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

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 **Contents**

[Introduction 2](#_Toc102746053)

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

[1.1 The Chevron 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 Zeligman 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 agency’s interpretation of legislation and of its own regulation occupies courts all over the world. In the administrative state, the question of deference showcases the tension between the rule of law and the acknowledgement of agency’s expertise and the need for a broad space of action in a world quickly changing.

Similar to other countries around the world, in recent years, this question reached out the Israeli legal discourse. In Israel, the judicial branch holds the ultimate power to interpret legal norms, a principle that considers to be one of the main principles of Israeli public law. In administrative law, this principle provides that, interpretative determinations made by administrative agencies do not enjoy judicial deference in the court. Some recent decisions of the Israeli Supreme Court, however, suggest that the Court seems to rethink its current dominant approach to consider a Chevron-like deference approach, an American doctrine as reflected by the well-known *Chevron v. NRDC* decision,[[1]](#footnote-1) which according to it*,* courts grant considerable deference to interpretative determinations made by administrative agencies, unless such determinations are unreasonable.

For instance, in the 2018 Zeligman case,[[2]](#footnote-2) the Supreme Court of Israel discussed a request to file a class-action against a group of insurance companies; the class action claimed that the companies 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; and this sparked a major question of principle, concerning the degree of deference that the court should grant to a regulator’s interpretation of his own regulations. In a panel of three justices, the Supreme Court adopted a deferential doctrine, underscoring the agency’s experience and expertise. The basic assumption, noted the court, is that the agency’s interpretation would lead to the optimal execution of its own policy, and would therefore benefit the public interest with which it is charged. Much like the post-Chevron deferential doctrines developed by the US Supreme Court,[[3]](#footnote-3) it was decided that the court shall defer to an agency’s interpretation of its own regulations so long as the interpretation is at one with the regulation’s language and is reasonable. Only substantial and weighty considerations, such as the regulator being in a conflict of interest, shall justify deviating from her interpretation.

This paper seeks to shed light on the American *Chevron* doctrine and to point to its potential as a source of inspiration for Israeli administrative law. Doing so, I aim to point out the various difficulties entailed by the attempt to adopt *Chevron* into Israeli law. My main argument is that considering the nature of the Israeli legal system and the structure of the Israeli government, adopting a deferential doctrine might bear adverse results.

*First*, I argue that in the United States, the Chevron doctrine is based on the assumption that when the law is vague or unclear it reflects legislative intent to delegate interpretative power to administrative agencies rather than to the courts. That is, the major rational underlying Chevron is the theory of *congressional delegation*. This rational based on the advantages of agencies over courts with respect to professional and technological expertise. That is, Congress would prefer the agency, which has expertise, and is in charge of executing policy in the field it administers, to interpret norms governing its operation. In other words, according to the presumption, the agency is considered to be in a better position than the courts to solve the ambiguity. Moreover, this rational also based on the assumption that agencies are more democratically accountable than courts. This assumption, however, runs in counter to the central pillar of Israeli constitutional law under which the interpretative power is vested with the judiciary and is not subject to the possibility of delegation to any other branch.

*Second*, I argue that adopting *Chevron* in Israel would mean that considerable power currently held by the Israeli *Attorney General* would be shifted to administrative agencies. This would seriously infringe on the powers of the *Attorney General* and threaten 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 implications of Chevron doctrine on administrative law in the United States, and its underlying assumptions. **Part 2** examines the assumptions on which the Chevron doctrine is based and compares them with the Israeli public law’s underlying assumptions. This part points out the various implications of adopting the Chevron doctrine, in particular regarding to the division of powers between the three distinct governmental 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 named *Clean Air Act* (CAA).[[4]](#footnote-4) This Act 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 percentages, compared 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”. However, the law itself did not define this term. The Environmental Protection Agency (EPA), however, has formulated an interpretive concept that according to it, if in a particular factory, or in a company that runs several factories, there was an overall reduction in the level of pollution (in percentages) to the extend required by law – that is enough, and the law does not require a reduction to the required level in the unit that emits pollution separately. For instance, if we assume that one factory has three identical chimneys that emit a certain substance, and the law requires meeting the target of 10% reduction of pollution within five years, then all chimneys can be treated as one source, and then, it is enough that the factory reduced 30% of one chimney emissions, while not changing anything in the other two. In this case, the factory is considered to meet the CAA’s requirement. This interpretive approach was called “the bubble concept” because it treated all sources of pollution in a particular factory as a single unit.

