# Congress' Chevron?

## Statutory Signposts as a Means of Clarifying Agency Deference

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The *Skidmore-Chevron* deference precedent depicts a Supreme Court struggling to divine congressional intent regarding the scope of delegated agency authority.[1] In these cases, the Court often finds that the statutory language is not sufficiently instructive, and turns to statutory purpose, legislative history, and the formality of agency action as aids. This complex, excursive process provokes two related questions: Would clearer congressional delegation simplify courts' efforts and result in more accurate determinations? In particular, would administrative law benefit from congressional use of the Court's *Skidmore-Chevron* deference terminology to alert courts off the bat to which standard they should employ?

Although the first question has been the subject of extensive analysis,[2] the second is largely uncharted. Scholars have widely debated potential reforms to courts' application of the *Skidmore-Chevron* doctrines,[3] but none have seriously considered whether congressional use of these standards as terms in statutes themselves could save courts a lot of blood,

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[1] *See* Skidmore v. Swift & Co., 323 U.S. 134 (1944); Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[2] *See, e.g.*, Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2795 (2003); Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 823–24 (2002); Bernard W. Bell, *Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the* Post-Chevron *Era?*, 13 J.L. & POL. 105, 108 (1997).

[3] *See, e.g.*, Peter L. Strauss, *"Deference" Is Too Confusing-Let's Call Them "*Chevron *Space" and "*Skidmore *Weight"*, 112 COLUM. L. REV. 1143 (2012); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1091–93 (2008); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1291 (2007).

sweat, and tears. The following analysis suggests that while such signposts could well be beneficial in some respects, the downsides might be prohibitive. Ultimately, because the advantages are truly significant, the practice calls for future study and perhaps eventual implementation.

## I.

The reform of congressional drafting conventions to include deference signposts is appealing in part because it could increase judicial efficiency. The *Chevron* case illustrates this point.[4] In *Chevron*, the Court devoted significant effort to identifying how much leeway Congress had intended to give the Environmental Protection Agency (EPA) in defining "stationary source" in the context of pollution-emitting devices.[5] The Court reviewed multiple sections of statutory language and found that "the listing of overlapping, illustrative terms was intended to enlarge, rather than confine, the scope of the agency's power."[6] The Court also went beyond statutory text, combing through legislative history to find that its silence supported "broad discretion."[7]

Congress could have saved the Court the effort of searching throughout the statute's text and legislative history by merely placing a signpost in the amended Clean Air Act. The signpost would explicitly denote that the EPA should receive deference for reasonable interpretations. More specifically, Congress could simply insert the term "*Chevron*" after the word "stationary source" to indicate its preference to the Court. By thus diverting the Court from other parts of the statute and the legislative history, Congress could also help strengthen the accuracy of the Court's determinations. Signposts would give the Court opportunity to ground its administrative law decisions more firmly in statutory statements in the legislation actually at issue. This would lessen the Court's reliance on sources that some might view as questionable for their remoteness from strictly relevant text.

## II.

Notwithstanding these benefits, a strong criticism could be raised that the use of these clear congressional statements of intent would, at best,

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[4] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, *supra* note 1.
[5] *Id.*
[6] *Id.* at 862.
[7] *Id.* at 862–64.

address only half of the two-part *Chevron* analysis.[8] Although signposts would indicate whether Congress intended to leave a gap for the agency to fill,[9] they would not provide guidance as to what constitutes a reasonable agency action within that gap.[10] To determine reasonableness, courts might still have to resort to non-textual sources, like legislative history. In other words, they might have to keep undertaking time intensive reviews of peripheral materials whose implications might lead even reasonable people to disagree.

The weight of this critique depends on the meaning of "reasonable" under the *Chevron* standard.[11] According to common usage, for instance, "reasonable" could connote logical coherence. Such coherence could, in turn, require that the agency action be consistent with related statutes or with the circumstances of the passage of the law as evident in legislative history. Yet the *Chevron* Court's definition of "reasonable" does not support this view. The Court specifies that an agency interpretation is reasonable if it is "based on a *permissible* construction of the statute"[12] and if it is not "arbitrary, capricious, or *manifestly* contrary to the statute."[13] These characterizations suggest that reasonableness embodies a hands-off approach by the Court. Indeed, they indicate that the Court's assessment can rest on a general sense that the agency's interpretation is not outright absurd, which does not require an expedition into legislative history or further afield.

