Judicial Review in the Post-*Chevron* Era

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An important function of the modern judiciary is to ensure that decisions by administrative agencies remain within statutory boundaries. These boundaries, however, are often imprecise. Rather than specify the precise details of a program, Congress often gives an agency a broad mandate, for example, to clean up the environment, to monitor the banking system, or to improve worker safety. In such circumstances, federal courts sometimes defer to statutory interpretations made by the implementing agencies.

Affording deference to an agency's legal analysis, however, seems facially contrary to the fundamental principle, incorporated in Chief Justice John Marshall's broad dictum in *Marbury v. Madison*,[1] that "[i]t is emphatically the duty of the judicial department to say what the law is."[2] Judicial deference to agencies' statutory interpretations thus constitutes a continuing source of tension for judges because it necessarily means that an agency of the executive branch, to a greater or lesser degree, is displacing the judiciary in its traditional and jealously guarded law-declaring function.[3] Largely because of this tension between the judiciary's law-declaring function and the need to defer to congressional delegation, application of the deference doctrine in the federal courts has been rather erratic.[4]

The Supreme Court recently dealt with this recurring problem in a series of cases, beginning with its watershed decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,[5] which involved an interpretation of the Clean Air Act Amendments of 1977[6] rendered by the

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1. 5 U.S. (1 Cranch) 137 (1803) (holding that Supreme Court lacked the power to order the Secretary of State to deliver judicial commissions) (Marshall, C.J.).

2. *Id.* at 177.

3. *See* Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 5 (1983).

4. *E.g.*, Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2d Cir. 1976) (Friendly, J.), *aff'd sub nom.* Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977); Coffman, *Judicial Review of Administrative Interpretations of Statutes*, 6 W. NEW ENG. L. REV. 1, 3 (1983); Jaffe, *Judicial Review: Questions of Law*, 69 HARV. L. REV. 239, 350-51 (1955); Monaghan, *supra* note 3, at 3-4, 31; Stever, *Deference to Administrative Agencies in Federal Environmental, Health and Safety Litigation—Thoughts on Varying Judicial Application of the Rule*, 6 W. NEW ENG. L. REV. 35, 62 (1983).

5. 104 S. Ct. 2778 (1984).

6. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 129, 91 Stat. 685, 746-51 (codified at 42 U.S.C. §§ 7501-7508 (1982)).

Environmental Protection Agency (EPA). The *Chevron* decision was both evolutionary and revolutionary. It was evolutionary because it applied and refined a long line of Supreme Court precedent reminding lower federal courts of their obligation to defer to an agency's reasonable construction of any statutes administered by that agency.[7] It was also revolutionary because it eliminated a significant ambiguity in the law and cast substantial doubt upon several well-established doctrines that had sometimes permitted courts to overturn agency interpretations. This revolutionary effect is not apparent from a quick examination of the opinion itself. The opinion on its face signals no break with the past; it does not explicitly overrule or disapprove of a single case. Nonetheless, *Chevron* has quickly become a decision of great importance, one of a small number of cases that every judge bears in mind when reviewing agency decisions.

Chevron is significant for two reasons. First, just as a lesser known case of the 1970's, *Batterton v. Francis*,[8] narrowed the scope of judicial review of welfare legislation,[9] *Chevron* narrowed the ambit of judicial review of complex regulatory issues. In short, *Chevron* has made it more difficult for courts to overturn policy choices made by agencies when these choices are embodied in legal interpretations of statutes administered by the agencies. Second, the Court's decision rendered untenable an assumption that seems to have undergirded many administrative law decisions in the past: that federal courts have a general duty to supervise agencies in much the same way that the Supreme Court supervises lower federal courts.

This article will elaborate upon *Chevron*'s implications for judicial review. Part I briefly describes the case and its history and discusses more recent Supreme Court cases that have applied *Chevron*'s analytical framework. Part II sets forth my view of the decision's legal consequences—its effects on the deference doctrine and related principles. Part III explores the fundamental shift *Chevron* has signaled in the relationship between federal courts and administrative agencies. Part IV sets forth my reasons for believing that the case was correctly decided.

7. *See, e.g.*, Bayside Enterprises v. NLRB, 429 U.S. 298, 304 (1977); Federal Maritime Commission v. Seatrain Lines, 411 U.S. 726, 745-46 (1973); United States v. Drum, 368 U.S. 370, 385-86 (1962); NLRB v. Hearst Publications, 322 U.S. 111, 130-31 (1944).

8. 432 U.S. 416 (1977).

9. In *Batterton*, the Secretary of Health, Education, and Welfare had defined "unemployment" in such a way as to exclude from participation in the Aid to Families with Dependent Children-Unemployed Fathers program all families whose fathers' unemployment resulted from misconduct, involvement in a strike, or voluntarily quitting their jobs. The Supreme Court upheld the Secretary's regulation as reasonable. The Court said that where, as in that case, "Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term, . . . [a] reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner." 432 U.S. at 425.

I. A New Approach to Review of Agency Interpretations

Chevron introduced a two-part test for reviewing agencies' statutory interpretations. The U.S. Court of Appeals for the D.C. Circuit, after finding no clear legislative intent on the definitional question at issue, had relied on an analysis of the general policy underlying the statute to invalidate the EPA interpretation. The Supreme Court reversed and found that, absent direct evidence of legislative intent, the Agency's interpretation should be allowed if it is a reasonable reading of the statute. Subsequent Supreme Court cases have reiterated this new approach.

A. Chevron *in the D.C. Circuit*

The dispute in *Chevron* involved EPA's definition of "stationary source," a key term in both the 1970 and 1977 amendments to the Clean Air Act.[10] The 1970 amendments were passed largely in reaction to the perceived failure of the states to cooperate fully with the federal government in protecting and improving air quality.[11] The law required states to develop pollution control programs, called State Implementation Plans (SIPs), to prevent levels of certain atmospheric pollutants from exceeding the National Ambient Air Quality Standards (NAAQSs) set by EPA.[12] The legislation also established deadlines for attainment of the NAAQSs.[13]

By 1976, however, many states had failed to achieve the NAAQSs within the statutory deadlines. Congress responded to the problem of these "non-attainment areas" by adding Part D to Title I of the 1977 Clean Air Act Amendments,[14] which required states with non-attainment areas to submit revised SIPs by January 1, 1979.[15] Part D required that these

10. The term "stationary source" was used in the new source performance standard provisions of the Clean Air Act Amendments of 1970 and defined for the purpose of those provisions. Pub. L. No. 91-604, § 4, 84 Stat. 1676, 1683 (codified at 42 U.S.C. § 7411(3) (1982)). The term "major stationary source" was included in the non-attainment area provisions of the Clean Air Act Amendments of 1977. Pub. L. No. 95-95, § 129, 91 Stat. 685, 746-48 (codified at 42 U.S.C. § 7502 (1982)). The 1977 amendments defined the term "major stationary source" for purposes of the Act, but the definition addresses the meaning of "major" without clarifying the meaning of "stationary source." Pub. L. No. 95-95, § 301, 91 Stat. 685, 770 (codified at 42 U.S.C. § 7602(j) (1982)).

11. *See* ASARCO, Inc. v. EPA, 578 F.2d 319, 321 (D.C. Cir. 1978).

12. Pub. L. No. 91-604, § 4, 84 Stat. 1676, 1679-83 (codified as amended at 42 U.S.C. §§ 7409, 7410 (1982)).

13. *See* Pub. L. No. 91-604, § 4, 84 Stat. 1676, 1679-82. The 1970 Act required that state implementation plans incorporate the goal of achieving the NAAQSs as expeditiously as practicable but in no case later than three years after the date of approval of such plan. The law also provided for a two-year extension of these deadlines under certain circumstances. *Id.*

14. 42 U.S.C. §§ 7501-7508 (1982).

15. Pub. L. No. 95-95, § 129(c), 91 Stat. 685, 750-51. This deadline was later extended to July 1, 1979. Pub. L. No. 95-190, § 14(b)(2), 91 Stat. 1393, 1404.

revised SIPs contain permit programs "for the construction and operation of new or modified major stationary sources" of pollution in non-attainment areas.[16] Part D also carried a big stick: it prohibited major new construction in any non-attainment area for which there was no SIP meeting all of the statutory requirements.[17]

EPA's view of what constituted a "stationary source" was therefore of critical importance. Since the passage of the 1970 amendments, EPA had developed two distinct definitions of the term "source" in other contexts. Under the "dual" definition, an individual piece of equipment was considered a source.[18] Under the "plant-wide" or "bubble" definition, an entire plant, including all of the various individual pieces of equipment, was considered a source.[19] The bubble definition was more lenient; it exempted replacements of individual pieces of equipment from EPA's requirements so long as the total emissions level of the plant was not increased above a certain limit.[20]

In the waning months of the Carter Administration, EPA conducted an informal rulemaking pursuant to which it concluded that the more stringent dual definition should be adopted for non-attainment areas because "Congress intended that new source review be applied to the greatest extent possible" in reducing pollution levels.[21] In early 1981, however, the incoming Administration called on agencies to conduct a "Government-wide reexamination of regulatory burdens and complexities."[22] As a result of this review, EPA conducted another informal rulemaking, at the conclusion of which it repealed the more stringent 1980 rules and replaced the dual definition with the more lenient bubble standard.[23] This change allowed states in non-attainment areas to employ the bubble approach in their SIPs.[24]

In response to EPA's shift in position, the Natural Resources Defense Council (NRDC) and several other groups petitioned the Court of Appeals for review of EPA's new regulation.[25] In an opinion striking

16. Pub. L. No. 95-95, § 129, 91 Stat. 685, 747 (codified at 42 U.S.C. § 7502(b)(6) (1982)). The requirements for the permit program are set forth in 42 U.S.C. § 7503 (1982).