Following this, the question whether the EPA’s interpretation of the term “source of pollution” is subject to judicial review was arose. When the case went to the federal court, the court turned the law and ruled that the law should be interpreted in away that polluting factories must meet the CAA’s goal which is considering each source of pollution separately. However, when the case went to the Supreme Court, the Court reversed the federal court’s ruling, setting a new standards 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 has a wide interpretive range between different interpretive options. The Court will intervene in the interpretive determination of law only if it explicitly contradicts a clear determination on the law. That is, if the interpretation taken by the authority does not seem to the court unreasonable, the Court should restrain itself and refrain from intervening, even if there is another interpretation of the law that seems to the Court to be more correct. That is, Chevron provides a two-step examination for judicial review of agencies interpretation: in the first step, the court would clarify, using the judicial tools of construction, whether the statutory term is indeed *ambiguous*; then, if it is, in the second step, the court would defer 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 field of Administrative law.[[7]](#footnote-7) It has created a major revolution in the perception of judicial review, a revolution whose boundaries go far beyond the question of the scope of judicial review of interpretive determinations, as Sunstein put it “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 were to reduce 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 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 interpretation made within the exercise of secondary legislative powers.[[10]](#footnote-10) Chevron’s restraint standard, however, does not apply on other administrative decisions, such as interpretive positions in individual decision-making or interpretive guideline. But also in the latter, the Court has applied a strong restraint’s standard for judicial review.[[11]](#footnote-11) Furthermore, the Supreme Court has applied a similar approach with regard to the interpretation of regulations or other administrative norms created by the administrative authorities themselves.[[12]](#footnote-12)

Beyond these immediate implications in administrative law, the Chevron’s ruling had far-reaching implications in American public law in general, due to the fact that the Chevron’s ruling redrawn the boundaries of the division of responsibilities between the three distinct branches. *First*, Chevron challenged the traditional perception of the division of powers, which according to it the interpretation of the law is the responsibility of the judicial branch. That is, Chevron brought a new concept regarding the division of the constitutional power between the three distinct branches. No wonder that Chevron was defined by many as contrary to the basic assumptions of American constitutional law as appears in the well-known ruling of *Marbury v. Madison,* where it was held that “it is emphatically the province and duty of the judicial department to say what the law is.” [[13]](#footnote-13) That’s it, the Court, not the legislature, is the authorized interpreter of the Constitution.

In addition, the Chevron’s ruling presented a new conception of the nature of legal interpretation and the distinction between it and between policy-making. The recognition of the broad authority of administrative authorities to interpret the law, while reducing the role of the Court in the interpretation of administrative legislation, reflects a perception that sees legal interpretation as part of the standard work of administrative authorities in exercising their statutory discretion. Doing so, Chevron challenges the distinction between the interpretation of law and policy.[[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 consideration of professional expertise, technological knowledge, ability to gather facts systematically from multiple sources, and knowledge of practical law enforcement constraints, are no less important than the theoretical legal analysis designed to impart meaning to a given legal norms.

The recognition of the interpretation of the law as an integral part of the process of determining administrative policy, has, in itself, far-reaching implications. One of these important implications is the recognition that changes in reality, such as the political reality, can legitimately lead to a change in administrative policy – May 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 authority is interested in changing its policy, it may also change its interpretive positions regarding the law applicable to its actions. Such a change may happen following a new factual or technological developments, but also due to changes in the moral perceptions of the authorities that may happen due to political change caused by the 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. With the rise of the vast array of federal public administration authorities and especially the independent agencies that have been given a complex and complicated set of powers and duties to fulfill their regulatory functions, the possibility of relying on judicial interpretation as a basis for public administration guidance has become impractical.[[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 assumption 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) That is a general assumption that stems from the relative institutional advantages of administrative authorities over courts when it comes to interpreting vague or unclear terms in the complex fabric of administrative legislation, which deals with conferring powers on administrative authorities.

This assumption is also related to an element of the doctrine, which according to it, in the complex administrative reality, it is hard to distinguish between the interpretation of the law and policy, and that an interpretation should be seen as a determination of administrative policy. In this case, the administrative authorities have considerable advantages over the court when it comes to determining policy. These advantages are related to the expertise of the administrative authority, its priority capabilities in the professional and technological fields, and its familiarity with the administrative reality and the practical implications and the costs at the level of enforcement of any interpretive position.[[18]](#footnote-18)

Moreover, another advantage the administrative authority had over the court, insofar as the interpretive decision represents moral positions, due to its level of democratic legitimacy which is higher than that of the court.[[19]](#footnote-19)

