Preface

This PDF file contains two documents, the first a Supreme Court decision, the second an essay written by Cass Sunstein that affirms its significance.

In effect, the decision turns the Executive Branch into a monarchy by allowing the Executive's myriad unelected, unaccountable agencies to impose their will on the People without due process or recourse where legislation is ambiguous, or even where no enabling legislation exists. Agencies are free to roam wherever they determine voids exist!

The decision also allows agencies to change their minds. Regulations are flexible, and allowed to change from one Administration to the next. Nothing is fixed. There is nothing the People can depend upon. Every President gets to change the law. This is the fulfillment of Edward Mandell House's dream, as expressed in his book *Philip Dru: Administrator*. It was House that guided the policies of Woodrow Wilson and Franklin Delano Roosevelt.

The Court's decision is in stark contrast to the Constitution, itself, which imposes constraints on government by limiting its powers to certain enumerated purposes, and gives no power of legislation to the Executive branch, much less the power to change the meaning of the law from one administration to the next.

Supreme Court decisions that alter the meaning or intent of the Constitution amount to constitutional amendments, unconstitutionally enacted without the constitutionally-mandated consent of the People. Rather than protect constitutional government, these decisions defeat it. Our nation, and our people, are not bound by unconstitutional acts, no matter the source.

Those who wish to retain constitutional government, i.e., a government defined by the People to protect their interests, should study this decision and help to expose it.

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U.S. Supreme Court

CHEVRON U.S. A. v. NATURAL RES. DEF. COUNCIL, 467 U.S. 837 (1984)

467 U.S. 837
CHEVRON U.S. A. INC. v. NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 82-1005.

Argued February 29, 1984
Decided June 25, 1984 *

[Footnote *] Together with No. 82-1247, American Iron & Steel Institute et al. v. Natural Resources Defense Council, Inc., et al.; and No. 82-1591, Ruckelshaus, Administrator, Environmental Protection Agency v. Natural Resources Defense Council, Inc., et al., also on certiorari to the same court.

The Clean Air Act Amendments of 1977 impose certain requirements on States that have not achieved the national air quality standards established by the Environmental Protection Agency (EPA) pursuant to earlier legislation, including the requirement that such "nonattainment" States establish a permit program regulating "new or modified major stationary sources" of air pollution. Generally, a permit may not be issued for such sources unless stringent conditions are met. EPA regulations promulgated in 1981 to implement the permit requirement allow a State to adopt a plantwide definition of the term "stationary source," under which an existing plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant, thus allowing a State to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble." Respondents filed a petition for review in the Court of Appeals, which set aside the regulations embodying the "bubble concept" as contrary to law. Although recognizing that the amended Clean Air Act does not explicitly define what Congress envisioned as a "stationary source" to which the permit program should apply, and that the issue was not squarely addressed in the legislative history, the court concluded that, in view of the purpose of the nonattainment program to improve rather than merely maintain air quality, a plantwide definition was "inappropriate," while stating it was mandatory in programs designed to maintain existing air quality.

Held:

The EPA's plantwide definition is a permissible construction of the statutory term "stationary source." Pp. 842-866.

(a) With regard to judicial review of an agency's construction of the statute which it administers, if Congress has not directly spoken to the precise question at issue, the question for the court is whether the [467 U.S. 837, 838] agency's answer is based on a permissible construction of the statute. Pp. 842-845.

(b) Examination of the legislation and its history supports the Court of Appeals' conclusion that Congress did not have a specific intention as to the applicability of the "bubble concept" in these cases. Pp. 845-851.

(c) The legislative history of the portion of the 1977 Amendments dealing with nonattainment areas plainly discloses that in the permit program Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in

improving air quality. Pp. 851-853.

(d) Prior to the 1977 Amendments, the EPA had used a plantwide definition of the term "source," but in 1980 the EPA ultimately adopted a regulation that, in essence, applied the basic reasoning of the Court of Appeals here, precluding use of the "bubble concept" in nonattainment States' programs designed to enhance air quality. However, when a new administration took office in 1981, the EPA, in promulgating the regulations involved here, reevaluated the various arguments that had been advanced in connection with the proper definition of the term "source" and concluded that the term should be given the plantwide definition in nonattainment areas. Pp. 853-859.

(e) Parsing the general terms in the text of the amended Clean Air Act - particularly the provisions of 302(j) and 111(a)(3) pertaining to the definition of "source" - does not reveal any actual intent of Congress as to the issue in these cases. To the extent any congressional "intent" can be discerned from the statutory language, it would appear that the listing of overlapping, illustrative terms was intended to enlarge, rather than to confine, the scope of the EPA's power to regulate particular sources in order to effectuate the policies of the Clean Air Act. Similarly, the legislative history is consistent with the view that the EPA should have broad discretion in implementing the policies of the 1977 Amendments. The plantwide definition is fully consistent with the policy of allowing reasonable economic growth, and the EPA has advanced a reasonable explanation for its conclusion that the regulations serve environmental objectives as well. The fact that the EPA has from time to time changed its interpretation of the term "source" does not lead to the conclusion that no deference should be accorded the EPA's interpretation of the statute. An agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. Policy arguments concerning the "bubble concept" should be addressed to legislators or administrators, not to judges. The EPA's interpretation of the statute here represents a reasonable accommodation of manifestly competing interests and is entitled to deference. Pp. 859-866.

222 U.S. App. D.C. 268, 685 F.2d 718, reversed. [467 U.S. 837, 839]
STEVENS, J., delivered the opinion of the Court, in which all other Members joined, except MARSHALL and REHNQUIST, JJ., who took no part in the consideration or decision of the cases, and O'CONNOR, J., who took no part in the decision of the cases.

Deputy Solicitor General Bator argued the cause for petitioners in all cases. With him on the briefs for petitioner in No. 82-1591 were Solicitor General Lee, Acting Assistant Attorney General Habicht, Deputy Assistant Attorney General Walker, Mark I. Levy, Anne S. Almy, William F. Pedersen, and Charles S. Carter. Michael H. Salinsky and Kevin M. Fong filed briefs for petitioner in No. 82-1005. Robert A. Emmett, David Ferber, Stark Ritchie, Theodore L. Garrett, Patricia A. Barald, Louis E. Tosi, William L. Patberg, Charles F. Lettow, and Barton C. Green filed briefs for petitioners in No. 82-1247.

David D. Doniger argued the cause and filed a brief for respondents.Fn

Fn [467 U.S. 837, 839] Briefs of amici curiae urging reversal were filed for the American Gas Association by John A. Myler; for the Mid-America Legal Foundation by John M. Cannon, Susan W. Wanat, and Ann P. Sheldon; and for the Pacific Legal Foundation by Ronald A. Zumbrun and Robin L. Rivett.

A brief of amici curiae urging affirmance was filed for the Commonwealth of Pennsylvania et al. by LeRoy S. Zimmerman, Attorney General of Pennsylvania, Thomas Y. Au, Duane Woodard, Attorney General of Colorado, Richard L. Griffith, Assistant Attorney General, Joseph I. Lieberman, Attorney General of Connecticut, Robert A. Whitehead, Jr., Assistant Attorney General, James S. Tierney, Attorney General of Maine, Robert Abrams, Attorney General of New York, Marcia J. Cleveland and Mary L. Lyndon, Assistant Attorneys General, Irwin I. Kimmelman, Attorney General of New Jersey, John J. Easton, Jr., Attorney General of Vermont, Merideth Wright, Assistant Attorney General, Bronson C. La Follette, Attorney General of Wisconsin, and Maryann Sumi, Assistant Attorney General.

James D. English, Mary-Win O'Brien, and Bernard Kleiman filed a brief for the United Steelworkers of America, AFL-CIO-CLC, as amicus curiae.

JUSTICE STEVENS delivered the opinion of the Court.

In the Clean Air Act Amendments of 1977, Pub. L. 95-95, 91 Stat. 685, Congress enacted certain requirements applicable [467 U.S. 837, 840] to States that had not achieved the national air quality standards established by the Environmental Protection Agency (EPA) pursuant to earlier legislation. The amended Clean Air Act required these "nonattainment" States to establish a permit program regulating

"new or modified major stationary sources" of air pollution. Generally, a permit may not be issued for a new or modified major stationary source unless several stringent conditions are met. 1 The EPA regulation promulgated to implement this permit requirement allows a State to adopt a plantwide definition of the term "stationary source." 2 Under this definition, an existing plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant. The question presented by these cases is whether EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble" is based on a reasonable construction of the statutory term "stationary source."

I

The EPA regulations containing the plantwide definition of the term stationary source were promulgated on October [467 U.S. 837, 841] 14, 1981. 46 Fed. Reg. 50766. Respondents 3 filed a timely petition for review in the United States Court of Appeals for the District of Columbia Circuit pursuant to 42 U.S.C. 7607(b) (1). 4 The Court of Appeals set aside the regulations. National Resources Defense Council, Inc. v. Gorsuch, 222 U.S. App. D.C. 268, 685 F.2d 718 (1982).

The court observed that the relevant part of the amended Clean Air Act "does not explicitly define what Congress envisioned as a `stationary source, to which the permit program . . . should apply," and further stated that the precise issue was not "squarely addressed in the legislative history." Id., at 273, 685 F.2d, at 723. In light of its conclusion that the legislative history bearing on the question was "at best contradictory," it reasoned that "the purposes of the nonattainment program should guide our decision here." Id., at 276, n. 39, 685 F.2d, at 726, n. 39. 5 Based on two of its precedents concerning the applicability of the bubble concept to certain Clean Air Act programs, 6 the court stated that the bubble concept was "mandatory" in programs designed merely to maintain existing air quality, but held that it was "inappropriate" in programs enacted to improve air quality. Id., at 276, 685 F.2d, at 726. Since the purpose of the permit [467 U.S. 837, 842] program - its "raison d'etre," in the court's view - was to improve air quality, the court held that the bubble concept was inapplicable in these cases under its prior precedents. Ibid. It therefore set aside the regulations embodying the bubble concept as contrary to law. We granted certiorari to review that judgment, 461 U.S. 956 (1983), and we now reverse.

The basic legal error of the Court of Appeals was to adopt a static judicial definition of the term "stationary source" when it had decided that Congress itself had not commanded that definition. Respondents do not defend the legal reasoning of the Court of Appeals. 7 Nevertheless, since this Court reviews judgments, not opinions, 8 we must determine whether the Court of Appeals' legal error resulted in an erroneous judgment on the validity of the regulations.

II

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, [467 U.S. 837, 843] as well as the agency, must give effect to the unambiguously expressed intent of Congress. 9 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, 10 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. 11

"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." Morton v. Ruiz, 415 U.S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation [467 U.S. 837, 844] of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. 12 Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provison for a reasonable interpretation made by the administrator of an agency. 13

We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, 14 and the principle of deference to

administrative interpretations

"has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. See, e. g., National Broadcasting Co. v. United States, 319 U.S. 190 ; Labor Board v. Hearst Publications, Inc., 322 U.S. 111 ; Republic Aviation Corp. v. [467 U.S. 837, 845] Labor Board, 324 U.S. 793 ; Securities & Exchange Comm'n v. Chenery Corp., 332 U.S. 194 ; Labor Board v. Seven-Up Bottling Co., 344 U.S. 344 .

". . . If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." United States v. Shimer, 367 U.S. 374, 382 , 383 (1961).

Accord, Capital Cities Cable, Inc. v. Crisp, ante, at 699-700.
In light of these well-settled principles it is clear that the Court of Appeals misconceived the nature of its role in reviewing the regulations at issue. Once it determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was not whether in its view the concept is "inappropriate" in the general context of a program designed to improve air quality, but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one. Based on the examination of the legislation and its history which follows, we agree with the Court of Appeals that Congress did not have a specific intention on the applicability of the bubble concept in these cases, and conclude that the EPA's use of that concept here is a reasonable policy choice for the agency to make.

III

In the 1950's and the 1960's Congress enacted a series of statutes designed to encourage and to assist the States in curtailing air pollution. See generally Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 63 -64 (1975). The Clean Air Amendments of 1970, Pub. L. 91-604, 84 Stat. 1976, "sharply increased federal authority and responsibility [467 U.S. 837, 846] in the continuing effort to combat air pollution," 421 U.S., at 64 , but continued to assign "primary responsibility for assuring air quality" to the several States, 84 Stat. 1678. Section 109 of the 1970 Amendments directed the EPA to promulgate National Ambient Air Quality Standards (NAAQS's) 15 and 110 directed the States to develop plans (SIP's) to implement the standards within specified deadlines. In addition, 111 provided that major new sources of pollution would be required to conform to technology-based performance standards; the EPA was directed to publish a list of categories of sources of pollution and to establish new source performance standards (NSPS) for each. Section 111(e) prohibited the operation of any new source in violation of a performance standard.

Section 111(a) defined the terms that are to be used in setting and enforcing standards of performance for new stationary sources. It provided:

"For purposes of this section:

. . . . .

"(3) The term `stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant." 84 Stat. 1683.

