**The American Chevron’s Doctrine in Israel: A Comparative Analysis of Deference to an Agency’s Interpretation**

Alaa Hajyahia (LL.M. ’22)

Submitted to Professor James Q. Whitman

 **Contents**

[Introduction 2](#_Toc102746053)

[**Part 1: The American Law** 4](#_Toc102746054)

[1.1 The](#_Toc102746055) *[Chevron](#_Toc102746055)* [Case 4](#_Toc102746055)

[1.2 Different Implications for the Chevron Doctrine 6](#_Toc102746056)

[1.3 The Chevron Doctrine: Rationales and Underlying Assumptions 9](#_Toc102746057)

[**Part 2: The Israeli Law** 11](#_Toc102746058)

[2.1 The](#_Toc102746059) *[Zeligman](#_Toc102746059)* [Case 11](#_Toc102746059)

[2.2. The Division of Powers in Israel 15](#_Toc102746060)

[2.3 The Division of Power within Israel’s Executive Branch 16](#_Toc102746061)

[Conclusion 19](#_Toc102746062)

# Introduction

The scope of judicial review of an agency’s interpretation of legislation and of its own regulation occupies courts all over the world. In the administrative state, the question of deference to agencies highlights the tension between the rule of law and the acknowledgement of an agency’s expertise and its need for flexibility to act optimally in a rapidly changing world.

This question engaging the attention of so many countries has also become the subject of Israeli legal discourse in recent years. In Israel, a central principle of Israeli public law is that the judicial branch holds the ultimate power to interpret legal norms. Applying this principle in administrative law, courts do not give judicial deference to interpretative determinations made by administrative agencies. However, some recent decisions of the Israeli Supreme Court suggest that it may be rethinking its current dominant position when ruling on agency decisions, and possibly even considering a Chevron-like deference approach. According to the Chevron doctrine, articulated in the well-known 1984 *Chevron v. NRDC* decision,[[1]](#footnote-1) courts grant considerable deference to interpretative determinations made by administrative agencies, unless such determinations are found unreasonable.

An example of this shift in Israel is the 2018 *Zeligman v. Hapenix* case,[[2]](#footnote-2) in which the Israeli Supreme Court heard a request to file a class-action against a group of insurance companies, claiming that the companies had illegally double-charged fees for items related to payment scheduling. The National Insurance Commissioner joined the proceeding and filed an opinion supporting the companies’ interpretation of the National Insurance Regulations. This case raised a major question of principle regarding the degree of deference the court should grant to a regulator’s interpretation of their own regulations. The Supreme Court, sitting with a panel of three justices, adopted a deferential approach, emphasizing that due to the agency’s experience and expertise, it could be assumed that the agency’s interpretation would lead to the optimal execution of its own policy, thereby benefitting the public interest the agency is charged with protecting. Much like the post-Chevron deferential doctrines developed by the U.S. Supreme Court,[[3]](#footnote-3) the *Zeligman* judges ruled that the court will defer to an agency’s interpretation of its own regulations as long as the interpretation is reasonable and consistent with the regulation’s language. Only substantial and weighty considerations, such as the regulator having a conflict of interest, would justify deviating from the regulator’s interpretation.

This paper seeks to shed light on the American *Chevron* doctrine and to examine its potential as an example for changes in Israeli administrative law. It also will identify the challenges Israeli courts face in trying to adopt *Chevron* into Israeli law. My main argument is that given the nature of the Israeli legal system and the structure of the Israeli government, adopting a deferential doctrine could lead to adverse results.

*First*, I take into account that in the United States, the Chevron doctrine is based on the assumption that when the language of the law is ambiguous or the intent of the legislature is not clear, or even silent on a particular issue, the courts should defer to the interpretation of the administrative agencies as long as their determination is reasonable and permissible. Thus, the major rationale underlying Chevron is the theory of *congressional delegation*, based on a recognition of the advantages of agencies over courts with respect to professional and technological expertise. Essentially, the Chevron doctrine holds that Congress would prefer that the agency, which has the requisite expertise and is responsible for executing policy in the field it has been charged to administer, interpret norms governing its operation. According to this presumption, the agency is considered better situated than the courts to resolve any ambiguity. Moreover, the rationale behind Chevron is also based on the assumption that agencies, appointed through the elected legislature or executive, are more democratically accountable than the courts and are therefore the preferable arbiters of their decisions. This assumption, however, is incompatible with the central pillar of Israeli constitutional law whereby interpretative power is vested in the judiciary and cannot be delegated to any other branch of government.

