"intent") on that question—aware that such instructions are not merely "found" but are constructed on the basis of an understanding of what makes best sense. See Ronald Dworkin, Law's Empire (1985).

Accordingly, in interpreting a statute to resolve relevant questions of law, the courts might adopt several different approaches. They might look not only to legislative history, language, structure, history, purpose of the program, and so forth but also to the other factors referred to in note 1 to determine what attitude Congress intends courts to take toward the agency's views on the meaning of the statute. Alternatively, they might try to develop a single rule about when to "defer"; the *Chevron* case set out after these notes develops such a "simplified" approach. In either case, deference, when it existed, would be based on the view that "what the law is" is, in certain circumstances, what the agency says that it is. See Henry Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1 (1983).

6. The analysis developed above identifies two distinct (if operationally overlapping) reasons why a court might defer to an agency's resolution of a question of law. First, the court might conclude that the statute granted the agency discretion to decide the issue one way or another. Second, the court might accept the agency's resolution as a presumptively correct interpretation of the statutory commands. The first leaves policymaking to the agency and rests on the idea that the statute does not resolve the question; the second assumes that Congress has made a policy choice and that there is a "right" answer to the legal question that is embodied in the statute. Which, if either, of these approaches does *Skidmore* reflect?

The choice between these two models of deference will matter for many reasons, not least because if a court defers to the agency for the second reason — because of the greater likelihood that the agency's interpretation of the statute is "correct" — then a court will be reluctant to allow the agency to change a long-standing interpretation. If, however, the court has deferred to the agency for the first reason — because the decision is in an area where it is reasonable to infer a congressional desire for agency lawmaking discretion — then the court will be less reluctant to allow a change in interpretation. The issue has considerable practical significance.

We turn now to the dominant modern deference case. Consider whether it reflects the same theory of deference as *Skidmore*.

C. *Chevron:* Synthesis or Revolution?

1. *The Decision*

Chevron U.S.A., Inc. v. Natural Resources Defense Council

467 U.S. 837 (1984)

Justice STEVENS delivered the opinion of the Court.

[The case concerns the interpretation of the words "stationary source" in the 1977 Amendments to the Clean Air Act. The statute requires states to develop air pollution plans that "require permits for the construction and operation of new or modified major stationary sources in accordance with section 173," 42 U.S.C. §7502(b)(6). Section 173 governs controls on new sources in "nonattainment" areas of the nation that do not meet national air quality standards. It imposes extremely strict requirements. For example, it requires an applicant to certify that all its other sources comply with pollution standards. It subjects the "new or modified" source to an elaborate

preconstruction review process. It requires the new source to comply the "lowest achievable emission rate" (LAER) and to obtain "offsets" (reductions of emissions from existing sources in the region) at least equal to its emission increases.

[The Environmental Protection Agency (EPA) issued a rule that allowed states to define an entire plant, containing many individual pollution-emitting units, as if it were a single "source." Thus, if a firm *reduced* emissions from one part of the plant, it could build a whole new unit or modify an existing unit within the plant and increase its emissions without complying with the various requirements of §173. Those requirements would not be triggered as long as pollution from the plant, *considered as a whole*, did not increase. In effect, the rule allowed states to treat each plant as if a bubble were placed over it; the owner could emit whatever it wished *within* the bubble as long as the total emissions coming from the bubble, considered as a single "source," did not increase.

[Proponents of this concept, which was already in place for clean air regions of the country, argued that it would allow plants to allocate controls between new and existing units in the most cost-effective way, provide industry with incentives to find new ways of cleaning up existing units, and eliminate time-consuming preconstruction review. Opponents claimed it did not force owners to incorporate the most advanced technologies in new units and would slow efforts to *improve* air quality in dirty air regions. The court of appeals set aside the rule, concluding that it would undermine Congress's goal of speedy compliance with national air quality standards.

[The statute itself provides the following definitions:

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

[In addition, a different part of the statute, §111, not directly applicable here (imposing certain minimum "performance standards" on all new "stationary sources" of pollution regardless of whether they are located in a nonattainment region), says:

> (3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant.

[During the Carter administration, EPA had considered extending the bubble policy to nonattainment areas, but decided against it. The Reagan administration EPA changed the regulation and allowed states to adopt a plant-wide definition of "source."]

II

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.[1] If, however, the court determines Congress has not directly addressed the precise questions at

1. The judiciary is the final authority on issues of statutory construction and must reject administrative constructions that are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress has an intention on the precise question at issue, that intention is the law and must be given effect

issue, the court does not simply impose its own construction on the statute,[2] as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[3]

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

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

> has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. . . .
>
> . . . If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.

United States v. Shimer, 367 U.S. 374, 382, 383 (1961).

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

VII

In this Court respondents . . . contend that the text of the Act requires the EPA to . . . [say that] if either a component of a plant, or the plant as a whole, emits over 100 tons of pollutant, it is a major stationary source. . . .

2. See generally R. Pound, The Spirit of Common Law 174-175 (1921).

3. The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. . . .

STATUTORY LANGUAGE

The definition of the term "stationary source" in Section 111(a)(3) refers to "any building, structure, facility, or installation" which emits air pollution. . . . The text of the statute does not make this definition applicable to the [§173] permit program. Petitioners therefore maintain that there is no statutory language even relevant to ascertaining the meaning of stationary source in the permit program aside from Section 3020)(j), which defines the term "major stationary source." . . . We disagree with petitioners on this point.