17. 42 U.S.C. § 7410(a)(2)(I) (1982).

18. *See Leading Cases of the 1983 Term*, 98 HARV. L. REV. 87, 248-49 (1984) and citations therein.

19. *Id.*

20. *See id.*; Note, *A Framework for Judicial Review of an Agency's Statutory Interpretation: Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 1985 DUKE L. J. 469, 474-75 and citations therein.

21. 45 Fed. Reg. 52,676, 52,697 (1980) (final rule adopting the dual definition).

22. 46 Fed. Reg. 16,280, 16,281 (1981) (proposal to amend rules to incorporate bubble definition).

23. 46 Fed. Reg. 50,766 (1981) (final rule adopting the bubble definition).

24. *See, e.g.*, DeLong, *The Bubble Case*, AD. L. NEWS, Fall 1984, at 1.

25. Natural Resources Defense Council v. Gorsuch, 685 F.2d 718, 723-24 (D.C. Cir. 1982),

down the new bubble approach, the court observed that the relevant portion of the amended Clean Air Act "does not explicitly define what Congress envisioned as a 'stationary source' " for purposes of Part D's permit process and construction moratorium.[26] Next, the court found that the legislative history was "at best contradictory" on the definitional question.[27] Given Congress' lack of clarity as to the meaning of "stationary source," the court felt free to provide its own interpretation of the statute. It found that "the purposes of the non-attainment program should guide our decision here."[28] Relying on two earlier decisions,[29] the court held that the bubble concept was mandatory for Clean Air Act programs designed merely to maintain existing air quality, but was inappropriate when applied to programs designed to improve air quality.[30] In other words, the court found that EPA's employment of the bubble definition was inconsistent with the statute's purpose of ameliorating, rather than merely maintaining, air quality. The regulation was thus set aside as incompatible with Congress' remedial purposes.[31]

B. *The Supreme Court's Two-Step Framework*

Chevron successfully sought review in the Supreme Court. In a unanimous opinion overturning the Court of Appeals' decision, Justice Stevens laid out a general framework for analyzing agency interpretations of statutes. He began by gently chastising the lower court for "misconceiv[ing] the nature of its role in reviewing the regulations at issue."[32] According to the Court, the Court of Appeals erred when it rendered its own *de novo* interpretation of the statute after determining "that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program."[33] Having made that determination, the lower court should not have addressed whether the bubble concept was inappropriate or inconsistent with the policies underlying the statute. Instead, the inquiry should have been "whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one."[34]

rev'd sub nom. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 104 S. Ct. 2778 (1984).

26. *Id.* at 723.
27. *Id.* at 726 n.39.
28. *Id.*
29. ASARCO, Inc. v. EPA, 578 F.2d 319 (D.C. Cir. 1978); Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979).
30. NRDC v. Gorsuch, 685 F.2d at 726.
31. *Id.* at 726-27.
32. 104 S. Ct. at 2781, 2783 (1984).
33. *Id.*
34. *Id.*

In the course of this decision, the Supreme Court articulated a simple, two-step framework for analyzing cases in which an agency charged with administering a particular statute finds its interpretation of that statute under attack. First, the court must consider whether Congress "has directly spoken to the precise question at issue."[35] This inquiry into legislative intent should focus first on the plain language of the statute. If the answer is not found in the statute itself, then the court should look to the measure's legislative history. As the Court declared, "if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[36]

In cases where Congress' intent is not clear, the Supreme Court mandated a second analytical step that differed from the approach taken by the Court of Appeals. The Court stated: "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[37] Other parts of the opinion made it clear that the word "permissible," as used here, simply meant "reasonable,"[38] an admittedly ambiguous—but nonetheless common—term of art in administrative law. A reviewing court is therefore obliged in these circumstances to uphold any reasonable interpretation offered by the agency.[39] When an administrative agency has already interpreted the statute, then, "the court does not simply impose its own construction."[40]

C. *Post*-Chevron *Jurisprudence*

In the two years since *Chevron* was decided, the Supreme Court has applied *Chevron*'s analytic framework in several cases, most notably *Chemical Manufacturers Ass'n v. NRDC*,[41] *United States v. Riverside Bayview Homes, Inc.*,[42] and *Board of Governors v. Dimension Financial Corp.*[43] The first two decisions, like *Chevron*, upheld agency interpretations by finding that Congress had expressed no clear intent and that the agency's interpretation was reasonable.[44] In *Dimension*

35. *Id.* at 2781.
36. *Id.* at 2781-82 (footnote omitted).
37. *Id.* at 2782 (footnote omitted).
38. *Id.* at 2792.
39. *Id.* at 2782.
40. *Id.*
41. 105 S. Ct. 1102 (1985).
42. 54 U.S.L.W. 4027 (U.S. December 4, 1985) (No. 84-701).
43. 54 U.S.L.W. 4101 (U.S. January 22, 1986) (No. 84-1274).
44. Just before this article went to press, the Court decided yet another case that, like *Chevron*, upheld an agency interpretation on this ground. United States v. City of Fulton, 54 U.S.L.W. 4343 (U.S. April 8, 1986) (No. 84-1725). Certain other cases, moreover, have applied the *Chevron* analyti-

Financial, the Court applied the first step of the *Chevron* framework and rejected an administrative interpretation on the ground that it was contrary to clear legislative intent as manifested in the statute itself.

Chemical Manufacturers involved EPA's interpretation of the term "modify" in section 301(l) of the Clean Water Act.[45] EPA had promulgated regulations establishing categories of pollution sources, based on particular statutory factors, and setting effluent limitations for those categories.[46] Under the regulations, however, a company could obtain a variance from these limitations by demonstrating to EPA that its industrial plant was "fundamentally different" in some relevant way from the other types of plants in the category to which EPA had assigned it.[47] This "Fundamentally Different Factor" variance program was challenged on the ground that, under section 301(l) of the Act,[48] EPA may not "modify" any requirement of section 301 relating to certain toxic pollutants. EPA, however, interpreted that provision as prohibiting only those modifications expressly permitted by other provisions of section 301—namely those based on economic and water quality considerations[49]—not as a general prohibition against modifying any effluent limitations.[50]

Justice White, writing for a majority of the Court, began his analysis by restating the analytic framework developed in *Chevron*.[51] After an extensive analysis of the statute and its legislative history, he concluded that Congress had not clearly expressed any view on the issue.[52] As in *Chevron*, the Court upheld EPA's interpretation as a reasonable interpretation of an ambiguous statute.[53] The four dissenting Justices, speaking through Justice Marshall, maintained that Congress had intended to prevent EPA from modifying any of its effluent standards;[54] since Congress' intent was clear, EPA was bound to adhere to the considered judgment of the Article I branch. At the same time, the dissenters went to some length to point out that their disagreement with the majority did not reflect a disagreement either with *Chevron* or with the majority's reading of that case.[55] Justice Marshall wrote, "[i]f I agreed with the Court's analysis of

cal framework without expressly invoking *Chevron*. *See, e.g.*, CIA v. Sims, 105 S. Ct. 1881 (1985).

45. Pub. L. No. 95-217, § 53(c), 91 Stat. 1566, 1590 (codified at 33 U.S.C. § 1311(l) (1982)).
46. 105 S. Ct. at 1105.
47. 40 C.F.R. § 403.13 (1983).
48. 33 U.S.C. § 1311(l) (1982).
49. 33 U.S.C. §§ 1311(c), 1311(g) (1982).
50. 105 S. Ct. at 1107-08.
51. *Id.* at 1108.
52. *Id.* at 1110.
53. *Id.* at 1112.
54. *Id.* at 1114.
55. *Id.* at 1121.

the statute and the legislative history, I too would conclude that *Chevron* commands deference to the administrative construction."[56]

Justice White also authored the *Riverside Bayview* opinion, in which the Court regained its *Chevron* unanimity. At issue was an interpretation of the Clean Water Act by the Army Corps of Engineers. The Clean Water Act establishes permit requirements for discharge of dredged or fill materials into "navigable waters," defined merely as "waters of the United States."[57] The Corps, however, issued regulations which defined "waters of the United States" to include not only navigable waters but also "fresh water wetlands" adjacent to, but not regularly flooded by, other bodies of water included in the definition.[58] The Corps' expansive interpretation of this statutory term was opposed by a real estate developer anxious to construct a housing development on low-lying, marshy land without seeking the Corps' permission.[59]