This encouraging finding does not end the inquiry, however. Even if signposts would in fact promote efficiency for both of *Chevron's* two parts, the question becomes at what cost. By way of an answer, *FDA v. Brown & Williamson Tobacco Corporation* provides reason to believe that judicial reliance on signposts could result in an incoherent statutory framework.[14] The *Brown & Williamson* Court sought to determine Congress' intent regarding agency authority over regulation of tobacco and was confident that it was able to do so by looking across statutes and

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[8] *Id.* at 842–43 ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions.").

[9] *Id.* ("First, always, is the question whether Congress has directly spoken to the precise question at issue.").

[10] *Id.* at 843 ("[I]f 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.").

[11] *Id.*

[12] *Id.* (emphasis added).

[13] *Id.* at 844 (emphasis added).

[14] 529 U.S. 120 (2000).

over time.[15] It pointed to various statutes that taken together demonstrated a consistent position that the Food and Drug Administration (FDA) does not have the power to regulate tobacco.[16] It also noted that over the past several decades, Congress had established a regime for tobacco regulation not including the FDA.[17] Signposts could stand in the way of the congruity apparent in *Brown & Williamson*. In contrast to the *Brown & Williamson* Court's longitudinal method of analysis, the act of legislating is more myopic and responsive to immediate political pressures.[18] As such, Congress might employ signposts in a manner that asks courts to make rulings inconsistent with long-standing agency practices or other rules in the area under administration. This would put courts in a bind. Admittedly, such bothersome behavior is all the more likely because it would hardly be new—Congress has enacted conflicting statutes before.[19]

Nevertheless, this risk is not necessarily fatal to the proposition of signposts. Members of Congress and their staff might focus more on short-term politics than on the preservation of a consistent and judicially manageable statutory framework.[20] But the congressional Offices of Legislative Counsel concentrate on the latter.[21] In providing statutory drafting assistance to Members of Congress, these offices generally help ensure that a proposed statute would have its intended result. This can include an examination of how the new piece of legislation would interact with others already in effect. Reviewing bills' signposts to ensure that they do not conflict with other statutes or agency authorities would thus be a natural extension of these offices' current functions, and one that could head off signposts' potential for statutory inconsistency.

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[15] *Id.*

[16] *Id.* at 143–44.

[17] *Id.* at 144–56.

[18] *See, e.g.*, Jessica Mantel, *Setting National Coverage Standards for Health Plans Under Healthcare Reform*, 58 UCLA L. REV. 221, 250 (2010) (describing Congress as responsive to the "Siren call of short-term, self-interested politics") (internal citation omitted).

[19] *See* Harvard Law Rev. Assoc., *Deference to Agency Interpretation of Conflicting Statutes, The Supreme Court 2006 Term*, 121 HARV. L. REV. 1, 405 (2007) (noting that "conflicting statutes are another unavoidable result of the extensive administrative system").

[20] Mantel, *supra* note 18.

[21] *Quick Guide to Legislative Drafting*, Office of the Legislative Counsel, U.S. House of Representatives (Oct. 6, 2014), http://legcounsel.house.gov/HOLC/Resources/quick_guide.pdf (explaining the office's focus on how proposed policy relates to existing law).

That being said, this fix is no panacea. Currently, such review for consistency is not mandatory.[22] And even if it were, it comes with its own downside—it positions Congress perilously close to courts, raising separation of powers concerns. In reviewing bills for this fine-grained level of consistency, and even worse, providing explicit guidance to courts on their standard of review, Congress could be viewed as self-aggrandizing at the expense of the judiciary. Indeed, determination of the appropriate standard of review is a quintessentially judicial exercise. In light of the critical importance of separation of powers to the U.S. democratic system, this risk should not be taken lightly.[23]