In the 1970 Amendments that definition was not only applicable to the NSPS program required by 111, but also was made applicable to a requirement of 110 that each state implementation plan contain a procedure for reviewing the location of any proposed new source and preventing its construction if it would preclude the attainment or maintenance of national air quality standards. 16
In due course, the EPA promulgated NAAQS's, approved SIP's, and adopted detailed regulations governing NSPS's [467 U.S. 837, 847] for various categories of equipment. In one of its programs, the EPA used a plantwide definition of the term "stationary source." In 1974, it issued NSPS's for the nonferrous smelting industry that provided that the standards would not apply to the modification of major smelting units if their increased emissions were offset by reductions in other portions of the same plant. 17

Nonattainment

The 1970 legislation provided for the attainment of primary NAAQS's by 1975. In many areas of the country, particularly the most industrialized States, the statutory goals were not attained. 18 In 1976, the 94th Congress was confronted with this fundamental problem, as well as many others respecting pollution control. As always in this area, the legislative struggle was basically between interests seeking strict schemes to reduce pollution rapidly to eliminate its social costs and interests advancing the economic concern that strict schemes would retard industrial development with attendant social costs. The 94th Congress, confronting these competing interests, was unable to agree on what response was in the public interest: legislative proposals to deal with nonattainment failed to command the necessary consensus. 19

In light of this situation, the EPA published an Emissions Offset Interpretive Ruling in December 1976, see 41 Fed. Reg. 55524, to "fill the gap," as respondents put it, until Congress acted. The Ruling stated that it was intended to [467 U.S. 837, 848] address "the issue of whether and to what extent national air quality standards established under the Clean Air Act may restrict or prohibit growth of major new or expanded stationary air pollution sources." Id., at 55524-55525. In general, the Ruling provided that "a major new source may locate in an area with air quality worse than a national standard only if stringent conditions can be met." Id., at 55525. The Ruling gave primary emphasis to the rapid attainment of the statute's environmental goals. 20 Consistent with that emphasis, the construction of every new source in nonattainment areas had to meet the "lowest achievable emission rate" under the current state of the art for that type of facility. See Ibid. The 1976 Ruling did not, however, explicitly adopt or reject the "bubble concept." 21

IV

The Clean Air Act Amendments of 1977 are a lengthy, detailed, technical, complex, and comprehensive response to a major social issue. A small portion of the statute - 91 Stat. [467 U.S. 837, 849] 745-751 (Part D of Title I of the amended Act, 42 U.S.C. 7501-7508) - expressly deals with nonattainment areas. The focal point of this controversy is one phrase in that portion of the Amendments. 22

Basically, the statute required each State in a nonattainment area to prepare and obtain approval of a new SIP by July 1, 1979. In the interim those States were required to comply with the EPA's interpretative Ruling of December 21, 1976. 91 Stat. 745. The deadline for attainment of the primary NAAQS's was extended until December 31, 1982, and in some cases until December 31, 1987, but the SIP's were required to contain a number of provisions designed to achieve the goals as expeditiously as possible. 23 [467 U.S. 837, 850]

Most significantly for our purposes, the statute provided that each plan shall

"(6) require permits for the construction and operation of new or modified major stationary sources in accordance with section 173 . . . ." Id., at 747.

Before issuing a permit, 173 requires (1) the state agency to determine that there will be sufficient emissions reductions in the region to offset the emissions from the new source and also to allow for reasonable further progress toward attainment, or that the increased emissions will not exceed an allowance for growth established pursuant to 172(b)(5); (2) the applicant to certify that his other sources in the State are in compliance with the SIP, (3) the agency to determine that the applicable SIP is otherwise being implemented, and (4) the proposed source to comply with the lowest achievable emission rate (LAER). 24 [467 U.S. 837, 851]
The 1977 Amendments contain no specific reference to the "bubble concept." Nor do they contain a specific definition of the term "stationary source," though they did not disturb the definition of "stationary source" contained in 111(a)(3), applicable by the terms of the Act to the NSPS program. Section 302(j), however, defines the term "major stationary source" as follows:

"(j) Except as otherwise expressly provided, the terms `major stationary source' and `major emitting facility' mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator)." 91 Stat. 770.

V

The legislative history of the portion of the 1977 Amendments dealing with nonattainment areas does not

contain any specific comment on the "bubble concept" or the question whether a plantwide definition of a stationary source is permissible under the permit program. It does, however, plainly disclose that in the permit program Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality. Indeed, the House Committee Report identified the economic interest as one of the "two main purposes" of this section of the bill. It stated:

"Section 117 of the bill, adopted during full committee markup establishes a new section 127 of the Clean Air Act. The section has two main purposes: (1) to allow reasonable economic growth to continue in an area while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) to allow [467 U.S. 837, 852] States greater flexibility for the former purpose than EPA's present interpretative regulations afford.

"The new provision allows States with nonattainment areas to pursue one of two options. First, the State may proceed under EPA's present `tradeoff' or `offset' ruling. The Administrator is authorized, moreover, to modify or amend that ruling in accordance with the intent and purposes of this section.

"The State's second option would be to revise its implementation plan in accordance with this new provision." H. R. Rep. No. 95-294, p. 211 (1977). 25

The portion of the Senate Committee Report dealing with nonattainment areas states generally that it was intended to "supersede the EPA administrative approach," and that expansion should be permitted if a State could "demonstrate that these facilities can be accommodated within its overall plan to provide for attainment of air quality standards." S. Rep. No. 95-127, p. 55 (1977). The Senate Report notes the value of "case-by-case review of each new or modified major source of pollution that seeks to locate in a region exceeding an ambient standard," explaining that such a review "requires matching reductions from existing sources against [467 U.S. 837, 853] emissions expected from the new source in order to assure that introduction of the new source will not prevent attainment of the applicable standard by the statutory deadline." Ibid. This description of a case-by-case approach to plant additions, which emphasizes the net consequences of the construction or modification of a new source, as well as its impact on the overall achievement of the national standards, was not, however, addressed to the precise issue raised by these cases.
Senator Muskie made the following remarks:

"I should note that the test for determining whether a new or modified source is subject to the EPA interpretative regulation [the Offset Ruling] - and to the permit requirements of the revised implementation plans under the conference bill - is whether the source will emit a pollutant into an area which is exceeding a national ambient air quality standard for that pollutant - or precursor. Thus, a new source is still subject to such requirements as `lowest achievable emission rate' even if it is constructed as a replacement for an older facility resulting in a net reduction from previous emission levels.

"A source - including an existing facility ordered to convert to coal - is subject to all the nonattainment requirements as a modified source if it makes any physical change which increases the amount of any air pollutant for which the standards in the area are exceeded." 123 Cong. Rec. 26847 (1977).

VI

As previously noted, prior to the 1977 Amendments, the EPA had adhered to a plantwide definition of the term "source" under a NSPS program. After adoption of the 1977 Amendments, proposals for a plantwide definition were considered in at least three formal proceedings.

In January 1979, the EPA considered the question whether the same restriction on new construction in nonattainment areas that had been included in its December 1976 Ruling [467 U.S. 837, 854] should be required in the revised SIP's that were scheduled to go into effect in July 1979. After noting that the 1976 Ruling was ambiguous on the question "whether a plant with a number of different processes and emission points would be considered a single source," 44 Fed. Reg. 3276 (1979), the EPA, in effect, provided a bifurcated answer to that question. In those areas that did not have a revised SIP in effect by July 1979, the EPA rejected the plantwide definition; on the other hand, it expressly concluded that the plantwide approach would be permissible in certain circumstances if authorized by an approved SIP. It stated:

"Where a state implementation plan is revised and implemented to satisfy the requirements of Part D,

including the reasonable further progress requirement, the plan requirements for major modifications may exempt modifications of existing facilities that are accompanied by intrasource offsets so that there is no net increase in emissions. The agency endorses such exemptions, which would provide greater flexibility to sources to effectively manage their air emissions at least cost." Ibid. 26 [467 U.S. 837, 855]

In April, and again in September 1979, the EPA published additional comments in which it indicated that revised SIP's could adopt the plantwide definition of source in nonattainment areas in certain circumstances. See id., at 20372, 20379, 51924, 51951, 51958. On the latter occasion, the EPA made a formal rulemaking proposal that would have permitted the use of the "bubble concept" for new installations within a plant as well as for modifications of existing units. It explained:

"`Bubble' Exemption: The use of offsets inside the same source is called the `bubble.' EPA proposes use of the definition of `source' (see above) to limit the use of the bubble under nonattainment requirements in the following respects:

"i. Part D SIPs that include all requirements needed to assure reasonable further progress and attainment by the deadline under section 172 and that are being carried out need not restrict the use of a plantwide bubble, the same as under the PSD proposal.

"ii. Part D SIPs that do not meet the requirements specified must limit use of the bubble by including a definition of `installation' as an identifiable piece of process equipment." 27 [467 U.S. 837, 856]

Significantly, the EPA expressly noted that the word "source" might be given a plantwide definition for some purposes and a narrower definition for other purposes. It wrote:

"Source means any building structure, facility, or installation which emits or may emit any regulated pollutant. `Building, structure, facility or installation' means plant in PSD areas and in nonattainment areas except where the growth prohibitions would apply or where no adequate SIP exists or is being carried out." Id., at 51925. 28

The EPA's summary of its proposed Ruling discloses a flexible rather than rigid definition of the term "source" to implement various policies and programs:

"In summary, EPA is proposing two different ways to define source for different kinds of NSR programs:

"(1) For PSD and complete Part D SIPs, review would apply only to plants, with an unrestricted plant-wide bubble.

"(2) For the offset ruling, restrictions on construction, and incomplete Part D SIPs, review would apply to both plants and individual pieces of process equipment, causing the plant-wide bubble not to apply for new and modified major pieces of equipment.

"In addition, for the restrictions on construction, EPA is proposing to define `major modification' so as to prohibit the bubble entirely. Finally, an alternative discussed but not favored is to have only pieces of process equipment reviewed, resulting in no plant-wide bubble and allowing minor pieces of equipment to escape NSR [467 U.S. 837, 857] regardless of whether they are within a major plant." Id., at 51934.

In August 1980, however, the EPA adopted a regulation that, in essence, applied the basic reasoning of the Court of Appeals in these cases. The EPA took particular note of the two then-recent Court of Appeals decisions, which had created the bright-line rule that the "bubble concept" should be employed in a program designed to maintain air quality but not in one designed to enhance air quality. Relying heavily on those cases, 29 EPA adopted a dual definition of "source" for nonattainment areas that required a permit whenever a change in either the entire plant, or one of its components, would result in a significant increase in emissions even if the increase was completely offset by reductions elsewhere in the plant. The EPA expressed the opinion that this interpretation was "more consistent with congressional intent" than the plantwide definition because it "would bring in more sources or modifications for review," 45 Fed. Reg. 52697 (1980), but its primary legal analysis was predicated on the two Court of Appeals decisions. In 1981 a new administration took office and initiated a "Government-wide reexamination of regulatory burdens and complexities." 46 Fed. Reg. 16281. In the context of that [467 U.S. 837, 858] review, the EPA reevaluated the various arguments that had been advanced in connection with the proper definition of the term "source" and concluded that the term should be given the same definition in both nonattainment areas and PSD areas.

In explaining its conclusion, the EPA first noted that the definitional issue was not squarely addressed in either the statute or its legislative history and therefore that the issue involved an agency "judgment as how to best carry out the Act." Ibid. It then set forth several reasons for concluding that the plantwide definition was more appropriate. It pointed out that the dual definition "can act as a disincentive to new investment and modernization by discouraging modifications to existing facilities" and "can actually retard progress in air pollution control by discouraging replacement of older, dirtier processes or pieces of equipment with new, cleaner ones." Ibid. Moreover, the new definition "would simplify EPA's rules by using the same definition of `source' for PSD, nonattainment new source review and the construction moratorium. This reduces confusion and inconsistency." Ibid. Finally, the agency explained that additional requirements that remained in place would accomplish the fundamental purposes of achieving attainment with NAAQS's as expeditiously as possible. 30 These conclusions were expressed [467 U.S. 837, 859] in a proposed rulemaking in August 1981 that was formally promulgated in October. See id., at 50766.

VII

In this Court respondents expressly reject the basic rationale of the Court of Appeals' decision. That court viewed the statutory definition of the term "source" as sufficiently flexible to cover either a plantwide definition, a narrower definition covering each unit within a plant, or a dual definition that could apply to both the entire "bubble" and its components. It interpreted the policies of the statute, however, to mandate the plantwide definition in programs designed to maintain clean air and to forbid it in programs designed to improve air quality. Respondents place a fundamentally different construction on the statute. They contend that the text of the Act requires the EPA to use a dual definition - if either a component of a plant, or the plant as a whole, emits over 100 tons of pollutant, it is a major stationary source. They thus contend that the EPA rules adopted in 1980, insofar as they apply to the maintenance of the quality of clean air, as well as the 1981 rules which apply to nonattainment areas, violate the statute. 31

Statutory Language

The definition of the term "stationary source" in 111(a)(3) refers to "any building, structure, facility, or installation" which emits air pollution. See supra, at 846. This definition is applicable only to the NSPS program by the express terms of the statute; the text of the statute does not make this definition [467 U.S. 837, 860] applicable to the permit program. Petitioners therefore maintain that there is no statutory language even relevant to ascertaining the meaning of stationary source in the permit program aside from 302(j), which defines the term "major stationary source." See supra, at 851. We disagree with petitioners on this point.

The definition in 302(j) tells us what the word "major" means - a source must emit at least 100 tons of pollution to qualify - but it sheds virtually no light on the meaning of the term "stationary source." It does equate a source with a facility - a "major emitting facility" and a "major stationary source" are synonymous under 302(j). The ordinary meaning of the term "facility" is some collection of integrated elements which has been designed and constructed to achieve some purpose. Moreover, it is certainly no affront to common English usage to take a reference to a major facility or a major source to connote an entire plant as opposed to its constituent parts. Basically, however, the language of 302(j) simply does not compel any given interpretation of the term "source."