Justice White's opinion followed the approach enunciated in *Chevron* and applied by a divided Court in *Chemical Manufacturers*. He concluded that Congress had left open the issue of whether such wetlands could be considered "waters of the United States," and stated that the reviewing court's analysis of the Corps' construction of the statute "is limited to the question whether it is reasonable, in light of the language, policies, and legislative history of the Act."[60] The Court found that the Corps' interpretation was reasonable.[61]

The third opinion in the post-*Chevron* line, *Dimension Financial*, was written for a unanimous Court by Chief Justice Burger. At issue was an attempt by the Federal Reserve Board to assert jurisdiction over so-called "non-bank banks." The Board had accomplished this jurisdictional outreach by amending and broadening the definition of "bank" contained in its Regulation Y.[62] Under the Bank Holding Company Act of 1956, "bank" is defined as any institution that "(1) accepts deposits that the depositor has a legal right to withdraw on demand and (2) engages in the business of making commercial loans."[63] In amending Regulation Y, the Board interpreted the first clause of this definition to include deposits that "as a matter of practice" are payable on demand, and interpreted the term "commercial loans" in the second clause to include commercial loan sub-

56. *Id.*
57. 33 U.S.C. §§ 1344, 1362(7) (1982).
58. 33 C.F.R. § 323.2(a) (1985).
59. 54 U.S.L.W. at 4028 (1985).
60. *Id.* at 4030.
61. *Id.* at 4032.
62. 12 C.F.R. § 225.2 (1985).
63. 12 U.S.C. § 1841(c) (1982).

stitutes, that is, transactions through which credit is extended to commercial enterprises without the use of a conventional commercial loan.[64]

The Supreme Court upheld the Court of Appeals' decision setting aside the regulation. Relying on *Chevron*, the Chief Justice concluded that the statute was "clear and unambiguous," and that the Board's interpretation was contrary to congressional intent.[65] The Court thus reached its decision solely by engaging in step one of the *Chevron* analysis; the second step was unnecessary.

These cases demonstrate that *Chevron*'s two-step approach to analyzing agency interpretations of statutes is firmly entrenched in the body of law applicable to judicial review of agency action. Although it can be argued whether *Chevron* was properly applied in these cases,[66] *Chevron*'s analytical framework appears to be here to stay.

II. *Chevron*'s Legal Effects

As one would expect with a landmark case, expressions of uncertainty promptly emerged as to *Chevron*'s precise meaning.[67] The Supreme Court's subsequent pronouncements, however, have clarified the effects of the decision on the deference question. On the one hand, *Chevron* strengthened the judicial deference principle; on the other hand, the case raised yet unanswered questions about its application.

64. 12 C.F.R. § 225.2(a)(1) (1985).

65. 54 U.S.L.W. at 4103.

66. Bruce Fein, for example, has recently argued that the analysis in *Dimension Financial* is inconsistent with *Chevron*. Fein, *Agency Discretion Unwisely Limited in 'Dimension'*, LEGAL TIMES, Feb. 10, 1986, at 10.

67. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 549-53 (1985); DeLong, *supra* note 24, at 5, 7; Note, *supra* note 20, at 469-96. The lower courts, however, have had little difficulty applying the *Chevron* framework. *See, e.g.*, Independent Bankers Ass'n v. Marine Midland Bank, 757 F.2d 453, 461 (2d Cir. 1985) (absent compelling evidence of error, arbitrariness, or indications that the interpretation is unsupported by statute, the Comptroller of the Currency's interpretation of the term "branch" in a bank regulatory statute deserved deference, even if a court would have rendered a different permissible interpretation); State of Texas v. United States, 756 F.2d 419, 421 (5th Cir. 1985) (ICC's interpretation of a statute regulating bus lines was permissible and therefore entitled to deference, even if a different interpretation by the D.C. Circuit was perhaps more in line with legislative intent); Missouri Public Service Comm'n v. ICC, 763 F.2d 1014, 1017 (8th Cir. 1985) (holding that the question for the Court is whether the agency's standard is based on a reasonable interpretation of the statute, that the ICC's construction of statute regulating bus lines was "reasonable and consistent with the plain language and legislative history" of the statute, and that the ICC's interpretation therefore must be upheld); Sudemir v. McMahon, 767 F.2d 1456, 1459 (9th Cir. 1985) (Secretary of Health and Human Services' interpretation of statute supporting denial of AFDC benefits to asylum applicants must be reviewed under a permissibility standard; a reasonable construction could not be struck down merely because the court would prefer another); Callaway v. Block, 763 F.2d 1283, 1288 (11th Cir. 1985) (Secretary of Agriculture's interpretation of a statute was entitled to deference absent compelling signs that it was wrong; the court need not conclude that the agency's construction was the only permissible one, or that it would have reached the same interpretation, in order to uphold it).

A. *The Deference Principle*

At first blush, *Chevron* appears to be little more than an application of long-standing Supreme Court precedent calling for courts to defer to administrative interpretations absent strong reasons for not doing so.[68] A generation ago, for example, in *NLRB v. Hearst Publications, Inc.*,[69] the Court stated that "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited."[70] The agency's interpretation, the Court thought, should be accepted as long as it has "warrant in the record and a reasonable basis in law."[71] Moreover, as the Court subsequently stated in *Red Lion Broadcasting Co. v. FCC*,[72] such an interpretation "should be followed unless there are compelling indications that it is wrong."[73]

Chevron not only reaffirmed the deference principle but buttressed it in several ways. First, it removed a long-standing ambiguity in the law resulting from the existence of two distinct lines of cases, one calling for deference, the other disregarding deference altogether. Second, it eliminated much of the courts' authority to invalidate agency interpretations based on perceived inconsistencies with congressional policies. Third, it specified certain conditions under which courts are required to give controlling weight to agency interpretations. Fourth, it seemingly rendered the longevity of an agency's interpretation irrelevant in determining how much weight the interpretation should be given.

Chevron's first effect on the deference principle was to eliminate a long-standing ambiguity in the law. Prior to *Chevron*, it was difficult to discern

68. *See, e.g.*, Jaffe, *supra* note 4, at 263 and cases cited therein; Monaghan, *supra* note 3, at 15 and n.83 and cases cited therein; Stever, *supra* note 4, at 36-41 and cases cited therein; Weaver, *Judicial Interpretation of Administrative Regulations: The Deference Rule*, 45 U. PITT. L. REV. 587 n.3 (1984) and cases cited therein; *Chevron*, 104 S. Ct. at 2782 nn.11,14 and cases cited therein. *See also* Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist., 104 S. Ct. 2472, 2479 (1984) ("Under established administrative law principles, it is clear that the Administrator's interpretation of the Regional Act is to be given great weight."); Blum v. Bacon, 457 U.S. 132, 141 (1982) ("We have often noted that the interpretation of an agency charged with the administration of a statute is entitled to substantial deference."); Quern v. Mandley, 436 U.S. 725, 738 (1977) ("The interpretation of the agency charged with administration of the statute is, of course, entitled to substantial deference."); Investment Company Inst. v. Camp, 401 U.S. 617, 626-27 (1971) ("[I]t is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute."); Unemployment Comm'n v. Aragon, 329 U.S. 143, 153-54 (1946) ("To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.").

69. 322 U.S. 111 (1944).

70. *Id.* at 131.

71. *Id.*

72. 395 U.S. 367 (1968).

73. *Id.* at 381.

any single standard for judicial review of agency interpretations.[74] In contrast to the line of cases which called for judicial deference to agency interpretations[75] was another, equally impressive, line of Supreme Court decisions in which the Court freely substituted its own judgment for that of the agency with no mention of deference.[76] In *Ford Motor Credit Co. v. Millhollin*,[77] for example, the Court deferred to a Federal Reserve Board interpretation of the Truth in Lending Act, emphasizing that considerable respect is due the interpretation of a statute given by an agency charged with its administration.[78] The following year, however, in *United States v. Swank*,[79] the Court rejected an Internal Revenue Service construction of a section of the Internal Revenue Code without discussing deference at all.[80]

Not only were there two conflicting lines of cases, but the Court failed to formulate any consistent rationale explaining why it sometimes used

74. Perhaps the best explication of the ambiguity that existed in the law prior to *Chevron* was offered by Judge Henry J. Friendly in 1976. Of the Supreme Court's deference decisions, he remarked:

> We think it is time to recognize . . . that there are two lines of Supreme Court decisions on this subject which are analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for the case at hand. Leading cases support the view that great deference must be given to the decisions of an administrative agency applying a statute to the facts and that such decisions can be reversed only if without rational basis. . . . However, there is an impressive body of law sanctioning free substitution of judicial for administrative judgment when the question involves the meaning of a statutory term. . . . In one of its most recent decisions on the subject, *Morton v. Ruiz*, 415 U.S. 199, 237 . . . (1974), the Court held that "In order for an agency interpretation to be granted deference, it must be consistent with the Congressional purpose;" this very nearly eliminates the "deference" principle as regards statutory construction altogether since if the agency's determination is found by a court to be consistent with the Congressional purpose, it presumably would be affirmed on that ground without any need for deference.

Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2d Cir. 1976) (footnotes omitted).

