THE EXECUTIVE BRANCH, ADMINISTRATIVE ACTION, AND COMPARATIVE EXPERTISE

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How much deference should the Court give to an executive branch agency's own formulation of a policy or to an agency's determination of what a statute means? How willing should the Court be to overturn or to sustain an agency's decision about these matters? The answers to these technical-sounding questions are more important than one might think. Administrative decision making constitutes the bulk of executive branch work; and the bulk of its administrative decisions are subject to judicial review. Hence, the questions' answers help to define much of the Court-executive relationship. Moreover, agencies act within the confines of statutes. Hence, in answering the questions, the Court must keep Congress in mind.

Most important, the answers affect the lives of ordinary Americans. While it is easy to see the effect of executive branch decisions on basic rights, such as the presidential order to send troops to Little Rock to enforce *Brown*, it is harder to remember that routine agency decisions can also affect our daily existence, often in profound ways.

The answers matter, for they affect the way government works, the ability of modern government to solve the problems of ordinary Americans, and consequently the broader question this book considers: how the Court can earn the public's confidence by developing relationships with other institutions that will help government work well.

* Associate Justice, United States Supreme Court. This Article is reprinted without change from STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW ch. 9 (Alfred A. Knopf 2010). Reprinted with permission. Because the original format of the chapter has been preserved, some text and citations do not conform to *Cardozo Law Review* or Bluebook style.

EXECUTIVE BRANCH ADMINISTRATION

Whether we like it or not, government administration is everywhere. The Constitution vests the "executive Power" of the United States in the president. The executive branch exercises that power by administering the laws that Congress enacts, and those laws are numerous. Government administrators implement laws that regulate the conduct of private businesses or individuals, that obtain money from citizens and businesses, that disburse funds, and that provide some goods and services directly. Federal statutes, for example, require or permit government officials to obtain, provide, or regulate taxes, welfare, Social Security, medicine, pharmaceutical drugs, education, highways, railroads, electricity, natural gas, stocks and bonds, banking, medical care, public health, safety, the environment, fair employment practices, consumer protection, and much else besides (including the armed forces, which for present purposes I put to the side).[1]

Statutes delegate the authority to administer these programs sometimes to the president himself but more often to a (typically presidentially appointed) head of a cabinet department or bureau or perhaps an independent agency, such as the Federal Reserve Board, the Federal Communications Commission, or the Securities and Exchange Commission. "Independent agencies" are labeled as such because, unlike executive branch agencies, their members serve fixed terms and are removable by the president only for good cause, rather than on the basis of policy disagreements. Because of their relative autonomy from the president, some have called the independent agencies a "headless fourth branch" of government. But I believe them best considered as part of the executive branch.[2]

Agencies (and here I include virtually all civil executive branch agencies, bureaus, and departments) typically possess great power. They write regulations that, like congressional statutes, take effect as law. They resolve disputes, often in much the same way that courts adjudicate controversies. They investigate private behavior. They impose sanctions, such as heavy fines, on those who violate their rules, and they license businesses or individuals to perform services. They regularly consider and grant requests by individual private citizens for goods or services, ranging from books of the president's speeches to local weather forecasts.

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[1] U.S. CONST. art. II, § 1, cl. 1.

[2] See *President's Committee on Administrative Management, Report with Special Studies* (1937) (characterizing administrative agencies as a "headless 'fourth branch' "of government).

In a word, federal government programs are many, they come in different shapes and sizes, and they employ millions of government officials and ordinary workers (two million civilian employees in 2009). It is important to keep their size, complexity, and diversity in mind even though here I use the singular term "agency" to refer generically to the units that administer most government programs. I shall also overlook the fact that some agencies enjoy special independence from presidential control.[3]

ADMINISTRATIVE LAW AND COURT REVIEW

Despite the size and complexity of government administration, the Court often applies principles drawn from one branch of law, administrative law, when it reviews the lawfulness of an agency's actions. Our legal system asks courts to review agency work because the technical nature of modern society, along with the public's desire for Social Security, medical care, and the like, has brought laws that delegate enormous decision-making power and responsibility to administrators who are not themselves elected. The federal government has regulated railroads since the 1880s (through the Interstate Commerce Commission), pharmaceutical drugs since the beginning of the twentieth century (through the Food and Drug Administration), and unfair or deceptive business practices since World War I (through the Federal Trade Commission).

