has changed over time, the common-law history is extremely relevant here. We start, therefore, in the past.

B. The Interpretive Role Agencies Play

Agencies regulate almost all aspects of modern society. In doing so, they regularly interpret statutes and regulations. Do agency interpretations of these laws control? The short answer is no. The long answer is that simply because agency interpretations do not control does not mean that they are irrelevant. They are highly relevant; therefore, some level of deference is appropriate.

Article III of the Constitution grants the judiciary all "[j]udicial power." U.S. CONST. art. III, § 1. According to *Marbury v. Madison*, "[i]t is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. (1 Cranch) 137, 177 (1803). Because the Constitution delegates interpretive power to the judiciary, a formalist might argue that agencies should have no interpretive role, or, at the very least, not one that trumps the judicial role. Yet, the formalist view is extreme.

For many reasons, agency interpretation is necessary, making judicial deference appropriate. The modern administrative state is vastly complex. Agencies have expertise in their area of responsibility; consider the U.S. Department of Veterans' Affairs (VA), the Environmental Protection Agency (EPA), and the Food and Drug Administration (FDA). Each of these agencies has experts and specialists trained in the relevant field. Judges are generalists with expertise in law, not in the environment or food safety. Hence, it simply makes more sense for medical personnel within the VA to determine disability benefits for veterans, for scientists within the EPA to determine acceptable levels of pollutants in the air, and for nutritionists within the FDA to determine what food additives are safe.

Moreover, agencies may be more responsive to the electorate than the judiciary. National goals and policies change as society evolves. Agency administrators are accountable to the public via the Office of the President and, therefore, will be more likely to conform their policies to match populist expectations. Judges, in contrast, are elected for life and are more insulated from political backlash. As a result, they tend to protect minority interests. Thus, agencies should receive some deference when they interpret statutes within their area of expertise. Even *Marbury's* author, Chief Justice John Marshall, suggested that courts respect an agency's "uniform construction" of "doubtful" statutes. *United States v. Vowell*, 9 U.S. (5 Cranch) 368, 371 (1810).

In this chapter, we will explore the level of deference a court will give to an agency interpretation of a statute or regulation. This is a politically important question because the power to say what the law means shifts to the executive branch when courts defer to agency interpretations. *See generally* Linda D. Jellum, *The Impact of the Rise and Fall of* Chevron *on the Executive's Power to Make and Interpret Law*, 44 LOY. U. CHI. L.J. 141, 169–71 (2012) (arguing that when the Supreme Court decided *Chevron*, the Court dramatically, and likely unintentionally, shifted interpretive power

from the judiciary to the executive). The appropriate level of deference has changed over time as the justices have been more or less comfortable with deferring to the executive. The question is what level of deference judges should give to an agency when, in the process of developing a rule or adjudicating a case, the agency interprets a statute or regulation. As the Supreme Court has addressed this issue over the last seventy years, it has oscillated among three deference standards: (1) complete deference, (2) limited deference, and (3) no deference. While the level of deference has changed, the rationale for affording deference has remained relatively consistent. Courts defer to agency interpretations because of agency expertise and implied congressional delegation. The next section will explore the Court's approach to deference prior to its landmark decision in *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Before we get there, you need to understand the types of issues agencies resolve.

Agencies resolve three types of legal issues. First, they determine the boundaries of their delegated authority and the meaning of the laws within that authority. Questions related to these types of issues are questions of law. When an agency resolves a question of law, the facts of an individual case are largely irrelevant. What matters is what the statute or regulation says. In this chapter, we will focus on these questions: questions of law. But you need to be aware that agencies resolve other kinds of questions as well.

A second type of question that agencies resolve is questions of fact and policy. For example, are airbags safer enough than seatbelts to justify the higher cost to industry of installing them? How much pollutant can be in water before it is unsafe to drink? Should genetically modified produce be labeled as such? When an agency resolves a question of fact or policy, the law is not relevant (although there may also be a question of law implicated).

When an agency resolves a question of fact or policy, courts apply one of two different standards to determine the validity of that finding. APA § 706(2). For agency findings of fact made during informal rulemaking and informal adjudication, the relevant standard is whether the agency's findings are arbitrary and capricious. APA § 706(2)(A). Under the arbitrary and capricious standard, a court determines whether the agency's findings were based on a consideration of irrelevant factors or whether the agency made a clear error of judgment. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). For agency findings of fact made during formal rulemaking and formal adjudication, the standard is whether the agency's findings were supported by substantial evidence. APA § 706(2)(E). Under the substantial evidence standard, a court determines whether the record contains "such evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). While these two standards originally differed, today, they tend to converge, and the distinction is "largely semantic." *Association of Data Processing Servs. Org. v. Board of Governors*, 745 F.2d 677, 684 (D.C. Cir. 1984) (citation omitted) (internal quotation marks omitted). You will explore these standards in more detail in a traditional administrative law course.

