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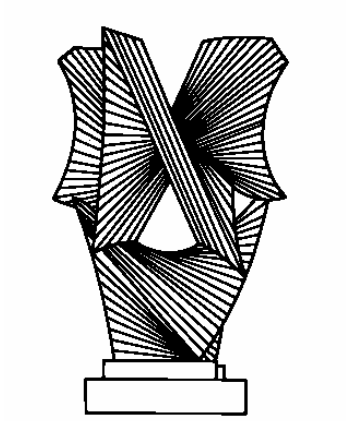

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J O I N T C E N T E R

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Executive Summary

Under *Marbury v. Madison*, it is "emphatically the province and duty of the judicial department to say what the law is." But as a matter of actual practice, statements about "what the law is" are often made by the executive department, not the judiciary. In the last quarter-century, the Supreme Court has legitimated the executive's power of interpretation, above all in *Chevron v. Natural Resources Defense Council*, the most-cited case in modern public law. Chevron reflects a salutary appreciation of the fact that the executive is in the best position to make the judgments of policy and principle on which resolution of statutory ambiguities often depends. But the theory that underlies Chevron remains poorly understood, and in the last two decades, significant efforts have been made to limit the executive's interpretive authority. In general, these efforts should be resisted. The principal qualification involves 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.

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

Cass R. Sunstein

1. Introduction

Consider the following cases:

a. Under the administration of President Jimmy Carter, the Department of the Interior adopted a broad definition of what it meant to "harm" a member of an endangered species.[1] The governing statute made it unlawful to "take" a member of an endangered species, and it defined "take" to include "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect."[2] The Interior Department interpreted "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral functions, including breeding, feeding, or sheltering."[3] The interpretation was challenged as inconsistent with the statute. A majority of the Supreme Court rejected a challenge to the Carter-era regulation,[4] over a dissenting opinion by Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas.[5]

b. 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] The underlying statute required the agency to regulate emissions of air pollutants from motor vehicles if, in his judgment, those emissions "may reasonably be anticipated to endanger public health or welfare."[7] The EPA concluded that it lacked statutory authority over greenhouse gases and that even if it had such authority, it would use its discretion and refuse to exercise it. Environmental

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[1] *See* Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995).
[2] 16 U.S.C. § 1532 (1992).
[3] 50 C.F.R. § 17.3 (1994).
[4] 515 U.S. at 708.
[5] 515 U.S. at 714.
[6] Massachusetts v. EPA, 415 F.3d 50 (DC Cir 2005).
[7] 42 U.S.C. § 7521(a)(1) (2000)

groups and others challenged the EPA's decision as inconsistent with the underlying statute. The D.C Circuit rejected the challenge. Judge Randolph wrote the opinion for the court, refusing to resolve the question of statutory authority, but concluding that the EPA had properly exercised its discretion. Judge Tatel dissented, emphasizing that the EPA had taken an unlawfully "constricted view" of its statutory authority[8] and that the agency had exercised its discretion unlawfully.[9]

c. Under the administration of President Bill Clinton, the Food and Drug Administration (FDA) asserted authority over tobacco and tobacco products.[10] The governing statute allows the FDA to regulate "drugs" and "devices," and it defines "drugs" to include "articles (other than food) intended to affect the structure or any function of the human body."[11] In the FDA's view, nicotine qualifies as a "drug." Tobacco companies challenged the FDA's assertion of jurisdiction. The Supreme Court agreed, ruling that Congress had not authorized the FDA to control tobacco and tobacco products and that the agency's initiative under President Clinton was therefore unlawful.[12] Justice Breyer wrote a dissenting opinion, joined by Justices Stevens, Souter, and Ginsburg.[13]

My major goal here is to vindicate the law-interpreting authority of the executive branch. This authority, I suggest, is indispensable to the healthy operation of modern government. Indeed, the executive's law-interpreting authority is a natural and proper outgrowth of one of the most important legal developments 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 the President, the Department of Defense, the Environmental

[8] 415 F.3d at 62 (Tatel, J., dissenting).
[9] *Id.*
[10] FDA v. *Brown & Williamson*, 529 U.S. 120 (2000).
[11] 21 U.S.C. § 321(g)(1)(c) (1996).
[12] *See Brown & Williamson*, 529 U.S. at 161.
[13] *Id.*

Protection Agency, the Federal Communications Commission, the Securities and Exchange Commission, the Federal Trade Commission, the National Labor Relations Board, the Department of Homeland Security, and countless other institutions within the executive branch.[14] Because the resolution of statutory ambiguities often calls for assessments of both policy and principle, the key judgments are legitimately made by executive officers, not courts.

In the three cases above, the relevant statutes were ambiguous, and statutory interpretation was inevitably driven by some combination of political values and assessments of disputed facts. In the first two, federal courts were correct to defer to the executive; the Supreme Court should have deferred in the third as well. It should be no surprise that when federal judges disagreed with one another in all three cases, the disagreement operated along unmistakably political lines — splitting the stereotypically liberal judges from the stereotypically conservative ones. There is no reason to believe that in cases of this kind, 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 those who operate under the President.

The 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 countless 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 what *Erie Railroad Co. v. Tompkins*[15] had to the first: an institutional shift in interpretive power brought about by a realistic understanding of what interpretation involves. In short, *Chevron* is our *Erie*. When courts resolve genuine ambiguities, they cannot appeal to any

[14] Throughout I shall treat the so-called independent agencies (such as the Federal Trade Commission, the Federal Communications Commission, and the National Labor Relations Board) as within the executive branch, even though the heads of such agencies are not at-will employees of the President. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245. The key point is that the independent agencies are subject to a range of presidential controls, so that their own judgments line up fairly well with those of the President. *See* Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 COLUM. L. REV. 573 (1984). It is controversial to see independent agencies as part of the executive branch, *see id.*, but I believe that the analysis would be qualified, rather than fundamentally different, if independent agencies were not so seen. Thus I shall use the terms "agencies" and "executive branch" interchangeably, though readers should be aware that some agencies are not always thought to be within that branch.

[15] 304 U.S. 64 (1938).

"brooding omnipresence in the sky"[16]; often they must rely on policy judgments of their own. The meaning of statutory law should not depend on the policymaking discretion of the judiciary.

2. *Marbury*, Counter-*Marbury*, and the New Deal

The grant of interpretive authority to the executive stems above all from a belief that when statutory interpretation calls for political judgments, those judgments should be made by those with a high degree of political accountability. If Congress has not settled a particular question, the settlement should be made by responsive officials, rather than by judges. The executive's interpretive authority also rests on an understanding that the resolution of ambiguities often requires specialized competence; here too the executive should be preferred to the judiciary. Of course these claims must be qualified in various ways.[17] But they provide the right foundation for the allocation of interpretive authority. To see why, it is necessary to explore *Chevron* itself.