Technological change and changing political attitudes during the 1930s led to President Roosevelt's New Deal, which significantly expanded the scope of federal regulation. The New Deal created and augmented the power of many independent regulatory commissions, such as the Securities and Exchange Commission, the Federal Power Commission, the National Labor Relations Board, the Civil Aeronautics Board, and the Federal Communications Commission. Government again expanded the scope of regulation significantly in the 1970s with the creation of powerful but not necessarily organizationally "independent" regulatory authorities, such as the Environmental Protection Agency, the Occupational Safety and Health Administration, and the National Highway Traffic Safety Administration. The deregulation movement of the late twentieth and early twenty-first centuries changed somewhat the manner and extent to which the government regulated. A few regulatory programs and agencies were abolished (such as the Civil Aeronautics Board and the Interstate

[3] Bureau of Labor Statistics, U.S. Department of Labor, *Career Guide to Industries, 2010-11 Edition* (2009), www.bls.gov/oco/cg/home.htm.

Commerce Commission). More commonly, Congress changed the name and government location of an agency, for example, changing the name of the Federal Power Commission to the Federal Energy Regulatory Commission and moving it to the Department of Energy—all without major change in function or performance.

The Roosevelt administration and later administrations saw the expansion of government authority as a practical necessity. Just after the New Deal, James Landis, a strong advocate of activist government, wrote that the "administrative process is, in essence, our generation's answer to the inadequacy of the judicial and legislative processes." But the resulting growth and concentration of power also led the public to return to Madison's basic observation: "if angels were to govern," there would be no need for "controls," but in a world where government is "administered by men," how do we make government "control itself"? How can we ensure that related administrative decisions are fair and reasonable? Or, as the ancient Romans put it, *quis custodiet ipsos custodes*? Who will regulate the regulators?[4]

At the time of the early New Deal, some thought the "science" of administration itself would check administrative behavior, rather in the way that medical science and canons of ethics limit doctors' behavior. But few today believe in a "science" of regulation or administration "canons" that, if followed, would bring about fair, reasonable decisions. Rather, we have relied on Congress, the president, and the courts to oversee administrative decision making.[5]

Congress oversees agency decision making through hearings, budget decisions, and ultimately legislation. But congressional oversight is limited by the same lack of time, knowledge, and expertise that led Congress to delegate power to the agency in the first place.

The executive branch relies on a number of sources to check agency action. For example, it uses ombudsmen and inspectors general to detect improper behavior. Perhaps most significant, it conducts policy oversight through the Office of Management and Budget (OMB). A small OMB bureau, now called the Office of Information and Regulatory Affairs (OIRA), seeks to coordinate the regulatory work of the sprawling executive branch and improve its efficiency. But OIRA can review only a few agency policy decisions made each year. Furthermore, it may seek to influence an agency's policy decision but lack the legal authority to change that decision. Outside OIRA, the president may not have the time or willingness to review decisions, even those of his own political appointees.

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[4] James M. Landis, *The Administrative Process* 46 (1938); Federalist 51 (James Madison).

[5] See M. J. C. Vile, *Constitutionalism and the Separation of Powers* 277-80 (1st ed. 1967) (tracing the history of the idea of public administration as an apolitical science).

Thus, courts too must have an important role in reviewing executive branch agency decisions. A member of the general public who will likely suffer concrete harm as a result of an agency action may typically seek judicial review. Applying basic principles of administrative law, a court may consider whether the agency properly found the facts, followed proper procedures, and followed its own rules and regulations. A court may also consider whether the agency's determinations, including those of policy, are reasonable; not "arbitrary, capricious, [or] an abuse of discretion"; conform to certain basic principles of fairness; are consistent with relevant statutory requirements; and are consistent with the Constitution.[6]

COMPARATIVE EXPERTISE AND JUDICIAL DEFERENCE

Courts find the notion of comparative expertise useful, indeed necessary, when reviewing administrative decisions. Courts ask which institution, court, or agency is comparatively more likely to understand the critical matters that underlie a particular kind of legal question, broadly phrased. Courts are more likely to have experience with procedures, basic fairness to individuals, and interpreting the Constitution. Thus, where questions of this kind are at issue, courts are less likely to give much deference to agency decisions. Agencies, however, are more likely to have experience with facts and policy matters related to their administrative missions. Thus courts will likely give agencies considerably more deference when decisions are about these matters.

