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LAW AND ADMINISTRATION AFTER *CHEVRON*

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TABLE OF CONTENTS

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INTRODUCTION

Throughout its brief history, administrative law has often been concerned with the question whether the name of its own subject is an oxymoron. We might distingnish among three positions on that question. The first treats law and administration as largely incompatible; the second sees traditional legal checks as a bulwark against administrative tyranny; the third suggests that these traditional checks must be adapted to the values, functions, and failures of the administrative state.

The incompatibility of law and administration was a prominent theme during the 1920s and the New Deal period, which produced a fundamental reformation in the structure of American constitutionalism.[1] Indeed, the creation of the administrative state was largely a self-conscious repudiation of legalism. The New Deal reformers believed that modern problems required institutions having flexibility, expertise, managerial capacity, political accountability, and powers of initiative far beyond those of the courts. On this view, the appropriate response of the legal system to the rise of administration is one of retreat.[2]

The view that legal checks, in their traditional form, are an indispensable constraint on regulatory administration played a large role in the constitutional assault on the administrative state[3] and, in more modest form, helped give rise to the Administrative Procedure Act ("APA")[4] in 1946.[5] This view can also be found in the old idea, per-

1. See, e.g., J. Landis, The Administrative Process 1–5 (1938); Sunstein, Constitutionalism After the New Deal, 101 Harv. L. Rev. 421, 422–25 (1987). Thus it is that the modern justiciability doctrines—most notably, limitations on standing and reviewability—owe their origin to this period, not to the framing. See, e.g., FCC v. CBS, 311 U.S. 132, 136 (1940) (reviewability); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 48, 50–51 (1938) (reviewability and ripeness); Fairchild v. Hughes, 258 U.S. 126, 129 (1922) (standing).

2. See cases cited supra note 1 (showing roots of justiciability limits in 1920s and 1930s); J. Landis, supra note 1, at 46 (suggesting displacement of legal with administrative institutions).

3. See, e.g., Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–30 (1935) (constitutional attack under article I); Crowell v. Benson, 285 U.S. 22, 49–51 (1932) (constitutional attack under article III); Myers v. United States, 272 U.S. 52, 158–61 (1926) (constitutional attack under article II).

4. 5 U.S.C. §§ 551–706 (1988).

5. See Dickinson, Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review, 33 A.B.A. J. 434, 434–35 (1947); McCarran, Improving "Administrative Justice": Hearings and Evidence; Scope of Judicial Review, 32 A.B.A. J. 827, 829

haps enjoying a renaissance, that statutes in derogation of the common law should be narrowly construed.[6] On this account, legal checks of the pre-New Deal sort are a crucial mechanism for domesticating regulation by limiting governmental interference with private markets and by promoting a range of original constitutional goals. Hearing rights, independent judicial interpretation of law, separation of functions, and procedural safeguards are all necessary quid pro quos for the creation of administrative agencies combining traditionally separated functions and exercising broad discretionary authority.[7]

A number of observers have argued that law should continue to play a large role in the administrative state, but that it must be adapted to take account of the new forms and values represented by the rise of social and economic regulation.[8] On this view, regulatory controls protecting interests such as environmental quality, nondiscrimination, safe work places, and fair trade practices should be treated hospitably by the legal culture. This view can be found in a number of ideas: that private law principles ought not to play a large role in administrative law; that courts should attempt to prevent arbitrary or overzealous regulation, but also to help bring about regulatory controls when they are legally required; that courts should attempt both to promote the goals of regulation, understood in a public-regarding way, and to ensure against its pathologies. Here the relationship of law to administration is neither acquiescence nor hostility but instead adaptation.

All of these views have played a large role in legal developments of the last two decades. In particular, the view that law and administration

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(1946); Sherwood, The Federal Administrative Procedure Act, 41 Am. Pol. Sci. Rev. 271, 271–73 (1947), and sources cited therein. See generally Verkuil, The Emerging Concept of Administrative Procedure, 78 Colum. L. Rev. 258, 268–74 (1978) (discussing the Walter-Logan Bill, an earlier proposal to limit administrative agencies that laid the foundation for the APA).

Consider in this regard Roscoe Pound's claim that autonomous administration is a "Marxian idea" or a system of "administrative absolutism," in Dodd, Garfield, Maguire, McGuire & Pound, Report of the Special Committee on Administrative Law, 63 Ann. Rep. A.B.A. 331, 339–40 (1938).