What *Chevron* Said

The Administrative Procedure Act[18] (APA), 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."[19] At first glance, this provision appears to reassert the understanding, signaled by *Marbury v. Madison*,[20] that questions of statutory interpretation must be resolved by courts, not the executive.[21] Many post-APA decisions seemed to embrace this understanding.[22] But there were important contrary indications, in

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[16] Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).
[17] See the discussion of nondelegation canons, below.
[18] 5 U.S.C. § § 551-559, 701-706 (2000 & Supp. II 2002)
[19] *Id.* § 706 (2000).
[20] 5 U.S. 137 (1803).
[21] *See* John F. Duffy, Administrative Common Law in Judicial Review, 77 TEX. L. REV. 113 (1998).
[22] *See, e.g.*, NLRB v. Hearst Publications, 322 U.S. 111 (1944); FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981); NLRB v. Insurance Agents, 361 U.S. 477, 499 (1960); NLRB v. Highland Park Mfg. Co., 341 U.S. 322 (1951); Office Employees Intl. Union v. NLRB, 353 U.S. 313 (1957). For recognition of the ambiguity of the cases, see *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35 (2d Cir. 1976).

which courts suggested that agency interpretations would be upheld so long as they were rational.[23]

The law remained complex and confused until 1984, when the Court decided *Chevron*.[24] The Court's ruling is difficult to understand without a sense of the context. The case involved an ambitious effort by the EPA to increase private flexibility under the Clean Air Act,[25] in a way that presaged the substitution of economic incentives for command-and-control regulation.[26] The initiative was part of the Reagan Administration's general effort to reduce regulatory burdens on the private sector.[27] More particularly, the EPA redefined "stationary source"[28] under the Act so as to include an entire factory, rather than each pollution-emitting unit within the plant. Responding to a lower court invalidation of the new definition,[29] the Supreme Court created a novel two-step inquiry for assessing agency decisions. The first inquiry is whether Congress has directly decided the precise question at issue.[30] If not, the second inquiry is whether the agency's decision is "permissible," which is to say reasonable.[31] In the court's view, Congress had not forbidden a plant-wide definition of "source," and hence the EPA could supply whatever (reasonable) definition it chose. Thus an inquiry into the two relevant "steps" validated the EPA's decision.[32]

Strikingly, the Court did not discuss the language or history of the APA. But it did note that Congress sometimes explicitly delegates law-interpreting power to agencies.[33] In the face of an explicit delegation of that power, courts would certainly defer. No one doubts that Congress has the constitutional power to say that some statutory terms ("source," for example, or "take"[34]) may be defined by the executive.[35] But the Court

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[23] *See* Gray v. Powell, 314 U.S. 402, 411 (1941); Udall v. Tallman, 380 U.S. 1, 16 (1965). Ford Motor Co. v. NLRB, 441 U.S. 488 (1979); Ford Motor Credit Co. v. Milhollin, 440 U.S. 555, 565 (1980).
[24] 467 U.S. 837 (1984).
[25] 42 U.S.C. § 7401 et seq (2000).
[26] *See* A, DENNY ELLERMAN ET AL., MARKETS FOR CLEAN AIR (2000).
[27] *See, e.g.*, Executive Order 12291.
[28] 42 U.S.C. § 7502(c).
[29] NRDC v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982).
[30] 467 U.S. at 842–43.
[31] *Id.*
[32] *Id.*
[33] 467 U.S. at 844.
[34] Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995).

could not, and did not, contend that the relevant provision of the Clean Air Act contained any explicit delegation. Hence the Court added that "sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit."[36] An implicit delegation would give rise to deference as well. The Clean Air Act does give the EPA the power to issue regulations; in granting that power, perhaps the Act is best taken to say that the agency is implicitly entrusted with the interpretation of statutory terms. The Court referred to this possibility, noting that Congress might have wanted the agency to strike the relevant 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."[37] But lacking any evidence on the question, the Court did not insist that Congress in fact so thought. It did not say that the power to issue regulations is best taken to signal a delegation of law-interpreting power. On the contrary, it said that Congress's particular intention "matters not."[38]

Instead the Court referred to two pragmatic points: 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."[39] The Court was alert to the fact that it was reviewing a decision made by the Reagan Administration, altering an interpretation by the Carter Administration; and to say the least, the Reagan Administration had a self-conscious program for reorienting the administrative state. Some of that program would inevitably be undertaken through fresh interpretations of statutory terms. In the Court's view, that was not objectionable. It would be appropriate for agencies operating under the Chief Executive, rather than judges, to resolve "competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved in light of everyday realities."[40]

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[35] In extreme cases, the power to interpret statutory terms might be taken to raise nondelegation problems; but those problems are not an issue in the ordinary cases of explicit delegation to define terms. On nondelegation issues and *Chevron*, see *infra*.
[36] *Chevron*, 467 U.S. at 844.
[37] 467 U.S. at 865.
[38] *Id.*
[39] *Id.*
[40] *Id*.

What is most striking about this passage 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 we can imagine cases in which courts resolve ambiguities through the standard sources — by, for example, using dictionaries, consulting statutory structure, deploying canons of construction, or relying on legislative history if that technique is thought to be legitimate.[41] Under *Chevron* Step One, the executive will lose if the standard sources show that the agency is wrong.[42] But sometimes those sources will leave gaps; *Chevron* itself is such a case, and there are many others. If the Court's analysis is accepted on this point, its deference principle seems inescapable.

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

Fictions

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*.[43] If Congress wanted to repudiate *Chevron*, it could do precisely that. Before *Chevron*, some courts appeared to understand that the deference question was for congressional resolution; they approached the deference question on a statute-by-statute basis, asking whether the relevant statute should be taken to include an implicit delegation.[44] In *Chevron*, the Court replaced that case-by-case inquiry with a simple rule, to the effect that delegations of rulemaking power implicitly include the power to interpret ambiguities.[45] But as Justices Breyer and Scalia have independently emphasized,[46] this is a legal fiction; 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 any statutory text, but from a heavily pragmatic

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[41] *See* Stephen Breyer, *On the Uses of Legislative History*, 65 SO. CAL. L. REV. 845 (1992).
[42] *See, e.g.*, MCI Telecom. Corp. v. AT&T Co., 512 U.S. 218 (1994).
[43] *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 227–231 (2001).
[44] Antonin Scalia, *Judicial Deference to Agency Interpretations of Law*, 1989 DUKE L.J. 511.
[45] *Id.*
[46] *Id.*; Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986).

construction of (nonexistent) congressional instructions. Any judgment about those instructions is inevitably an ascription; it is not a matter of finding something.

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. The history supports the text. For example, Representative Walter, Chairman of the House Subcommittee on Administrative Law and author of the House Committee Report on the bill, plainly said that the provision "requires courts to determine independently all relevant questions of law, including the interpretation of constitutional or statutory provisions."[47] Hence the only possible justification for deference is that certain grants of authority, in organic statutes, implicitly contain interpretive power as well.[48] But this argument also runs into difficulty. At the time the APA was enacted, the bulk of important agency business was done via adjudication,[49] and if Congress wanted courts to defer to interpretations that were produced through adjudication, someone would almost certainly have said so at some point in the extensive debates.[50] The claim that agency adjudicators (or rulemakers) have interpretive authority is certainly weakened by the absence of any contemporaneous suggestions to that effect in Congress itself.