Respondents recognize that, and hence point to 111(a)(3). Although the definition in that section is not literally applicable to the permit program, it sheds as much light on the meaning of the word "source" as anything in the statute. 32 As respondents point out, use of the words "building, structure, facility, or installation," as the definition of source, could be read to impose the permit conditions on an individual building that is a part of a plant. 33 A "word may have a character of its own not to be submerged by its association." Russell Motor Car Co. v. United States, 261 U.S. 514, 519 [467 U.S. 837, 861] (1923). On the other hand, the meaning of a word must be ascertained in the context of achieving particular objectives, and the words associated with it may indicate that the true meaning of the series is to convey a common idea. The language may reasonably be interpreted to impose the requirement on any discrete, but integrated, operation which pollutes. This gives meaning to all of the terms - a single building, not part of a larger operation, would be covered if it emits more than 100 tons of pollution, as would any facility, structure, or installation. Indeed, the language itself implies a "bubble concept" of sorts: each enumerated item would seem to be treated as if it were encased in a bubble. While respondents insist that each of these terms must be given a discrete meaning, they also argue that 111(a)(3) defines "source" as that term is used in 302(j). The latter section, however, equates a source with a facility, whereas the former defines

"source" as a facility, among other items.

We are not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress. 34 [467 U.S. 837, 862] We know full well that this language is not dispositive; the terms are overlapping and the language is not precisely directed to the question of the applicability of a given term in the context of a larger operation. To the extent any congressional "intent" can be discerned from this language, it would appear that the listing of overlapping, illustrative terms was intended to enlarge, rather than to confine, the scope of the agency's power to regulate particular sources in order to effectuate the policies of the Act.

Legislative History

In addition, respondents argue that the legislative history and policies of the Act foreclose the plantwide definition, and that the EPA's interpretation is not entitled to deference because it represents a sharp break with prior interpretations of the Act.

Based on our examination of the legislative history, we agree with the Court of Appeals that it is unilluminating. The general remarks pointed to by respondents "were obviously not made with this narrow issue in mind and they cannot be said to demonstrate a Congressional desire . . . ." Jewell Ridge Coal Corp. v. Mine Workers, 325 U.S. 161, 168 -169 (1945). Respondents' argument based on the legislative history relies heavily on Senator Muskie's observation that a new source is subject to the LAER requirement. 35 But the full statement is ambiguous and like the text of 173 itself, this comment does not tell us what a new source is, much less that it is to have an inflexible definition. We find that the legislative history as a whole is silent on the precise issue before us. It is, however, consistent with the view that the EPA should have broad discretion in implementing the policies of the 1977 Amendments. [467 U.S. 837, 863]

More importantly, that history plainly identifies the policy concerns that motivated the enactment; the plantwide definition is fully consistent with one of those concerns - the allowance of reasonable economic growth - and, whether or not we believe it most effectively implements the other, we must recognize that the EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives as well. See supra, at 857-859, and n. 29; see also supra, at 855, n. 27. Indeed, its reasoning is supported by the public record developed in the rulemaking process, 36 as well as by certain private studies. 37

Our review of the EPA's varying interpretations of the word "source" - both before and after the 1977 Amendments - convinces us that the agency primarily responsible for administering this important legislation has consistently interpreted it flexibly - not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena. The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations [467 U.S. 837, 864] and the wisdom of its policy on a continuing basis. Moreover, the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute.

Significantly, it was not the agency in 1980, but rather the Court of Appeals that read the statute inflexibly to command a plantwide definition for programs designed to maintain clean air and to forbid such a definition for programs designed to improve air quality. The distinction the court drew may well be a sensible one, but our labored review of the problem has surely disclosed that it is not a distinction that Congress ever articulated itself, or one that the EPA found in the statute before the courts began to review the legislative work product. We conclude that it was the Court of Appeals, rather than Congress or any of the decisionmakers who are authorized by Congress to administer this legislation, that was primarily responsible for the 1980 position taken by the agency.

Policy

The arguments over policy that are advanced in the parties' briefs create the impression that respondents are now waging in a judicial forum a specific policy battle which they ultimately lost in the agency and in the 32 jurisdictions opting for the "bubble concept," but one which was never waged in the Congress. Such policy arguments are more properly addressed to legislators or administrators, not to judges. 38 [467

U.S. 837, 865]

In these cases the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, 39 the agency considered the matter in a detailed and reasoned fashion, 40 and the decision involves reconciling conflicting policies. 41 Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices - resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the [467 U.S. 837, 866] agency charged with the administration of the statute in light of everyday realities.

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges - who have no constituency - have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches." TVA v. Hill, 437 U.S. 153, 195 (1978).

We hold that the EPA's definition of the term "source" is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth. "The Regulations which the Administrator has adopted provide what the agency could allowably view as . . . [an] effective reconciliation of these twofold ends . . . ." United States v. Shimer, 367 U.S., at 383 .

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE MARSHALL and JUSTICE REHNQUIST took no part in the consideration or decision of these cases.
JUSTICE O'CONNOR took no part in the decision of these cases.

Footnotes

[Footnote *] ERRATA: "provison" should be "provision".

[Footnote 1] Section 172(b)(6), 42 U.S.C. 7502(b)(6), provides:

"The plan provisions required by subsection (a) shall -

. . . . .

"(6) require permits for the construction and operation of new or modified major stationary sources in accordance with section 173 (relating to permit requirements)." 91 Stat. 747.

[Footnote 2] "(i) `Stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.

"(ii) `Building, structure, facility, or installation' means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any

vessel." 40 CFR 51.18(j)(1)(i) and (ii) (1983).

[Footnote 3] National Resources Defense Council, Inc., Citizens for a Better Environment, Inc., and North Western Ohio Lung Association, Inc.

[Footnote 4] Petitioners, Chevron U.S. A. Inc., American Iron and Steel Institute, American Petroleum Institute, Chemical Manufacturers Association, Inc., General Motors Corp., and Rubber Manufacturers Association were granted leave to intervene and argue in support of the regulation.

[Footnote 5] The court remarked in this regard:

"We regret, of course, that Congress did not advert specifically to the bubble concept's application to various Clean Air Act programs, and note that a further clarifying statutory directive would facilitate the work of the agency and of the court in their endeavors to serve the legislators' will." 222 U.S. App. D.C., at 276, n. 39, 685 F.2d, at 726, n. 39.

[Footnote 6] Alabama Power Co. v. Costle, 204 U.S. App. D.C. 51, 636 F.2d 323 (1979); ASARCO Inc. v. EPA, 188 U.S. App. D.C. 77, 578 F.2d 319 (1978).

[Footnote 7] Respondents argued below that EPA's plantwide definition of "stationary source" is contrary to the terms, legislative history, and purposes of the amended Clear Air Act. The court below rejected respondents' arguments based on the language and legislative history of the Act. It did agree with respondents contention that the regulations were inconsistent with the purposes of the Act, but did not adopt the construction of the statute advanced by respondents here. Respondents rely on the arguments rejected by the Court of Appeals in support of the judgment, and may rely on any ground that finds support in the record. See Ryerson v. United States, 312 U.S. 405, 408 (1941); LeTulle v. Scofield, 308 U.S. 415, 421 (1940); Langnes v. Green, 282 U.S. 531, 533 -539 (1931).

[Footnote 8] E. g., Black v. Cutter Laboratories, 351 U.S. 292, 297 (1956); J. E. Riley Investment Co. v. Commissioner, 311 U.S. 55, 59 (1940); Williams v. Norris, 12 Wheat. 117, 120 (1827); McClung v. Silliman, 6 Wheat. 598, 603 (1821).

[Footnote 9] The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. See, e. g., FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 32 (1981); SEC v. Sloan, 436 U.S. 103, 117 -118 (1978); FMC v. Seatrain Lines, Inc., 411 U.S. 726, 745 -746 (1973); Volkswagenwerk v. FMC, 390 U.S. 261, 272 (1968); NLRB v. Brown, 380 U.S. 278, 291 (1965); FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965); Social Security Board v. Nierotko, 327 U.S. 358, 369 (1946); Burnet v. Chicago Portrait Co., 285 U.S. 1, 16 (1932); Webster v. Luther, 163 U.S. 331, 342 (1896). If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

[Footnote 10] See generally, R. Pound, The Spirit of the Common Law 174-175 (1921).

[Footnote 11] The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. FEC v. Democratic Senatorial Campaign Committee, 454 U.S., at 39 ; Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978); Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 75 (1975); Udall v. Tallman, 380 U.S. 1, 16 (1965); Unemployment Compensation Comm'n v. Aragon, 329 U.S. 143, 153 (1946); McLaren v. Fleischer, 256 U.S. 477, 480 -481 (1921).

[Footnote 12] See, e. g., United States v. Morton, ante, at 834; Schweiker v. Gray Panthers, 453 U.S. 34, 44 (1981); Batterton v. Francis, 432 U.S. 416, 424 -426 (1977); American Telephone & Telegraph Co. v. United States, 299 U.S. 232, 235 -237 (1936).

[Footnote 13] E. g., INS v. Jong Ha Wang, 450 U.S. 139, 144 (1981); Train v. Natural Resources Defense Council, Inc., 421 U.S., at 87 .

[Footnote 14] Aluminum Co. of America v. Central Lincoln Peoples' Until Dist., ante, at 389; Blum v. Bacon, 457 U.S. 132, 141 (1982); Union Electric Co. v. EPA, 427 U.S. 246, 256 (1976); Investment Company Institute v. Camp, 401 U.S. 617, 626 -627 (1971); Unemployment Compensation Comm'n v. Aragon, 329 U.S., at 153 -154; NLRB v. Hearst Publications, Inc., 322 U.S. 111, 131 (1944); McLaren v.

Fleischer, 256 U.S., at 480 -481; Webster v. Luther, 163 U.S., at 342 ; Brown v. United States, 113 U.S. 568, 570 -571 (1885); United States v. Moore, 95 U.S. 760, 763 (1878); Edwards' Lessee v. Darby, 12 Wheat. 206, 210 (1827).

[Footnote 15] Primary standards were defined as those whose attainment and maintenance were necessary to protect the public health, and secondary standards were intended to specify a level of air quality that would protect the public welfare.

[Footnote 16] See 110(a)(2)(D) and 110(a)(4).

[Footnote 17] The Court of Appeals ultimately held that this plantwide approach was prohibited by the 1970 Act, see ASARCO Inc., 188 U.S. App. D.C., at 83-84, 578 F.2d, at 325-327. This decision was rendered after enactment of the 1977 Amendments, and hence the standard was in effect when Congress enacted the 1977 Amendments.

[Footnote 18] See Report of the National Commission on Air Quality, To Breathe Clean Air, 3.3-20 through 3.3-33 (1981).

[Footnote 19] Comprehensive bills did pass both Chambers of Congress; the Conference Report was rejected in the Senate. 122 Cong. Rec. 34375-34403, 34405-34418 (1976).

[Footnote 20] For example, it stated:

"Particularly with regard to the primary NAAQS's, Congress and the Courts have made clear that economic considerations must be subordinated to NAAQS achievement and maintenance. While the ruling allows for some growth in areas violating a NAAQS if the net effect is to insure further progress toward NAAQS achievement, the Act does not allow economic growth to be accommodated at the expense of the public health." 41 Fed. Reg. 55527 (1976).

[Footnote 21] In January 1979, the EPA noted that the 1976 Ruling was ambiguous concerning this issue:

"A number of commenters indicated the need for a more explicit definition of `source.' Some readers found that it was unclear under the 1976 Ruling whether a plant with a number of different processes and emission points would be considered a single source. The changes set forth below define a source as `any structure, building, facility, equipment, installation, or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control).' This definition precludes a large plant from being separated into individual production lines for purposes of determining applicability of the offset requirements." 44 Fed. Reg. 3276.

[Footnote 22] Specifically, the controversy in these cases involves the meaning of the term "major stationary sources" in 172(b)(6) of the Act, 42 U.S.C. 7502(b) (6). The meaning of the term "proposed source" in 173(2) of the Act, 42 U.S.C. 7503(2), is not at issue.

[Footnote 23] Thus, among other requirements, 172(b) provided that the SIP's shall -

"(3) require, in the interim, reasonable further progress (as defined in section 171(1)) including such reduction in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology;

"(4) include a comprehensive, accurate, current inventory of actual emissions from all sources (as provided by rule of the Administrator) of each such pollutant for each such area which is revised and resubmitted as frequently as may be necessary to assure that the requirements of paragraph (3) are met and to assess the need for additional reductions to assure attainment of each standard by the date required under paragraph (1);

"(5) expressly identify and quantity the emissions, if any, of any such pollutant which will be allowed to result from the construction and operation of major new or modified stationary sources for each such area; . . .

. . . . .

"(8) contain emission limitations, schedules of compliance and such other measures as may be necessary

to meet the requirements of this section." 91 Stat. 747.

Section 171(1) provided:

"(1) The term `reasonable further progress' means annual incremental reductions in emissions of the applicable air pollutant (including substantial [467 U.S. 837, 850] reductions in the early years following approval or promulgation of plan provisions under this part and section 110(a)(2)(I) and regular reductions thereafter) which are sufficient in the judgment of the Administrator, to provide for attainment of the applicable national ambient air quality standard by the date required in section 172(a)." Id., at 746.

[Footnote 24] Section 171(3) provides:

"(3) The term `lowest achievable emission rate' means for any source, that rate of emissions which reflects -

"(A) the most stringent emission limitation which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or

"(B) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent.

"In no event shall the application of this term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance."

The LAER requirement is defined in terms that make it even more stringent than the applicable new source performance standard developed under 111 of the Act, as amended by the 1970 statute.

[Footnote 25] During the floor debates Congressman Waxman remarked that the legislation struck

"a proper balance between environmental controls and economic growth in the dirty air areas of America. . . . There is no other single issue which more clearly poses the conflict between pollution control and new jobs. We have determined that neither need be compromised. . . .