*Second*, I argue that adopting Chevronin Israel would mean that considerable power currently held by the Israeli Attorney Generalwould be shifted to administrative agencies, thus seriously infringing on the powers of the Attorney General’s office and threatening its authority as the ultimate interpreter of the law.

This paper proceeds in two parts: **Part 1** reviews the evolution of the American law, and the underlying assumptions and implications of the Chevron doctrine on administrative law in the United States. **Part 2** compares the fundamental assumptions of the Chevron in the United States with the underlying assumptions of Israeli public law. This part identifies the various implications of adopting the Chevron doctrine in Israel, in particular with regard to the division of powers between the three distinct government branches as well as within the executive branch.

# Part 1: The American Law

# 1.1 The *Chevron* Case

At the center of this case stands the interpretation of the American Air Pollution Act, *Clean Air Act* (CAA)[[4]](#footnote-4) that sets different targets for reducing the emission of various pollutants into the air. These targets were calculated on the basis of the reduction of pollution in percentage terms relative to the amount of emissions at the time of the CAA’s enactment.[[5]](#footnote-5)

The demand to reduce emissions was imposed by law on every “source of pollution,” but this critical term was not defined by the legislation. The Environmental Protection Agency (EPA) filled this void, formulating an interpretation that it would be sufficient for a particular factory, or in a company that runs several factories, to achieve an overall reduction in the level of pollution (in percentages) to the extent required by law, and that the law did not require a reduction to the required level in each individual unit emitting pollution. For example, if one factory has three identical chimneys that emit a certain substance, and the law requires meeting the target of a 10% reduction of pollution within five years, then all the chimneys can be treated as one source. Thus, it is legally sufficient that the factory reduce one chimney’s emissions by 30% while not changing anything in the other two in order to meet the CAA’s legal requirements of the law This interpretive approach has been termed “the bubble concept” because it treats all sources of pollution in a particular factory as a single unit.

The question of whether the EPA’s interpretation of the term “source of pollution” is subject to judicial review was then challenged in the *Chevron* case. When the case was first heard in federal court, the court ruled that the law should be interpreted to mean that each source of pollution should be considered separately when determining whether a polluting factory has met the CAA’s goal. However, this decision was reversed upon appeal to the U.S. Supreme Court, with the Supreme Court setting a new standard for the scope of judicial review of administrative interpretation, stating:

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. [[6]](#footnote-6)

*Chevron’s* approach, therefore, is that where there is interpretive *ambiguity* in the law, the administrative authority enjoys a wide range of interpretive options. The Court will intervene in an agency’s interpretive determination of law only if it explicitly contradicts a clear determination of the law. That is, if the administrative authority’s interpretation taken does not seem unreasonable to the court, the Court should refrain from intervening, even if there is another interpretation of the law that the Court may deem more correct. *Chevron* provides a two-step examination for judicial review of agencies’ interpretation: first, the court applies judicial tools of construction to clarify whether the statutory term is indeed *ambiguous*; then, if it finds ambiguity, the court defers to the agency’s interpretation, if *reasonable*.

# 1.2 Different Implications for the Chevron Doctrine

*Chevron* is considered one of the most important judgments given by an American court in the last fifty years, especially in the context of administrative law.[[7]](#footnote-7) It has created a major revolution in the perception of judicial review, the boundaries of which extend far beyond the question of the scope of judicial review of agencies’ interpretive determinations. As Cass Sunstein observed, “*Chevron* also appeared to have imperialistic aspirations, cutting across countless areas of substantive law and the full range of procedures by which agencies might interpret statutory law.”[[8]](#footnote-8)

One of the immediate implications of *Chevron* was reducing the scope for federal courts to intervene in decisions of administrative authorities in general and in interpretive decisions in particular.[[9]](#footnote-9) *Chevron’s* judicial restraint standard, however, has not been applied to all interpretive provisions but only to certain situations where Congress has given the administrative authority a broad authority to determine provisions that have the force of law; that is, primarily to interpretations made within the exercise of secondary legislative powers.[[10]](#footnote-10) *Chevron’s* restraint standard, however, does not apply to other administrative decisions, such as interpretive positions in individual decision-making or interpretive guidelines. Nonetheless, even in the latter, the Court has applied a strong restraint standard for judicial review.[[11]](#footnote-11) Furthermore, the Supreme Court has applied a similar approach regarding the interpretation of regulations or other administrative norms created independently by the administrative authorities.[[12]](#footnote-12)