Perhaps subsequent grants of adjudicative or rulemaking power, as for example in the Clean Air Act or the Endangered Species Act, are best taken to confer interpretive power on the executive. But 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 — and hence we are back in 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 judicial judgment on the deference question involves judicial policymaking — 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

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[47] 92 Cong. Rec. 5654 (1946) (statement of Rep. Walter), reprinted in APA Legislative History, (Sen. Doc).
[48] *See* Scalia, *supra* note.
[49] *See* Nathanson; STEPHEN BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY (5th ed. 2001).
[50] For relevant discussion, see Duffy, *supra* note. Note also the Attorney General's Manual, relied on by Justice Scalia, supra note, is supportive of the deference principle. But in this context in particular, the Attorney General's Manual is unreliable, stating as it does the views of the executive branch, which would naturally be inclined in favor of deference to its own views. *See* Duffy, *supra* note.

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.

Realists and realism

The legal realists saw the interpretation of statutory ambiguities as necessarily involving judgments of policy and principle.[51] They insisted that when courts understand statutes to mean one thing rather than another, they are inevitably using judgments of their own, at least in genuinely hard cases. In the realist view, judicial judgments often hide behind standard interpretive devices, such as legislative intent and canons of construction, and these did not in fact motivate courts.

In a famous article, for example, Max Radin attacked the standard tools as largely unhelpful. Canons of construction often have little "foundation in logic and in ordinary habits of speech."[52] In his view, "A legislative intent, undiscoverable in fact, irrelevant if it were discovered, . . . is a queerly amorphous piece of slag. Are we really reduced to such shifts that we must fashion monsters and endow them with imaginations in order to understand statutes?" [53] Nor is it helpful to rely on purpose, which can be characterized in multiple different ways.[54] In the end, a judge must be "impelled to make his selection . . . by those psychical elements which him the kind of person that he is. That this is pure subjectivism and therefore an unfortunate situation is beside the point."[55] Radin said that a key question was inevitably: "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."[56]

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

[51] *See* Karl Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222 (1931).
[52] *Id.* at 874.
[53] Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870–72 (1930).
[54] *Id.* at 876-77.
[55] *Id.* at 881.
[56] Radin, *supra* note, 884.

saw that for some statutes, "executive interpretation is an important factor."[57] 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 with the legislature in the development of written law." [58] After surveying the various sources of interpretation, Freund said that "in cases of genuine ambiguity courts should use the power of interpretation consciously and deliberately to promote sound law and sound principles of legislation."[59] Freund added:

> "That object is far more important than a painstaking fidelity to the supposed legislative intent. This intent is in reality often a fiction, and the legislature is fully aware that any but the most explicit language is subject to the judicial power of interpretation. That power might, therefore, as well be frankly and vigorously used as a legitimate instrument of legal development and of balancing legislative inadvertence by judicial deliberation."[60]

For his part, Karl Llewellyn contended that the standard sources of interpretation, above all the canons of construction, were a fraud, masking judgments that were really based on other grounds.[61] He asked courts to "strive to make sense *as a whole* out of our law *as a* whole."[62] In his view, statutory meaning should be derived from "the 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."[63]

Radin, Llewellyn, and Freund undoubtedly overstated their arguments. Canons of construction, for example, can discipline judicial (or executive) interpretation,[64] and it may well be better to rely on them than on a judge's general sense of what is best. But

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[57] *Id.* at 211.
[58] Ernst Freund, *Interpretation of Statutes*, 65 U. PA L. REV. 207, 208 (1917).
[59] *Id.* at 231.
[60] *Id.*
[61] Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules of Canons about How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 399 (1950) (emphasis in original).
[62] *Id.* at 399 (emphasis in original).
[63] *Id.* at 401.
[64] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997).

suppose that the realists were broadly right to suggest that in the face of genuine ambiguity, courts are often making judgments of policy,[65] and that they should candidly acknowledge that fact and try to "promote sound law and sound principles of legislation." Suppose that in hard cases, the search for "legislative intent" is often a fraud, and that when courts speak for that intent, they are often speaking for their own preferred views.[66] (I will offer evidence for that proposition below.[67]) If Radin, Llewellyn, and Freund are indeed right, then there seems to be little reason to think that courts, rather the executive, should be making those 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. Return to the question in *Chevron* itself. In the abstract, it is difficult to know whether a plantwide definition of source will help or hurt the environment; and the economic gains, if any, from the increased flexibility are not easily assessed by federal judges. Consider also strong evidence that for hard statutory questions within the Supreme Court, policy arguments of one or another sort often play a central role, even in a period in which "textualism" has seemed on the ascendancy.[68]

We can even bring the realist view of interpretation in close contact with Ronald Dworkin's account of law as "integrity."[69] Of course Dworkin is no realist; his own view of adjudication places a large emphasis on the constraints imposed by the existing legal materials.[70] Nonetheless, his account strongly supports the argument for executive interpretation. Dworkin contends that interpretation, including statutory interpretation,[71] requires a judgment about "fit" with existing materials and also about "justification" of those materials; his conception of law as integrity requires judges to put existing materials in their "best constructive light."[72] Where "fit" leaves more than one possibility,

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[65] *See* Jane 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).
[66] 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.
[67] *See infra* Part IV.
[68] *See*Schacter, *supra* note 65.
[69] *See* RONALD DWORKIN, LAW'S EMPIRE (1985).
[70] See *id*.
[71] *See id*.
[72] *Id*.

judges have a degree of discretion. Everyone should agree that the executive, no less than the judiciary, has a duty of "fit"; many of the hard cases arise when the key question is which interpretation puts the law in its best constructive light.

But – and here is a question Dworkin does not ask -- why should *courts* be entrusted with the duty to carry out that task? In modern government, courts are often less capable on that count than is the executive, precisely because of its comparatively greater expertise and accountability. In deciding how to understand the Endangered Species Act, the Food and Drug Act, and the Clean Air Act, it would be puzzling to suggest that courts are in a particularly good position to identify the "best constructive light."

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.[73] In a wholesale attack on the adequacy of the common law,[74] the New Deal saw the rise and legitimation of a vast array of new agencies, including the National Labor Relations Board, the Securities and Exchange Commission, the Social Security Administration, the Federal Deposit Insurance Corporation, an expanded Federal Trade Commission, an expanded Food and Drug Administration, and more.[75] Many of the agencies were necessarily in the business of interpreting ambiguous statutory provisions; indeed, interpretation was a central part of their job. And there is a close link between the realists' emphasis on the policy-driven nature of interpretation and the New Deal's enthusiasm for expert administrators.[76]

The *Marbury* principle, calling for independent judicial judgments about law, came under intense pressure as a result. After Roosevelt's triumph in the Supreme Court

[73] *See* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).
[74] *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987).
[75] *See* BREYER, *supra* note, at 29.
[76] *See* Llewellyn, *supra* note.

in the late 1930s, courts started to signal that the executive would have considerable law-interpreting power. A strong and representative statement came in 1941, when the Court upheld a controversial interpretation by the Department of the Interior:

> "Although we have here no dispute as to the evidentiary facts, that does not permit a court to substitute its judgment for that of the Director. *It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere factfinding bodies deprived of the advantages of prompt and definite action.*"[77]

Two features of this passage are especially noteworthy. The first is the suggestion that "administrative functions" include judgments of law. The second is the emphasis on the need for "prompt and definite action" — an emphasis that is understandable on the heels of Roosevelt's effort to take bold action in the face of the Great Depression.[78]

Or consider this passage, written in the same year, from the Attorney General's Committee on Administrative Procedure[79]:

> "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

[77] Gray v. Powell, 314 U.S. 402, 412 (1941).
[78] For an overview, see CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS (2004).
[79] S. DOC. NO. 8, 77th Cong., 1st Sess. 90-91 (1941).