This notion helps courts answer a key question of administrative law: What *attitude* should a reviewing court take toward the administrative agency's decision? What do I mean by "attitude"? That word refers to the standards that judges use when reviewing the lawfulness of a decision made by other judges, by juries, or by administrators. For example, an appellate court will set aside a lower-court judge's finding of a fact only if the finding is *clearly erroneous*. A judge reviewing a jury's decision that a criminal defendant is guilty will overturn the jury's verdict only if *no reasonable person* could have reached that decision. And a judge reviewing administrative agency findings of fact will set them aside only if they are not *supported by substantial evidence*. Each standard gives slightly more leeway to the fact finder than the preceding one.[7]

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6 See 5 U.S.C. § 706; see, e.g., Service v. Dulles, 354 U.S. 363, 388 (1957).

7 See Fed. R. Civ. P. 52(a)(6); see Jackson v. Virginia, 443 U.S. 307, 318-19 (1979); see 5 U.S.C. § 706.

Some argue that applying these different standards is a psychological impossibility. A distinguished circuit judge, Harold Leventhal, for example, once facetiously wrote that he "thought" he had found the case "dreamed of by law school professors," a case where he could "conscientiously" distinguish among the standards, upholding an agency's finding of fact because it was supported by "substantial evidence," even though, had that finding been made by a district judge, he would have struck it down as "clearly erroneous." But he decided on second thought that the finding was not supported by "substantial evidence" either.[8]

Judge Leventhal's reaction is an overstatement. Judges are able to apply different standards—at least to some degree. When they review a lower-court judge's decision about what the law means, they can simply ask themselves, "Is it right?" When they review a jury decision, they can ask, "Am I completely certain the jury is wrong, to the point where no one could sensibly come to that conclusion?" A reviewing judge can also think, "I wouldn't have come to that conclusion, but I can see how someone else might."

The matter of different standards for review is often better expressed in terms of degree, not kind. To what extent does the reviewing judge give the other decision maker leeway to come to a decision that the judge, on his own, would likely think wrong? A judge who grants that other decision maker at least some leeway in respect to a decision has adopted an *attitude of deference.*

Many administrative law questions—particularly those that define the relation between judges and administrators—can be put in terms of deference: How much deference should the reviewing court grant? For example, should it give the agency the benefit of *any* doubt, thereby coming close to presuming the correctness of the agency's decision? Should it instead review the agency's decision from scratch, giving the agency little or no benefit of any doubt? Administrative lawyers would describe the first attitude as one of strong *deference* to the agency, the second as one of no deference at all. Should a court give an agency deference? When should it do so? How much deference should it give?[9] These are key questions defining relationships between the courts and much of the executive branch.

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[8] International Brotherhood of Electrical Workers, Local Union No. 68 v. National Labor Relations Board, 448 F.2d 1127, 1142 (D.C. Cir. 1971) (Leventhal, J., dissenting).

[9] See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 365–67 (1986) (describing two opposing views toward agency decisions of law—one "deferential" and another "independent"); id. at 371-72 ("[T]he 'delegation' way of looking at deference . . . suggests that Congressional intent to make agency decisions of law binding is really a question of how much deference Congress intended courts to pay to the agency's decisions, a matter of degree, not kind").

During the New Deal many administrative law experts supported greater deference. They believed that agency administrators used expertise to determine "scientifically" such matters as the proper level of railroad rates or when an agency should suppress competition on the ground it was "destructive." At the same time, they believed that courts, often hostile to regulation, would prove too willing to substitute their own views for those of the administrators. Today, however, the public has less confidence in agency expertise. Political appointees, often not experts, are normally responsible for managing agencies and determining policy. And policy often reflects political, not simply "scientific," considerations. Agency decisions will also occasionally reflect "tunnel vision," an agency's supreme confidence in the importance of its own mission to the point where it leaves common sense aside. At the same time, courts no longer seem particularly hostile to regulation as a matter of principle. Hence, the public now relies more heavily on courts to ensure the fairness and rationality of agency decisions.

Expertise is still relevant, however, to the question of how much deference to give—although "comparative expertise" is a better term. Courts will exercise relatively more control over issues within their expertise while according agencies relatively more leeway (but not unqualified deference) as to issues within theirs. How the Court has applied these principles to two types of agency decisions—those relating to policy and to the interpretation of statutes—is the question to which I now turn.