Beyond these immediate implications for administrative law, the *Chevron* ruling has had far-reaching implications for American public law in general, as *Chevron* redrew the boundaries of the division of responsibilities between the three branches of government. *First*, *Chevron* challenged the traditional perception of the division of powers, according to which, the interpretation of the law is the responsibility of the judicial branch. Thus, *Chevron* introduced a new concept regarding the division of the constitutional power between the three distinct branches. No wonder that many viewed *Chevron* as contrary to the basic assumptions of American constitutional law as originally set forth in the landmark 1803 *Marbury v. Madison* case*,* where the Court held that “it is emphatically the province and duty of the judicial department to say what the law is.” [[13]](#footnote-13) That is, the Court, not the legislature, is the authorized interpreter of the Constitution.

In addition to challenging the traditional role of the judiciary as stated in *Marbury v. Madison*, the *Chevron* ruling introduced a new conception of the nature of legal interpretation and the distinction between it and between policy-making. *Chevron’s* sanctioning of the broad authority of administrative authorities to interpret the law, while reducing the role of the Court in the interpretation of administrative decisions, reflects a perception that legal interpretation is part of the standard work of administrative authorities in exercising their statutory discretion. In this, Chevron challenges the distinction between interpreting law and policy-making.[[14]](#footnote-14) It recognizes that in the complex reality of the modern administrative state, the interpretation of the law is an integral part of the policy-making process made by the administrative authority, a process in which professional expertise, technological knowledge, the ability to gather facts systematically from multiple sources, and knowledge of practical law enforcement constraints are no less important than the legal analysis designed to impart meaning to legal norms.

The acknowledgement that interpreting the law is an integral part of the process of determining administrative policy has, in itself, far-reaching implications. One is the recognition that changes in reality, including the political reality, can legitimately lead to a change in administrative policy; in fact, could even justify a change in the interpretive position of the administrative authority. That is, if the interpretation of the law is perceived as part of a policy-making process, then when the agency is interested in changing its policy, it may also change its interpretive positions regarding the law applicable to its actions. Such a change may occur following a new technological or other developments, but also in response to changes in the moral perceptions of the agencies resulting from political changes arising from a change of government.[[15]](#footnote-15)

# 1.3 The Chevron Doctrine: Rationales and Underlying Assumptions

In the American academic literature, the Chevron doctrine is seen as an inevitable product of the rise of the administrative state in the first half of the 20th century. With the rise of a vast array of federal public administration authorities, and especially the independent agencies that have been granted a complex and complicated set of powers and duties for fulfilling their regulatory functions, the practicality of relying on judicial interpretation as a basis for public administration guidance has become questionable.[[16]](#footnote-16)

Accordingly, the main rationale of the Chevron doctrine is a judicial presumption of the delegation of interpretive authority on behalf of Congress to the public administrative authorities. The doctrine is based on the determination that where Congress did not make a decisive and clear provision in the law, it actually intended to delegate the authority to interpret the law to the administrative authorities and not to the courts.[[17]](#footnote-17) This decision is based on the general assumption that administrative authorities enjoy relative institutional advantages over courts when it comes to interpreting vague or unclear terms in the complex fabric of administrative legislation, which thereby calls for conferring powers on administrative authorities.

This assumption is also related to an element of the doctrine, according to which it is hard to distinguish between the interpretation of the law and policy in the complex administrative reality, and that an interpretation should be considered actually as a determination of administrative policy. Consequently, the administrative authorities have considerable advantages over the courts in determining their independent policies. These advantages are related to the expertise of the administrative authority, its presumed better capabilities in the professional and technological fields, and its familiarity with the administrative reality and the practical implications and costs of enforcement of any interpretive position.[[18]](#footnote-18)

Moreover, the administrative authority’s interpretive authority can be considered preferable to that of the court in cases of of interpretive decision involving moral positions, as agencies, appointed by the elected legislature or executive, arguably have a higher level of democratic legitimacy that of the court.[[19]](#footnote-19) In addition, the Chevron deference doctrine goes to the issue of *political* *accountability*: agencies are the mechanism through which the democratically elected president executes policy set by the democratically elected legislature. As a result, unlike the unelected courts, agencies can be held accountable for their interpretational choices.