> familiar with the problems dealt with by the statute and burdened with the duty of enforcing it. This may be legislation that deals with complex matters calling for expert knowledge and judgment."

It is in this light that 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.[80] The replacement has been spurred by dual commitments to specialized competence and democratic accountability — and also by an understanding of the need for frequent shifts in policy over time, with new understandings of fact and with new values as well. For banking, telecommunications, foreign 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 judgments of the interpreter's own, then the argument for executive interpretation seems overwhelming.

Vacillations and counterarguments

The period between 1940 and 1984 offered a mixed picture on the deference question. In a number of cases, the Court seemed to indicate that it would take a firm hand.[81] The rise of the "hard look doctrine" in the 1970s, spurred by judicial distrust of agency discretion, could not easily coexist with deference to agency interpretations of law.[82] A key development was the new administration of President Reagan, which in relevant ways replicated that of President Roosevelt.[83] In both cases, the executive branch was attempting to reorient the law in significant respects, with large-scale rethinking of the approach offered by its predecessor. It should come as no surprise that in the same period that the President was attempting such rethinking, the Supreme Court firmly

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[80] An illuminating study is PRICE FISHBACK AND SHAWN KANTOR, A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION (1999). *See also* JERRY MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1983), for a valuable discussion in the context of social security disability determinations.

[81] The most important of these cases is *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

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

[83] *See* Matthew SPITZER & LINDA COHEN, SOLVING THE CHEVRON PUZZLE, 57 LAW AND CONTEMP. PROBS. 65 (1994).

endorsed the law-interpreting power of the executive branch. At the time the Court itself may have had limited ambitions for its decision,[84] but *Chevron* was soon viewed as a kind of revolution, a counter-*Marbury* for the modern era[85] — or even as a *McCulloch v Maryland*,[86] granting the executive broad discretion to choose its own preferred means to promote statutory ends.

We can now summarize the discussion in order to venture a simple account of *Chevron*'s understanding of (implicit, fictional) legislative instructions. *First*, interpretation of statutes often calls for technical expertise, and here the executive has conspicuous advantages over the courts. *Second*, interpretation of statutes often calls for political accountability, and the executive has conspicuous advantages on that count as well. *Third*, the executive administers laws that apply over extended periods and across heterogeneous contexts. Changes in both facts and values argue strongly for considerable executive power in interpretation. Courts are far too cumbersome and too decentralized to do enough "updating," or to adapt statutes to diverse domains. *Fourth*, it is often important to permit the modern state to act promptly and decisively. Deference to executive interpretations promotes that goal far better than a strong judicial role, and for two different reasons. It reduces the likelihood that judicial disagreement will result in time-consuming remands to the agency for further proceedings.[87] More subtly, it combats the risk that different lower courts will disagree about the appropriate interpretation of statutes — and thus works to counteract the balkinization of federal law.[88] These ideas help to account for *Chevron*'s legal fiction, which is that Congress has delegated law-interpreting power to the executive.

Of course there are plausible counterarguments. The foundations of *Chevron*, understood in the terms I have sketched, are intensely pragmatic, and a challenge might be mounted on pragmatic grounds. Suppose that we believe that executive agencies do

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[84] *See* Robert Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 ENVTL. L. REP. 10,606, 10,613 (1993).
[85] *See, e.g.*, Kenneth Starr, *Judicial Review in the Post*-Chevron *Era*, 3 YALE J. REG. 283 (1986); Richard Pierce, Chevron *and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988).
[86] 17 U.S. 316 (1819); *see* Duffy, *supra* note.
[87] *See* JERRY MASHAW & DAVID HARFST, THE STRUGGLE FOR AUTO SAFETY (1990).
[88] *See* Peter 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).

not usually deploy technical expertise in a way that is properly disciplined by political accountability. Suppose we think that such agencies are largely controlled by well-organized private groups hoping to redistribute wealth or opportunities in their favor.[89] 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.[90]

We can easily imagine a parallel world, perhaps not so very 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 by comparison. In that parallel world, *Chevron* would be written very differently, and independent judicial interpretation would be the norm. And if some agencies are different from others, perhaps a single deference rule makes no sense. It might be tempting to distinguish between those decisions, and those agencies, 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. Perhaps the rule of deference should, and does, reflect an understanding of contextual differences.

There is a further point. Political accountability and technical expertise are both important, but they might not march hand-in-hand. Perhaps politically accountable actors are not much interested in technical expertise; often they have agendas of their own.[91] 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.

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. In practice, *Chevron* is not uniformly applied, and courts trust some agencies more than others; but it would be extremely difficult to alter the formal doctrine in a way that recognized such differences. Notwithstanding the counterarguments, the general argument for judicial deference to executive interpretations of law remains sound; it rests

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[89] See, e.g., Sam Peltzman, Toward a More General Theory of Regulation, 19 J Law and Econ 211 (1976); for a good collection, see Chicago Studies in Regulation (George Stigler ed. 1988).

[90] *Cf.* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989).

[91] For a controversial account, see Chris Mooney, The Republican War on Science (2005).

on the undeniable claim that specialized competence is often highly relevant and that political accountability plays a legitimate role in the choice of one or another approach. If the executive's judgment ignores relevant facts, then the proper approach is not to abandon *Chevron*, but to invalidate that judgment under Chevron Step 2 or as unlawfully arbitrary.[92] 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. Of course those officials are fallible; but in a democratic society, that goal is worth pursuing.

3. Does *Chevron* Matter?

Does *Chevron* matter? At first glance, we would predict, with some confidence, that the decision would produce a significant increase in judicial validations of regulations. Giving the benefit of the doubt to agencies, courts would be expected to uphold agency action that would be struck down if courts were interpreting the law on their own. But a skeptic, or a dedicated realist, might believe that the judicial rules governing deference would not have much of an effect, and that judicial policy preferences would in the end turn out to be determinative.

Schuck and Elliott

An early study attempts to measure the effect of *Chevron* by examining affirmance rates in different periods. Schuck and Elliott find a statistically significant increase in validation rates in the immediate aftermath of *Chevron*. In particular, they find an increase in affirmance rates from 71% in the pre-*Chevron* year of 1984 to 81% in the post-*Chevron* year of 1985.[93] They also find a dramatic decrease in judicial remands on the ground that agencies erred on the law.[94] The combination of a higher rate of affirmance with a lower rate of remands for errors of law strongly suggests that *Chevron* had a significant impact.[95]

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[92] See Motor Vehicle Manufacturers' Assn. V. State Farm, 463 US 29 (1983).
[93] Peter Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 42 DUKE L.J. 984 (1989).
[94] *Id.* at 1032-33.
[95] *Id.* at 1034.