6. See Fordham & Leach, Interpretation of Statutes in Derogation of the Common Law, 3 Vand. L. Rev. 438, 440–41 (1950). For cases suggesting a possible modern revival of narrow interpretation of regulatory statutes, see Independent Fed'n of Flight Attendants v. Zipes, 109 S. Ct. 2732, 2735–37 (1989) (narrowly construing Title VII attorneys' fees provision); Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2123–27 (1989) (narrowing scope of Title VII by shifting burden of proof on disparate impact); Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 24–25 (1981) (narrowly construing Developmentally Disabled Assistance and Bill of Rights Act).

7. These views are reflected in the Administrative Procedure Act, 5 U.S.C. §§ 551–706 (1988), and its history, see supra notes 4–5.

8. See, e.g., Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 364–65 (1986); Stewart, The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act, 62 Iowa L. Rev. 713, 714 (1977); C. Sunstein, After the Rights Revolution 227–33 (1990).

are incompatible has enjoyed a revival—ironically, mostly at the hands of people with little sympathy for regulation in general or the New Deal reformation in particular.[9] This view can be found in the revival of serious limits on standing to review administrative action, on reviewability of agency inaction, and on the courts' ability to impose procedural requirements beyond those in the Administrative Procedure Act.[10] But of all of the Supreme Court's decisions raising issues of this sort, by far the most important is *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[11]

In *Chevron*, the Court established that "[i]f . . . Congress has not directly addressed the precise question at issue," courts should accept reasonable administrative interpretations of law.[12] The *Chevron* principle means that in the face of ambiguity, agency interpretations will prevail so long as they are "reasonable." This principle is quite jarring to those who recall the suggestion, found in *Marbury v. Madison*[13] and repeated time and again in American public law, that it is for judges, and no one else, to "say what the law is."[14] But it is also strikingly reminiscent of the New Deal enthusiasm for agency autonomy and the New Deal belief in a sharp disjunction between the realm of law and the realm of administration.[15] In view of the breadth and importance of the decision, it should be unsurprising that the case has been cited

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9. See generally J. Rabkin, Judicial Compulsions (1989) (arguing that courts should limit intervention in agency process to protection of individual rights to liberty and property, rather than considering policy arguments of various interest groups). An exception is J. Mashaw & D. Harfst, The Struggle for Auto Safety (1990), which argues that legal checks have slowed down desirable regulation; see also Strauss, Considering Political Alternatives to "Hard Look" Review, 1989 Duke L.J. 538, 544 (arguing against judicial "hard look" because of availability of political safeguards).

It is not surprising that many commentators with little sympathy for regulation recently have adopted the view that law and administration are incompatible. Since the 1980s, the Republican party, enthusiastic for deregulation, has occupied the executive branch and thus dominated federal agencies. The majority in Congress generally has been Democratic and more receptive to social and economic regulation. Part of the debate over *Chevron* undoubtedly turns on competing views about regulation, and the outcome of that debate will have consequences for the scope of regulatory intervention. The reach of *Chevron* should depend, however, on broader institutional considerations, not on political alliances, which may be short-term.

10. See Allen v. Wright, 468 U.S. 737, 754–56 (1984) (standing); Heckler v. Chaney, 470 U.S. 821, 837–38 (1985) (reviewability); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 546–49 (1978) (additional procedural requirements).

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

12. Id. at 843.

13. 5 U.S. (1 Cranch) 137 (1803).

14. Id. at 177.

15. See supra note 1 and accompanying text; see also O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 507–08 (1951) (characterizing agency determination of law as one of fact in order to support deference to agency); Gray v. Powell, 314 U.S. 402, 411–12 (1941) (deferring to agency interpretation of law).

more than 1000 times since its publication in 1984.[16] *Chevron* promises to be a pillar in administrative law for many years to come. It has become a kind of *Marbury*, or counter-*Marbury*, for the administrative state.