As will be further elaborated, a reasonableness-based judicial review of agency interpretations indeed acknowledges that there may be multiple possible interpretational choices, and equates agency interpretations with policy-making to a large extent. Indeed, as Adrian Vermeule has observed, distinguishing between agency’s fact-finding functions, policy-making and legislative interpretation may simply be impractical.[[20]](#footnote-20)

Another basic assumption underlying Chevron’s delegation theory is that the fundamental premise of American constitutional law that Congress is the competent body to shape the scope of judicial review of public administrative actions. That is, in American law, the scope of judicial review of administrative acts is perceived as an integral part of the legislative plan regarding the mechanisms of l review of administrative authority. This presumption can explain how the Congress may “delegate” the authority to interpret legislation to the administrative authorities rather than to the judiciary.[[21]](#footnote-21) In essence, American public law does not see judicial review of public administrative actions as a constitutional authority given to the court, but as part of the general fabric of delegating powers from the legislature to the public administrative authority.[[22]](#footnote-22)

To conclude, in the United States, the legislature inherently grants the administrative agency interpretative authority within the law. The legislature also designs various mechanisms – including the judicial review mechanism – to oversee and limit the ways in which the competent agency exercises its authority. The legislature can, therefore, expand, reduce or even reject the scope of judicial review of certain administrative decisions within the framework of a specific law or with respect to certain types of decisions. Since the legislature controls all matters concerning the design of the overall structure of the agency’s action within the framework of the authorizing law, including the interpretive review mechanism, Congress has the power to grant the agency the authority to interpret the law itself, thereby delegating the review mechanism to the administrative agency rather than to the judiciary.[[23]](#footnote-23)

These underlying assumptions can explain the reasoning behind the *Chevron* decision to affirm the legislative right to delegate the authority to interpret the law to the administrative agency and not to the court in cases of interpretive ambiguity..

# Part 2: The Israeli Law

# 2.1 The *Zeligman* Case

In the 2018 *Zeligman* case,[[24]](#footnote-24) the Supreme Court of Israel discussed a request to file a class action suit against a group of insurance companies claiming that the companies had illegally double-charged fees for items related to payment scheduling. The National Insurance Commissioner joined the proceeding and filed an opinion supporting the companies’ interpretation of the National Insurance Regulations. This gave rise to a major question of principle concerning the degree of deference that the court should grant to a regulator’s interpretation of its own regulations.

The three-justice panel of the Supreme Court adopted a deferential doctrine. The court’s basic assumption was that due to the agency’s experience and expertise, the agency’s interpretation would lead to the optimal execution of its own policy, and would therefore benefit the public interest with which it was charged. Much like the post-*Chevron* evolution of the deferential doctrine developed by the U.S. Supreme Court,[[25]](#footnote-25) the Court determined that courts should defer to an agency’s interpretation of its own regulations as long as the interpretation is reasonable and consistent with the regulation’s language and is reasonable. Only substantial and weighty considerations, such as the regulator having a conflict of interest, would justify deviating from its interpretation.

Arguably, this approach marks a shift from the Israeli tradition of judicial review, in which the court would have considered the agency’s interpretation, but would not necessarily have given it special weight. That is, the prevailing presumption in Israel was that the agency cannot “replace the court” as the authoritative interpreter of the law and the court would prefer the *correct* interpretation, rather than the agency’s reasonable interpretation.

The Israel Supreme Court in *Zeligman* provided three justifications for deferring to a reasonable interpretation. The *first* echoes the presumption of legislative delegation, also underlying Chevron and deferential doctrines in other countries outlined earlier: “it appears that the decision to authorize the commissioner to promulgate norms to govern the market of which he is in charge, to enforce these norms and to adjudicate concrete complaints and disputes, strengthens the presumption that the regulator [in this case, the insurance commissioner] is conceived by the legislator as the optimal decision-maker in the regulated market.” In this regard, the *Zeligman* Court also noted that deferring to the regulator’s interpretation promotes uniformity that could otherwise be undermined if different courts would interpret the same regulation differently.