"This is a fair and balanced approach, which will not undermine our economic vitality, or impede achievement of our ultimate environmental objectives." 123 Cong. Rec. 27076 (1977).

The second "main purpose" of the provision - allowing the States "greater flexibility" than the EPA's interpretative Ruling - as well as the reference to the EPA's authority to amend its Ruling in accordance with the intent of the section, is entirely consistent with the view that Congress did not intend to freeze the definition of "source" contained in the existing regulation into a rigid statutory requirement.

[Footnote 26] In the same Ruling, the EPA added:

"The above exemption is permitted under the SIP because, to be approved under Part D, plan revisions due by January 1979 must contain adopted measures assuring that reasonable further progress will be made. Furthermore, in most circumstances, the measures adopted by January 1979 must be sufficient to actually provide for attainment of the standards by the dates required under the Act, and in all circumstances measures adopted by 1982 must provide for attainment. See Section 172 of the Act and 43 F R 21673-21677 (May 19, 1978). Also, Congress intended under Section 173 of the Act that States would have some latitude to depart from the strict requirements of this Ruling when the State plan is revised and is being carried out in accordance with Part D. Under a Part D plan, therefore, there is less need to subject a modification of an existing facility to LAER and other stringent requirements if the modification is accompanied by sufficient intrasource offsets so that there is no net increase in emissions." 44 Fed. Reg. 3277 (1979).

[Footnote 27] Id., at 51926. Later in that Ruling, the EPA added:

"However, EPA believes that complete Part D SIPs, which contain adopted and enforceable requirements sufficient to assure attainment, may apply the approach proposed above for PSD, with plant-wide review but no review of individual pieces of equipment. Use of only a plant-wide definition of source will permit plant-wide offsets for avoiding NSR of new or modified pieces of equipment. However, this is only appropriate once a SIP is adopted that will assure the reductions in existing emissions necessary for

attainment. See 44 FR 3276 col. 3 (January 16, 1979). If the level of emissions allowed in the SIP is low enough to assure reasonable further progress and attainment, new construction or modifications with enough offset credit to prevent an emission increase should not jeopardize attainment." Id., at 51933.

[Footnote 28] In its explanation of why the use of the "bubble concept" was especially appropriate in preventing significant deterioration (PSD) in clean air areas, the EPA stated: "In addition, application of the bubble on a plant-wide basis encourages voluntary upgrading of equipment, and growth in productive capacity." Id., at 51932.

[Footnote 29] "The dual definition also is consistent with Alabama Power and ASARCO. Alabama Power held that EPA had broad discretion to define the constituent terms of `source' so as best to effectuate the purposes of the statute. Different definitions of `source' can therefore be used for different sections of the statute. . . .

"Moreover, Alabama Power and ASARCO taken together suggest that there is a distinction between Clean Air Act programs designed to enhance air quality and those designed only to maintain air quality. . . .

. . . . .

"Promulgation of the dual definition follows the mandate of Alabama Power, which held that, while EPA could not define `source' as a combination of sources, EPA had broad discretion to define `building,' `structure,' `facility,' and `installation' so as to best accomplish the purposes of the Act." 45 Fed. Reg. 52697 (1980).

[Footnote 30] It stated:

"5. States will remain subject to the requirement that for all nonattainment areas they demonstrate attainment of NAAQS as expeditiously as practicable and show reasonable further progress toward such attainment. Thus, the proposed change in the mandatory scope of nonattainment new source review should not interfere with the fundamental purpose of Part D of the Act.

"6. New Source Performance Standards (NSPS) will continue to apply to many new or modified facilities and will assure use of the most up-to-date pollution control techniques regardless of the applicability of nonattainment area new source review.

"7. In order to avoid nonattainment area new source review, a major plant undergoing modification must show that it will not experience a [467 U.S. 837, 859] significant net increase in emissions. Where overall emissions increase significantly, review will continue to be required." 46 Fed. Reg. 16281 (1981).

[Footnote 31] "What EPA may not do, however, is define all four terms to mean only plants. In the 1980 PSD rules, EPA did just that. EPA compounded the mistake in the 1981 rules here under review, in which it abandoned the dual definition." Brief for Respondents 29, n. 56.

[Footnote 32] We note that the EPA in fact adopted the language of that definition in its regulations under the permit program. 40 CFR 51.18(j)(1)(i),(ii)(1983).

[Footnote 33] Since the regulations give the States the option to define an individual unit as a source, see 40 CFR 51.18(j)(1) (1983), petitioners do not dispute that the terms can be read as respondents suggest.

[Footnote 34] The argument based on the text of 173, which defines the permit requirements for nonattainment areas, is a classic example of circular reasoning. One of the permit requirements is that "the proposed source is required to comply with the lowest achievable emission rate" (LAER). Although a State may submit a revised SIP that provides for the waiver of another requirement - the "offset condition" - the SIP may not provide for a waiver of the LAER condition for any proposed source. Respondents argue that the plantwide definition of the term "source" makes it unnecessary for newly constructed units within the plant to satisfy the LAER requirement if their emissions are offset by the reductions achieved by the retirement of older equipment. Thus, according to respondents, the plantwide definition allows what the statute explicitly prohibits - the waiver of the LAER requirement for the newly constructed units. But this argument proves nothing because the statute does not prohibit the waiver unless the proposed new unit is indeed subject to the permit program. If it is not, the statute does not impose the LAER requirement at all and there is not need to reach any waiver question. In other words, 173 of the statute merely deals with the consequences of the definition of the term "source" and does not define the term.

[Footnote 35] See supra, at 853. We note that Senator Muskie was not critical of the EPA's use of the "bubble concept" in one NSPS program prior to the 1977 amendments. See ibid.

[Footnote 36] See, for example, the statement of the New York State Department of Environmental Conservation, pointing out that denying a source owner flexibility in selecting options made it "simpler and cheaper to operate old, more polluting sources than to trade up. . . ." App. 128-129.

[Footnote 37] "Economists have proposed that economic incentives be substituted for the cumbersome administrative-legal framework. The objective is to make the profit and cost incentives that work so well in the marketplace work for pollution control. . . . [The `bubble' or `netting' concept] is a first attempt in this direction. By giving a plant manager flexibility to find the places and processes within a plant that control emissions most cheaply, pollution control can be achieved more quickly and cheaply." L. Lave & G. Omenn, Cleaning the Air: Reforming the Clean Air Act 28 (1981) (footnote omitted).

[Footnote 38] Respondents point out if a brand new factory that will emit over 100 tons of pollutants is constructed in a nonattainment area, that plant must obtain a permit pursuant to 172(b)(6) and in order to do so, it must satisfy the 173 conditions, including the LAER requirement. Respondents argue if an old plant containing several large emitting units is to be modernized by the replacement of one or more units emitting over 100 tons of pollutant with a new unit emitting less - but still more than 100 tons - the result should be no different simply because "it happens to be built not at a new site, but within a pre-existing plant." Brief for Respondents 4.

[Footnote 39] See, e. g., Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist., ante, at 390.

[Footnote 40] See SEC v. Sloan, 436 U.S., at 117 ; Adamo Wrecking Co. v. United States, 434 U.S. 275, 287 , n. 5 (1978); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[Footnote 41] See Capital Cities Cable, Inc. v. Crisp, ante, at 699-700; United States v. Shimer, 367 U.S. 374, 382 (1961). [467 U.S. 837, 867]

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Beyond *Marbury*: The Executive's Power To Say What the Law Is

ABSTRACT. Under *Marbury v. Madison*, it is "emphatically the province and duty of the judicial department to say what the law is." But in the last quarter-century, the Supreme Court has legitimated the executive's power of interpretation, above all in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, the most cited case in modern public law. *Chevron* is not merely a counter-*Marbury* for the executive branch, but also the *Erie Railroad Co. v. Tompkins* of the last half-century. It reflects a salutary appreciation of the fact that the law's meaning is not a "brooding omnipresence in the sky"—and that the executive, with its comparative expertise and accountability, is in the best position to make the judgments of policy and principle on which resolution of statutory ambiguities often depends. The principal qualification has to do with certain sensitive issues, most importantly those involving constitutional rights. When such matters are involved, Congress should be required to speak unambiguously; executive interpretation of statutory ambiguities is not sufficient.

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ESSAY CONTENTS

INTRODUCTION 2582

I. *MARBURY*, COUNTER-*MARBURY*, AND THE NEW DEAL 2584
- A. Interpretation as Policymaking 2585
  - 1. Law and Policy 2585
  - 2. Behind *Chevron* 2587
- B. *Chevron*'s Fiction: Delegation, Realism, and Institutional Competence 2589
  - 1. Fiction 2589
  - 2. Realists and Realism 2591
  - 3. The New Deal and Beyond 2593
  - 4. Vacillations and Counterarguments 2595
- C. The Real World of *Chevron* and "Policy Spaces" 2598

II. *MARBURY*'S REVENGE? 2602
- A. *Chevron* Step Zero (with a Note on Deference to the President) 2602
- B. Pure Questions of Law 2604
- C. Jurisdiction 2604
- D. Major Questions 2605
- E. Nondelegation Canons and the Limits of Executive Power 2607

CONCLUSION 2610

INTRODUCTION

Consider the following cases:

1. Under the administration of President Jimmy Carter, the U.S. Department of the Interior adopted a broad definition of what it meant to "harm" a member of an endangered species.[1] A majority of the Supreme Court rejected a challenge to the Carter-era regulation[2] over a dissenting opinion by Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas.[3]

2. Under the administration of President Bill Clinton, the Food and Drug Administration (FDA) asserted authority over tobacco and tobacco products. The Supreme Court invalidated the FDA's decision.[4] Justice Breyer wrote a dissenting opinion, joined by Justices Stevens, Souter, and Ginsburg.[5]

3. Under the administration of President George W. Bush, the Environmental Protection Agency (EPA) rejected a petition to issue regulations to control the emission of greenhouse gases from motor vehicles.[6] Environmental groups and others challenged the EPA's decision. The court of appeals rejected the challenge over Judge Tatel's dissent.[7]

In each of these cases, the relevant statute seemed ambiguous, and statutory interpretation appeared to be driven by some combination of political values and assessments of disputed facts. It should be no surprise that when federal judges disagreed with one another in all three cases, their disagreement operated along unmistakably political lines – splitting the stereotypically liberal judges from the stereotypically conservative ones.[8] There is no reason to believe that in the face of statutory ambiguity, the meaning of federal law should be settled by the inclinations and predispositions of federal judges. The outcome should instead depend on the commitments and beliefs of the President and those who operate under him.

My major goal in this Essay is to vindicate the law-interpreting authority of the executive branch. This authority, I suggest, is indispensable to the healthy

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1. *See* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995).
2. *Id.*
3. *Id.* at 714 (Scalia, J., dissenting).
4. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).
5. *Id.* at 161 (Breyer, J., dissenting).
6. Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 2960 (2006). I do not mean here to express a view on the statutory provisions involved in this case.
7. *Id.* at 61 (Tatel, J., dissenting).
8. For a similar example, with more complicated debates about interpretive authority, see *Gonzales v. Oregon*, 126 S. Ct. 904 (2006).

operation of modern government; it can be defended on both democratic and technocratic grounds. Indeed, the executive's law-interpreting authority is a natural and proper outgrowth of both the legal realist attack on the autonomy of legal reasoning and the most important institutional development of the twentieth century: the shift from regulation through common law courts to regulation through administrative agencies. In the modern era, statutory interpretation must often be undertaken, at least in the first instance, by numerous institutions within the executive branch.[9] For the resolution of ambiguities in statutory law, technical expertise and political accountability are highly relevant, and on these counts the executive has significant advantages over courts. Changed circumstances, involving new values and new understandings of fact, are relevant too, and they suggest further advantages on the part of the executive.

Recognition of the executive's interpretive power fits well with the institutional judgments that are embodied in the post-New Deal willingness to embrace presidential authority, including the varied forms of administrative power that are exercised under the President. I shall suggest that recognition of the executive's interpretive power has the same relationship to the last half of the twentieth century that *Erie Railroad Co. v. Tompkins*[10] had to the first: an institutional shift in interpretive power brought about by a realistic understanding of what interpretation involves. In short, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[11] is our *Erie*. When courts resolve genuine ambiguities, they cannot appeal to any "brooding omnipresence in the sky";[12] often they must rely on policy judgments of their own. Those judgments should be made by the executive, not the judiciary.[13] As we shall see, the shift from independent judicial judgment to respect for reasonable interpretations by the executive rests on the same realistic commitments that

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9. Throughout this Essay I shall treat the so-called independent agencies (such as the FTC, the FCC, and the NLRB) as within the executive branch, even though the heads of such agencies are not at-will employees of the President. Though I use the terms "agencies" and "executive branch" interchangeably, readers should be aware that some agencies are not always thought to be within that branch. Because the independent agencies are subject to a significant degreee of political control, and because they are highly specialized, I believe that the analysis here applies to them no less than to the more conventionally "executive" agencies.

10. 304 U.S. 64 (1938).

11. 467 U.S. 837 (1984).

12. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

13. An instructive discussion is Lawrence Lessig, Erie—*Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1797-1800 (1997).

led the federal judiciary to abandon "general" federal common law in favor of respect for state law.

I. *MARBURY*, COUNTER-*MARBURY*, AND THE NEW DEAL

Marbury v. Madison holds that it is "emphatically the province and duty of the judicial department to say what the law is."[14] The Court does not permit the executive to interpret ambiguous constitutional provisions as it sees fit. Courts construe the document independently, not with deference to executive interpretations of unclear provisions.