This conflict had its genesis long ago in the opinions of Chief Justice Marshall. His statement in *Marbury* that it was "the province of the judicial department to say what the law is" seemed to allow little, if any, room for deference to statutory interpretation by the Executive. 5 U.S. at 177. Yet, six years after *Marbury*, Marshall expressed a different view in *United States v. Vowell & M'Lean*, 9 U.S. (5 Cranch) 368 (1808). That case involved a lawsuit brought to enforce a bond given for custom duties owed on a particular commodity. The case turned on when the bondholder's duty had accrued. *Id.* at 368. In a one paragraph decision, Justice Marshall stated that "[i]f the question had been doubtful, the court would have respected the uniform construction which it is understood has been given by the treasury department of the United States upon similar questions." *Id.* at 372.

75. *See supra* text accompanying notes 68-73.

76. *See, e.g.*, Jewett v. Commissioner, 455 U.S. 305 (1982); Blanding v. DuBoso, 454 U.S. 393 (1982); Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 181 (1981); Anderson Bros. Ford v. Valencia, 452 U.S. 205 (1981); United States v. Larionoff, 431 U.S. 864 (1977); Ehlert v. United States, 402 U.S. 99 (1971); Thorpe v. Housing Authority, 393 U.S. 268 (1969); Bowles v. Seminole Rock Co., 325 U.S. 410 (1945); United States v. Eaton, 169 U.S. 331 (1898).

77. 444 U.S. 555 (1980).

78. *Id.* at 566.

79. 451 U.S. 571 (1981).

80. Justice White, in dissent, stated that "the Court's opinion . . . is nothing more than a substitution of what it deems meet and proper for the wholly reasonable views of the Internal Revenue Service as to the meaning of its own regulation and of the statutory provisions." 451 U.S. at 595.

one approach and sometimes the other.[81] Not surprisingly, this led several commentators to suggest that the deference standard was being applied in a result-oriented manner,[82] with judges making independent interpretations and then invoking the principle only when it was convenient.[83] Justice Marshall, dissenting from the Court's decision to reject an agency interpretation of a statute in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*,[84] argued that by ignoring precedent calling for judicial deference, the Court had given credence to the "frequently voiced criticism" that the deference principle is honored "only when the Court finds itself in substantive agreement with the agency action at issue."[85] At the very least, the lingering ambiguity in the law constituted a source of confusion for lower federal courts.[86]

Chevron removed this ambiguity by enunciating its two-step analytical framework. By so doing, the Court implicitly disapproved the approach embodied in earlier cases in which courts, without pointing to any clear expression of congressional intent and without even pausing to consider whether deference to the agency would be appropriate, simply decided legal questions already passed upon by administrative agencies.[87] *Chevron*'s clear-cut analytic approach effectively removed the most obvious avenue for courts seeking to avoid deference to a particular agency interpretation.

Chevron also strengthened the deference principle by restricting the power of federal courts to reject an agency interpretation on the grounds of infidelity to the policies underlying the statute. Pre-*Chevron* cases, such as *Federal Elections Commission v. Democratic Senatorial Campaign Committee*,[88] held that an agency interpretation could be overturned either because it violated Congress' clearly enunciated intent, or because it "frustate[d] the *policy* that Congress sought to implement."[89] *Chevron*, by contrast, held that, once a court has determined that Congress had no intent with regard to the question before it, policy considerations should play little, if any, role. The decision recognized that, because a statute

81. *See* 5 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29:07 (1978); Coffman, *supra* note 4, at 3 n.13.

82. *See* Gellhorn & Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 780-81 (1975); Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 890 (1930).

83. Weaver, *supra* note 68, at 590.

84. 448 U.S. 607 (1980).

85. *Id.* at 712.

86. *See supra* note 74.

87. *See, e.g.*, Davies Warehouse Co. v. Bowles, 321 U.S. 144 (1944).

88. 454 U.S. 27 (1981).

89. *Id.* at 32 (emphasis added). This language has been quoted, but not relied upon, in post-*Chevron* cases. *See, e.g.*, Securities Industry Ass'n v. Board of Governors, 104 S. Ct. 2979, 2983 (1984).

often represents a compromise or accommodation between two or more conflicting policies, discerning a single underlying policy or purpose can be difficult.[90] The Court emphatically stated that it was for the agency, not the reviewing court, "to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved."[91] The Court of Appeals, it will be recalled, had rejected EPA's interpretation on the ground that it was inconsistent with the purposes of the Clean Air Act amendments.[92] By invalidating the Court of Appeals' approach, the Supreme Court invalidated what had been a rather common method of overturning agency interpretations.[93]

After *Chevron*, the one clear avenue for courts to appeal to congressional policy in statutory interpretation cases arises under the first step of the *Chevron* analysis. For example, a reviewing court may find a statute's terms to be crystal clear but nonetheless irrational or patently contrary to the legislative history, leaving the court to look to the underlying purposes of the statute in order to resolve the conflict. This analytical mode is not, however, an open invitation for the judiciary to force recalcitrant agencies to implement more vigorously the policies that animated Congress in the first instance. Instead, upon analysis, this approach seems to be merely an exception to the "plain meaning" rule of statutory construction, which provides that statutory language is the starting point for divining legislative intent. Moreover, such cases are rare indeed, likely to exist only where the statutory language admits of only one reading and where that reading could not possibly have been embraced by a reasonable Congress seeking to attain the goals it sought.

A recent case in our court, *Max Ralis v. RFE/RL, Inc.*,[94] illustrates the difficulty of arguing successfully that implicit congressional policy

90. 104 S. Ct. at 2793 & n.41. *See also* Stukane, *EPA's Bubble Concept After Chevron v. NRDC: Who is to Guard the Guards Themselves?*, 17 NAT. RESOURCES LAW. 647, 678-79 (1985) (tendency of courts is to search for the purpose of specific provision of statute under consideration, yet problems arise where the statute itself embodies multiple, overlapping goals).

91. 104 S. Ct. at 2793. The Court concluded:

> [W]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within the gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.

Id.

92. *See* 685 F.2d at 726.

93. *See* DeLong, *supra* note 24, at 7. *See, e.g.*, SEC v. Sloan, 436 U.S. 103, 118-19 (1978); FMC v. Seatrain Lines, 411 U.S. 726, 745-46 (1973); Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 272 (1968); NLRB v. Brown, 380 U.S. 278, 291-92 (1965); Federal Maritime Bd. v. Isbrandsten Co., 356 U.S. 481, 499-500 (1957).

94. 770 F.2d 1121 (D.C. Cir. 1985).

should override the clear terms of the statute. In that case, the issue was whether the Age Discrimination in Employment Act (ADEA) permitted discrimination against otherwise protected employees who were situated outside the United States. The ADEA, by virtue of its express incorporation of the limitations embodied in the Fair Labor Standards Act (FLSA), was limited to the territorial boundaries of the United States. The plaintiff, a U.S. citizen who had been working in Europe for Radio Free Europe, claimed that his involuntary retirement was discriminatory and argued that rigorous application of the literal language of the statute would create an anomaly: all anti-discrimination statutes except the ADEA would apply to U.S. citizens employed abroad by American firms. This contention, however, was insufficient to persuade the court to override the plain meaning of the statute.[95] In the court's view, whatever Congress may have had in mind by incorporating the FLSA's territorial limitations into the ADEA, it was not for the judiciary to rewrite the statute so as to accomplish the broader policy goals undergirding the statute.

A third way in which *Chevron* strengthened the deference principle was by modifying the meaning of "deference." In some earlier cases, to defer to an agency interpretation had merely meant giving some weight to that interpretation. The Supreme Court in *NLRB v. Hearst*, for example, enunciated its own interpretation of the statutory term "employee" before even discussing the NLRB's interpretation.[96] This suggests that the Court viewed the NLRB's consonant interpretation as a happy coincidence. To defer to an agency's interpretation, then, was merely to give some weight to its interpretation.[97]

In *Chevron*, however, the Court made it clear that if its two conditions for deferring to the agencies are met,[98] "a court may not substitute its own construction" for that of the agency.[99] In *Chevron*, then, deference meant that a reviewing court not only must consider the agency's interpretation, but must give controlling weight to that interpretation when these preconditions are met.[100]

95. *Id.* at 1124.

96. *See* 322 U.S. 111, 128-32.

97. Indeed, *Hearst* also stated that "questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving *appropriate weight*" to the agency's interpretation. *Id.* at 130-31 (emphasis added).

98. As explained above, these conditions are the absence of an explicit congressional intent and a reasonable interpretation by the agency. *See* text accompanying notes 35-40.

99. 104 S. Ct. at 2782.

100. *See* Saunders, Interpretative Rules—Legislative Effect 18, 19 (1986) (forthcoming in the *Duke Law Journal*).

Chevron's fourth effect on the deference principle was to cast doubt upon a number of earlier decisions which had adopted a "sliding scale" approach in determining how much deference to afford an agency's statutory interpretation.[101] These decisions indicated that the degree of deference to which an interpretation would be entitled depended upon such factors as whether the agency's interpretation had been consistent over a long period, whether the agency had helped shepherd the legislation through Congress, whether the agency's interpretation was adopted near the time the statute was passed, and whether the agency possessed special expertise.[102] All are common-sense indicia of reliability.