 The *second* justification focuses on agency’s expertise and experience. The *Zeligman* panel remarked that interpretation is often conducted in the context of complex policy-making, involving economic or other highly professionalized issues, where the regulator has a salient advantage. The court also acknowledged that often, a number of reasonable interpretations are possible, and that allowing the regulator to choose between them would optimize policy-making. The *third* justification given by the court relies on the presumption of regularity. This has not appeared in comparative research, and I personally view it as a rather weak justification, bearing in mind that the presumption of regularity may provide mainly evidentiary value, but it doesn’t make the agency comparatively more capable than the court.

The *Zeligman* case quickly generated intense judicial and scholarly debate; a petition for an additional Supreme Court discussion has been accepted by the Deputy President of the Supreme Court, who decided that the case would be discussed again before an expanded panel of seven justices – a special procedure employed in the case of major legal questions.

Before continuing, a clarifying remark is needed. While the comparative discussion of deference (and the legal scholarship on deference more generally) has largely focused on deference to the agency’s interpretation of the legislation governing its field, as set forth in *Chevron*, the *Zeligman* case focused on the regulator’s interpretation of its own regulations. In this respect, the case is less equivalent to *Chevron*, but closer to the recent U.S. Supreme Court *Kisor* *v. Wilkie* case examining regulatory, not legislative ambiguity. Nevertheless, in *Zeligman*, the Israeli Supreme Court has largely merged the two, mentioning that in cases of legislative ambiguity, the agency’s interpretation could “tip the scale” as long as it does not conflict with the plain text of the law, especially when the agency possesses special expertise.[[26]](#footnote-26)

Accordingly, legal scholarship in Israel treated the *Zeligman* case as “importing” the deference doctrine and applying it to the interpretation of both legislation and regulations. These scholars largely agreed that deferring to an agency’s interpretation of its own regulations would be more justifiable than deferring to its interpretation of legislation. Their assumption is that regulations tend to be more technical and require more expertise, thus inviting the agency’s interpretational “added value,” especially as the drafter of the regulation in question. Legislation, they have argued, involves both technical and normative dimensions, and therefore agencies are not more capable of interpreting them then are courts. On the contrary, as the courts are responsible for protecting human rights from agency’s intrusion, it is considered preferable to have courts interpret legislation.[[27]](#footnote-27)

In the United States, as noted above, both scholars and judges have considered the *Kisor* deference to regulations as a “radicalization” of deference to legislation, given the concentration of powers in the hand of the regulator, and the lesser likelihood of presuming a delegation to the regulatory agencies of the authority to both promulgate and interpret. Notably, it raises a concern, although scholars have admittedly questioned its extent,[[28]](#footnote-28) about incentivizing the agency to promulgate vague regulations and then to fill them with content on an ad-hoc basis, knowing they will be subject to flexible or even minimal judicial review.

# 2.2. The Division of Powers in Israel

In this section I argue that the previous sections’ examination of the principles and assumptions of the *Chevron* doctrine and its partial adoption in Israel’s *Zeligman* decision indicate the difficulties of incorporating *Chevron* into Israeli law. Basically, the assumptions underlying the *Chevron* decision simply do not exist in the Israeli legal system. In Israel, since the early 1980s, and subsequently reinforced with the adoption of the Basic Laws in 1992, judicial review, including judicial review of administrative acts, is a basic constitutional tenet based on the principles of division of powers in the government and the rule of law.[[29]](#footnote-29) The Israeli position is that interpretive authority is vested in the judicial branch and that the legislature is not allowed to grant itself any interpretative authority, or delegate it to others, such as the executive branch.[[30]](#footnote-30)

This basic conception of the Israeli legal system explains not only the broad scope of the justiciability doctrine in Israel – which is much broader than that prevailing in the American legal and other legal systems, where justiciability is much more narrowly defined – but also the position of Israeli law regarding any legislative attempts to negate or limit the scope of judicial review. Contrary to the American approach that the legislature has the freedom to shape the scope of administrative judicial review as it sees fit, and as part of the law, the Israeli legal view is that any attempt by the legislature to limit or negate the scope of judicial review immediately raises a constitutional question. Thus, in accordance with the prevailing legal approach in Israeli law, the authority of the courts to review administrative acts derives from the provisions of Section 15 of Basic Law: The Judiciary (1984),[[31]](#footnote-31) which essentially enshrine the scope of the court’s review in Israel’s equivalent of a “constitution.” Consequently, any legislative effort that would modify the scope of judicial review is ostensibly contrary to the provision of Section 15, thereby raising doubts about its constitutionality and validity.[[32]](#footnote-32)