Why is the executive not permitted to construe constitutional ambiguities as it sees fit? The simplest answer is that foxes are not permitted to guard henhouses, or, in other words, those who are limited by law cannot decide on the scope of the limitation. *Marbury* might be said to rest on a theory of "implicit nondelegation," to the effect that the Constitution is not properly taken to grant the President (or, for that matter, Congress) the final authority to interpret its ambiguities. That authority has been granted to the courts.

This judgment—the foundation of *Marbury*—has not been uncontroversial. Foxes should not guard henhouses; but who is the fox? In a famous article, James Bradley Thayer contended that the Court should uphold democratic judgments unless they plainly violate the Constitution.[15] If we believe that the interpretation of ambiguous constitutional provisions calls for judgments of policy and that democratic institutions are in a particularly good position to make those judgments, then *Marbury* is indeed vulnerable. Suppose that questions of political morality underlie judgments about the legitimacy of discrimination or the scope of free speech.[16] If so, it is certainly reasonable to say that constitutional ambiguities should be resolved by those who are most accountable. But our constitutional tradition has generally rejected Thayer's view, apparently on the theory that by virtue of their insulation, courts have comparative advantages in the interpretive domain.[17]

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14. 5 U.S. (1 Cranch) 137, 177 (1803).

15. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

16. *See* RONALD DWORKIN, JUSTICE IN ROBES 129-39 (2006) (arguing that judgments of political morality are involved in constitutional interpretation).

17. For an illuminating defense of Thayerism, arguing for judicial deference to democratic branches in constitutional law, see ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 230-36 (2006).

It should be easy to see how this view might be transplanted to the arena of ordinary statutory law. Perhaps statutory law has the same relationship to the executive as the Constitution has to the government in general. If foxes are not permitted to guard henhouses, perhaps the executive ought not to be authorized to interpret the scope of statutes that limit its authority. And indeed, administrative law doctrines were long built on precisely this assumption,[18] which continues to play a role in contemporary law.[19] As we shall soon see, *Chevron* selects other foundations.

A. Interpretation as Policymaking

The Administrative Procedure Act (APA),[20] the basic charter governing administrative agencies, was enacted in 1946. The governing provision of the APA says that the "reviewing court shall decide all relevant questions of law, [and] interpret statutory provisions."[21] At first glance, this provision appears to reassert the understanding that questions of statutory interpretation must be resolved by courts, not the executive.[22] Although many post-APA decisions seemed to embrace this understanding,[23] there were important contrary indications, in which courts suggested that agency interpretations would be upheld so long as they were rational.[24]

1. Law and Policy

The law remained complex and confused until 1984, when the Court decided *Chevron*. The case involved an ambitious effort by the EPA to increase

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18. *See, e.g.*, NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111 (1944).

19. *See infra* Part II.

20. 5 U.S.C. §§ 551-557, 701-706 (2000).

21. *Id.* § 706.

22. *See* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 193-200 (1998).

23. *See, e.g.*, FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981); NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 499 (1960); Office Employees Int'l Union v. NLRB, 353 U.S. 313 (1957); NLRB v. Highland Park Mfg. Co., 341 U.S. 322 (1951); *Hearst Publ'ns*, 322 U.S. 111. For recognition of the ambiguity of the cases, see *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35 (2d Cir. 1976).

24. *See* Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980); Ford Motor Co. v. NLRB, 441 U.S. 488 (1979); Udall v. Tallman, 380 U.S. 1, 16 (1965); Gray v. Powell, 314 U.S. 402, 412 (1941).

private flexibility under the Clean Air Act.[25] More particularly, the EPA redefined "stationary source" under the Act so as to include an entire plant, rather than each pollution-emitting unit within the plant. Upholding the rule, the Supreme Court created a novel two-step inquiry for assessing agency interpretations of statutes. The first inquiry is whether Congress has directly decided the precise question at issue.[26] If Congress has not, the second inquiry is whether the agency's interpretation is "permissible," which is to say reasonable.[27] In the Court's view, Congress had not forbidden a plant-wide definition of "source"; hence, the EPA could supply whatever (reasonable) definition it chose.

Strikingly, the Court did not discuss the language or history of the APA. It did note that Congress sometimes explicitly delegates law-interpreting power to agencies.[28] But the Court could not, and did not, contend that the relevant provision of the Clean Air Act contained any such explicit delegation. The Court referred to the possibility that Congress might have wanted the agency to strike the appropriate balance with the belief "that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so."[29] But lacking any evidence on the question, the Court did not say that the EPA was the beneficiary of an implicit delegation here. On the contrary, it said that Congress's particular intention "matter[ed] not."[30]

Instead the Court offered two pragmatic arguments: judges lack expertise and they are not politically accountable. In interpreting law, the agency may "properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is . . . ."[31] The Court was alert to the fact that it was reviewing a decision made by the Reagan Administration that had altered the previous interpretation made by the Carter Administration. In the Court's view, it would be appropriate for agencies operating under the Chief Executive, rather than judges, to resolve "the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the

25. Pub. L. No. 95-95, 91 Stat. 712 (1977) (codified as amended at 42 U.S.C. §§ 7401-7671q. (2000)).

26. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

27. *Id.* at 843.

28. *Id.* at 843-44.

29. *Id.* at 865.

30. *Id.*

31. *Id.*

agency charged with the administration of the statute in light of everyday realities."[32]

2. *Behind* Chevron

What is most striking about the Court's analysis in *Chevron* is the suggestion that resolution of statutory ambiguities requires a judgment about resolving "competing interests." This is a candid recognition that assessments of policy are sometimes indispensable to statutory interpretation. Of course it is easy to find cases in which courts resolve ambiguities by using the standard legal sources—for example, by using dictionaries, consulting statutory structure, deploying canons of construction, or relying on legislative history if that technique is thought to be legitimate. Under the first step of *Chevron*, the executive will lose if the standard sources show that the agency is wrong. But sometimes those sources will leave gaps or reasonable disagreement; *Chevron* itself is such a case, and there are many others.

Suppose, for example, that the question involves the appropriate valuation of natural resources;[33] the proper calculation of Medicare payments;[34] or the proper extent of deregulation under the Telecommunications Act.[35] If we emphasize the need to attend to "competing interests," four separate points support the executive's power to interpret the law. First, interpretation of statutes often calls for technical expertise, and here the executive has conspicuous advantages over the courts. The question in *Chevron* itself was highly technical, and it was difficult to answer that question without specialized knowledge. Second, interpretation of statutes often calls for political accountability, and the executive has conspicuous advantages on that count as well. When the executive is seeking to expand or limit the Endangered Species Act or deciding whether to apply the Clean Air Act to greenhouse gases, democratic forces undoubtedly play a significant role. Third, the executive administers laws that apply over extended periods and across heterogeneous contexts. Changes in both facts and values argue strongly in favor of considerable executive power in interpretation. Unlike the executive, courts are too decentralized—and their processes far too cumbersome—to do the relevant "updating," or to adapt statutes to diverse domains. Fourth, it is often important to permit the modern state to act promptly and decisively.

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32. *Id.* at 865-66.

33. Ohio v. U.S. Dep't of the Interior, 880 F.2d 432 (D.C. Cir. 1989).

34. Univ. Med. Ctr. of S. Nev. v. Thompson, 380 F.3d 1197 (9th Cir. 2004).

35. MCI Telecomms. Corp. v. AT&T, 512 U.S. 218 (1994).

Deference to executive interpretations promotes that goal far more effectively than a strong judicial role, for two different reasons. Deference to the executive reduces the likelihood that judicial disagreement will result in time-consuming remands to the agency for further proceedings.[36] More subtly, such deference combats the risk that different lower courts will disagree about the appropriate interpretation of statutes—and thus counteracts the balkanization of federal law.[37]

To be sure, it is possible to imagine some tension among these different considerations. Perhaps an issue calls for specialized competence, but perhaps the relevant agency has been buffeted about by political pressure imposed by an administration for which technical considerations are far from primary.[38] Technical and political justifications for *Chevron* may not march hand-in-hand; they might well conflict with one another. But so long as the statute is genuinely ambiguous, and so long as the agency is not acting arbitrarily, it is entirely legitimate for the executive either to rely on its technical competence or to make its assessment on the basis of normative judgments that are not inconsistent with the governing statute.

Notice that so defended, *Chevron* stands for much more than the modest claim that courts may not invalidate executive action unless the standard legal sources require invalidation. Less modestly, *Chevron* means that courts must uphold reasonable agency interpretations even if they would reject those interpretations on their own. Courts must be prepared to say: "If we were interpreting the statute independently, we would read it to say X rather than Y; but because it is ambiguous, the executive is permitted to prefer Y."[39] This

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36. *See* JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 224-31 (1990) (arguing that remands discourage agency rule-making).

37. *See* Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1105-16 (1987) (documenting the balkanization of federal law).

38. For a popular account, see CHRIS MOONEY, THE REPUBLICAN WAR ON SCIENCE 224-47 (2005). Mooney contends that political considerations, not science, have driven policy judgments in many domains.

39. For those concerned about lack of judicial competence, it would be possible to raise a second-order objection. If courts are not particularly good at resolving ambiguities when the resolution turns on a judgment of policy, why should they be thought to be particularly good at identifying the proper standard of review of executive decisions, a question that necessarily turns on a judgment of policy? (I am grateful to David Barron for pressing this question.) The simplest answer is that when Congress has not spoken clearly, courts have no choice but to decide on the appropriate standard of review. The decision whether to select the *Chevron* approach, or some alternative, can be made only by courts, at least in cases in which Congress has not resolved the problem. (Courts could in principle resolve the question by asking what the executive would like them to do—second-order *Chevron*—but

argument applies most obviously to the national government, operated by the Chief Executive, who stands as the most visible official in the United States. But the same arguments can easily be invoked by other executive officers—above all, by governors and mayors—who are also entrusted with overseeing implementation of the law. For state and local officers, just as for federal officials, statutory ambiguities often cannot be resolved without judgments of policy. Those judgments should likewise be made by agencies with technical expertise or political accountability.

As we shall see, it is possible, in some circumstances, to suggest that statutory ambiguity is not enough—that for some questions, courts ought not allow the executive to resolve such ambiguities on its own, and that courts should instead rule that the executive lacks the relevant power unless Congress grants it expressly. Here we find an important limitation on the executive's power to interpret statutes, one to which I shall return in due course.

B. Chevron*'s Fiction: Delegation, Realism, and Institutional Competence*

We can now see that *Chevron* is properly understood as a kind of counter-*Marbury* for the administrative state.[40] Indeed, it suggests that in the face of ambiguity, it is emphatically the province of the executive department to say what the law is. But this understanding raises a large question: What underlies the rise of this counter-*Marbury*?

1. Fiction

In the years since *Chevron*, a consensus has developed on an important proposition, one that now provides the foundation for *Chevron* itself: The executive's law-interpreting power turns on congressional will.[41] If Congress wanted to repudiate *Chevron*, it could do precisely that. Before *Chevron*, some courts appeared to understand that the deference question was one for congressional resolution; they approached the deference question on a statute-by-statute basis, asking whether the relevant statute should be taken to include

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the question would remain why courts should choose to answer the question in that way.) For those who are skeptical of judicial capacities, of course, it would be tempting to seek a clear congressional judgment on the appropriate judicial approach to executive interpretations of law, but a congressional judgment is often absent.

40. *See, e.g.*, Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283 (1986).

41. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 227-31 (2001).

an implicit delegation.[42] In *Chevron*, the Court replaced that case-by-case inquiry with a simple rule, to the effect that delegations of rule-making power implicitly include the power to interpret ambiguities.[43] But as Justices Breyer and Scalia have independently emphasized, this is a legal fiction;[44] usually the legislature has not expressly conferred that power at all. The view that the executive may "say what the law is" results not from any reading of statutory text, but from a heavily pragmatic construction, by courts, of (nonexistent) congressional instructions.

In terms of the standard sources of law, *Chevron*'s fiction is not at all easy to defend. As noted, the text of the APA appears to contemplate independent review of judgments of law. Hence the most natural justification for deference is that certain grants of authority, in organic statutes such as the Clean Air Act, implicitly contain interpretive power as well. But this argument also runs into difficulty. At the time the APA was enacted, the bulk of important agency business was done via adjudication.[45] If Congress wanted courts to defer to the countless interpretations of organic statutes that were produced through agency adjudication, someone would almost certainly have said so at some point in the extensive debates.[46] The claim that agency adjudicators (or rule-makers) have interpretive authority is certainly weakened by the absence of any contemporaneous suggestions to that effect within Congress itself. Perhaps subsequent grants of adjudicative or rule-making power, as for example in the Clean Air Act or the Endangered Species Act, are best taken to confer interpretive power on the executive. If this is so, the question must be explored on a case-by-case basis, and it is likely that courts will be unable to find any clear expression of congressional will to that effect, bringing us back to the world of fictions.

To say that *Chevron* rests on a fiction, and one that does not clearly track congressional instructions, is to acknowledge that the Court's decision on the

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42. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515-16.

43. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984); *see also* Scalia, *supra* note 42, at 515-16.

44. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) (noting the fiction); Scalia, *supra* note 42, at 517 (same).

45. *See* STEPHEN BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 660 (5th ed. 2002).

46. For relevant discussion, see Duffy, *supra* note 22, at 193-202. Note also that the Attorney General's Manual relied on by Justice Scalia, *supra* note 42, at 513, supports the deference principle. In this particular context, however, the Attorney General's Manual is unreliable, as it states the views of the executive branch and would naturally be inclined to favor deference to its own views. *See* Duffy, *supra* note 22, at 195-96.

deference question involves judicial policymaking[47]—subject to legislative override, to be sure, but not rooted in actual legislative judgments. I suggest that the Court's allocation of interpretive power to the executive should be seen as an outgrowth of two closely related developments. The first is the legal realist attack on the autonomy of legal reasoning. The second is the twentieth-century shift from regulation through common law courts to regulation through executive agencies.