In addition, the Chevron deference has to do with *political* *accountability*: agencies are the mechanism through which the democratically elected president operates and executes policy; unlike the unelected courts, agencies can thus be held accountable for their interpretational choices. And as will be further elaborated, a reasonableness-based review indeed acknowledges there may be multiple possible interpretational choices, and equates it, to a large extent, to policy making. Indeed, as Adrian Vermeule has noted, it turns out that the distinction between agency’s fact finding, policy-making and legislative interpretation could be just 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 plan created by the legislature when it comes to judicial review of the administrative authority. That understanding can explain how the Congress may “delegate” the authority to interpret legislation to the administrative authorities, instead of the court.[[21]](#footnote-21) Put differently, the American public law does not see the court’s 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, the legislature gives the administrative authority the authority within the law. The legislature also designs various mechanisms that will oversee and limit the ways in which the competent authority exercises its authority – including the judicial review mechanism. The legislature can, therefore, expand the judicial review of certain administrative decisions within the framework of a certain law. The legislator also can reduce the judicial review or reject it in relation to certain types of decisions. Since the legislature is in control of all matters concerning the design of the overall plan of the authority’s action within the framework of the authorizing law, including the judicial review mechanism, Congress has the power to monitor the authority to interpret the law itself, and delegate it from the court to the administrative authority.[[23]](#footnote-23)

These underlying assumptions can explain the Chevron and its idea which according to it, the legislature chooses, in cases of interpretive ambiguity, to delegate the authority to interpret the law to the administrative authority, and not to the court.

# 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 against a group of insurance companies; the class action claimed that the companies 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; and this sparked a major question of principle, concerning the degree of deference that the court should grant to a regulator’s interpretation of her own regulations.

In a panel of three justices, the Supreme Court adopted a deferential doctrine, underscoring the agency’s experience and expertise. The basic assumption, noted the court, is that the agency’s interpretation would lead to the optimal execution of its own policy, and would therefore benefit the public interest with which it is charged. Much like the post-Chevron deferential doctrines developed by the US Supreme Court,[[25]](#footnote-25) it was decided that the court shall defer to an agency’s interpretation of its own regulations so long as the interpretation is at one with the regulation’s language and is reasonable. Only substantial and weighty considerations, such as the regulator being in a conflict of interest, shall justify deviating from her 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 give it special weight. In other words, the conception 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 Supreme Court 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, that we 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 Supreme Court also mentioned that deferring to the regulator’s interpretation promotes uniformity, that could be otherwise impeded if courts would interpret the same regulation differently.

 The *second* justification focuses on agency’s expertise and experience; it reminds 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 few reasonable interpretations are possible, and that allowing the regulator to choose between them would optimize policy-making. The *third* justification 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 soon came to be at the center of an 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 extended 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) have largely focused on deference to the agency’s interpretation of the legislation governing its field, the Zeligman case focused on the regulator’s interpretation of her own regulations. In this regard, the case is not exactly equivalent to *Chevron*, but more to the recent *Kisor* case. Nevertheless, the Israeli Supreme Court has largely bundled the two, mentioning that under legislative ambiguity the agency’s interpretation could “tip the scale”, as long as not conflicting with the plain text of the law, especially when the agency possesses special expertise.[[26]](#footnote-26)

Accordingly, legal scholarship in Israel treated the case as “importing” deferential doctrines both in the cases of interpretation of legislation and of regulations. Scholars largely share the understanding that deferring to an agency’s interpretation of its own regulation would be more plausible than deferring to its interpretation of legislation: the assumption is that regulations tend to be more technical and require more expertise, thus inviting for the agency’s interpretational “added value”, especially as the drafter of the regulation in question. Legislation, so it has been argued, involves both technical and normative dimensions, and therefore agencies are not more capable of interpreting, when compared to the courts. On the contrary, as the courts are in charge of protecting human rights from agency’s intrusion, it would be desirable to leave the interpretation of legislation in their capacity.[[27]](#footnote-27)

In the US, as noted above, both scholars and judges have considered the deference to regulations as “radicalization” of deference to legislation – bearing in mind the concentration of powers in the hand of the regulator, and the lesser likelihood of presuming a delegation of both the authorities to promulgate and interpret. Notably, it raises a concern, though scholars admittedly have 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 it will be subject to flexible judicial review.

# 2.2. The Division of Powers in Israel

My argument in this section is that the examination I made in the previous section in relation to the principles and assumptions of the Chevron doctrine indicates the difficulties of absorbing it into Israeli law. This is because the assumptions underlying Chevron do not exist in the Israeli legal system. In Israel, since the early 1980s, and later on with the adoption of the Basic laws in 1992, the judicial review, including judicial review on administrative acts, is a basic constitutional principle that stems from the principle of division of powers and the rule of law.[[29]](#footnote-29) This view holds that the interpretive authority is vested in the judicial branch and that the legislature is not allowed to leave it in its hands, or delegate it to others, such as the executive branch.[[30]](#footnote-30)