The considerable gap between the basic conceptions of Israeli law regarding the source and the place of interpretive authority in the framework created by the country’s constitutional division of power between the three branches of government and the applicable principles of American law, where there is more fluidity in the division of power between the branches of government, indicates that the Chevron doctrine cannot be adopted in Israel, at least not as the doctrine currently stands, without a major change in Israel’s fundamental perceptions regarding judicial review. The authority to interpret laws in Israel is an inherent power granted to the judiciary branch, reflecting a basic constitutional principle. Therefore, the legislature cannot delegate it to the executive branch because the legislature is not invested with such powers to begin with, nor can it be, as doing so would fundamentally contravene Israeli constitutional law.

# 2.3 The Division of Power within Israel’s Executive Branch

In the previous section, I discussed the implications of the Chevron doctrine at the level of the relationship between the three distinct branches of the government. In this section, I will show that Chevron has important implications not only for the division of powers between the three distinct branches in Israel, but also within the executive branch.

Chevron’s view that there is more than one legal authority empowered to interpret the law, and that interpretation can be a form of policy-making has led to the decentralization of administrative review in the United States, shifting it from jurists to professionals and experts in scientific and technological matters. While the earlier American “correct interpretation” approach of the law gave the power of review to legal advisors of the administrative authority considered the experts in the interpretation of law, Chevron’s pluralistic approach has shifted much of this power to professional policy makers and technology experts within the administrative authorities.[[33]](#footnote-33)

Applying Chevron’s new approach to Israel’s public law reality would inevitably result in far-reaching changes in of the status of the Attorney General in Israel. In the Israeli legal system, the Attorney General wears “three hats”: the head of the prosecution; the authoritative legal advisor to the executive; and the legal representative of the executive in courts. In their legal advisory role, the Attorney General is the “competent interpreter” of the law, whose interpretive position is binding on the entire executive branch, as long as the court has not ruled otherwise.[[34]](#footnote-34)

The position of the Attorney General as the party qualified to interpret the law is a key element in the position of the Attorney General in the Israeli political system, and it is essential to the Attorney General’s function as a “gatekeeper” responsible for ensuring the legality of government actions and other actions of the executive branch. This position reflects Israel’s existing conception of the interpretation of the law, which is similar the pre-Chevron approach in the United States of the “correct interpretation” of the law. The Israeli approach, as mentioned before, assumes that the law has one interpretation, and that the way to explore and clarify this interpretation requires legal expertise; in Israel, the party responsible is the Attorney General.

The adoption of the Chevron approach threatens to transform this order. First, according to Chevron, in many cases, the law need not have one correct interpretation but could give rise to several different interpretations, all of which are within the range of interpretive reasonableness. Moreover, the Chevron approach perceives interpretation as a not necessarily purely legal procedure, but as a policy-making process, one in which lawyers and jurists do not have any advantage. According to Chevron, the way to reach the desired interpretation may be the result of an analysis of professional, technological, and policy considerations. That is, it is a process where the professional advantage may lie with the professionals or policy makers within the authority and not necessarily with the legal advisors. Hence, applying Chevron in Israel could quickly undermine the status and authority of the Attorney General vis-à-vis the administrative authorities.

It is instructive to imagine a dialogue between an administrative authority and the General Attorney’s legal advisors regarding the interpretation of a particular section. In this dialogue, the authority supports interpretation A while the legal advisors support interpretation B, which they consider the “correct” one. In this situation, if the Chevron doctrine applies, the authority has strong grounds to oppose the General Attorney’s legal advisor, even if the General Attorney considers the authority’s interpretation incorrect, as the authority’s interpretation will, under the Chevron doctrine, be considered within the range of interpretive reasonableness. In fact, the representatives of the administrative authority could go even further, and argue that the very fact that the administrative authority supports this interpretation renders it a reasonable one, even if in theory it is not the “most correct” interpretation of the law. In addition, they can argue that they have the expertise and authority to formulate policy in the relevant field, and that they are the ones who “know the field” better than others, and are aware of the implications of any enforcement interpretation. All these factors, they would argue, give them an interpretive advantage over jurists and legal advisors. Hence, with Chevron as a guide, the way is indeed short to a situation where the administrative authority can almost completely cease consulting with the Attorney General when making decisions and formulating policies.

