trials take a longer time to analyze the highly complicated estimations and calculations of the agencies. Neither are desirable. Hence, it has to be accepted that the technological and economic

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[144] Scalia, *supra* note 63, 518.

[145] Redeker, *supra* note 29, 762; Scalia, *supra* note 63, 517.

[146] Merill, *supra* note 34, 970.

progress creates powerful agencies. However, those agencies have to be controlled. Both the *Chevron* clause and the German normative authorization doctrine guarantee a sufficient standard of judicial control.

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