We must be careful, however, with findings of this sort. First, it might well be expected that panel composition would matter as much as or more than *Chevron* itself. We might hypothesize, for example, that a panel of three Republican appointees would uphold agency action under President Reagan, whatever the formal doctrine — and that a panel of three Democratic appointees would be far less likely to do so, even with a strong deference signal from the Supreme Court.[96] A realist perspective on the application of *Chevron* would speculate that the formal deference rules could be dwarfed by political inclinations. A shift in the direction of greater deference might suggest, not that the deference rule matters, but that Republican appointees are deferring to a Republican president. This point matters because Schuck and Elliott did not control for panel composition. Perhaps the higher deference rates, in 1985, were a product of a greater percentage of Republican appointees, rather than *Chevron* itself. I will return to this point below.

Second, 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. Even without an increase in deference rates, *Chevron* might have had a large effect, simply because different cases are being litigated; the margin along which challenges occur might have shifted. A comparison between 1984 and 1985 helpfully concentrates attention on the year immediately after *Chevron*, when litigants may not have fully adjusted to the new regime. But it is hard to draw large-scale inferences from the limited data.

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[96] *See infra* Part.

Schuck and Elliott are entirely aware of this general point, and hence they attempted to study federal appeals decisions for a two-month period in March and April 1988. Examining 151 cases, they found an affirmance rate of 75%, closer to the pre-*Chevron* year of 1984 than to the post-*Chevron* year of 1985.[97] Perhaps this figure suggests that *Chevron* had a less substantial effect than the 1985 data indicate. But it is hard to know how to evaluate the relevant numbers, reflecting as they might a shift in the nature of the cases that were reaching the courts of appeals.

Merrill

Thomas Merrill offers an interesting before-and-after picture of Supreme Court decisions involving deference to executive agencies.[98] In the three-year period before *Chevron*, the Court decided forty-five cases on the deference question, accepting the agency's view 75% of the time. In the seven-year period after *Chevron*, the Court decided ninety cases on that question, accepting the agency's view 70% of the time. Merrill concludes that *Chevron* did not produce an increase in the level of deference to agency decisions.

That conclusion does not, however, follow from his data.[99] Here as well, litigants on both sides might have adjusted their behavior in accordance with *Chevron*, and hence the world cannot be held constant between 1981 and 1990. Other variables might also account for the shift, including changes in the substantive areas with which the Supreme Court was confronted.

Point Estimates v. Policy Space: A Glimpse from the Trenches

E. Donald Elliott, a former General Counsel of the EPA, has offered an informal but illuminating account of the impact of *Chevron*, one that strongly supports the argument I have sketched on behalf of deference to the executive.[100] Elliott reports that

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[97] Schuck & Elliott, *supra* note, at 1040.
[98] Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969 (1992).
[99] *See* COHEN & SPITZER, LAW AND CONTEMP PROBLEMS, at 92.
[100] E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. J. ENV. L. 1 (2005).

Chevron "change[d] the way that we did business."[101] Before *Chevron*, the Office of Legal Counsel (OLC) within EPA usually assumed that a statute was "a prescriptive text having a single meaning, discoverable by specialized legal training and tools."[102] 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."[103] But post-*Chevron*, lawyers within the EPA offered no single point estimate. Instead they "attempt[ed] to describe a permissible range of agency policy-making discretion that arises out of a statutory ambiguity."[104] The result is not a single meaning but a "policy space,"[105] 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."[106]

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."[107] 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."[108] 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."[109] 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."[110]

This account strongly supports the general justification that I am attempting to offer here. The precise point of *Chevron* is to acknowledge that in the face of ambiguity, the key questions are not for those with legal training, but instead for other professionals. We do not know enough to know whether the shift that Elliott describes has also occurred

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[101] *Id.* at 11.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.* at 12.
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.* at 13.
[110] *Id.*

within other agencies. But if the FCC is deciding whether or how to engage in deregulation, if the President is deciding how to implement an authorization to use force in response to the attacks of September 11,[111] and if the Department of the Interior is deciding on the reach of the Endangered Species Act,[112] there is every reason to think that the job of lawyers, and of reviewing courts, is to identify policy spaces, not to insist on point estimates.

Republican and Democratic appointees, and beyond

Let us return to data and explore the results of a study, conducted by Thomas Miles and me, of judicial behavior in *Chevron* cases.[113] The central goal of the study is to see whether political affiliation, or political convictions, play a role in judicial review of agency interpretations of law.

On the lower courts, the study involves all published court of appeals decisions between 1990 and the present, reviewing interpretations of law by the Environmental Protection Agency, the Federal Communications Commission, and the National Labor Relations Board. Decisions are generally coded as "liberal" if the agency decision is upheld against industry attack; decisions are also generally coded as liberal if the agency decision is invalidated as a result of an attack by a public interest group. Here are the principal findings:

1. Republican appointees show significantly more conservative voting patterns than Democratic appointees. The former provide “liberal” votes 49% of the time; the latter provide such votes 60% of the time.[114]

2. When Republican appointees sit only with Republican appointees, and when Democratic appointees sit only with Democratic appointees, the gap grows – to 28%. Republican appointees show far more conservative voting patterns (43% liberal votes)

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[111] *See* Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663 (2005).
[112] *See* Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995).
[113] See Cass R. Sunstein and Thomas Miles, Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron, U Chi L Rev (forthcoming 2006).
[114] Id.

when sitting only with other Republican appointees; the same is even more true for Democratic appointees on the liberal side (70% liberal votes).[115]

3. Republican appointees are more likely to uphold the interpretations of Republican presidents than those of Democratic presidents. Democratic appointees are more likely to uphold the interpretations of Democratic presidents than those of Republican presidents.[116]

What about the Supreme Court? Here the study investigates the votes of the individual justices between 1990 and the present in all clear Chevron cases -- that is, in all cases in which the Court applies the Chevron framework. These are the main results:

1. Justices Scalia, Thomas, and Rehnquist show significantly higher deference rates under the Bush Administration than under the Clinton Administration. Justices Souter, Stevens, Breyer, and Ginsburg show higher deference rates under the Clinton Administration than under the Bush Administration.[117] (The change in the latter group is 13%, smaller than the 18% increase shown by the former group.)

2. If decisions are coded in political terms, Justices Scalia, Thomas, and Rehnquist show the most conservative voting patterns in *Chevron* cases, while Justices Stevens, Souter, Breyer, and Ginsburg show the most liberal.[118] This finding is noteworthy because *Chevron* requires courts to defer to agency interpretations of ambiguous statutes; for that reason, it might be anticipated to ensure that judicial votes, reviewing agency interpretations of law, do not fall along the expected ideological lines.

3. When a justice is voting to reverse an agency's decision under *Chevron*, what is the likelihood that the agency's decision will be liberal? For the Souter, Stevens, Breyer, and Ginsburg group, the likelihood is 33%; for the Rehnquist, Scalia, and Thomas group, the likelihood is 62%.[119]

These findings present many questions, and this is not the space to explore them in detail.[120] The most general conclusion is that even under *Chevron*, the political

[115] Id.
[116] Id.
[117] Id.
[118] Id.
[119] Id.
[120] See id. for detailed treatment.

commitments of reviewing judges continue to play a significant role in the decision whether to uphold decisions by the executive branch. For courts of appeals, the difference between Republican and Democratic appointees is smaller than it is on the Supreme Court, which decides the hardest cases; but the difference remains substantial. At first glance, this evidence fortifies the argument for a strong reading of *Chevron*. There is no reason to think that where statutes are ambiguous, their meaning should depend on the composition of the panel that litigants draw.