One can argue, however, that if the interpretive position of the administrative authority is beyond the scope of interpretive reasonableness, or clearly contradicts the law, then this position will not, in the end, stand the test of the judicial review in court. However, here is the place to clarify a key point regarding the current status of the Attorney General as the “qualified interpreter” of the law. This status is most salient precisely with respect to those cases that do not reach the court, i.e., the vast majority of cases where the Attorney General’s interpretation his decision on any legal issue is required. When a matter comes to court, the court will in any event reexamine the interpretive question, and either adopt or reject the Attorney General’s position.[[35]](#footnote-35) Essentially, the status conferred on Israel’s Attorney General’s legal positions vis-à-vis all administrative authorities is specifically designed to regulate and ensure the legality of the “internal” administration’s activities, in an independent way, which is not dependent on litigation or judicial intervention. The adoption of Chevron doctrine in Israel would inevitably undermine the existing Israeli legal system of checks and balances.

# Conclusion

The ruling in the *Zeligman* case which I mentioned in the opening of this paper indicates certain changes that are emerging in the Israel Supreme Court’s approach to the scope of judicial review of interpretive decisions by administrative authorities. In this paper, I sought to shed light on the Chevron doctrine in American law. While acknowledging the insights that can be drawn from the American rich jurisprudence in this field, I sought to point out the difficulties involved in adopting the American approach to the constitutional and administrative reality in Israel.

I argued that Chevron doctrine is based on the assumption that when there is an ambiguity in legislation, it expresses the intention of Congress to delegate interpretive authority to the administrative authorities and not to courts. This conclusion is based on the advantages of the administrative authority over the court in terms of professional expertise and in terms of democratic representation. However, this position is not consistent with the basic assumptions of the legal system in Israel, where the interpretive authority of law is vested in the judicial branch and not subject to delegation. I also argued that applying the Chevron doctrine in Israel may undermine the status of the Attorney General as the interpreter of the law and therefore cannot be reconciled with the basic principles of the Israeli public law.

Finally, there is no doubt that Israeli law could be enriched by exposure to the Chevron doctrine, even if its direct application to Israeli law does not conform to some of the basic guidelines of the Israeli public law at this time.