Chevron, however, specifically found irrelevant the first of these common-sense factors, and, as discussed in the next section, has cast doubt upon the others. The Court pointedly rejected the argument that EPA's interpretation was entitled to little or no deference because it was a recent interpretation and because the Agency had, in the past, adopted conflicting interpretations of the same provision.[103] Indeed, the Court seemed to find merit in the Agency's change in position: "An initial agency interpretation is not instantly carved in stone. On the contrary, to engage in informed rulemaking, the agency must consider varying interpretations and the wisdom of its policy on a continuing basis."[104]

This, of course, does not mean that an agency's change in position is without significance in all circumstances. Such a change took on considerable importance in at least one recent case, *Motor Vehicle Manufacturers Ass'n v. State Farm*.[105] *State Farm*, although not involving an agency interpretation of a statute, is an important counterpoint to *Chevron* in modern administrative law. There, the Supreme Court rejected the proposition that a deregulatory action—rescinding the requirement that the U.S. automobile fleet install passive restraints during a phase-in

101. *See, e.g.*, Office of Consumers' Counsel v. FERC, 655 F.2d 1132, 1141 (D.C. Cir. 1980); Chrysler Corp. v. Brown, 441 U.S. 281, 315 (1979); General Electric Co. v. Gilbert, 429 U.S. 125, 141-45 (1976); Morton v. Ruiz, 415 U.S. 199, 237 (1974); Zuber v. Allen, 396 U.S. 168, 192 (1969); Skidmore v. Swift, 323 U.S. 134, 140 (1944).

102. *See* Skidmore v. Swift, 323 U.S. at 140; Morton v. Ruiz, 415 U.S. at 231-37; Batterton v. Francis, 432 U.S. at 425 n.9. Additional cases emphasizing that long-standing interpretations have great weight include United States v. Clark, 454 U.S. 555, 562 (1982); Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978); United States v. National Ass'n of Sec. Dealers, 422 U.S. 694, 718-19 (1975).

103. 104 S. Ct. at 2792. Earlier cases had given considerable weight to the consistency of agency interpretations over time. *See, e.g.*, United Housing Foundation v. Forman, 421 U.S. 837, 858 n.25 (1975) (recent SEC interpretation that was inconsistent with prior, long-standing interpretation not entitled to deference); United States v. Leslie Salt Co., 350 U.S. 383, 396 (1956) (recent Treasury interpretation that was inconsistent with prior, long-standing interpretation not entitled to deference).

104. 104 S. Ct. at 2792. This conclusion comports with the established principle of administrative law that an agency's modification of a proposed rule in light of comments received indicates reasoned decisionmaking. *See, e.g.*, International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 632 n.51 (D.C. Cir. 1973).

105. 463 U.S. 29 (1983).

period—should be scrutinized under the highly deferential standard applicable when an agency simply declines to take any action. The courts have traditionally been most deferential in declining to overturn an agency's decision not to act at all; indeed, a recent Supreme Court decision, *Heckler v. Chaney*,[106] held that such decisions are entitled to a presumption of nonreviewability that may be rebutted only "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers."[107] But *State Farm* held that an agency decision to rescind a rule should not be treated as a decision not to act in the first instance. Thus, if an agency changes its view about the wisdom of a rule, *State Farm* requires the agency to demonstrate not only that the new rule is reasonable, but also that the agency's decision to change course is reasonable.

Under *Chevron*, however, an agency that changes its mind about the meaning of a statute it administers need not justify its change of course. It must merely show that its new interpretation falls within the range of reasonable interpretations. In this respect, as well as in the other three respects discussed above, *Chevron* makes it much more difficult for a reviewing court to overturn an agency interpretation.

Despite its strengthening of the deference principle, however, *Chevron* has not made judicial review a dead letter. On the contrary, as the Court's own post-*Chevron* decisions demonstrate, application of the *Chevron* framework—particularly its first step—continues to be a potent check on agency interpretations.[108] Indeed, step one of the *Chevron* analysis will be the primary battleground on which litigation over agency interpretations is fought. As we have seen, the Court itself did not find it necessary to go beyond step one in *Dimension Financial*,[109] and four members of the Court would have decided *Chemical Manufacturers* on the basis of congressional intent alone.[110] So too, I recently participated in a decision overturning an agency's interpretation of a statute on that ground.[111] I suspect that such decisions will continue to be a prominent feature of the

106. 105 S. Ct. 1649 (1985).

107. *Id.* at 1656. One case in which this presumption was successfully rebutted is Dunlop v. Bachowski, 421 U.S. 560 (1975), which is discussed in Heckler v. Chaney, 105 S. Ct. at 1657. In *Dunlop*, the statute giving enforcement authority to the National Labor Relations Board required the Board to take enforcement action if certain "clearly defined" factors were present. The *Heckler* opinion distinguished *Dunlop* on the ground that these factors had provided sufficiently definite standards to warrant reviewability in that case. *Id* at 1658.

108. Contrast this to other judicial tests that seem to be satisfied almost invariably. For example, the first prong of the familiar two-prong test of ripeness originally enunciated in Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), which concerns the fitness of the issue for judicial resolution, seems to be satisfied much more frequently than not.

109. *See supra* text accompanying note 65.

110. *See supra* text accompanying notes 54-56.

111. Wisconsin Elec. Power Co. v. Dep't of Energy, 778 F.2d 1 (D.C. Cir. 1985).

administrative law landscape. I therefore cannot agree with the jeremiads that *Chevron* has somehow emasculated judicial review.

B. *Unresolved Issues*

Chevron also raised questions regarding the application of the deference principle. These unresolved issues include whether the "sliding scale" approach to deference retains any validity; whether courts will be more willing to hold an interpretation "reasonable" when the statute relates to the core powers of the Executive; and what a reviewing court should do when faced with conflicting interpretations of the same statute by different agencies.

First, it is not clear to what extent the "sliding scale" approach is still appropriate, or to what extent any of the factors usually employed in that analysis are still relevant. The *Chevron* approach seems rather absolute, leaving little if any room for varying degrees of deference based on varying combinations of the factors discussed above. The three post-*Chevron* cases have offered nothing that would call *Chevron*'s seeming absolutism into question. Yet, it is unclear whether the Court would be as willing to defer if the statutory scheme were neither technical nor complex, and if the agency making the interpretation had no particular expertise in the area. If the statute in question were straightforward, free from the complexity of, say, the environmental laws or the Internal Revenue Code, then the Court might find no explicit or implicit gap left by Congress for the agency—rather than the courts—to fill. Even if the Court found such a gap, a lack of complexity might lead the Court to undertake a more searching review of the reasonableness of the agency interpretation.

Second, it is not yet clear to what extent other prudential considerations will affect the degree of deference afforded by reviewing courts to statutory interpretations made by members of the executive branch. For example, should a court be more willing to defer to a decision involving the use of executive authority over the military or over foreign relations?[112] Such considerations may well play an important role during step two of the *Chevron* analysis, when a court is attempting to determine whether the administrative interpretation at issue is sufficiently reasonable to be upheld. Perhaps the Court will incline toward greater deference in matters that touch on core powers of the Executive than it would in less sensitive settings.

112. My colleague Judge Bork, for example, has argued that the "principle of deference applies with special force where the subject of that analysis is a delegation to the Executive of authority to make and implement decisions relating to the conduct of foreign affairs." Abourezk v. Reagan, No. 84-5673, Slip Op. at 4 (D.C. Cir. March 11, 1986) (Bork, J., dissenting).

Another unresolved problem is what a reviewing court should do when agencies have adopted conflicting interpretations of the same statute. Such situations are not frequent, but they do arise on occasion. The Federal Reserve Board and the Comptroller of the Currency, for example, have been known to take opposing views of the meaning of the Glass-Steagall Act of 1933,[113] a banking statute both agencies are charged with administering.[114] *Chevron*'s recognition that there might be more than one reasonable interpretation of a statute[115] suggests that if both agencies' interpretations were reasonable, both would be upheld if Congress had not spoken to the issue. However, the Court could well require—based on a desire to preserve consistency in the law or ensure fairness to regulated entities—that only one of the two interpretations be permitted to stand.

III. *Chevron*'s Broader Message

When one takes all of its legal effects into account, I believe *Chevron* contains a broader message to the federal courts about their relationship to administrative agencies. This message is best understood by considering two paradigms upon which that relationship might be based. These paradigms represent the two ends of a continuum. At one end is the "supervisory" paradigm, of which the relationship between the Supreme Court and the lower federal courts is the best example. At the other end is the much more deferential "checking and balancing" paradigm, which describes the relationship between the federal courts and Congress or between the federal courts and the President. Prior to *Chevron* and the 1978 administrative law landmark, *Vermont Yankee Nuclear Power Corp. v. NRDC*,[116] the lower federal courts often saw the court-agency relationship as a supervisory one in many respects. *Chevron*, taken together with *Vermont Yankee*, has made this view untenable. Although the Court has not completely embraced the pure checking and balancing paradigm as a normative description of the court-agency relationship, and probably never will, *Chevron* strongly suggests that courts should see

113. Ch. 89, 48 Stat. 162 (1933) (codified in scattered sections of 12 U.S.C.).

114. In Investment Company Inst. v. Camp, 401 U.S. 617 (1971), for example, the Comptroller had interpreted sections 16 and 21 of the Glass-Steagall Act inconsistently with regulations previously promulgated by the Federal Reserve Board. *See id.* at 621-23. Other examples are cited in Coffman, *supra* note 4, at 8 n.51.