## III.

A more palatable version of this drafting reform might be for courts to preserve their proper dominion by only affording congressional signposts discretionary weight. For instance, if Congress labels a statutory term "*Chevron*" but the court perceives that there is plainly a long history of only one very narrow agency interpretation being permissible, the court could disregard the given signpost as inapropos. Signposts would still be worthwhile in instances in which the court does not find ready guidance elsewhere on the appropriate standard of review with respect to agency deference. An ambiguity raised by the Court's ruling in *United States v. Mead* illustrates one type of scenario that might fall into this second category. [24] The *Mead* Court clarified *Chevron* by identifying congressional delegation of notice-and-comment rulemaking to agencies as an indicator of congressional intent of *Chevron* deference. But it also exposed a grey area.[25] Though *Mead* explained that formal agency actions such as notice-and-comment rulemaking reflect an intention that the actions have the "force of law"[26] and qualify for *Chevron* deference, it did not provide a strict definition of "formality."[27] To fill that definitional void, courts must assess "formality" on a case-by-case basis. Discretionary signposts could guide courts in this endeavor. They would ease courts'

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[22] *See* Victoria F. Nourse and Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 588 (2002).

[23] *See generally* John F. Manning, *Separation of Powers As Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011) (describing separation of powers as a far-reaching bedrock principle inherent in essentially every statutory scheme).

[24] 533 U.S. 218 (2001).

[25] *Id.* at 227, 229–30.

[26] *Id.*

[27] *See, e.g.*, *id.* at 228.

burden by generally signaling how wide a berth to give to agency action, while affording courts the flexibility to particularize a signpost's command through context-specific determinations as needed.

Conceptualizing signposts as discretionary raises the obvious counterargument that signposts would then carry little, if any, weight. If Congress does not direct courts to grant these statutory terms the same import as others, how would courts know when to let signposts control? In this vein, textualists might advocate an all or nothing approach: Courts have a duty to interpret *all* statutory terms as meaningful expressions of congressional intent.[28] Therefore, signposts should either be authoritative or should not be at all. What is more, textualists would likely bemoan signposts irrespective of their degree of force because adherents to this strict method of statutory interpretation have grounds to object to both discretionary and obligatory use by courts. Allowing courts license to choose when to give signposts weight would permit judges to illegitimately insert their own preferences into statutes and to override Congress in contravention of separation of powers. Likewise, courts should not steadfastly rely on signposts because Congress might deploy them in ways that conflict with and damage crucial statutory schemes.

On the other hand, signposts are not necessarily distasteful to all jurists. Non-textualists, such as Justice Breyer,[29] might support elective signposting, which views a signpost's usefulness along a sliding scale. Under such a theory, courts would gauge a signpost's persuasiveness according to the depth of the congressional deliberations surrounding incorporation of the signpost. When the indicia of considered reflection are at the bottom of the scale, because there is no evidence that Congress examined the signpost's effect on other statutes for instance, courts could exercise their discretion to disregard the signpost. At the top of the scale, courts' administrative jurisprudence could benefit from the instructions of signposts that Congress thoroughly considered. An authoritative signpost might be supported by congressional findings on the given statute's relationship with related laws or the statute's consistency with legislatively sanctioned agency powers. Regardless of whether a judge ultimately finds herself at the top or the bottom of the sliding scale, this would likely be a far more circumscribed process than courts' current

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[28] *See, e.g.*, Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 355 (2005) ("[T]extualists . . . embrace the presumption against surplusage.").

[29] *See, e.g.*, Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1948 n.101 (2008) (citing Justice Breyer as an example of a "nontextualist Justice").

examination of distinct statutes and expansive legislative history. It would be confined to Congress' decision-making on the signpost alone.

## IV.

The flexible signpost model is not entirely unprecedented because it mirrors the *Skidmore* deference standard[30] in two noteworthy respects. First, both *Skidmore* and discretionary signposts ask courts to examine underlying reasoning. Under *Skidmore*, courts look to agencies' persuasiveness to determine deference;[31] under flexible signposts, courts look to Congress' deliberations to weigh signposts' usefulness. Second, *Skidmore* and the flexible approach to signposts are similar for the threat that they each pose to separation of powers—as discussed below, both foist courts into other branches' terrains. Yet *Skidmore* and flexible signposts are also distinguishable on this point. Whereas *Skidmore* contains an inherent defense against violations of separation of powers, flexible signposts do not. This weakness would seem to counsel against signposts' usage.