2. *Realists and Realism*

The legal realists saw the interpretation of statutory ambiguities as necessarily involving judgments of policy and principle.[48] They insisted that when courts understand statutes to mean one thing rather than another, they use judgments of their own, at least in genuinely hard cases. In a famous article, for example, Max Radin attacked the standard tools as largely unhelpful. In his view, "[a] legislative intent, undiscoverable in fact, irrelevant if it were discovered . . . is a queerly amorphous piece of slag."[49] Radin said that, inevitably, a key question was, "Will the inclusion of this particular determinate in the statutory determinable lead to a desirable result? What is desirable will be what is just, what is proper, what satisfies the social emotions of the judge, what fits into the ideal scheme of society which he entertains."[50]

Radin's argument was characteristic of the general period in which courts were being displaced by regulatory agencies. A specialist in administrative law, Ernst Freund saw at an early stage that for some statutes, "executive interpretation is an important factor."[51] Freund noted, with evident concern, that "in view of the inevitable ambiguities of language, a power of interpretation is a controlling factor in the effect of legislative instruments, and makes the courts that exercise it a rival organ with the legislature in the development of the written law."[52] After surveying the various sources of interpretation, Freund emphasized that policy, in the end, must be primary;

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47. Thus we find, at the meta-level, the same kinds of considerations to which *Chevron* is responsive insofar as that decision sees legal interpretation as involving judgments of policy. In *Chevron* itself, the word "source" could not be construed without such judgments; so too with most of the terms that must be construed in deciding on the appropriate judicial posture to agency interpretations of law.

48. Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 884 (1930).

49. *Id*. at 872.

50. *Id*. at 884.

51. Ernst Freund, *Interpretation of Statutes*, 65 U. PA. L. REV. 207, 211 (1917).

52. *Id*. at 208.

therefore, "in cases of genuine ambiguity courts should use the power of interpretation consciously and deliberately to promote sound law and sound principles of legislation."[53]

For his part, Karl Llewellyn contended that the standard sources of interpretation, above all the canons of construction, masked judgments that were really based on other grounds.[54] He asked courts to "strive to make sense *as a whole* out of our law *as a whole*."[55] In his view, the canons were plural and inconsistent, and thus unable to provide real help. Llewellyn argued that statutory meaning should be derived from "[t]he good sense of the situation and a *simple* construction of the available language to achieve that sense, *by tenable means, out of the statutory language*."[56]

Radin, Freund, and Llewellyn overstated their arguments. Canons of construction, for example, can constrain judicial (or executive) interpretation, and it may well be better to rely on them than on a judge's individual, general sense of what is best. But suppose that the realists were broadly right to suggest that, in the face of genuine ambiguity, courts often make judgments of policy.[57] Suppose that in hard cases, the search for "legislative intent" is often a fraud, and that when courts purport to rely on that intent, they often speak for their own preferred views.[58] If Radin, Freund, and Llewellyn are indeed right, then there seems to be little reason to think that courts, rather than the executive, should be making the key judgments. The President himself should be in a better position to make the relevant judgments, simply because of his comparatively greater accountability. And if specialized knowledge is required, executive agencies have large advantages over generalist judges. In support of the realist position, consider strong evidence that, for hard statutory questions within the Supreme Court, policy arguments of one or another sort often play a

53. *Id.* at 231.

54. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 395-400 (1950).

55. *Id.* at 399.

56. *Id.* at 401.

57. *See* Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1 (1998) (finding a large role for policy considerations in judicial judgments about statutory meaning).

58. Not incidentally, the question of deference to executive interpretations itself seems to fall in this category; it is hard to tease out, from the existing legal materials, an authoritative legislative judgment on that question, and hence it is necessary, as we have seen, to speak in terms of legal fictions.

central role, even in a period in which "textualism" has seemed on the ascendancy.[59]

3. *The New Deal and Beyond*

These points are easily linked with the post-New Deal transfer of effective lawmaking power from common law courts to federal bureaucracies. For much of the nation's history, the basic rules of regulation were elaborated by common law courts, using the principles of tort, contract, and property to set out the ground rules for social and economic relationships. In the early part of the twentieth century, some of those rules were taken to have constitutional status, so as to forbid legislative adjustments.[60] But in a wholesale attack on the adequacy of the common law, the New Deal saw the rise and legitimation of a vast array of new agencies, including the National Labor Relations Board (NLRB), the Securities and Exchange Commission (SEC), the Social Security Administration (SSA), the Federal Communications Commission (FCC), the Federal Deposit Insurance Corporation (FDIC), an expanded Federal Trade Commission (FTC), and an expanded Food and Drug Administration (FDA).[61]

Many of the agencies were necessarily in the business of interpreting ambiguous statutory provisions; indeed, interpretation was the central part of their job. Agency-made common law dominated the early days of the administrative state.[62] To take just one example, the NLRB was required to decide a number of fundamental questions about national labor policy. The statute did not speak plainly, and questions of policy were inevitably involved.[63] While the federal courts also played a significant and sometimes aggressive role,[64] the elaboration of the labor enactments of the New Deal was inevitably founded on the work of the NLRB. What can be said for the NLRB can also be said of the FDA, the FCC, the SEC, and the FTC, all of which, in the New Deal era, were also charged with implementing statutory law through the interpretation of largely open-ended statutory provisions.

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59. *See* Schacter, *supra* note 57.

60. *See* Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 880-82 (1987) (discussing the use of common law principles to inform constitutional law).

61. *See* BREYER ET AL., *supra* note 45, at 29.

62. As a modern example, consider the common law of cost-benefit analysis, itself an agency creation with infrequent judicial oversight. *See* CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE 129-48 (2005) (providing an overview).

63. *See, e.g.*, *In re* Botany Worsted Mills, 27 N.L.R.B. 687 (1940); *In re* Am. Can Co., 13 N.L.R.B. 1252 (1939).

64. *See* NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939).

There is an evident link between the realists' emphasis on the policy-driven nature of interpretation and the New Deal's enthusiasm for administrators, who were to be both expert and accountable.[65] The *Marbury* principle, calling for independent judicial judgments about law, came under intense pressure as a result of this enthusiasm. After President Roosevelt's triumph in the Supreme Court in the late 1930s, courts began to signal that the executive would have considerable law-interpreting power. A representative statement came in 1941, when the Court upheld a controversial interpretation by the Department of the Interior. The Court said that the judiciary may not "substitute its judgment for that of the" agency, and emphasized that courts should not "absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action."[66] It is significant that the Court suggested that "administrative functions" include judgments of law and emphasized the need for "prompt and definite action"[67]—an emphasis that is understandable on the heels of Roosevelt's effort to take bold action in the face of the Great Depression.[68] The need for prompt action has special importance in any period of large-scale change, especially one in which national security is threatened.

In the same year, the Attorney General's Committee on Administrative Procedure wrote:

> Even on questions of law [independent judicial] judgment seems not to be compelled. The question of statutory interpretation might be approached by the court de novo and given the answer which the court thinks to be the "right interpretation." Or the court might approach it, somewhat as a question of fact, to ascertain, not the "right interpretation," but only whether the administrative interpretation has substantial support. Certain standards of interpretation guide in that direction. Thus, where the statute is reasonably susceptible of more than one interpretation, the court may accept that of the administrative body. Again, the administrative interpretation is to be given weight—not merely as the opinion of some men or even of a lower tribunal, but as the opinion of the body especially familiar with the problems dealt with by the statute and burdened with the duty of enforcing it. This

65. See the celebration of administrative authority in JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938), which might well be seen as a bridge between the realists and the architects of the New Deal.

66. Gray v. Powell, 314 U.S. 402, 412 (1941).

67. *Id.*

68. For an overview, see CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS 35-53 (2004).

> may be particularly significant when the legislation deals with complex matters calling for expert knowledge and judgment.[69]

In this light, a recognition of the executive's law-interpreting power can be understood as a natural outgrowth of the twentieth-century shift from judicial to executive branch lawmaking. The shift has been spurred by dual commitments to specialized competence and democratic accountability—and also by an understanding of the need for frequent changes in policy over time, with new understandings of fact and new values as well. For banking, telecommunications, foreign relations, energy, national security, labor relations, and environmental protection—among many other areas—changing circumstances often require agencies to adapt old provisions to unanticipated problems. And if interpretation of unclear terms cannot operate without some of the interpreter's own judgments, then the argument for executive interpretation seems even more compelling.

4. Vacillations and Counterarguments

The period between 1940 and 1984 offered a mixed picture with respect to the deference question. In a number of cases, the Court seemed to indicate that it would offer relatively little deference to agencies.[70] The rise of the "hard look" doctrine in the 1970s,[71] spurred by judicial distrust of agency discretion, could not easily coexist with deference to agency interpretations of law. A key development was the election of President Reagan, whose administration in relevant ways replicated that of President Roosevelt, notwithstanding the obvious ideological differences between the two. In both cases, the executive branch attempted to reorient the law in significant domains, with large-scale rethinking of the approach offered by the preceding administration. It should come as no surprise that in those same periods that President Reagan attempted such rethinking, the Supreme Court firmly endorsed the law-interpreting power of the executive branch. At the time, the Court itself may have had limited ambitions for its decision in *Chevron*.[72] But the decision was

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69. ATTORNEY GEN.'S COMM. ON ADMIN. PROCEDURE, FINAL REPORT, S. DOC. NO. 77-8, at 90-91 (1941) (internal citations omitted).

70. The most important of these cases is *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411-15 (1971).

71. *See* Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 511 (1974).

72. *See* Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 ENVTL. L. REP. 10,606, 10,613 (1993).

soon viewed as a kind of revolution. It could be seen not only as a counter-*Marbury* for the modern era but also as a kind of *McCulloch v. Maryland*,[73] granting the executive broad discretion to choose its own preferred means to promote statutory ends.

The discussion thus far has provided the ingredients of *Chevron*'s understanding of (implicit, fictional) legislative instructions on the deference question. Expertise is often relevant, and the central questions often turn on judgments of policy, for which accountability is crucial. In the face of rapidly changing circumstances, the executive has significant advantages over the courts, especially in light of the frequent need for speed and expedition. Of course, plausible counterarguments can be made. The foundations of *Chevron*, understood in the terms I have sketched out, are intensely pragmatic, and a challenge might be mounted on pragmatic grounds. Suppose we believe that executive agencies do not usually deploy technical expertise in a way that is properly disciplined by political accountability. Suppose we think that such agencies are often or largely controlled by well-organized private groups hoping to redistribute wealth or opportunities in their favor.[74] If claims of agency "capture" are valid, deference to the executive might seem perverse. And if agencies are thought to be systematically biased, then the argument for independent judicial judgments on questions of law will seem much stronger.

We can easily imagine a parallel world, perhaps not unrecognizably different from our own, in which there is a high risk of unreliable or biased interpretations from the executive branch; perhaps courts can be trusted in comparison. In that parallel world, independent judicial interpretation would be the norm. Perhaps our world is, with respect to some agencies, akin to that parallel world. If courts fear incompetence or bias, they will be less likely to defer. Perhaps some institutions (the SEC? the White House itself?) deserve more respect than others (the Federal Energy Regulatory Commission? the Bureau of Immigration Affairs?); the real world of judicial review undoubtedly reflects different levels of deference to different agencies. Alternatively, it might be tempting to distinguish between those decisions that are attributable to the views of high-level officials, or those with technical expertise, and those decisions that involve low-visibility judgments that do not require, or do not benefit from, such expertise. As I have noted, political accountability and technical expertise are both important, but they might not march hand-in-hand. Perhaps politically accountable actors are not so interested in technical

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73. 17 U.S. (4 Wheat.) 316 (1819). Also see the superb discussion in Duffy, *supra* note 22, at 199-203.

74. *See, e.g.*, Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 214-20 (1976).

expertise; often they have agendas of their own.[75] If the displacement of common law courts by regulatory agencies is seen as an effort to ensure that judgments are made by specialists rather than generalists, then a strong judicial hand might, on occasion, be necessary to vindicate specialization against politics.

Indeed, several state courts call for independent judicial review of agency interpretations of law—and thus reject the executive's power to interpret state law. State courts in New York follow an approach closely akin to pre-*Chevron* law, deferring to agency interpretations of statutes to "varying degrees . . . depending upon the extent to which the interpretation relies upon the special competence the agency is presumed to have developed."[76] In this view, "the judiciary need not accord any deference to the agency's determination, and is free to ascertain the proper interpretation from the statutory language and legislative intent."[77] California courts reject the notion that agencies have been delegated authority to interpret statutes.[78] Similarly, the New Jersey Supreme Court notes that "courts are in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue."[79]

Few institutional judgments can be defended in the abstract. If agencies are systematically biased, independent judicial review of legal judgments is certainly easier to defend. Notwithstanding the counterarguments, the general argument for judicial deference to executive interpretations rests on the

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75. For a controversial account, see MOONEY, *supra* note 38, at 224-47.

76. Rosen v. Pub. Employment Relations Bd., 526 N.E.2d 25, 27-28 (N.Y. 1988).

77. *In re* Claim of Gruber, 674 N.E.2d 1354, 1358 (N.Y. 1996).

78. Yamaha Corp. v. State Bd. of Equalization, 960 P.2d 1031, 1033 (Cal. 1998).

79. *In re* Petition for Authorization to Conduct a Referendum on Withdrawal of N. Haledon Sch. Dist. from the Passaic County Manchester Reg'l High Sch. Dist., 854 A.2d 327, 336 (N.J. 2004) (internal quotations marks omitted). The difference between the *Chevron* approach and the contrasting approach of several state courts raises many puzzles. One explanation would point to the nature of the federal system. In that system, the interest in uniformity helps to support *Chevron*; an independent judicial role could result in the balkanization of federal law, as different courts of appeals produce different interpretations. This point has much less force within states because review by the state's highest court can more easily sort out any such problems.