115. The Court stated: "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the questions initially had arisen in a judicial proceeding." 104 S. Ct. at 2782 n.11.

116. 435 U.S. 519 (1978) (administrative agencies are free to fashion their own procedural rules and the courts may not impose procedural requirements that go beyond the minimum standards of the Administrative Procedure Act).

themselves not as supervisors of agencies, but more as a check or bulwark against abuses of agency power.

A. *The Paradigms Compared*

The relationship between the Supreme Court and the lower courts differs from that between the Court and the other two branches in at least five respects. First, the Supreme Court prescribes detailed rules to be followed by the lower courts, but prescribes no such rules for Congress or the President. Second, the Court conducts *de novo* review of lower courts' legal analysis, but generally does not review those of Congress or the President. Third, the Court seeks to ensure consistency in the decisions of lower courts, but does not require consistency in presidential or congressional decisionmaking. Fourth, the Court exercises much broader review over the policy judgments of federal judges than over those of the President or Congress. Finally, the Court has at its disposal a broader range of remedies when it reviews decisions of lower federal courts. In all of these respects, the Court, in its checking and balancing relationship with the coordinate branches, is much more deferential than in its role as supervisor of the lower courts.

1. *Rules*

The first point of comparison between the two paradigms concerns the Court's authority to prescribe the "rules of the game." At the behest of Congress, the Supreme Court promulgates at least four sets of rules that bind the lower federal courts. These rules are designed to promote justice and ensure rational decisionmaking. They include the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, and the Federal Rules of Appellate Procedure. These rules are, of course, drafted by advisory committees before the Court approves them, and are subject to congressional approval. Even so, their promulgation and enforcement are primarily the responsibility of the Supreme Court.[117]

By contrast, the Court makes no effort to impose procedures on either of the coordinate branches. Thus, at the most obvious level, the Court does not prescribe procedures by which the Congress must generate legislation, or by which the White House must exercise executive power. All that the Court does is ensure that the procedures employed by the legislative and executive branches pass constitutional muster.

117. 28 U.S.C. § 331 (1982); *see also* S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 2-4 (1986).

2. *Review of Legal Analysis*

The second point of comparison concerns the scope of review of legal analysis. As already noted, the Supreme Court engages in *de novo* review of such analysis by the lower federal courts, including their interpretations of the Constitution, statutes, and prior cases, as well as their applications of legal principles to specific factual situations.

Judicial review of legal analysis by Congress or the President has a considerably more narrow scope. Since neither Congress nor the President provides explicit analysis of legal problems, the Supreme Court rarely has occasion to review a legal decision by a coordinate branch. Nonetheless, many important decisions of both branches rest upon presidential or congressional views of what is constitutional or lawful. The Court tries to avoid intruding upon such implicit legal analysis. For instance, the Court has enunciated a doctrine under which decisions that lie at the core of Presidential power (e.g. decisions relating to the military or to foreign policy) are unreviewable.[118] More generally, under the "political question" doctrine, the Court will sometimes avoid reviewing a decision it deems constitutionally committed to the discretion of another branch of government.[119] Finally, it is a well-settled principle that the Court, when faced with a constitutional challenge to an Act of Congress, will attempt to construe the statute at issue in a way that preserves its constitutionality.[120] All of these techniques reflect the Court's hesitancy to overturn legal decisions made by coordinate branches.[121]

3. *Ensuring Consistency*

The third distinction between the two paradigms concerns the role of the courts in ensuring consistent decisionmaking. In its relationship with the lower courts, the Supreme Court is the guarantor of consistency in the

118. Goldwater v. Carter, 444 U.S. 996 (1979); Gilligan v. Morgan, 413 U.S. 1, 8 (1973); Chicago & Southern Air Lines v. Waterman Steamship Corp., 333 U.S. 103, 110-11 (1948) (presidential control over decisions by Civil Aeronautics Board regarding overseas and foreign air transportation not subject to review); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (President has "exclusive power . . . as the sole organ of the federal government in the field of international relations").

119. Baker v. Carr, 369 U.S. 186, 217 (1962) ("Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department . . .").

120. Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (" 'When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' ") (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)) (footnote omitted).

121. *See generally* A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111-98 (1962) (discussing various techniques used by the Court to avoid deciding constitutional issues assigned to coordinate branches).

law. The Court seeks to ensure that the lower federal courts follow prior Supreme Court decisions.[122] It also frequently agrees to hear cases solely to resolve a conflict among the circuits.[123]

In contrast to the Court's efforts to preserve doctrinal consistency among the lower federal courts, the Court makes no attempt to ensure that presidential policies or congressional decisionmaking are internally consistent. As long as these decisions are not so irrational or inconsistent as to be discriminatory and thereby run afoul of the Constitution, for example, the Court will not interfere.

4. *Policy Judgments*

Another important distinction between the checking and balancing paradigm and the supervisory paradigm lies in the scope of review of policy determinations. In general, policy considerations play only a limited role in judicial decisions, appearing most often in such largely judge-made areas of the law as torts, contracts, antitrust, and equitable remedies, where the courts expressly take into account "the public interest." To the extent that a court's view of wise policy plays a role in its decision, a reviewing court may overturn that policy determination just as easily as it can overturn the analysis of a purely legal issue. Superior courts therefore need not defer to or even accord respect to the policy choices of lower courts.

This, of course, stands in sharp contrast to the Court's treatment of policy determinations made by the executive and legislative branches. As long as policy decisions by the President and Congress pass constitutional muster, the Court does not subject them to further scrutiny. It does not second guess legislative or executive policy choices.

5. *Remedies*

The final point of comparison involves the range of remedies available to the Court if it believes an error has been committed. If the Supreme Court determines that a lower court has erred, the Court has several options. It can simply solve the problem without sending the case back down; it can send the case back down with precise instructions; or it can

122. *See, e.g.*, McAllister v. New Jersey, 396 F.2d 776, 777 (3d Cir. 1968); Bursten v. United States, 395 F.2d 976, 980 (5th Cir. 1968), *on appeal of remand*, 453 F.2d 605 (1971) (affirming unreported trial decision), *cert. denied*, 409 U.S. 843 (1972); Davis v. Board of School Commissioners, 318 F.2d 63, 64 (5th Cir. 1963); Lichter Found., Inc., v. Welch 269 F.2d 142, 145 (6th Cir. 1959).

123. Recent examples include Mueller v. Allen, 463 U.S. 388, 390-91 (1983); United States v. Villamonte-Marquez, 462 U.S. 579, 584 (1983); Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 700 (1982); Finnegan v. Leu, 456 U.S. 431, 433 (1982); Howe v. Smith, 452 U.S. 473, 479 (1981).

reverse the lower court's judgment, explain why it is doing so, and leave it to the lower court to choose the appropriate disposition. In brief, the Court has tremendous flexibility and authority not only to dictate a new remedy but also to determine the appropriate forum for providing that remedy.

The Court does not, however, make any effort to rectify mistakes made by either the President or Congress. If, for example, the Court determines that a statute is unavoidably unconstitutional, it does not attempt to amend the statute, except to the extent that a narrow reading of the statute may be considered an amendment. It simply invalidates the statute and thus returns the matter to Congress.[124] When reviewing congressional statutes or executive actions, the Court does not have the broad range of remedies that it has when reviewing decisions of lower courts.

In short, the Supreme Court has broad authority to supervise lower federal courts. Except for findings of fact,[125] the Court does not, as a general matter, have any obligation to defer to determinations made by district and circuit courts. By contrast, the relationships between the Court and the coordinate branches of the federal government—Congress and the President—are characterized by a high degree of deference. The Court does not see itself as a supervisor of its coordinate branches. Rather, it provides a check and a balance, ensuring that legislative and executive actions remain within certain bounds. Otherwise, it leaves the other branches free to pursue the policies they select in the manner they deem to be in the public interest.[126]

B. *Agency-Court Relations Before* Chevron *and* Vermont Yankee

Prior to *Chevron* and *Vermont Yankee*, the agency-court relationship, at least as perceived by the lower federal courts, fit into the supervisory paradigm in at least three ways. First, as reflected in the Court of Appeals decision in *Vermont Yankee*, some federal courts believed they could prescribe procedural rules for executive agencies.[127] Second, as discussed earlier, courts often felt free to undertake a *de novo* interpretation of a stat-

124. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (holding unconstitutional the National Industrial Recovery Act of 1933); Adair v. United States, 208 U.S. 161 (1908) (holding unconstitutional a federal law against "yellow dog" contracts on interstate railroads).

125. *See* FED. R. CIV. P. 52(a) (finding of fact may be set aside if clearly erroneous); Anderson v. City of Bessemer City, 105 S. Ct. 1504, 1511-12 (1985) (discussing clearly erroneous rule).