REVIEWING AGENCY DECISIONS OF POLICY

Consider more specifically how comparative expertise helps determine deference in respect to agency policy decisions. In reviewing such a decision—for instance, about what standards to impose on tire manufacturers in order to ensure automobile tire safety—a court often must answer a legal question: Is the agency's tire safety decision "arbitrary, capricious, an abuse of discretion"? A realistic appraisal of comparative expertise would start with an understanding of the kinds of problems facing the agency and how agencies would typically go about solving such problems.[10]

An agency staff formulating rules for automobile tire safety might begin with little expert knowledge. Nonetheless, it has time to learn and will likely research the subject matter for months, perhaps longer. The

[10] 5 U.S.C. § 706(2)(a).

staff can consult with outside experts, learning from those experts even where they have competing interests. It can ask for public comments on its initial efforts and revise those efforts accordingly. It can seek information and reactions from colleagues at other agencies. In a word, it can develop subject-matter expertise.

At the same time, the agency staff must make technical decisions and write technical standards based on what they have learned. To do so, they must decide such technical issues as whether to employ cost-benefit analyses or whether to base standards on product design or product performance. And to be effective, they may also have to take account of the views of those who favor or oppose their work, perhaps writing standards that reflect political compromise.

By way of contrast, consider the judge's expertise in such matters. Judges have little time to spend on any one case, such as a case in which a party contests the reasonableness of the agency's tire safety regulations. They deal with a record that rarely reflects all that the agency or its staff had to consider. They cannot look for information beyond that record. They must respond to the arguments of the lawyers. They do not necessarily have much political experience.

It is not surprising, then, that courts, recognizing the institutional differences, find agency policy decisions "arbitrary, capricious, an abuse of discretion" only in rare and clear cases. Courts have struck down, for example, a National Labor Relations Board election rule that allowed officials to buy drinks for the voters on Election Day—a policy that reflected considerations beyond the area of the labor board's special expertise. But ordinarily, courts, while insisting on proper procedures, will allow agencies considerable leeway. Courts very much defer to agencies when they review agency determinations of policy.[11]

REVIEWING AGENCY INTERPRETATION OF STATUTES

A difficult and important problem involving judicial attitude arises when a court reviews an agency decision interpreting a statute. Should a court ever defer to an agency's decision about the meaning or scope of statutory language? Or should a court always decide what a statute means uninfluenced by the agency's interpretation? It may seem surprising that courts sometimes take the former approach.

Why would courts ever defer to an agency's interpretation of a statute? Statutory interpretation is a basic judicial job that courts

[11] National Labor Relations Board v. Labor Services, Inc., 721 F.2d 13, 14-15 (1st Cir. 1983); *cf.* Breyer, *supra* note 9, at 383 ("When writing an administrative law case book in the late 1970s, the authors could find only a handful of cases that faced so directly an agency policy decision and held it 'arbitrary'; by the time the second edition was published in 1985, they found many more").

perform day in and day out using a well-developed set of tools. If ever courts have comparatively more expertise, isn't this the place? But let's imagine that Congress writes a statute that specifically grants to an agency leeway to fill in the blank. Suppose, for example, Congress writes a labor statute that uses the term "employee" and adds "the labor board shall have the power to determine in accordance with the objectives of this statute what kinds of employees fall within this term." In that case, Congress has given to the agency the power to write a regulation that takes effect as a law. If a court is to maintain a workable relationship with Congress, it must respect that decision. Now suppose that Congress does the same thing implicitly. That is, it delegates to the agency the power to define "employee," but not by *explicitly* delegating this power in the statute. A court should similarly respect Congress's implicit decision.[12]

Consider the vast number of statutory provisions that Congress writes to handle the business of government. Many of these provisions concern matters of detail, some quite technical, that are important for the operation of the program. Agency officials are likely to understand these details, but courts may not. Indeed, Congress may have delegated power to the agency in the first place because it, too, lacks this expertise. If so, the court will likely defer to a reasonable agency interpretation of the statutory provision.[13]

But how does a court know whether Congress intended the court to defer to a reasonable agency interpretation of a statute? Congress is normally silent on the subject, delegating interpretive power to the agency implicitly if at all. Furthermore, Congress could not have taken from the courts all their ordinary power to interpret statutes. Nor would Congress likely have intended to give the agencies free rein to interpret statutes in ways that, for example, diminish the limits on their delegated powers. Hence the problem: When should courts, recognizing an agency's comparative expertise, defer, or not defer, to the agency's interpretation of the statute?