4. 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. Many observers have feared that this idea ultimately compromises the rule of law, by allowing a combination of executive and adjudicatory authority in a way that eliminates an independent judicial check.[121] 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. The underlying point is that those who seek an independent judicial check would, in reality, increase the likelihood that judgments of policy would be made by federal judges, not by Congress.

Pure Questions of Law

In one of the most important pre-*Chevron* cases, the Court seemed to distinguish between purely legal questions, to be resolved by judges, and applications of law to fact, for which deference would be appropriate.[122]

The key case was INS v. Cardoza-Fonseca.[123] At issue was a statutory provision permitting the Attorney General to deny asylum to an alien who wishes to stay in the United States "because of . . . a well-founded fear of persecution" in his home country. The INS interpreted "well-founded fear" to require persecution to be "more likely than not." On this view, a good-faith subjective belief, based on evidence, would not be enough; a 51% probability of persecution was necessary. The Court struck down the

[121] See Farina, supra note; Breyer, supra note, is in the same spirit.
[122] See NLRB v. Hearst Publications, 322 US 111 (1944).
[123] 480 US 421 (1987).

agency's interpretation, emphasizing the text, structure, and history of the statute. But the Court added that the issue in the case involves "a pure question of statutory construction for the courts to decide."[124] That question "is, of course, quite different from the question of interpretation that arises in each case in which the agency is required to apply" a standard "to a particular set of facts."[125] In applying law to fact through case-by-case decisions, agencies would receive judicial respect. But the interpretive issue in Cardoza-Fonseca "is well within the province of the judiciary."[126]

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 any "pure question of statutory construction." And in fact, Justice Scalia saw Justice Stevens' opinion in exactly that way. In his concurrence, he said that the Court's "discussion is flatly inconsistent" with the view that *Chevron* established "that courts must give effect to a reasonable agency interpretation of a statute unless that interpretation is inconsistent with a clearly expressed congressional intent."[127] On pure questions of law, no less than on mixed questions, Justice Scalia contended that deference was the appropriate approach.

On this count Justice Scalia was clearly correct. Suppose that the statute in Cardoza-Fonseca was genuinely ambiguous – that an investigation of the standard legal sources did not say whether Congress meant to forbid the INS from adopting a "more probable than not" standard. In that event, judicial deference would be appropriate, however "pure" the legal question. By hypothesis, the ambiguity is genuine, and hence a judgment of policy is involved (in a particularly sensitive area). The key point is that even when purely legal questions are raised, purely legal competence may not be enough to resolve them. *Chevron* itself is an example. The definition of "source" did not involve the application of law to fact, and nonetheless the Court deferred to the EPA's view.

Justice Scalia's concurrence has triumphed, in the sense that there is no separate category of cases involving purely legal questions. The distinction drawn in Cardoza-Fonseca has failed to appear in subsequent cases.

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[124] Id at
[125] Id
[126] Id at
[127] Id at

Jurisdiction

Does *Chevron* apply to jurisdictional disputes? The Supreme Court has divided on the question,[128] which remains unsettled in the lower courts.[129] If courts are entitled to make independent judgments about jurisdictional issues, the executive would be deprived of law-interpreting power in many of the areas in which it would most like to have that power. It can be contested whether an exception for jurisdictional questions would arise in many cases; but the importance of such an exception would be incontestable. This, then, is a second route by which *Chevron*'s reach might be cabined.

In the abstract, there are plausible arguments on both sides. Recall that *Chevron* is rooted in a theory of implied delegation, and it is reasonable to think that Congress should not be taken to have delegated to agencies the power to decide on the scope of their own authority. That question, it might be thought, ought to be answered by an independent institution, not by the agency itself. If foxes ought not to guard henhouses, then perhaps agencies should not be understood to have power to assess the reach of their own authority. For this reason, Justice Brennan argued that judgments about jurisdiction "have not been entrusted to the agency" and might well "conflict with the agency's institutional interests in expanding its own power."[130]

On the other hand, any exemption of jurisdictional questions is vulnerable on two grounds. First, the line between jurisdictional and nonjurisdictional questions is far from clear, and hence any exemption threatens to introduce much more complexity into the inquiry into the deference question. With this point in mind, Justice Scalia argued that "there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority."[131] Second, and far more fundamentally, the considerations that underlie *Chevron* might well support, rather than

[128] Miss. Power & Light Co. v. Mississippi, 487 U.S. 357 (1988).
[129] *See, e.g.*, Alaska v. Babbitt, 72 F.3d 698 (9th Cir. 1995) (deferring on jurisdictional issue involving definition of "public lands"); Cavert Acquisition Corp. v. NLRB, 83 F.3d 598 (3d Cir. 1996) (deferring on jurisdictional issue involving definition of "employee"); United Trans. Union v. Surface Transp. Bd., 183 F.3d 606 (7th Cir. 1999) (refusing to defer on jurisdictional issue). A recent discussion can be found in *NRDC v. Abraham*, 355 F.3d 179 (2d Cir. 2004), in which the court, after finding a Step One violation, adds 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 suggested that *Mead* (!) provided the appropriate framework. *See id.* at 199-200.
[130] 487 U.S. at 387 (Brennan, J., dissenting).
[131] *Id.* at 345 (Scalia, J., concurring in the judgment).

undermine, 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.

To be sure, an assertion of jurisdiction is an expansion of authority, but in the abstract, a refusal to exercise that authority may be troubling as well. In the face of ambiguity with respect to jurisdiction, the executive, and not the judiciary, should make the underlying judgments of policy and principle.

Major Questions

Although debate continues over the executive's authority to decide jurisdictional questions, the Court has recently raised a closely related question: whether *Chevron* applies to "major" questions. This issue was initially signaled in 1986 in a short essay by then-Judge Breyer, who suggested that *Chevron* should be read not to establish a simple rule, but instead to provide the foundation for a more particularistic inquiry into Congress' likely instructions on the deference issue.[132] In his view, the inference would rest on an inquiry into "what a sensible legislator would have expected given the statutory circumstances."[133] The expectations of the sensible legislator would depend on an inquiry into institutional competence:

> "The less important the question of law, the more interstitial its character, the more closely related to the everyday administration of the statute and to the agency's (rather than the court's) administrative or substantive expertise, the less likely it is that Congress (would have) 'wished' or 'expected' the courts to remain indifferent to the agency's views. Conversely, the larger the question, the more its answer is likely to clarify or stabilize a broad area of law, the more likely Congress intended the courts to decide the question themselves."[134]

[132] See Breyer, supra note.
[133] *Id.*
[134] *Id.*

For present purposes, the key distinction is between "less important" and "more interstitial" questions on the one hand and "larger" questions on the other. Justice Breyer's apparent suggestion is that for the latter, an independent judicial hand is desirable.