Perhaps more importantly, the decision has established itself as one of the very few defining cases in the last twenty years of American public law. *Chevron* defines a cluster of ideas about who is entrusted with interpreting ambiguous statutes and, less obviously, about what legal interpretation actually is.[17] In its allocation of governmental authority and in its production of outcomes in the real world, the importance of the case far exceeds that of the Supreme Court's more celebrated constitutional rulings on the subject of separation of powers in the 1980s, probably even if all of these are taken together.[18] In an extraordinarily wide range of areas—including the environment,[19] welfare benefits,[20] labor relations,[21] civil rights,[22] energy,[23] food and drugs,[24] banking,[25] and many others—*Chevron* has altered the distribution of national powers among courts, Congress, and administrative agencies.

To say this is not to say that *Chevron* is self-applying. As is usual with important rulings, the case raises at least as many questions as it answers. The Court's reasoning has been subject to sharp criticism,[26]

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16. A search of the LEXIS Genfed library, Courts file, on September 23, 1990, located 1037 cases citing *Chevron*. The number increases significantly every month.

17. See infra notes 73–79 and accompanying text.

18. See Mistretta v. United States, 109 S. Ct. 647, 675 (1989) (upholding congressional delegation of power to promulgate criminal sentencing guidelines to Sentencing Commission); Morrison v. Olson, 108 S. Ct. 2597, 2602 (1988) (upholding independent counsel act); Bowsher v. Synar, 478 U.S. 714, 736 (1986) (invalidating delegation of implementing power under Gramm-Rudman Act to Comptroller General, a congressional agent); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 855–57 (1986) (upholding adjudicative functions of agency); INS v. Chadha, 462 U.S. 919, 959 (1983) (invalidating legislative veto).

19. See Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 125 (1985); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985).

20. See Lukhard v. Reed, 481 U.S. 368, 376 (1987); Connecticut Dep't of Income Maintenance v. Heckler, 471 U.S. 524, 530 (1985).

21. See NLRB v. United Food & Commercial Workers Union, Local 23, 108 S. Ct. 413, 421–22 (1987); Cornelius v. Nutt, 472 U.S. 648, 659 (1985).

22. See EEOC v. Commercial Office Prods. Co., 108 S. Ct. 1666, 1676 (1988) (O'Connor, J., concurring in the judgment).

23. See United States v. City of Fulton, 475 U.S. 657, 666 (1986); cf. Mississippi Power & Light Co. v. Mississippi, 108 S. Ct. 2428, 2441–42 (1988) (deference to FERC's rate-making authority, which preempts contrary state agency or court).

24. See Young v. Community Nutrition Inst., 476 U.S. 974, 980 (1986).

25. See Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 404 (1987).

26. Most of the criticisms argue that *Chevron* ignores the need for an independent judicial arbiter on legal questions, is inconsistent with Congress's instructions, and is too general and undifferentiated to approach the wide range of questions that arise under the *Chevron* rubric. See Breyer, supra note 8, at 373; Byse, Judicial Review of

and it would not be altogether surprising to see departures from a broad interpretation of *Chevron*. Indeed, the decision's own author, Justice Stevens, has suggested a relatively narrow reading.[27] Perhaps the principle of deference will apply only when the agency is carrying out delegated lawmaking authority.[28] Perhaps the principle applies only to cases calling for the agency's specialized fact-finding and policy-making competence, most notably those involving applications of law to fact, rather than pure questions of law.[29] Perhaps an agency's views about its own jurisdiction will have little or no weight, or perhaps, more generally, an agency view will not warrant deference when its self-interest is conspicuously at stake.[30]

In this Article, I examine a range of questions about the rationale and reach of *Chevron*. My most general goal is to give the decision its appropriate place in mediating the relationship between law and administration. To carry out that task, it will be necessary to explore quite general questions about the relationship between the original constitutional structure and modern regulatory government.

The Article is organized into three parts. In Part I, I describe some of the initial conflicts between law and administration and examine the role of *Chevron* in reconciling these conflicts. In Part II, I explore *Chevron*'s reach, treating the case as if it set forth the only applicable interpretive principle and discussing the limitations of that principle. My principal claim here is that *Chevron* is best defended as a sensible reconstruction of congressional instructions in light of the relevant institutional capacities, and that this understanding requires certain limitations on the *Chevron* principle as much as a general endorsement of the principle itself. Most important, I argue that because *Chevron* applies only in cases of congressional delegation of law-making authority,

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Administrative Interpretation of Statutes: An Analysis of *Chevron*'s Step Two, 2 Admin. L.J. 255, 260–61 (1988); Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L. Rev. 452, 475–78 (1989); Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 444–46 (1989).