The question is important. It embodies a modern democratic dilemma. No one doubts that the conditions of modern life require Congress to grant agency officials broad authority to decide many questions that affect our daily lives—for example, whether gasoline can contain lead, whether power plants must eliminate sulfur dioxide, whether garbage must be recycled, whether telemarketers can interrupt

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12 *Cf.* National Labor Relations Board v. Hearst Publications, 322 U.S. 111 (1944); *see* Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984) (noting that legislative delegation to an agency may be implicit, in which case a court must defer to a reasonable interpretation by the agency).

13 See Breyer, *supra* note 9, at 370 (noting that courts have inferred legislative intent and looked to whether an agency has special expertise when deciding whether to defer to an agency's interpretation of a statutory provision).

families during dinner, whether shippers must pay higher charges to railroads, or whether interest rate costs must be fully disclosed. But *how much* authority should a legislature delegate?

In determining how much authority Congress did delegate in a particular statute, a court must balance two countervailing concerns. On the one hand, the court must not recognize more agency authority than Congress intended, because doing so would unnecessarily limit the citizens' ballot box control over government actions that importantly affect their lives. On the other hand, the court must not recognize less authority than Congress intended, because doing so would prevent citizens from securing basic objectives that they cast their votes to achieve, say a cleaner environment or greater consumer protection. The public cannot achieve its military objectives if Congress is required to enact a statute that tells the army in detail how to take a particular hill—nor is Congress likely to write such a statute. Statutes that tell administrators precisely which pollutants to regulate, and where and how to regulate them, can prove similarly counterproductive. The legislator who tries to become a super-detailed air pollution regulator can easily end up with dirtier air.

The Court considered the deference question in a well-known case, *Chevron v. National Resources Defense Council.* The case involved an environmental statute that said the Environmental Protection Agency (EPA) must regulate "new or modified stationary *sources*" of pollution in regions of the country that had not yet met the statute's clean air goals. The EPA had developed a system of regulation that in effect treated each machine that emitted a pollutant as a separate "source" that must meet a specified standard. The EPA then changed its system so that it no longer treated each machine as a separate source. Instead, hoping to achieve greater efficiency, the EPA placed an imaginary "bubble" over a factory and treated all the emissions within the bubble as if they came from a single source. This meant a company could keep some dirty machines in operation as long as it offset the resulting emissions by using cleaner machines elsewhere. The question was whether the EPA could apply the statutory word "source" to include all the machines within the bubble taken together, and the Court held that it could do so.[14]

In this case the Court set forth a general rule describing when courts should defer to an agency's interpretation of a statute. It said that if the answer to the statutory question is "clear," a court should not defer to the agency's interpretation of the statute; rather, it should provide the answer irrespective of what the agency says. But if the answer is not clear—where, for example, the statute itself is "silent or

[14] *Chevron*, 467 U.S. at 840-42; *id.* at 856-58; *id.* at 866.

ambiguous"—then courts should assume that Congress intended to *delegate to the agency* the power to interpret the statute, and they should defer to (and uphold) a "reasonable interpretation made by the administrator of an agency."[15]

The deference rule has not completely resolved the problem, however. Taken literally, it would give agencies authority to resolve virtually all statutory ambiguities. The Court has not permitted this result, because the deference question arises in respect to so many different programs involving so many different statutory provisions, potentially applicable to so many different kinds of circumstance, raising so many different administrative problems, that a single formula about deference cannot work every time a statute is ambiguous. Thus, the Court has treated *Chevron*'s rule not as a universally applicable formula but as a guiding rule of thumb. When there are good reasons to think Congress would not have wanted the Court to defer to an agency interpretation, the Court has not done so.

In 2007, for example, the Court considered a critically important environmental question. Does the Clean Air Act give the EPA the authority to regulate greenhouse gases, such as carbon dioxide? The statute said that the EPA should regulate "any air pollutant" that "endanger[s] public health or welfare." The statute defines "air pollutant" as including "any air pollution agent . . . including any physical, chemical . . . substance . . . emitted into . . . the ambient air." The EPA had interpreted the statutory words "air pollutant" as excluding greenhouse gases, but the Court by a narrow majority reversed that determination. In holding that the statute did cover greenhouse gases, the Court did not defer to the agency's own interpretation of the statute. Even though the statutory word "any" (in the phrase "any air pollution agent") created potential ambiguity, the Court thought that Congress would not have intended to delegate to the agency the legal power to interpret the statute to exclude gases that were major contributors to global warming. The decision is also consistent with the view that Congress would not have wanted to grant the agency the power to decide by itself such an important general policy question.[16]

In another, less important case the Court made clear that *Chevron* does not set forth an absolute deference rule. A statute authorizes the U.S. Customs Service to "fix" according to Treasury Department regulations the "final classification and rate of duty applicable" to imported merchandise. A customs service officer, applying a Treasury Department regulation, classified three-ring binder "day planners"

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[15] *Id.* at 842-44.