*Skidmore's* micro-level of review asks courts to undertake fact-intensive examinations of individual administrative law cases, to dig deeply into the factors the agency considered in selecting its course of action.[32] By conducting such a thorough investigation of policy formulation, courts are arguably positioning themselves in the executive branch, where they do not belong. More often than not, courts may not have the expertise necessary to properly determine how persuasive a regulatory rationale is. Judges do not possess the technical understanding of the many and varied agencies whose rules are subject to challenge. As but one example, a court's ability to assess "the validity of [an agency's] reasoning"[33] regarding what guidance to issue to factories about reducing pollution in nearby bodies of water is limited by the judiciary's scant scientific training.

*Skidmore* is not entirely objectionable on this ground, however, because the repeated use of deferential language in the *Skidmore* opinion

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[30] Skidmore v. Swift & Co., 323 U.S. at 140 ("The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

[31] *Id.*

[32] *Id.*

[33] *Id.*

tempers the danger of such maladroit judicial encroachment. For instance, the *Skidmore* Court steps back and recognizes that "the Administrator's policies are . . . based upon more specialized and broader investigations and information than is likely to come to a judge."[34] In other words, *Skidmore* does not require courts to grapple with the technical minutiae of policymaking. Rather, it places trust in agencies' unique policy proficiencies. It follows, then, that if judges apply the *Skidmore* standard in the spirit of its deferential tone, separation of powers will not suffer.

No such safeguard exists with respect to the flexible use of signposts. Relative to the dividing line between courts and agencies, the border between courts and Congress is less clear: Judicial decision-making is more markedly distinct from agencies' technical domains than it is from congressional policymaking. Agencies engage in fields like physics and chemistry that are largely illegible to courts, and this difference puts courts at a natural remove. In contrast, Congress' central craft—fashioning laws through language—is not so alien to courts' mandate to pronounce what these laws are. As a result, courts may more easily veer into legislative provinces, and flexible signposts may have the untoward consequence of inviting them to do so. Indeed, because of the similitude between courts and Congress, the separation of powers violations stemming from congressional signposts could run in both directions. As explained earlier, by prescribing courts' standard of review, Congress could be accused of encroaching on the judiciary; on the flip side, in choosing which signposts to give weight, courts could be viewed as legislating. Judges could change statutes' meanings more or less inadvertently by allotting their respect for signposts selectively.

## V.

Congressional administrative law signposts present alluring promises of judicial efficiency and of clear standards of review for important questions of agency deference. But as this essay reveals, their usage may come with formidable risks. Signposts could result in clashing statutory schemes because, innately, Members of Congress do not have the wide temporal and inter-statutory perspective that judges do. From a textualist standpoint, giving courts the discretion to deviate from signposts in instances that raise such concerns about inconsistency would be of little avail because this practice would violate the authoritativeness of statutory

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[34] *Id.* at 139.

text. And even non-textualists have reason to fear flexible use of signposts. In the long run, the congressional power to advise a certain standard of review could give Congress a gaping entrée into judicial territory. These unfavorable preliminary findings suggest that we might not want Congress to speak more clearly in delegating to agencies. Rather, this might be a gap that we want courts to continue to have the power to fill. This would be a surprising conclusion—indeed, it would mean that in this context, as opposed to many others, ambiguity would better serve effective governance than clarity.

This counterintuitive outcome need not be the final word. Notwithstanding the potential disadvantages of signposts, the concept warrants serious future consideration. As administrative law currently stands, courts have inadequate statutory guidance from Congress. This state of affairs often leaves judges no choice but to take circuitous and uncertain paths in attempts to divine the proper bounds between agencies and Congress. Though at first blush signposts might not appear to be the solution, on balance their advantages may well tip the scale in favor of their implementation. To fully account for this real possibility, subsequent study should start by focusing on whether the trade-offs set forth in this essay are worthwhile. For instance, should we prioritize enforcement of separation of powers between agencies and Congress (promoted by signposts) over a firm line between courts and Congress (threatened by signposts)? Critically, if we find that signposts as currently conceived are simply too hazardous, can we fashion remedies that curb signposting's threats while preserving its promise?