126. Lichter v. United States, 334 U.S. 742, 784 (1948) (delegation of authority by Congress in Renegotiation Act was within the "scope of its discretion"); Coleman v. Miller, 307 U.S. 433, 454 (1939) (fixing a reasonable time for ratification of a proposed constitutional amendment "lies within the congressional province" of Article V powers and therefore "would not be subject to review by the courts").

127. *See* 1 K. DAVIS, *supra* note 81, at § 2:18.

ute, even when the administering agency had already provided its own interpretation.[128] Third, courts fostered consistency in agency decision-making by professing to give greater deference to long-standing agency interpretations[129] and requiring agencies to explain and justify any change in position.[130]

Judicial review of agencies' policy choices, however, fell somewhere between the deference accorded by courts to decisions by Congress or the President and the complete absence of deference accorded in this respect by superior federal courts to lower courts.[131] In this regard, the relationship was not wholly supervisory because a reviewing court could not, for example, overturn an agency's policy choice merely because the court believed the decision to be misguided or wrong. Under the Administrative Procedure Act, a policy decision made by an agency could be overturned only if "arbitrary and capricious."[132] When determining whether an agency choice was arbitrary or capricious, however, courts were admonished to take a "hard look" at the agency choice[133] and to engage in a "searching and careful" review of the agency's reasoning.[134] Hence, courts did not have to accord agencies the same degree of deference accorded to Congress and the President.

The only feature of the court-agency relationship that fit—and still fits—the checking and balancing paradigm prior to *Chevron* and *Vermont Yankee* is the narrow range of remedies available to a reviewing court when it believes an agency has gone astray. Under well-established administrative law principles, a court cannot affirm an agency decision on a ground other than that articulated by the agency.[135] Hence, a reviewing court cannot simply remedy a defective decision. Rather, it must remand the case to the agency and allow the agency to cure the defects.

Thus, although the relationship between courts and agencies obviously did not fit perfectly the supervisory paradigm prior to *Chevron* and *Vermont Yankee*, it tended to fit that paradigm in many respects. Before these decisions, then, lower federal courts could easily view their appro-

128. *See* Natural Resources Defense Council v. NRC, 547 F.2d 633, 646 (1976); *see also* 5 K. DAVIS, *supra* note 81, at § 28:6.

129. *See* 5 K. DAVIS, *supra* note 81, at § 28:3; *see also* St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 84 (1936).

130. *See* United States v. National Ass'n of Sec. Dealers, 422 U.S. 694, 718-19 (1975); Skidmore v. Swift, 323 U.S. 134, 140 (1944).

131. *See* Motor Vehicle Mfrs. Ass'n v. State Farm, 463 U.S. 29 (1983).

132. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982).

133. *See* Greater Boston Television Co. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). For a discussion of the "hard-look" doctrine, see Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177.

134. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

135. *See* SEC v. Chenery, 332 U.S. 194, 196 (1947); R. PIERCE, S. SHAPIRO, & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 356 (1985).

priate role as one of supervision rather than one of providing checks and balances.

C. *The* Chevron *and* Vermont Yankee *Revolution*

Chevron and *Vermont Yankee*, however, produced a decided shift away from the supervisory paradigm and toward the checking and balancing paradigm. They did so by severely restricting the authority of federal courts to prescribe rules for agencies, to review agency legal analyses, to ensure consistency in agency interpretations, and, to some extent, to overturn agency policy choices. As already noted, however, these decisions had no effect on the range of remedies available to a court that believes an agency has gone astray; in this respect, the agency-court relationship continues to fit the checking and balancing paradigm.

Vermont Yankee substantially eroded the supervisory paradigm as a normative description of the court-agency relationship by refusing to permit the Court of Appeals to prescribe procedural rules beyond those contained in the Administrative Procedure Act. The case involved a rulemaking by the Atomic Energy Commission (AEC) to decide how environmental effects associated with the uranium fuel cycle would be considered in the AEC's licensing of nuclear plants. The Court of Appeals concluded that even though the AEC had satisfied all the requirements of the Administrative Procedure Act, the agency's procedures for considering fuel reprocessing and disposal issues were inadequate.[136] The Supreme Court reversed. Speaking for a unanimous Court, Justice Rehnquist stated that "agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."[137] According to the Court, then, federal courts were not free to establish procedural rules for agencies in the same way that the Supreme Court promulgates procedural and other rules for the lower federal courts.

Chevron completed the task begun in *Vermont Yankee* by definitively dislodging the supervisory paradigm as an appropriate model on which to base the agency-court relationship. It did so in three ways. First, as discussed earlier, *Chevron* established that unless congressional intent is clear, courts are not free to engage in a *de novo* interpretation of a statute that has already been interpreted by the agency charged with its administration. Second, as already noted, *Chevron* explicitly allowed for the possibility of multiple reasonable interpretations of a statute and minimized the

136. 547 F.2d at 658-59 (Bazelon J., concurring).
137. 435 U.S. at 543.

importance of the longevity of an agency interpretation; in so doing, it undermined the ability of federal courts to ensure consistency in agency interpretation. Finally, *Chevron* moved review of agencies' policy choices somewhat closer to the checking and balancing paradigm by reminding lower courts of their general obligation not to intrude into the agencies' policy-making domain. After *Chevron* and *Vermont Yankee*, therefore, none of the features of the supervisory paradigm applies to the agency-court relationship.

That is not to say, however, that the Supreme Court has now adopted the checking and balancing paradigm completely. As the Supreme Court's *State Farm* decision recently reminded us, a court must still undertake a "searching and careful" review of any agency decision to ensure that the outcome is not irrational, that the agency's explanaton of the outcome is adequate, and that the agency's own procedures have been followed.[138] Under *Chevron*, moreover, a court may still overturn an agency's interpretation of a statute found to be unreasonable or contrary to clear congressional intent.

Vermont Yankee and *Chevron* have nonetheless produced a revolution in administrative law. They have not only changed and refined particular doctrines, but, more importantly, they have changed—and will continue to change—the way courts conceive of their relationship to administrative agencies. Although the Supreme Court's view of the relationship between courts and agencies has not moved completely to the checking and balancing paradigm—and I doubt that it ever will—*Chevron* makes it clear, at the very least, that the supervisory paradigm is no longer appropriate.

IV. Why *Chevron* Makes Sense

Was *Chevron* a "good" decision? I think it was, both because I find its jurisprudential foundations appealing and because I think it will have a number of salutary practical effects.

A. *Jurisprudence*

Chevron appeals to me largely because I think it inappropriate for federal courts to take a supervisory approach when reviewing agency decisions. That is not to say, however, that courts should always be as deferential to agencies as to Congress or the President. Except where Congress has seen fit to commit certain matters to agency discretion or otherwise to insulate certain matters from judicial review, the courts have a congressionally-mandated duty, by virtue of the Administrative Procedure

138. Motor Vehicle Mfrs. Ass'n v. State Farm, 463 U.S. at 43.

Act and various organic statutes, to act as a check on the administrative agencies. Also, allowing agencies unbridled discretion would run afoul of the spirit, if not the letter, of the Supreme Court's non-delegation doctrine, which in broad terms holds that Congress may not delegate power to an agency without providing adequate standards for the exercise of that power.[139] For these reasons, judicial review of agency action should not be toothless. Courts are not, the Supreme Court frequently reminds us, simply to "rubberstamp" agency decisions[140] or to transform deference into "judicial inertia."[141]

However, administrative agencies are not subordinate to the federal courts in the organizational structure established by the Constitution. This alone suggests that Article III judges lack general supervisory authority over the agencies. Neither the framers of the Constitution nor subsequent legislative assemblies, moreover, have seen fit to confer that supervisory power on the courts. For the courts to assume such authority on their own would be inconsistent with the status of the judiciary as the only unelected branch. In part because federal judges are not directly accountable to any electorate, I believe they have a duty voluntarily to exercise "judicial restraint," that is, to avoid intrusions not clearly mandated by Congress or the Constitution into the processes and decisions of any other branch. Thus, *Chevron* reflects a more self-effacing—and in my view more appropriate—judicial philosophy than that embodied in earlier decisions laying claim to broader reviewing authority.[142]

Chevron accomplished this shift in thinking without violating the principles of judicial review enunciated in *Marbury*. As already explained, judicial review of agency interpretations, and of agency actions in general, is still significantly more potent than judicial review of decisions by the President or Congress. In undertaking the first step of the *Chevron* analysis,[143] moreover, a court retains authority to decide the critical issue whether Congress has conferred interpretive authority upon the agency. As Professor Monaghan has said: "The court's interpretational task . . . is to determine the boundaries of delegated authority."[144] The judicial prerogative to determine that an agency lacks interpretive authority or that its

139. *See, e.g.*, J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (delegation must contain an "intelligible principle" to which the agency must conform); *see also* Note, *Rethinking the Non-Delegation Doctrine*, 62 B.U.L. REV. 257 (1982).

140. Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Auth., 464 U.S. 89, 97 (1983) (quoting NLRB v. Brown, 380 U.S. 278, 291-92 (1965)).

141. NLRB v. Financial Inst. Employees of America, Local 1182, No. 84-1493, slip op. at 9 (U.S. February 26, 1986) (quoting American Shipbuilding Co. v. NLRB, 380 U.S. 300, 318 (1965)).