The Court as a whole signaled a strong interest in this distinction in *FDA v. Brown & Williamson*,[135] the tobacco case with which I began. Recall that the statutory language appeared ambiguous on the question, for it defined drug to include "articles (other than food) intended to affect the structure or any function of the body."[136] Under this language and with the assistance of *Chevron*, the FDA contended, with considerable force, that it could assert authority over tobacco. But the Court rejected its analysis through a complicated route. Much of its opinion emphasized the wide range of tobacco-specific legislation enacted by Congress in the last decades — legislation that, in the Court's view, should "preclude an interpretation of the FDCA that grants the FDA authority to regulate tobacco products."[137] But the Court added a closing word. It said that its inquiry into the *Chevron* question "is shaped, at least in some measure, by the nature of the question presented."[138] *Chevron*, the Court noted, is based on "an implicit delegation," but in "extraordinary cases," courts should "hesitate before concluding that Congress has intended such an implicit delegation."[139] The Court cited no case for this key proposition, but instead referred to the 1986 essay by then-Judge Breyer, [140] encapsulating one of his central arguments, that there is a difference between "major questions," on which "Congress is more likely to have focused," and "interstitial matters." At that point 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."[141]

How should this passage be read? It would be plausible to say that for decisions of great "economic and political significance," an implicit delegation ought not to be

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[135] 529 U.S. 120 (2000).
[136] 21 U.S.C. § 321(g)(1)(c).
[137] 529 U.S. at 157.
[138] 529 U.S. at 159.
[139] *Id.*
[140] See Breyer, supra note.
[141] *Id* at 160.

found. And if an exception exists for major questions, then the executive's power of interpretation faces a large limitation. And indeed, the EPA has seized on *Brown & Williamson* in contending that it lacks the power to regulate greenhouse gases.[142]

The brief passage in *Brown & Williamson* could be invoked in many contexts, limiting *Chevron* to "interstitial" questions, as Justice Breyer would apparently prefer. The problem is that there is no good justification for the conclusion that major questions should be resolved judicially rather than administratively. To say the least, no simple line separates interstitial and major questions; and an insistence on that line would raise doubts about an array of decisions, including *Chevron* itself. In any case expertise and accountability, the linchpins of *Chevron*'s legal fiction, are highly relevant to the resolution of major questions.

Assume, for example, that the statutes in *Brown & Williamson* were genuinely ambiguous — that the relevant sources of interpretation 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. Perhaps Congress could not easily be taken to delegate the resolution of these questions to administrative agencies. But would it really be better to understand Congress to have delegated the resolution of those questions to federal courts? Which federal courts? Nominated by which president?

A different version of the "major questions" exception would have greater appeal. Suppose it is thought that agencies should not be allowed to move the law in new directions without congressional approval. On this view, courts would not be displacing policy decisions by the executive branch. They would be attempting to block the executive from initiating massive changes without clear legislative authorization. Perhaps *Brown & Williamson* can be understood in these terms.[143] This claim is on the right track

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[142] *See* Note, *Trapped in the Greenhouse?*, 54 DUKE L.J. 147 (2004); 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).

[143] And so too for MCI Telecommunications Corp. v. ATT, 512 US 218 (1994), which prohibited the FCC from adopting a large-scale deregulatory initiative, and which emphasized that initiative would amount to a "radical or fundamental change in the Act's tariff-filing requirement. . . . It is highly unlikely that Congress

insofar as it emphasizes the relevance of nondelegation concerns to application of the *Chevron* framework.[144] But it runs into two problems. First, the distinction between "major" changes and less major ones remains ambiguous; consider *Chevron* itself. Second, it is legitimate for the executive to make "major" changes insofar as it is doing so through reasonable interpretation of genuinely ambiguous statutes. The best use of nondelegation concerns lies elsewhere, as we shall shortly see.

Chevron Step Zero

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.[145] The Step Zero inquiry has produced a great deal of confusion and complexity, defying the hopes of those who hoped that *Chevron* would simplify the law.[146]

The key case is *United States v. Mead Corporation*.[147] The question was the legal status of a tariff clarification ruling by the United States Customs Service. Was such a ruling entitled to *Chevron* deference? The Court concluded that it was not, distinguishing 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 deference at all.[148] The Court's central suggestion is that *Chevron* applies "when it appears that Congress has 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."[149] An implicit delegation of interpretive authority would be apparent if Congress "would expect the agency to be able to speak with the force of law."[150]

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would leave the determination of whether an agency will be entirely, or even substantially, rate-regulated to agency discretion . . . ."

[144] See infra.

[145] See Cass R. Sunstein, Chevron Step Zero, Virginia L Rev (forthcoming 2006).

[146] Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, VALD. L. REV. (forthcoming 2005); Adrian Vermeule, Mead *in the Trenches*, 71 GEO. WASH. L. REV. 847 (2003).

[147] 533 U.S. 218 (2001).

[148] 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."

[149] *Id*. at 226-27.

[150] *Id*.

In the Court's view, a "very good indicator of delegation" is authorization "to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed."[151] If agencies have been given power to use relatively formal procedures, and if they have exercised that power, they are entitled to *Chevron* deference. Nonetheless, *Chevron* deference can be found, and has sometimes been found, "even when no such administrative formality was required and none was afforded."[152] Why, then, was the tariff ruling in *Mead* not entitled to deference? A relevant factor was that formal procedures were not involved. Another was that nearly fifty customs offices issue tariff classifications, producing 10,000 to 15,000 annually. "Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is simply self-refuting."[153]

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. 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. Why is the refusal to defer to the executive the most sensible fiction? The Court must be thinking that if an agency is not operating pursuant to formal procedures, it is not entitled to deference, because the absence of such procedures signals a lack of accountability and a risk of arbitrariness. 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 have to work extremely hard to know whether a decision by the executive is entitled to deference. The second 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 judicial deference when the agency has not

[151] *Id.*
[152] *Id*. at 231.
[153] *Id*. at 233.

proceeded through formal procedures. Instead it should be seen as an unusual case in an exceedingly unusual setting, in which low-level administrators were required to produce thousands of rulings.

A narrow understanding of *Mead* would continue to allow deference to be applied to many agency decisions not preceded by formal procedures.[154] Most important, that narrow understanding would suggest that the President himself is entitled to deference in his interpretations of law, even if he has not proceeded through formal procedures. When Congress delegates authority to the President, it ought to be presumed to have entitled him to construe ambiguities as he sees fit, subject to the general requirement of reasonableness.[155]

Canons Against *Chevron*

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 limited. The area involves interpretive principles that require Congress to decide certain issues explicitly. In that area, an exception to the Chevron principle, calling for invalidation of agency decisions at Step One, is entirely appropriate.

It is familiar to hear the idea that Congress must speak with clarity, most obviously in connection with the nondelegation doctrine[156]; and in fact, my argument on behalf of judicial deference to executive interpretations of law might seem to be in tension with that doctrine. On one view, Article I forbids Congress from "delegating" its power to anyone else, and open-ended grants of authority are unconstitutional. While the Supreme Court has not used the nondelegation doctrine to invalidate a federal statute since in 1935, [157] the Court continues to pay lip service to the doctrine, and to hold it in

[154] For more detailed discussion, see Sunstein, supra note.

[155] See Acree v. Republic of Iraq, 370 F3d 41, 68 n. 2 (DC 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).