[16] Massachusetts v. Environmental Protection Agency, 549 U.S. 497, 505-6 (2007); *id.* at 528-30; 42 U.S.C. § 7521(a)(1); 42 U.S.C. § 7602(g).

among "diaries," placing them in a high-duty category rather than among "other" items in a low-duty category. In deciding this case, the Court held that the reviewing court, the U.S. Court of International Trade, should not defer to a customs officer's interpretation of the relevant regulations. The Court was convinced that Congress would not have intended that deference because of the large number of customs officers, the large number of such rulings, the speed and informality with which they were made, and the presence of a specialized reviewing court.[17]

What explains these decisions? Why does the Court sometimes defer to an agency's interpretation of a statute and sometimes not? Why does *Chevron* not always work as an explanation? The answer begins with the democratic dilemma mentioned earlier. To defer to an agency's view is to give the agency power to say what the law means. In principle, Congress, elected by the people, should decide how much power the agency should have. But what are courts to do when Congress does not say? As in all statutory matters, the answer will depend on the statute's purposes and context, and particularly on matters of comparative expertise.

It is more reasonable to believe that Congress (had it considered the matter) would have wanted the reviewing court to defer to the agency's views if an agency has special expertise regarding the legal question, if the question concerns detailed matters of the agency's program or its administration, if the legal question has little general importance, if the agency has considered the matter with greater care, and if the statute's language is ambiguous.

Congress (had it considered the matter) is more likely to have thought that the reviewing court possessed the relevant expertise (at least comparatively speaking) and did not intend deference to agency views, however, when the agency does not fully consider the question, the question involves important general matters of policy, or an answer is likely to clarify, illuminate, or stabilize a broad area of law. In both sets of circumstances, looking at the statutory purposes and context and the comparative expertise of the agency and the Court produces a decision that facilitates, rather than impedes, the working of the statute in the real world.

In the EPA case the breadth and importance of the legal question at issue seemed more significant than the fact of greater EPA technical expertise in respect to carbon dioxide. The Court could reasonably think that the relevant expertise needed to answer the question was primarily legal, not administrative, and that the agency ruling misinterpreted Congress's intent. The Court was (relatively) better

[17] 19 U.S.C. 1500(b); United States v. Mead Corp., 533 U.S. 218, 225-27 (2001); *id.* at 229-34.

positioned to consider the purposes of the statute and the related consequences of excluding or including greenhouse gases.

In the U.S. Customs Service case, the Court noted that the service's expertise argued in favor of deference. But the officers' informal ruling letters were "churned out at a rate of 10,000 a year at [the] agency's 46 scattered offices," which suggests those letters were done quickly without too much concern for their consistency with statutes, regulations, or one another. Moreover, the reviewing court, the U.S. Court of International Trade, not just the customs officers, had expertise in these matters. Hence, the Court concluded that Congress could not have intended deference.[18]

The Court, interpreting congressional silence, has worked out a practical system of deference. Using comparative expertise as a touchstone, courts by and large defer where, comparatively speaking, agencies are likely better able to solve the problem. They do not defer where, comparatively speaking, courts are likely better able to solve the problem. This approach is consistent with the Constitution's democratic aims. It recognizes that decisions about how much authority to delegate to an agency, like other statutory matters, rest ultimately in the hands of Congress. And Congress is responsible to voters. But importantly, those voters may be unaware of the details and may well only know whether Congress's statutes are "working out well."

The approach, complex though it is, therefore creates a workable partnership between the courts and Congress. Furthermore, it respects the role of agencies in performing the functions of government. By taking account of comparative expertise, the Court allows agencies to handle matters within their competence while subjecting them to appropriate constraints. Congress likely intends this arrangement for the simple reason that it can make statutes work better. It helps the tripartite system work well in practice. And that in turn helps to maintain public acceptance of the Court's decisions.

[18] *Mead*, 533 U.S. at 233.