This basic conception of the Israeli legal system can explain not only the broad justiciability doctrine in Israel – which is much broader than the prevailing in American legal system and other legal systems – but also the position of the Israeli law regarding provisions of law intended 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 wishes, and as part of the law, the perception of Israeli law is that any attempt by the legislature to limit or negate the scope of judicial review immediately raises a constitutional question. According to the prevailing legal approach in the Israeli law, the authority of the courts to apply judicial review on administrative acts derives from the provisions of section 15 of Basic Law: The Judiciary (1984).[[31]](#footnote-31) That is, it is enshrined in the Israeli “constitution”. Therefore, any such provision of law, which is intended to affect the scope of judicial review, is ostensibly contrary to the provision of section 15 and therefore its constitutionality and validity is in doubt.[[32]](#footnote-32)

The considerable gap between the basic conceptions of the Israeli law regarding the source and the place of interpretive authority in the fabric of the three authorities, within the framework of the doctrine of division of powers, and between the American approach, points to the fact that the Chevron doctrine cannot be accepted, at least not as it is, without causing a major change in the Israeli basic perceptions in relation to judicial review. The authority to interpret laws in Israel is an inherent power given to the judiciary branch as a constitutional principle. Therefore, the legislature cannot delegate it to the executive branch – because it is not in its hands in the first place, nor can it be in its hands because it is fundamentally contradicted with the Israeli constitutional law.

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

In the previous section, I have 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 an important implications not only for the division of powers between the three distinct branches in Israel, but also within the executive branch.

The Chevron’s view that there is more than one legal possibility to interpret the law, and the view of interpretation as a policy decision has led to the decentralization of administrative power and its shift from jurists to professionals and experts in scientific and technological matters. While the one “correct interpretation” approach of the law gave the power to legal advisors of the administrative authority who considered the experts in the interpretation of law, Chevron’s pluralistic approach, on the other hand, has shifted much of this power to professional policy makers within the administrative authorities and technology experts.[[33]](#footnote-33)

Applying this insight to the Israeli public law reality, the inevitable conclusion will be is that the application – even partial – may have far-reaching implications for 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 representor of the executive in courts. As for the legal advisory role, the Attorney General is the “competent interpreter” of the law, whose interpretive position in 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 qualified interpreter of 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” who is responsible on the legality of government actions and other actions of the executive branch. This position related on its core on the Israeli existing conception of the interpretation of the law, which is the approach 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 a legal expertise, and the one who is responsible on it is the Attorney general.

The adoption of the Chevron approach threatens to transform this order. First, according to Chevron, in many cases the law does not have one correct interpretation, but there may be several different interpretations – all of which are within the range of interpretive reasonableness. Moreover, the Chevron approach perceives interpretation as a procedure that is not necessarily pure legal, but as a policy-making process, and therefore, lawyers and jurists do not have any advantage in this process. 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, the way is short for a significant appeal of the status and authority of the Attorney General vis-à-vis the administrative authorities.

If we imagine a dialogue regarding the interpretation of a particular section between an administrative authority and the General Attorney’s legal advisors. In this dialogue, the authority holds interpretation A while the legal advisors hold interpretation B and they think that the correct interpretation is B. In this situation, is will be easy for the authority to argue against the General attorney’s legal advisor, even if the interpretation of the authority is incorrect from the perspective of the General Attorney. Yet, it will still consider as an interpretation that is within the range of interpretive reasonableness. In fact, they could even argue even beyond that. For instance, they would argue that the fact that the administrative authority holds this interpretation makes it an interpretation within the bounds of reasonableness, even if in theory it is no 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 they are aware of the implications of any enforcement interpretation. All these things, they would argue, give them an interpretive advantage over jurists and legal advisors. Hence, the way is indeed short to a situation where the administrative authority can almost completely relinquish consultation with the Attorney General while making decisions and formulating policies.

One can argue, however, that if the interpretive position of the administrative authority is outside the scope of the interpretive reasonableness, or it is 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. The cast majority of the status conferred on the Attorney General in this context is precisely in respect of those cases which do not reach the court, i.e., the vast majority of cases where the interpretation of the Attorney General or his decision on any legal issue is required. When the matter comes to court, the court is going in any case to re-examine the interpretive question, and to adopt or reject the position of the Attorney General.[[35]](#footnote-35) Put differently, the status conferred on the 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 depends on litigation or judicial intervention. The adoption of Chevron doctrine, therefore, would undermine the Israeli existing legal system.

# Conclusion

The ruling in the Seligman case which I mentioned in the opening of this paper point to certain changes that are taken place in the court’s approach regarding 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. Without being blind to 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 where the law leaves a margin of ambiguity, it expresses the intention of Congress to delegate interpretive authority to the administrative authorities and not to courts. This is in light of the advantages of the administrative authority over the court in terms of professional expertise and also in terms of democratic representation. This assumption does not comply 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 delegations. I also argued that the absorption of the Chevron doctrine in Israel may undermine the status of the Attorney General as the interpreter of the law and therefore it does not reconcile 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)
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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)
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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)