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

Respondents recognize that, and hence point to Section 111(a)(3). Although the definition in that section is not literally applicable to the [§173] permit program, it sheds as much light on the meaning of the word "source" as anything in the statute. As respondents point out, use of the words "building, structure, facility, or installation," as the definition of source, could be read to impose the permit conditions on an individual building that is part of a plant.

. . . On the other hand, the . . . language may reasonably be interpreted to impose the requirement on any discrete, but integrated, operation which pollutes. This gives meaning to all of the terms — a single building, not part of a larger operation, would be covered if it emits more than 100 tons of pollution, as would any facility, structure, or installation. Indeed, the language itself implies a "bubble concept" of sorts: each enumerated item would seem to be treated as if it were encased in a bubble. While respondents insist that each of these terms must be given a discrete meaning, they also argue that Section 111(a)(3) defines "source" as that term is used in Section 302(j). The latter section, however, equates a source with a facility, whereas the former defines "source" as a facility, among other items.

We are not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress. . . . To the extent any congressional "intent" can be discerned from this language, it would appear that the listing of overlapping, illustrative terms was intended to enlarge, rather than confine, the scope of the agency's power to regulate particular sources in order to effectuate the policies of the Act.

LEGISLATIVE HISTORY

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

Based on our examination of the legislative history, we agree with the Court of Appeals that it is unilluminating. . . . We find that the legislative history as a whole is silent on the precise issue before us. It is, however, consistent with the view that the EPA should have broad discretion in implementing the policies of the 1977 Amendments.

More importantly, that history plainly identifies the policy concerns that motivated the enactment; the plantwide definition is fully consistent with one of those concerns — the allowance of reasonable economic growth — and, whether or not we believe it most effectively

implements the other [controlling pollution], we must recognize that the EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives as well. . . .

Our review of the EPA's varying interpretations of the word "source" — both before and after the 1977 Amendments — convinces us that the agency primarily responsible for administering this important legislation has consistently interpreted it flexibly — not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena. The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations.

POLICY

The arguments over policy that are advanced in the parties' briefs create the impression that respondents are now waging in a judicial forum a specific policy battle which they ultimately lost in the agency and in the 32 [state] jurisdictions opting for the "bubble concept," but one which was never waged in the Congress. Such policy arguments are more properly addressed to legislators or administrators, not judges.[4]

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

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

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice

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

within a gap left open by Congress, the challenge must fail. In such a case, federal judges — who have no constituency — have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones; "Our Constitution vests such responsibilities in the political branches." TVA v. Hill, 437 U.S. 153 (1978).

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

The judgment of the Court of Appeals is reversed.

Notes and Questions

1. *Chevron* is the first or second most cited case in American administrative law, depending on how you count. As of July 2016, *Chevron* had been cited in federal courts about 14,000 times — far more than, for example, three better known and much older cases, *Brown v. Board of Education* (1850 cites), *Roe v. Wade* (2170 cites), and *Marbury v. Madison* (2077 cites), and indeed more than twice as often as the three of them combined! Among administrative law cases, *Chevron* lags in federal judicial citations just behind *Lujan v. Defenders of Wildlife* (14,900 cites), a standing decision you will read in Chapter 7.[5] But if one looks to *total* citations (all courts, plus secondary sources, etc.), *Chevron* is the undisputed ad law champion. Notwithstanding its visibility, however, there are questions about whether *Chevron* has actually produced, is producing, or will produce large-scale shifts in the law.

2. *Chevron* appears to establish a "two-step" process for judicial review of agency interpretations of statutes. The first step is to ask whether the statute is clear (that is, whether Congress has directly decided the question at issue). If so, the case is at an end. In step one, then, the court is engaged in what would seem to be ordinary statutory interpretation. If that inquiry yields no clear answer, the court proceeds to step two, asking whether the agency interpretation is "permissible" or "reasonable." Courts almost never invalidate an agency decision in step two. Under this structure the crucial question is when, or under what circumstances, a court abandons its own search for statutory meaning (step one) and defers to any reasonable agency conclusion (step two).

3. APA §706 says that "the reviewing *court* shall decide all relevant questions of law" (emphasis added). That provision is consistent with the old saw from *Marbury v. Madison* that it is "emphatically the province and duty of the judicial department to say what the law is." *Chevron* seems in conflict with those familiar and basic propositions; it can thus be seen as a kind of counter-*Marbury* for the administrative state.

The strong position is that for this reason *Chevron* deference violates the Constitution. Justice Thomas takes that view:

> As I have explained elsewhere, "[T]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws." Interpreting federal statutes—including ambiguous ones administered by an agency—"calls for that

5. The curious will find a most-cited list and some commentary in a blog post by Christopher Walker at http://www.yalejreg.com/blog/most-cited-supreme-court-administrative-law-decisions-by-chris-walker. Note, though, that the real citation champions are outside of administrative law. As of July 2016, Ashcroft v. Iqbal, 556 U.S. 662 (2009), had been cited 112,000 times in just seven years; and Bell Atlantic v. Twombly, 550 U.S. 544 (2007), a whopping 134,650 times, an order of magnitude more than *Chevron*.