142. *See supra* notes 127-30 and accompanying text.

143. 104 S. Ct. 2778, 2781 (1984).

144. Monaghan, *supra* note 3, at 6.

exercise of that authority has been arbitrary or capricious continues to provide a significant check on administrative agencies.[145]

Thus, when fully appreciated, *Chevron* vindicates the appropriate and traditional function of judicial review. It confirms the judiciary's historic role of declaring what the law is, but prevents the judiciary from going beyond that venerable, legitimate role and straying into the forbidden ground of overseeing administrative agencies. When Congress has not spoken to an issue, *Chevron* forbids the courts to engage in supervisory oversight of the agencies. Ours is not to supervise; that role is allotted to the political branches, those directly accountable to the people. *Chevron* affirms that fundamental allocation of responsibility.

B. *Practical Consequences*

In addition to its jurisprudential implications, the *Chevron* approach should produce important practical benefits. In particular, it should allow agencies to use their expertise in interpreting the many complex statutes that characterize the modern administrative state; improve agency proceedings; encourage better legislative draftsmanship by Congress; and permit an incoming administration to carry out its electoral mandate more comprehensively and consistently.

1. *Relying on Agency Expertise*

Agencies have certain well-recognized advantages in interpreting their own statutes. An agency obviously enjoys a more thorough understanding than the generalist judiciary of how a statute's various provisions interrelate and how different interpretations of a particular provision affect relevant parties.[146] Particularly where an agency has drafted a statute and shepherded it through Congress, the agency's understanding of the statute's language, its legislative history, and its goals is likely to be quite thorough and complete. Technical expertise, moreover, may greatly aid the interpretation of regulatory statutes, especially where an understanding of congressional intent requires familiarity with technical issues, as we saw in the *Riverside Bayview* case.[147] Although technical statutes are, of course, produced by generalist legislators—implying that congressional intent presumably would be as accessible to judges as it is to a technically

145. Illuminating discussions of these issues have been provided by Jaffe, *supra* note 4, at 258-59, and Monaghan, *supra* note 3, at 27-34.

146. *See* McGowan, *Congress, Courts and Control of Delegated Authority*, 77 COLUM. L. REV. 1119, 1164-68 (1977); Monaghan, *supra* note 3, at 31; Woodward & Levin, *In Defense of Judicial Review of Agency Action*, 31 AD. L. REV. 329, 339-41 (1979).

147. *See supra* text accompanying notes 57-61.

competent agency[148]—the agency inevitably enjoys an edge in understanding technical concepts and terminology contained in the statute or its legislative history. The agency is also more familiar with the regulated industry. These advantages of agency expertise are all the more evident during an era of burgeoning judicial caseloads, when judges must move rapidly from one area of the law to another.

Agency expertise is especially valuable when a regulatory scheme is complex or statutory terms are broad and imprecise. Many regulatory statutes, particularly those enacted in the 1960's and since, are highly complex.[149] *Chevron* and *Chemical Manufacturers* both placed special emphasis on the sheer complexity of the statute at issue.[150] Many statutes, moreover, contain terms that are intentionally imprecise. Examples of this studied imprecision are the term "public interest," which figures prominently in such measures as the Communications Act of 1934[151] administered by the Federal Communications Commission, and the phrase "closely related to banking," which figures prominently in the Bank Holding Company Act[152] administered by the Federal Reserve Board. Agency administrators, who have extensive experience with both the regulatory scheme and the regulated industry, are much better placed than generalist judges to make the policy decisions that such broad terms seem to invite. In my view, *Chevron* quite properly recognized that such terms constitute an implicit, but nonetheless valid, delegation of authority to the agency.[153]

2. *Improving Agency Proceedings*

As a practicing lawyer in Washington, I frequently heard lawyers deride administrative agencies. They were particularly fond of criticizing

148. *See* Stever, *supra* note 4, at 59-61.

149. *See, e.g.*, Clean Air Act, 42 U.S.C. §§ 7401-7642; Clean Water Act, 33 U.S.C. §§ 1251-1376; Bank Holding Company Act of 1956, May 9, 1956, ch. 240, § 2, 70 Stat. 133 (codified as amended at 12 U.S.C. §§ 1841-1850 (1982)); Staggers Railroad Act of 1980, Pub. L. no. 96-448, 94 Stat. 1895 (codified at 49 U.S.C. §§ 10101-10103 (1982)) (deregulating trucking); Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (codified in scattered sections of 15 U.S.C., 31 U.S.C., 45 U.S.C., and 49 U.S.C.) (deregulating railroad transportation); Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767; Pub.L. 96-561, 94 Stat. 3300 (codified at 26 U.S.C. §§ 4611-4612, 4661-4662, 4681-4682 and 42 U.S.C. §§ 9601-9657 (1982)) (so-called "Superfund" statute, providing for clean-up of hazardous waste dump sites); Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified at 42 U.S.C. §§ 6901-6987 (1982)) (regulating the generation, transportation, storage, and disposal of hazardous wastes).

150. 104 S. Ct. at 2785, 2792-93; 105 S. Ct. at 1108.

151. Communications Act of 1934, June 19, 1934, ch. 652, Title I-VI, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151-609 (1982)).

152. 12 U.S.C. §§ 1841-1850 (1982).

153. 104 S. Ct. at 2782, 2793.

the legal analysis in agency decisions. On the other hand, I often heard administrators complain that many of their actions—including statutory interpretations—were superfluous, since reviewing courts, in their view, often felt free to overturn them at will.

Both the spirit and the letter of *Chevron* should help change these perceptions, thereby improving the quality of agency proceedings. By giving them more interpretive authority, *Chevron* will encourage agencies to take more responsibility for interpreting the statutes they implement.[154] For the same reason, the quality of argument by parties before the agencies should improve. Because a court reviewing an agency determination is now less free to substitute its judgment for that of the agency, litigants will have an increased incentive to make their best arguments, clearly and aggressively, before the agency rather than waiting for the main event at the courthouse.

3. *Improving Statutory Draftsmanship*

Chevron also places the burden on Congress to legislate with greater precision if it wants to temper the agencies' new power. Consider the legislative-executive relationship before the Supreme Court decided *Chevron* and *INS v. Chadha*,[155] which declared the one-house legislative veto unconstitutional[156] and appears to have struck down the two-house legislative veto as well. Prior to these decisions, if Congress objected to the interpretation of a statute embodied in an agency's rule or regulation, it could veto the rule or regulation with a simple (one-house) or joint resolution provided that the original statute contained a legislative veto provision. If Congress approved of the interpretation, however, it could generally assume that the agency would continue to adhere to it. Neither option is open to Congress any longer. *Chadha* put an end to the legislative veto, and *Chevron* has unsettled the assumption that agencies will abide by orthodox interpretations of the statutes they administer. The agencies are now at greater liberty to alter their readings of ambiguous statutory language.

Legislators are thus left with one principal means of limiting agency discretion: they must draft clearer, more specific statutes. Clearer statutes are obviously preferable to vague ones, and, although clarity requires greater consensus among the lawmakers, making consensus more difficult

154. Professor Jaffe once said that "there is . . . a value in this recognition of administrative autonomy; it may invigorate the sense of responsibility, stimulate initiative, and encourage resourcefulness." Jaffe, *supra* note 4, at 261.

155. 462 U.S. 919 (1983).

156. *See id.* at 958-59.

to achieve is by no means bad in itself. If Congress must express itself more clearly in the interest of keeping agencies on a tighter rein, it may pass fewer laws. Those it does pass, however, will be better than many on the books now.

4. *Increasing Presidential Prerogative*

Chevron will also make it easier for a new administration to carry out its electoral mandate. After *Chevron*, agencies may depart more easily from their predecessors' interpretations. By orchestrating a number of changes in statutory interpretations by different agencies, an incoming administration will be better able to recast the regulatory system in its own image.

Increasing the power of the Executive in this way entails the obvious risk that the changes made may prove unwise. Despite this risk, however, I believe this to be a change for the better. Unelected judges should leave the executive branch free to pursue, within appropriate bounds, what it perceives to be the will of the people. If Congress disagrees with the Executive's new statutory interpretations, the proper response lies, again, in drafting clearer laws and amending vague ones.

Conclusion

Chevron, then, is one of the most important administrative law decisions in recent memory. The decision makes it clear that federal courts, in reviewing a statutory interpretation by an administrative agency, are not simply to substitute their own judgment for that of the agency; rather, they are to accept the agency's interpretation as long as it is reasonable and Congress has expressed no clearly discernible intent to the contrary. More broadly, *Chevron* conveyed the clear message to the lower federal courts that theirs is not to supervise the administrative agencies.

Chevron shifts power from the courts to the agencies, shifting with it the site of the real battle over regulatory decisions. In numerous ways, the decision returns the power to set policy to democratically accountable officials, not least by making it easier for a new administration to oust an old regulatory order. It encourages Congress to speak with clarity, heightening its responsibility for the choices it makes. Above all, *Chevron* chastens the excessive intrusion of courts into the business of agency policy-making. Policy, which is not the natural province of courts, belongs properly to the administrative agencies, and, ultimately, to the executive and legislature that oversee them.