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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. <i>MARBURY</i> , COUNTER- <i>MARBURY</i> , AND THE NEW DEAL	2584
A. Interpretation as Policymaking	2585
1. Law and Policy	2585
2. Behind <i>Chevron</i>	2587
B. <i>Chevron</i> '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 <i>Chevron</i> and "Policy Spaces"	2598
II. <i>MARBURY</i> 'S REVENGE?	2602
A. <i>Chevron</i> 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.<sup>1</sup> A majority of the Supreme Court rejected a challenge to the Carter-era regulation<sup>2</sup> over a dissenting opinion by Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas.<sup>3</sup>

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.<sup>4</sup> Justice Breyer wrote a dissenting opinion, joined by Justices Stevens, Souter, and Ginsburg.<sup>5</sup>

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.<sup>6</sup> Environmental groups and others challenged the EPA’s decision. The court of appeals rejected the challenge over Judge Tatel’s dissent.<sup>7</sup>

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.<sup>8</sup> 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 Cmty. 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.<sup>9</sup> 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*<sup>10</sup> 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.*<sup>11</sup> is our *Erie*. When courts resolve genuine ambiguities, they cannot appeal to any "brooding omnipresence in the sky";<sup>12</sup> often they must rely on policy judgments of their own. Those judgments should be made by the executive, not the judiciary.<sup>13</sup> 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 degree 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.”<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup>

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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,<sup>18</sup> which continues to play a role in contemporary law.<sup>19</sup> As we shall soon see, *Chevron* selects other foundations.

### A. Interpretation as Policymaking

The Administrative Procedure Act (APA),<sup>20</sup> 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.”<sup>21</sup> At first glance, this provision appears to reassert the understanding that questions of statutory interpretation must be resolved by courts, not the executive.<sup>22</sup> Although many post-APA decisions seemed to embrace this understanding,<sup>23</sup> there were important contrary indications, in which courts suggested that agency interpretations would be upheld so long as they were rational.<sup>24</sup>

#### 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. Millhollin*, 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.<sup>25</sup> 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.<sup>26</sup> If Congress has not, the second inquiry is whether the agency’s interpretation is “permissible,” which is to say reasonable.<sup>27</sup> 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.<sup>28</sup> 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.”<sup>29</sup> 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.”<sup>30</sup>

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 . . .”<sup>31</sup> 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

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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.”<sup>32</sup>

## 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;<sup>33</sup> the proper calculation of Medicare payments;<sup>34</sup> or the proper extent of deregulation under the Telecommunications Act.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup>

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.<sup>38</sup> 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.”<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup> But as Justices Breyer and Scalia have independently emphasized, this is a legal fiction;<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> 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<sup>47</sup>—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.<sup>48</sup> 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.”<sup>49</sup> 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.”<sup>50</sup>

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.”<sup>51</sup> 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.”<sup>52</sup> 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.”<sup>53</sup>

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.<sup>54</sup> He asked courts to “strive to make sense *as a whole* out of our law *as a whole*.”<sup>55</sup> 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*.”<sup>56</sup>

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.<sup>57</sup> 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.<sup>58</sup> 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

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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 ascendency.<sup>59</sup>

### 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.<sup>60</sup> 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).<sup>61</sup>

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.<sup>62</sup> 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.<sup>63</sup> While the federal courts also played a significant and sometimes aggressive role,<sup>64</sup> 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, *LAW 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.<sup>65</sup> 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."<sup>66</sup> It is significant that the Court suggested that "administrative functions" include judgments of law and emphasized the need for "prompt and definite action"<sup>67</sup>—an emphasis that is understandable on the heels of Roosevelt's effort to take bold action in the face of the Great Depression.<sup>68</sup> 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

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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.<sup>69</sup>

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.<sup>70</sup> The rise of the “hard look” doctrine in the 1970s,<sup>71</sup> 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*.<sup>72</sup> 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*,<sup>73</sup> 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.<sup>74</sup> 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.<sup>75</sup> 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.”<sup>76</sup> 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.”<sup>77</sup> California courts reject the notion that agencies have been delegated authority to interpret statutes.<sup>78</sup> 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.”<sup>79</sup>

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

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.<sup>80</sup> 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."<sup>81</sup> 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

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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.<sup>82</sup> Elliott reports that *Chevron* “change[d] the way that we did business.”<sup>83</sup> 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.”<sup>84</sup> 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.”<sup>85</sup> 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.”<sup>86</sup> 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.”<sup>87</sup>

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.”<sup>88</sup> 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.”<sup>89</sup> 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.”<sup>90</sup> 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.”<sup>91</sup>

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,<sup>92</sup> and if the Department of the Interior is deciding on the reach of the Endangered Species Act,<sup>93</sup> 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.<sup>94</sup> They also found a dramatic decrease in judicial remands on the ground that agencies erred on the law.<sup>95</sup> 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.<sup>96</sup>

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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 Cmty. 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<sup>97</sup>—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.<sup>98</sup> The Step Zero inquiry has produced a great deal of confusion and complexity, disappointing those who hoped that *Chevron* would simplify the law.<sup>99</sup>

The key case is *United States v. Mead Corp.*,<sup>100</sup> 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.<sup>101</sup> 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."<sup>102</sup> An implicit delegation of interpretive authority

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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.”<sup>103</sup>

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.<sup>104</sup> 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.<sup>105</sup> 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.<sup>106</sup> 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.<sup>107</sup> 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,

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.<sup>108</sup>

### B. Pure Questions of Law

In *INS v. Cardoza-Fonseca*,<sup>109</sup> the Court suggested that “a pure question of statutory construction” is “for the courts to decide,”<sup>110</sup> 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.”<sup>111</sup> 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*.<sup>112</sup> 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,<sup>113</sup> an issue that remains unsettled in the lower courts.<sup>114</sup> 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<sup>115</sup> or that the EPA is asserting jurisdiction over greenhouse gases.<sup>116</sup> 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?<sup>117</sup> The Court signaled a possible negative answer in *FDA v. Brown & Williamson Tobacco Corp.*,<sup>118</sup> 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.”<sup>119</sup> 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.”<sup>120</sup> 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.”<sup>121</sup>

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.<sup>122</sup> 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,<sup>123</sup> 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.<sup>124</sup> 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.<sup>125</sup> 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.<sup>126</sup>

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.<sup>127</sup> 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.<sup>128</sup> Though the Supreme Court has not invoked the nondelegation doctrine to invalidate a federal statute since 1935,<sup>129</sup> the Court continues to pay lip service to the doctrine and to hold it in reserve for extreme cases.<sup>130</sup> 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.<sup>131</sup> There are also doubts about the constitutional pedigree of the doctrine and about whether it would improve or impair American government.<sup>132</sup>

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.<sup>133</sup> 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.<sup>134</sup> 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.<sup>135</sup>

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.<sup>136</sup> 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.<sup>137</sup> 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.<sup>138</sup> 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.<sup>139</sup> 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.