A second explanation is that state agencies may well suffer by comparison with federal agencies, at least as a general rule. Perhaps such agencies are less likely to have the virtues associated with technical expertise. Perhaps some such agencies are peculiarly vulnerable to factional power; perhaps state courts are aware of that fact. If James Madison was right to think that factional influence is more difficult to obtain against the nation than against the states, *see* THE FEDERALIST NO. 10 (James Madison), then an independent judicial judgment is more important against state agencies than against their federal counterparts. If so, the institutional calculations that support *Chevron* are weakened at the state level.

undeniable claims that specialized competence is often highly relevant and that political accountability plays a legitimate role in the choice of one or another approach. A judicial effort to distinguish among agencies, or among levels of visibility or uses of technical expertise, is not without appeal, and undoubtedly some such effort sometimes plays a tacit role in judicial rulings. But if it were made explicit, such an effort would lead to a more complicated system of review, and it might also introduce biases and errors of the judges' own. If the executive's judgment is evidently biased, or if it ignores relevant facts, then the proper approach is not to abandon *Chevron*, but to invalidate that judgment under *Chevron*'s second step, or as unlawfully arbitrary.[80] A central goal of *Chevron* is to ensure that within the realm of reasonableness, the key judgments are made by policymaking officials, not by those with strictly legal competence.

I have suggested that *Chevron* is this generation's *Erie*, and it is now time to tighten the analogy, whose clarity is growing over time. Indeed, *Chevron* has the same relationship to the last half of the twentieth century as *Erie* had to the first half. *Erie* rested on a judicial recognition that the law is not "a brooding omnipresence in the sky."[81] When federal judges give content to the common law, they are necessarily relying on judgments of their own. When the Supreme Court concluded that there is no general federal common law, it recognized this point, which is what led to the conclusion that in diversity cases, federal judges should attend to the content of state law, not to their own beliefs and commitments. In the federal common law cases decided before *Erie*, judicial judgments about "what the law is" were not a matter of finding something, but a product of judicial norms and values. *Chevron* is closely parallel. When statutes are ambiguous, a judgment about their meaning rests on no brooding omnipresence in the sky, but on assessments of both policy and principle. There is no reason to allow those assessments to be made by federal courts rather than executive officers. So, at least, *Chevron* holds.

C. *The Real World of* Chevron *and "Policy Spaces"*

How has *Chevron* affected the real world of executive and judicial action? E. Donald Elliott, a former General Counsel of the EPA, has offered an informal but illuminating account that strongly supports the argument I have sketched

80. *See* Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (striking down an agency decision as unlawfully arbitrary).

81. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

on behalf of deference to the executive.[82] Elliott reports that *Chevron* "change[d] the way that we did business."[83] Before *Chevron*, the Office of Legal Counsel (OLC) within the EPA usually assumed that a statute was "a prescriptive text having a single meaning, discoverable by specialized legal training and tools."[84] In Elliott's view, the single meaning approach created a special role for lawyers, one that "led to a great deal of implicit policy-making."[85] But after *Chevron*, lawyers within the EPA ceased making "point estimates," which presumed that environmental statutes had only one possible meaning. Instead they "attempt[ed] to describe a permissible range of agency policy-making discretion that arises out of a statutory ambiguity."[86] The result was not a single meaning but a "policy space" containing a range of permissible interpretive discretion. It follows that the "agency's policy-makers, not its lawyers, should decide which of several different but legally defensible interpretations to adopt."[87]

In Elliott's account, "*Chevron* opened up and validated a policy-making dialogue within agencies about what interpretation the agency *should* adopt for policy reasons, rather than what interpretation the agency *must* adopt for legal reasons."[88] The result has been to "increase[] the weight given to the views of air pollution experts in the air program office relative to the lawyers."[89] At the same time, there has been a shift from an emphasis on legal texts to an emphasis on consequences. "*Chevron* moved the debate from a sterile, backward-looking conversation about Congress' nebulous and fictive intent to a forward-looking, instrumental dialogue about what future effects the proposed policy is likely to have."[90] In short, "*Chevron* is significant for reducing the relative power of lawyers within EPA and other agencies and for increasing the power of other professionals."[91]

It is not clear whether the shift that Elliott describes has also occurred within other agencies. But if the FCC is deciding whether or how to engage in

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82. 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 (2005).

83. *Id.* at 11.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 12.

88. *Id.*

89. *Id.* (emphasis omitted).

90. *Id.* at 13.

91. *Id.*

deregulation, if the President is deciding how to implement an authorization to use force in response to the attacks of September 11,[92] and if the Department of the Interior is deciding on the reach of the Endangered Species Act,[93] there is every reason to think that the job of lawyers, and of reviewing courts, is to identify policy spaces and not to insist on point estimates.

The behavior of the executive is, of course, affected by the behavior of courts, and there is a serious question whether *Chevron* is having the effect that it was meant to have. Peter Schuck and Elliott found a modest but statistically significant increase in affirmation rates in the immediate aftermath of *Chevron*. In particular, they found an increase in affirmation rates from seventy-one percent in the pre-*Chevron* year of 1984 to eighty-one percent in the post-*Chevron* year of 1985.[94] They also found a dramatic decrease in judicial remands on the ground that agencies erred on the law.[95] The combination of a higher rate of affirmation with a lower rate of remands for errors of law strongly suggests that *Chevron* had a significant impact.[96]

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92. *See* Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663 (2005).

93. *See* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995).

94. Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1031.

95. *Id.* at 1032-33.

96. *Id.* at 1034. We must be careful, however, with findings of this sort, because litigants should be expected to adjust their behavior to a post-*Chevron* world. Suppose that *Chevron* does make it more difficult to convince a court that an agency violated the law. If this is so, then litigants will not bring the cases they would have brought, and their success rate will change accordingly. This possibility suggests a hypothesis: The rate of judicial validations of agency interpretations of law should remain fairly constant over time, as litigants adjust their claims to the prevailing deference principles. But there is a countervailing factor: After *Chevron*, agencies might be willing to defend interpretations that they would not have made in a pre-*Chevron* world. As a result of this factor too, it might be expected that the rate of validation will remain constant. The general point is that because the mix of cases will shift, the world cannot be held constant for a test of *Chevron*'s effect.

Thomas Merrill offered an interesting picture of Supreme Court decisions involving deference to executive agencies before and after *Chevron*. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992). In the three-year period before *Chevron*, the Court decided forty-five cases on the deference question, accepting the agency's view seventy-five percent of the time. *Id.* at 982 tbl.2. In the seven-year period after *Chevron*, the Court decided ninety cases on that question, accepting the agency's view seventy percent of the time. *Id.* at 981 tbl.1. Merrill concluded that *Chevron* did not produce an increase in the level of deference to agency decisions. *Id.* at 984. But litigants on both sides may have adjusted their behavior in accordance with *Chevron*; thus, despite appearances, the world may not have remained constant between 1981 and 1990. Other variables might also account for the shift, including changes in the substantive questions with which the Supreme Court was confronted.

A more recent study, based on more extensive data and conducted by Thomas Miles and myself, offers a much more mixed picture, one that suggests a continuing role for judicial policy judgments in overseeing executive interpretations[97]—a role that greatly endangers the aspirations that underlie *Chevron* itself. Chief Justice Rehnquist and Justices Scalia and Thomas were more likely to defer to a conservative agency decision than to a liberal one; Justices Stevens, Souter, Breyer, and Ginsburg were more likely to defer to a liberal decision than to a conservative one. Chief Justice Rehnquist and Justices Scalia and Thomas, taken as a group, showed a significantly higher deference rate under the two Bush Administrations than under the Clinton Administration. By contrast, Justices Stevens, Souter, Breyer, and Ginsburg showed a significantly higher deference rate under President Clinton than under the two Bush Administrations. (Interestingly, the deference rate of the latter four Justices, taken as a whole, was higher under the two Bush Administrations than the deference rate of Chief Justice Rehnquist and Justices Scalia and Thomas, taken as a whole, in the same periods; but the largest difference was found under the Clinton Administration, when the deference rates of the three conservative Justices plummeted and those of the four others increased.) These figures reveal that within the Supreme Court, the political commitments of the Justices continue to play a substantial role in review of agency interpretations of law.

Among the lower courts, we investigated all published court of appeals decisions between 1990 and 2004, reviewing interpretations of law by the EPA and the NLRB. We found that Democratic appointees were more likely to uphold an interpretation under a Democratic administration than under a Republican one; and that Republican appointees were more likely to uphold an agency interpretation under a Republican administration than under a Democratic one. Republican appointees upheld liberal interpretations less often than conservative ones; Democratic appointees voted to uphold liberal agency interpretations more often than conservative ones. Perhaps most disturbingly, a Democratic appointee, sitting with two other Democratic appointees, was *far* more likely to vote to uphold a liberal decision than a conservative one—and a Republican appointee, sitting with two other Republican appointees, was *far* more likely to vote to uphold a conservative decision than a liberal one.

It is clear that even under *Chevron*, the political commitments of reviewing judges continue to play a significant role in the decision whether to uphold

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97. *See* Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823 (2006).

interpretations by the executive branch—and differences between Republican and Democratic appointees suggest that policy disagreements are a key factor. This evidence greatly fortifies the argument for a strong reading of *Chevron*. There is no reason to think that the meaning of ambiguous statutes should depend on the composition of the panel that litigants draw, or on whether a Republican or Democratic President has appointed the majority on the Supreme Court.

II. *MARBURY*'S REVENGE?

Since 1984, there have been serious attacks on the idea that the executive has the power to say what the law is. In the last twenty years, efforts to cabin the executive's power have taken several forms. I outline the principal efforts here and explain why they should be rejected—with one important exception.

A. Chevron *Step Zero (with a Note on Deference to the President)*

In recent years, the most active debates over the executive's power to interpret the law have involved "*Chevron* Step Zero"—the threshold inquiry into whether the executive's law-interpreting power exists at all.[98] The Step Zero inquiry has produced a great deal of confusion and complexity, disappointing those who hoped that *Chevron* would simplify the law.[99]

The key case is *United States v. Mead Corp.*,[100] which involved the legal status of a tariff clarification ruling by the U.S. Customs Service. The Court distinguished between *Chevron* cases, subject to the two-step framework, and other kinds of cases, in which the agency's decision would be consulted but would not receive the ordinary level of deference.[101] The Court's central suggestion was that *Chevron* applies "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[102] An implicit delegation of interpretive authority

98. *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006).

99. *See* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005); Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003).

100. 533 U.S. 218 (2001).

101. These cases follow *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), and hence it is now possible to distinguish between "*Chevron* deference" and "*Skidmore* deference."

102. *Mead*, 533 U.S. at 226–27.

would be apparent if Congress "would expect the agency to be able to speak with the force of law."[103]

What is motivating the Court to restrict *Chevron*'s domain? The Court's own rationale speaks of the absence of a congressional delegation of law-interpreting power.[104] Perhaps there has been no delegation in cases in which *Chevron* has been held not to apply. But recall that we are speaking here of fictions, not of actual congressional instructions. In *Mead* and similar cases, why is the refusal to defer to the executive the most sensible fiction, that is, the most reasonable instruction to attribute to Congress? The Court might well be reasoning that if an agency is not operating pursuant to formal procedures, it is less likely to be entitled to deference, because the absence of such procedures signals a lack of accountability and a risk of arbitrariness.[105] Perhaps formal procedures increase the likelihood that expertise will be properly applied; perhaps they also ensure political constraints on agency discretion.

These suggestions are understandable, but there are two problems with the resulting state of affairs. The first involves the burdens of decision. To say the least, it is unfortunate if litigants and courts must work extremely hard to know whether a decision by the executive is entitled to deference.[106] The second and more fundamental problem involves institutional comparisons. Even when an agency's decision is not preceded by formal procedures, there is no reason to think that courts are in a better position than agencies to resolve statutory ambiguities. For the future, *Mead* should not be taken to establish anything like a presumption against *Chevron*-style deference in cases in which the agency has not proceeded through formal procedures. Instead *Mead* should be seen as an unusual case in an exceedingly unusual setting, in which low-level administrators were required to produce thousands of rulings, in a way that undermined the view that the executive branch should receive deference.

A narrow understanding of *Mead* would continue to allow deference to be applied to many agency decisions not preceded by formal procedures.[107] Most importantly, that narrow understanding would suggest that the President himself is entitled to deference in his interpretations of law, even if he has not followed formal procedures. If Congress delegates authority to the President,

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103. *Id*. at 229.

104. In the same vein, see *Gonzales v. Oregon*, 126 S. Ct. 904, 918-22 (2006) (rejecting the agency interpretation on the ground that Congress had not delegated law-interpreting authority).

105. *See* Bressman, *supra* note 99.

106. Consider, for example, the exceedingly complex debates in *Gonzales*. The majority concluded that Congress did not delegate law interpreting power, 126 S. Ct. at 918-22, while Scalia concluded that Congress did delegate such power, *id*. at 936-38 (Scalia, J., dissenting).