1. Chevron U.S.A v. Natural Resources Defense Council, 467 U.S. 837 (1984) [*Chevron Case*]. [↑](#footnote-ref-1)
2. CivA 7488/16 Zeligman v. Haphenix, Israel Supreme Court Database (May 31, 2018) (Isr.), <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts/16/880/074/r18&fileName=16074880.R18&type=2>. ]*Zeligman Case*[. [↑](#footnote-ref-2)
3. Auer v. Robbins, 519 U.S. 452 (1997); Kisor v. Wilkie, 139 S. Ct. 657, 657 (2018). [↑](#footnote-ref-3)
4. The clean Air Act (CAA) is a comprehensive Federal law that regulates the various sources of air emissions. [↑](#footnote-ref-4)
5. *Chevron Case*, at 840-1. [↑](#footnote-ref-5)
6. *Chevron Case*, at 842-3. [↑](#footnote-ref-6)
7. Stephen G. Breyer et al., Administrative Law and Regulatory Policy: Problems, Text, and Cases 247 (6th ed. 2006); Thomas W. Merrill, *Justice Stevens and the* Chevron *Puzzle*, 106 Nw. U. L. Rev. 551, 552-53 (2012); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L. J.511, 512 (1989); Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2075 (1990). [↑](#footnote-ref-7)
8. Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 189 (2006). [↑](#footnote-ref-8)
9. 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 (2008); Peter H. Schuck & E. Donald Elliott, *To the* *Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L.J. 984, 1026 (1991). [↑](#footnote-ref-9)
10. United States v. Mead Corporation, 533 U.S. 218 (2001); Christensen v. Harris County, 529 U.S. 576 (2000). [↑](#footnote-ref-10)
11. This principle known as *Skidmore Deference*, a principle of judicial review of federal agency actions that applies when a federal agency’s interpretation of a statute administered by the agency according to the agency’s ability to demonstrate persuasive reasoning, seeSkidmore v. Swift, 323 U.S. 134 (1944). [↑](#footnote-ref-11)
12. *See* Auer v. Robbins, 519 U.S. 452, 461 (1997). [↑](#footnote-ref-12)
13. Marbury v. Madison, 5 U.S. 137, 177 (1803). [↑](#footnote-ref-13)
14. Cass R. Sunstein, *Chevron as Law*, 107 Geo. L. Rev. 1613, 1626 (2019). [↑](#footnote-ref-14)
15. *Chevron Case*, at 865-6. [↑](#footnote-ref-15)
16. Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 Nw U.L. Rev. 1239, 1251 (2002). [↑](#footnote-ref-16)
17. *Chevron Case*, at 843-4; Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*,89 Geo. L.J. 833, 836 (2001). [↑](#footnote-ref-17)
18. *Chevron Case*, at 865. [↑](#footnote-ref-18)
19. *Id.* [↑](#footnote-ref-19)
20. Adrian Vermeule, Law’s Abnegation 29-30 (2016). [↑](#footnote-ref-20)
21. Elizabeth Garrett, *Legislating* *Chevron*,101 Mich. L. Rev. 2637, 2639 (2003). [↑](#footnote-ref-21)
22. David S. Rubinstein, *"Relative Checks": Towards Optimal Control of Administrative Power*, 51 Wm. & Mary L. Rev. 2169, 2224 (2010); Nicholas Q. Rosenkranz, *Federal Rules of Statutory Interpretation*,115 Harv. L. Rev.2085, 2086 (2002). [↑](#footnote-ref-22)
23. *Id*, at 2227-8. [↑](#footnote-ref-23)
24. *Zeligman Case*. [↑](#footnote-ref-24)
25. Auer v. Robbins, 519 U.S. 452 (1997); Kisor v. Wilkie, 139 S. Ct. 657, 657 (2018). [↑](#footnote-ref-25)
26. *Zeligman Case*, at 33. [↑](#footnote-ref-26)
27. Ronen Avraham, Zeligman Be'rba'h Memadim [*Zeligman in Four Dimensions*], 44 Tau L. Rev. F. (2020) [Isr.]. [↑](#footnote-ref-27)
28. Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. Chi. L. Rev. 308-310. (2017). [↑](#footnote-ref-28)
29. *See* HCJ 910/86 Resler v. Minister of Defense, 42(2) PD 441, 519 (1988) (Shamgar, C.J.) (Isr.). [↑](#footnote-ref-29)
30. *See* 2Aharon Barak, Parshanot Bamishapt - Parshanot Haḥaḳiḳa [Interpretation in Law: Statutory Interpretation] 65 (1993) (Isr.). [↑](#footnote-ref-30)
31. Basic Law: The Judiciary (1984). [↑](#footnote-ref-31)
32. *See* HCJ 294/89 National Social Security Agency v. Appeal committee under Section 11 of The Compensation for Victims of Hostile Action Law, 5730-1970, 45(5) PD 445, para. 6-8 (1991) (Isr.). [↑](#footnote-ref-32)
33. E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*,16 Vill. Envtl. L.J. 1, 11-2, 16 (2005). Elizabeth Magill & Adrian Vermeule, *Allocating Power within Agencies*,120 Yale L.J. 1032, 1046 (2011). [↑](#footnote-ref-33)
34. HCJ 85/73 Kach (political party) v. Speaker of the Knesset, 39(3) PD 141, 152 (1985) (Isr.); HCJ 4267/93 Amitai – Citizens for Fairness and Honesty in Governance v. The Prime Minister of Israel, 47(5) PD 441, 476 (1993) (Isr.); HCJ 4646/08 Lavi v. The Prime Minister of Israel, Israel Supreme Court Database, 16-17 (Oct. 12 2008) (Isr.) <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts/08/460/046/n04&fileName=08046460_n04.txt&type=2>; HCJ 6494/14 Gini v. Chief Rabbinate of Israel, Israel Supreme Court Database, 7-8 (June 6, 2016) (Isr.) <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts/14/940/064/o11&fileName=14064940_o11.txt&type=2>. [*Gini Case*]. [↑](#footnote-ref-34)
35. *See* *Gini Case*, where the Court rejected the Attorney General interpretive position and preferred the administrative authority interpretive position. [↑](#footnote-ref-35)