[156] For general discussion and critique, see Eric Posner and Adrian Vermeule, Interring the Nondelegation Doctrine, 69 U Chi L Rev 1721 (2002).

[157] Schechter Poultry Corp v US, 295 US 495 (1935).

reserve for extreme cases.[158] 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 as it does difficult judgments of degree.[159] There are also questions about the constitutional pedigree of the doctrine, and about whether it would make American government work better or worse.[160]

At most, 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.[161] Perhaps *Chevron* is objectionable on nondelegation grounds, because it grants the executive the authority to interpret the very statutes that limit its power.[162] 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 it is not clear that any nondelegation concern is reduced as a result. On the contrary, an allocation of policymaking authority to the executive seems to reduce that concern, precisely because the executive has a measure of accountability.[163]

Nonetheless, there is a set of cases in which courts have denied the executive law-interpreting authority on the ground that the key decisions must be explicitly made by the national lawmaker. The most important idea here is that the executive is not permitted to construe statutes so as to raise serious constitutional doubts.[164] Note that this principle is far more ambitious than the modest claim that a statute will be construed so as to be constitutional rather than unconstitutional (thus forbidding the executive to adopt unconstitutional interpretations). Under the idea that I am describing, the executive is forbidden to adopt interpretations that are constitutionally sensitive, even if those interpretations might ultimately be upheld. The only limitations on the principle are that the constitutional doubts must be serious and substantial, and that the statute must be

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[158] Whitman v. ATA, 531 US 457 (2001).

[159] See Richard B. Stewart, Beyond Delegation Docrtine, 36 Am U L Rev 323, 324-28 (1987) (discussing "the absence of judicially manageable and enforceable criteria to distinguish permissible from impermissible delegations"); Mistretta v US, 488 US 361, 415-16 (Scalia dissenting) (emphasizing problems with judicial enforcement of the conventional doctrine).

[160] See Eric Posner and Adrian Vermeule, Interring the Nondelegation Doctrine, 69 U Chi L Rev 1721 (2002).

[161] See The Benzene Case, 448 US 607 (1980).

[162] See Farina, supra note.

[163] See Mistretta v US, 488 US 361, 415-16 (Scalia, J., dissenting).

[164]See, e.g, Solid Waste Agency v. USACE, 121 S Ct 675, 683 (2001); DeBartolo Corp v, Fla East Coast, 485 US 568 (1988).

fairly capable of an interpretation contrary to the agency's own.[165] So long as the statute is unclear, and the constitutional question serious, Congress must decide to raise that question via explicit statement.

Why does this idea overcome the executive' s usual 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 that does not permit the executive to make constitutionally sensitive decisions on its own.[166] For example, a court of appeals invalidated a Federal Election Commission rule that interpreted the governing statute so as to allow it to make a public release of the files of a completed investigation.[167] The court acknowledged that the statute was ambiguous, but said the agency's interpretation was unreasonable because it would create first amendment difficulties.

Other interpretive principles, also serving as nondelegation canons, trump *Chevron* as well. One of the most fundamental forbids the executive to apply statutes outside of the territorial borders of the United States.[168] The central notion here is that extraterritorial application calls for extremely sensitive judgments involving international relations; such judgments must be made via the ordinary lawmaking process (in which the President of course participates). The executive may not make this decision on its own.[169] Consider also the notion that unless Congress has spoken with clarity, the executive is not allowed to apply statutes retroactively, even if the relevant terms are quite unclear.[170] Retroactivity is disfavored in the law,[171] and Congress will not be taken to have delegated to the executive the authority to choose to apply statutes retroactively.

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[165]See *Rust v Sullivan*, 500 US 173, 191 (1991).

[166] I discuss this idea more generally in Cass R. Sunstein, Nondelegation Canons, 67 U Chi L Rev 315 (2000).

[167] AFL-CIO v. FEC, 333 F3d 168 (DC Cir 2003).

[168]*EEOC v Arabian American Oil Co.*, 499 US 244, 248 (1991).

[169]Of course the executive is permitted to make a large number of quite sensitive decisions involving foreign relations, partly because of express constitutional commitments, partly because of perceived contemporary necessities. And it would not be impossible to imagine a legal system in which the executive was permitted, in the event of ambiguity, to resolve the issue of extraterritoriality. Recall that my goal here is descriptive, not normative. The best defense of this particular nondelegation canon would be that the question whether the enacted law should be applied outside of the nation's borders is a large and essentially legislative one, which cannot be made by the executive on its own.

[170]*Bowen v Georgetown University Hospital*, 488 US 204, 208 (1988).

[171]Id.

One of the most general nondelegation canons is the rule of lenity, which says that in the face of ambiguity, criminal statutes will be construed favorably to criminal defendants.[172] Criminal law must be a product of a clear judgment on Congress's part. Where no clear judgment has been made, the statute will not apply merely because it is plausibly interpreted, by courts or enforcement authorities, to fit the case at hand. For broadly related reasons, the executive cannot interpret statutes and treaties unfavorably to Native Americans.[173] Where statutory provisions are ambiguous, the government will not prevail. 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 from the national legislature. The institutional checks created by congressional structure must be navigated before an adverse decision may be made. There are many other examples.[174] In many areas, ranging from broadcasting to the war on terror,[175] the nondelegation canons operate as constraints on the interpretive discretion of the executive.

What emerges is therefore a simple structure. In general, the executive is permitted to interpret ambiguous statutes as it sees fit, subject to the constraints of reasonableness. The only limitations can be found in the nondelegation canons. The resulting framework is admirably well-suited to the needs of modern government; it grants the executive the same degree of discretion that it deserves to have.

4. 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. Indeed, that claim

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[172]But see Dan Kahan, Is Chevron Relevant to Federal Criminal Law, 110 Harv L Rev 469 (1996).

[173]See *Ramah Navajo Chapter v Lujan*, 112 F3d 1455, 1461–62 (10th Cir 1997) (grounding a canon of statutory construction favoring Native Americans in "the unique trust relationship between the United States and the Indians"); *Williams v Babbitt*, 115 F2d 657, 660 (9th Cir 1997) (noting in dicta that courts "are required to construe statutes favoring Native Americans liberally in their favor"); *Tyonek Native Corp v Secretary of Interior*, 836 F2d 1237, 1239 (9th Cir 1988) (noting in dicta that "statutes benefiting Native Americans should be construed liberally in their favor").

[174]*United States Department of Energy v Ohio*, 503 US 607, 615 (1992); *National Association of Regulatory Utility Commissioners v FCC*, 880 F2d 422 (DC Cir 1989).

[175] See Curtis Bradley and Jack Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv L Rev. 2047 (2005).

is on the surface of the Court's opinion, with its suggestion that judgments about ambiguities call for an assessment of "competing interests." 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. But if a governing statute is ambiguous, the executive should usually be permitted to interpret it as it sees fit.

Unfortunately, courts have occasionally attempted to reassert their primacy in the interpretation of statutory law. These efforts should be resisted. The only qualification – narrow but exceedingly important -- involves domains in which Congress must explicitly provide explicit authorization to executive officials. In those domains, statutory ambiguity is not enough, and the executive branch is not permitted to act on its own.