The third type of question that agencies resolve is a mixed question of law and fact. These questions require an agency to determine whether a particular law applies to a given set of the facts. For example, are newspaper delivery people employees or independent contractors? The appropriate standard applicable to mixed questions of law and fact is currently unclear. Some courts apply the test from *NLRB v. Hearst Publication, Inc.*, 322 U.S. 111 (1944): An agency's decision is to be accepted if it has "warrant in the record" and a reasonable basis in the law. *Id.* at 131. Other courts break the mixed question into its component parts of law and fact. To the extent part of the issue involves a question of law, the analysis that follows applies.

C. Deference Pre-*Chevron*

In the 1940s and early 1950s, the Supreme Court used two, different, deference standards: "no deference" (or a *de novo* standard) and "limited deference." While the deference world was never black and white, the standard the Court used seemed to depend on the type of question that was presented. When an agency interpretation involved a question of law, the Court used the "no deference" standard. *See, e.g., Gray v. Powell*, 314 U.S. 402, 414–17 (1941), (refusing to defer to the agency's determination that coal that was transported from one entity to another without a title transfer constituted coal that was "sold or otherwise disposed of" within the meaning of the Bituminous Coal Act of 1937); *Hearst Publication*, 322 U.S. at 124–29 (refusing to defer to the agency's determination that newsboys were "employees" under the National Labor Relations Act); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 506 (1951) (refusing to defer to the agency's interpretation of the term "course of employment" in the Longshoremen's and Harbor Workers' Compensation Act).

In contrast, when an agency interpretation involved a mixed question of law and fact, the Supreme Court used the "limited deference" standard. *See, e.g., Gray*, 314 U.S. at 410–13 (deferring to the agency's finding that the specific plaintiff was a coal producer); *O'Leary*, 340 U.S. at 507–08 (deferring to the agency's factual finding that a particular rescue occurred during the course of employment). For mixed questions, the Court afforded the agency interpretations some deference because of agency expertise and express congressional delegation. *Hearst Publication*, 322 U.S. at 120; *Gray*, 314 U.S. at 412 ("Congress ... found it more efficient to delegate [these issues] to those whose experience in a particular field gave promise of a better informed, more equitable" resolution of the issues.").

In sum, when the issue involved law application, courts deferred because of the agency's expertise and the likelihood that Congress intended to delegate resolution of the issue to the agency. However, when the agency interpretation involved a pure question of law, the Court did not defer to the agency interpretation because judges were as competent, if not more so, than agencies to determine the intended meaning of ambiguous statutory language. Pursuant to this bifurcated deference approach, judges retained the primary responsibility for interpreting statutes. Judges generally reviewed questions of law *de novo*, giving the agency's interpretation no deference at

all. Judges reviewed questions of law application more deferentially, giving the agency's interpretation some level of deference.

This bifurcated deference, or two-tracked, approach to judicial review of agency interpretations made sense and was consistent with the judicial review approach in civil litigation. In civil cases, appellate judges determine questions of law *de novo*. Because appellate judges are experts at interpreting law, no deference is due when trial courts are resolving conclusions of law. But questions of fact and law application are reviewed under a more deferential standard. There is another reason that this two-tracked approach made sense: leaving questions of law for judicial resolution was consistent with the APA, which provides that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." APA § 706.

While judges deferred to agency interpretations involving law application, the level of their deference was uncertain. In 1944, the Supreme Court decided two cases that addressed how much judges should defer. In the first case, *Hearst Publication*, the Court held that as long as an agency interpretation had a "warrant in the record and a reasonable basis in law," a court should not substitute its own interpretation for that of the agency entrusted with administering the statute. 322 U.S. at 130. The second case is below. See if you can identify the Court's deference test and rationale for affording deference. As you read this case, try to determine what type of agency action was at issue: a legislative or non-legislative rule.

Skidmore v. Swift & Co.

Supreme Court for the United States
323 U.S. 134 (1944)

◆ JUSTICE JACKSON delivered the opinion of the Court [with whom STONE, C.J., and DOUGLAS, BLACK, ROBERTS, MURPHY, REED, RUTLEDGE, and FRANKFURTER, JJ., concur].

Seven employees of the Swift and Company packing plant at Fort Worth, Texas, brought an action under the Fair Labor Standards Act, 29 U.S.C.A. § 201 et seq.,* to recover overtime, liquidated damages, and attorneys' fees, totaling approximately $77,000.... [Petitioners claim that the time they spent in the fire hall subject to call to answer fire alarms were periods of work. Combined with their daytime employment, petitioners were entitled to overtime pay.]

It is not denied that the daytime employment of these persons was working time within the Act. [And that t]hey were paid weekly salaries.

Under their oral agreement of employment, however, petitioners undertook to stay in the fire hall on the Company premises, or within hailing distance, three and

* Editor's Footnote. The overtime provisions of FLSA applied only to "employees" and to "employment" in excess of a specified number of hours. 29 U.S.C. § 207. The definitions section of FLSA provided that "employ includes to suffer or permit to work." 29 U.S.C. § 203(g).