107. For more detailed discussion, see Sunstein, *supra* note 98.

then Congress presumably also entitles him to construe ambiguities as he sees fit, subject to the general requirement of reasonableness.[108]

B. Pure Questions of Law

In *INS v. Cardoza-Fonseca*,[109] the Court suggested that "a pure question of statutory construction" is "for the courts to decide,"[110] and that such a "pure question" must be treated differently from the question of interpretation that arises when an agency is applying a standard "to a particular set of facts."[111] Taken on its face, *Cardoza-Fonseca* seems to be an effort to restore the pre-*Chevron* status quo by asserting the primacy of the judiciary on purely legal questions. And in fact, Justice Scalia construed the Court's opinion in exactly this manner, objecting that the Court's "discussion is flatly inconsistent" with *Chevron*.[112] On this count Justice Scalia was clearly correct. The key point—and my main contention here—is that even when purely legal questions are raised, purely legal competence may not be enough to resolve them. Justice Scalia's concurrence has triumphed, in the sense that there is no separate category of cases involving purely legal questions.

C. Jurisdiction

The Supreme Court has divided on the question of whether *Chevron* applies to jurisdictional questions,[113] an issue that remains unsettled in the lower courts.[114] If courts are entitled to make independent judgments about

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108. *See* Acree v. Republic of Iraq, 370 F.3d 41, 64 n.2 (D.C. Cir. 2004) (Roberts, J., concurring) ("The applicability of *Chevron* to presidential interpretations is apparently unsettled, but it is interesting to note that this would be an easy case had the EWSAA provided that, say, the Secretary of State may exercise the authority conferred under section 1503. It is puzzling why the case should be so much harder when the authority is given to the Secretary's boss.") (citations omitted).

109. 480 U.S. 421 (1987).

110. *Id*. at 446.

111. *Id*. at 448.

112. *Id.* at 454 (Scalia, J., concurring).

113. *See* Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 380-82 (1988) (Scalia, J., concurring in the judgment) (arguing for deference to jurisdictional judgments); *id*. at 388-90 (Brennan, J., dissenting) (arguing against such deference).

114. *See, e.g.*, United Transp. Union-Ill. Legislative Bd. v. Surface Transp. Bd., 183 F.3d 606 (7th Cir. 1999) (refusing to defer on a jurisdictional issue); Cavert Acquisition Co. v. NLRB, 83 F.3d 598 (3d Cir. 1996) (deferring on a jurisdictional issue involving the definition of "employee"); Alaska v. Babbitt, 72 F.3d 698 (9th Cir. 1995) (deferring on a jurisdictional

jurisdictional issues, the executive would be deprived of law-interpreting power in many of the areas in which it would most like to exert that power. The importance of such an exception would be difficult to overstate.

Any exemption of jurisdictional questions is vulnerable on two grounds. First, the line between jurisdictional and non-jurisdictional questions is far from clear, and hence any exemption threatens to introduce much more complexity into the deference inquiry. Second, and far more importantly, the considerations that underlie *Chevron* support its application to jurisdictional questions. If an agency is asserting or denying jurisdiction over some area, it is either because democratic forces are leading it to do so or because its own specialized competence justifies its jurisdictional decision. Suppose, for example, that the FDA is asserting jurisdiction over tobacco products[115] or that the EPA is asserting jurisdiction over greenhouse gases.[116] Any such decision would be driven by some combination of political and technical judgments. So long as the statute is ambiguous, the executive should have the power to construe its jurisdictional limits as it (reasonably) sees fit.

D. Major Questions

Does *Chevron* apply to "major" questions?[117] The Court signaled a possible negative answer in *FDA v. Brown & Williamson Tobacco Corp.*,[118] the tobacco case with which I began this Essay. Much of the opinion emphasized the wide range of tobacco-specific legislation enacted by Congress in the last few decades—legislation that, in the Court's view, should "preclude an interpretation of the FDCA that grants the FDA jurisdiction to regulate tobacco products."[119] But the Court added an important closing word. *Chevron*, the Court noted, is based on "an implicit delegation," but in "extraordinary cases," courts may have reason to "hesitate before concluding that Congress has

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issue involving the definition of "public lands"). A recent discussion can be found in *Natural Resources Defense Council v. Abraham*, 355 F.3d 179 (2d Cir. 2004), in which the court, after finding a Step One violation, notes that "it seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power," and then suggests that *Mead* (!) provides the appropriate framework. *Id.* at 199-200.

115. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

116. *Cf.* Nicholle Winters, Note, *Carbon Dioxide: A Pollutant in the Air, but Is the EPA Correct That It Is Not an "Air Pollutant?,"* 104 COLUM. L. REV. 1996 (2004).

117. This question is explored in more detail in Sunstein, *supra* note 98.

118. 529 U.S. 120 (2000).

119. *Id.* at 155.

intended such an implicit delegation."[120] The Court added, "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[121]

The Court seems to be saying that for decisions of great "economic and political significance," an implicit delegation ought not to be found. And if an exception exists for major questions, then the executive's power of interpretation faces a large limitation. Indeed, the EPA has seized on *Brown & Williamson* to contend that it lacks the power to regulate greenhouse gases.[122] The problem is that there is no sufficient justification for the conclusion that major questions should be resolved judicially rather than administratively. To say the least, no simple line separates minor or interstitial from major questions. An insistence on such a line would raise doubts about an array of decisions, including *Chevron* itself; the question in that case, involving the definition of "source," had "economic and political significance" and is plausibly characterized as quite major. In any case, expertise and accountability, the linchpins of *Chevron*'s legal fiction, are highly relevant to the resolution of major questions. Contrary to Justice Breyer's suggestion,[123] there is no reason to think that Congress would want courts, rather than agencies, to resolve major questions.

Assume, for example, that the relevant statutes in *Brown & Williamson* could plausibly be read to support or to forbid the agency action at issue. If so, the argument for judicial deference would be exceptionally strong. In *Brown & Williamson*, the FDA was taking action to reduce one of the nation's most serious public health problems in a judgment that had a high degree of public visibility and required immersion in the subject at hand. Was it really best to understand Congress as having delegated the resolution of the underlying questions to federal courts? Which federal courts? Nominated by which President?

A different version of the "major questions" exception would have greater appeal. On this alternative view, the executive should not be allowed to move the law in fundamentally new directions without congressional approval.[124] In insisting on this point, courts would not be displacing policy decisions by the

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120. *Id.* at 159.

121. *Id.* at 160.

122. *See* J. Christopher Baird, Note, *Trapped in the Greenhouse?: Regulating Carbon Dioxide After* FDA v. Brown & Williamson Tobacco Corp., 54 DUKE L.J. 147, 157-58 (2004); Winters, *supra* note 116, at 1997-2001.

123. *See* STEPHEN BREYER, ACTIVE LIBERTY 107 (2005).

124. I am grateful to Jed Rubenfeld for pressing this point.

executive branch. They would be attempting instead to require the relevant changes to be made by Congress, not by the executive in the absence of clear legislative authorization. Perhaps *Brown & Williamson* can be understood in these terms.[125] The central idea, rooted in Article I, is that legislative power is vested in Congress, and massive shifts in direction must be specifically authorized by the national lawmaker. As we shall soon see, this claim is on the right track insofar as it emphasizes the relevance of nondelegation concerns to the *Chevron* framework.[126]

As described thus far, however, the "major questions" argument runs into two problems. First, the distinction between "major" changes and less "major" ones remains ambiguous. There is no metric here for making the necessary distinctions. Second, it is entirely legitimate for the executive to make "major" changes insofar as it is doing so through reasonable interpretation of genuinely ambiguous statutes. The alternative position would freeze existing interpretations, forbidding their alteration until Congress called for it. A position of this sort would badly disserve modern government and its needs, which are far better satisfied by allowing the executive to adopt reasonable interpretations of statutory ambiguities. Nothing in Article I of the Constitution argues otherwise. The best use of nondelegation concerns lies elsewhere.

E. Nondelegation Canons and the Limits of Executive Power

My general argument has been in favor of an expansive view of the executive's power to interpret the law. But there is one area in which that power is properly limited—an area involving interpretive principles that require Congress to decide certain issues explicitly. In this area, an exception to the *Chevron* principle, calling for invalidation of agency decisions at Step One, is entirely appropriate.

It is often said that Congress must speak with clarity, most obviously in connection with the nondelegation doctrine.[127] In fact, my argument on behalf

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125. And so too for *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994), which prohibited the FCC from adopting a large-scale deregulatory initiative. The Court emphasized that the proposed initiative would amount to a "radical or fundamental change in the Act's tariff-filing requirement," *id.* at 229, and that "it is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion," *id.* at 231.

126. *See infra* Section II.E.

127. For general discussion and critique, see Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

of judicial deference to executive interpretations of law might seem to be in tension with that doctrine. On a widely held view, Article I of the Constitution forbids Congress from "delegating" its power to anyone else, and open-ended grants of authority are unconstitutional.[128] Though the Supreme Court has not invoked the nondelegation doctrine to invalidate a federal statute since 1935,[129] the Court continues to pay lip service to the doctrine and to hold it in reserve for extreme cases.[130] Why has the Court been so reluctant to use the doctrine to strike down statutes? One reason is that the idea of nondelegation is difficult to enforce, requiring difficult judgments of degree. The relevant question is how much discretion is too much, and there are no simple standards for answering this question.[131] There are also doubts about the constitutional pedigree of the doctrine and about whether it would improve or impair American government.[132]

The nondelegation doctrine now operates as a tool of statutory construction, suggesting a presumption in favor of narrow rather than open-ended grants of authority.[133] It is tempting to object to *Chevron* on nondelegation grounds, because the decision grants the executive the authority to interpret the very statutes that limit its power. But there is a serious problem with this objection. If the executive is denied interpretive authority, that authority is given to the judiciary instead, and that step would hardly reduce the nondelegation concern; it would merely grant courts the power to make judgments of policy and principle. If anything, an allocation of policymaking authority to the executive seems to reduce the nondelegation concern, precisely because the executive, far more than courts, has a measure of accountability.

Nonetheless, there is a set of cases in which courts have denied the executive the authority to interpret the law, on the ground that the key decisions must be explicitly made by the national lawmaker. Most importantly, the executive is not permitted to construe statutes so as to raise serious

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128. *See, e.g.*, DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 10-22 (1993); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002).

129. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

130. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

131. *See* Mistretta v. United States, 488 U.S. 361, 415-16 (1989) (Scalia, J., dissenting) (emphasizing problems with judicial enforcement of the conventional doctrine).

132. *See* Posner & Vermeule, *supra* note 127.

133. *See* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980).

constitutional doubts.[134] This principle is far more ambitious than the modest claim that a statute will be construed so as to be constitutional. Instead it means that the executive is forbidden to adopt interpretations that are constitutionally sensitive, even if those interpretations might ultimately be upheld. So long as the statute is unclear and the constitutional question serious, Congress must decide to raise that question via explicit statement.[135]

Why does this idea overcome the executive's power of interpretation? The reason is that we are speaking of a kind of nondelegation canon—one that attempts to require Congress to make its instructions exceedingly clear and does not permit the executive to make constitutionally sensitive decisions on its own.[136] Other interpretive principles, also serving as nondelegation canons, trump *Chevron* as well, because they require a clear statement from the national legislature. Consider the notion that unless Congress has spoken with clarity, the executive is not permitted to interpret a statute to apply retroactively.[137] Here too, a nondelegation canon is at work: Only Congress may compromise the interest, long honored by Anglo-American traditions, in avoiding retroactive application of law. Or consider the idea that the executive cannot interpret statutes and treaties unfavorably to Native Americans.[138] This idea is plainly an outgrowth of the complex history of relations between the United States and Native American tribes, which have semi-sovereign status; it is an effort to ensure that any unfavorable outcome will be a product of an explicit judgment of the national legislature.

In areas ranging from broadcasting to the war on terror, the nondelegation canons operate as constraints on the interpretive discretion of the executive.[139] What emerges is therefore a simple structure. In general, the executive is

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134. *See, e.g.*, Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172-73 (2001); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 574-78 (1988).

135. AFL-CIO v. FEC, 333 F.3d 168, 179-81 (D.C. Cir. 2003) (striking down executive interpretation under Step Two to avoid First Amendment problems).

136. I discuss this idea more generally in Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

137. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

138. *See* Williams v. Babbitt, 115 F.3d 657, 660 (9th Cir. 1997) (noting in dicta that courts "are required to construe statutes favoring Native Americans liberally in their favor"); Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1461 (10th Cir. 1997) (grounding a canon of statutory construction favoring Native Americans in "the unique trust relationship between the United States and the Indians"); Tyonek Native Corp. v. Sec'y of the Interior, 836 F.2d 1237, 1239 (9th Cir. 1988) (referring in dicta to the canon of statutory construction that "statutes benefiting Native Americans should be construed liberally in their favor").

139. *See* Sunstein, *supra* note 92, at 2670-72.

permitted to interpret ambiguous statutes as it sees fit, subject to the constraints of reasonableness. The only limitations are found in the nondelegation canons. The resulting framework is admirably well suited to the needs of modern government; it grants the executive exactly the degree of discretion that it deserves to possess.

CONCLUSION

Chevron is best taken as a vindication of the realist claim that resolution of statutory ambiguities often calls for judgments of policy and principle. The allocation of law-interpreting power to the executive fits admirably well with the twentieth-century shift from common law courts to regulatory administration. Of course, the executive must follow the law when it is clear, and agency decisions are invalid if they are genuinely arbitrary. I have also emphasized that in some domains, Congress must provide explicit authorization to executive officials. When the executive is raising serious constitutional questions, statutory ambiguity does not constitute adequate authorization, and the executive branch should not be permitted to act on its own. But if the governing statute is ambiguous, the executive should usually be permitted to interpret it as it reasonably sees fit.

Unfortunately, courts have occasionally attempted to reassert their primacy in the interpretation of statutory law; as a result, the political convictions of federal judges continue to play a role in judicial review of agency interpretations. These efforts should be firmly resisted. The meaning of statutory enactments is no brooding omnipresence in the sky. *Chevron* is our *Erie*, and much of the time, it is emphatically the province and duty of the executive branch to say what the law is.