27. See INS v. Cardoza-Fonseca, 480 U.S. 421, 446–48 (1987). It is possible that the Court's decision to defer to the Food and Drug Administration in Young v. Community Nutrition Inst., 476 U.S. at 981, was the source of Justice Stevens's dissatisfaction with the broadest understandings of *Chevron*. See *Young*, 476 U.S. at 984–88 (Stevens, J., dissenting).

28. See Adams Fruit Co. v. Barrett, 110 S. Ct. 1384, 1390–91 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."); Crandon v. United States, 110 S. Ct. 997, 1011 (1990) (Scalia, J., concurring in the judgment); Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 25–28 (1983); Note, Coring the Seedless Grape: A Reinterpretation of *Chevron U.S.A. Inc. v. NRDC*, 87 Colum. L. Rev. 986, 993–95 (1987); infra notes 105–110 and accompanying text.

29. See INS v. Cardoza-Fonseca, 480 U.S. at 446–48; see also Byse, supra note 26, at 262–63 (court has reviewing role in "Statute-defining" but not in "Statute-applying"); infra notes 111–120 and accompanying text.

30. See infra notes 121–140 and accompanying text.

agency interpretations in a number of contexts are not entitled to deference at all.

In Part III, I deal with a problem that has only begun to be addressed in the courts. That question involves the relationship between the *Chevron* principle and other prevailing norms or principles of statutory construction.[31] What is a court to do when an administrative agency interprets an ambiguous statute in a way that conflicts with an established interpretive principle?[32] The question is of both considerable theoretical interest and immense practical importance. If *Chevron* allows agency interpretations to defeat well-established interpretive principles, it will indeed have worked a revolution in the law.

In Part III, I contend that many interpretive principles serve an important separation of powers function by requiring legislative rather than merely administrative deliberation on certain questions. For this reason, the *Chevron* principle ought not to be understood to overcome all otherwise applicable interpretive norms, though some of these norms are in fact defeated by *Chevron*.

A more general conclusion follows from these suggestions. In many of its applications, *Chevron* is a salutary recognition of a large-scale shift in the allocation of authority within American institutions. It embodies, in those applications, a plausible reconstruction of congressional desires and a sound understanding of the comparative advantages of agencies in administering complex statutes. At the same time, *Chevron* is in tension with deeply engrained ideas, traceable to the earliest days of the American republic, to the effect that those who are limited by law ought not to be entrusted with the power to define the limitation. But if other interpretive norms counter the *Chevron* approach in contexts in which the risks are especially serious, it may be possible to reconcile that approach with principles of separation of powers and statutory construction that are both time-honored and entitled to current respect. An effort to explain the relationship between *Chevron* and other interpretive principles is therefore part of the continuing and far larger enterprise of sorting out the relationship between the original constitutional framework and traditional legal constraints

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31. For a discussion of particular principles, see infra notes 160–174 and accompanying text. For general discussion, see Eskridge, Public Values in Statutory Interpretation, 137 U. Pa. L. Rev. 1007, 1019–33 (1989); Sunstein, supra note 26, at 468–88. Indeed, it is mistaken to suggest that language and history exist independent of interpretive principles. The very notion of statutory text cannot make sense without simultaneous reference to principles of statutory construction. See infra note 159.

32. See Bowen v. Georgetown Univ. Hosp., 109 S. Ct. 468, 475 (1988) (defeating agency interpretation by using principle against interpreting statutes to apply retroactively); DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 108 S. Ct. 1392, 1404 (1988) (defeating agency interpretation by using principle against interpreting statutes to raise constitutional doubts); Michigan Citizens for an Indep. Press v. Thornburgh, 868 F.2d 1285, 1292 (D.C. Cir. 1989) (allowing agency interpretation to override principle calling for narrow interpretation of exemptions from antitrust law), aff'd mem., 110 S. Ct. 398 (1989) (equally divided Court).

on the one hand, and, on the other, a regulatory state that was intended in large part to displace them.

I. COURTS, ADMINISTRATION, AND THE NEW DEAL

In this Part, I undertake two tasks. First, I outline the origins of the perceived tension between law and administration, and I explore various efforts by courts to mediate that tension in the wake of the New Deal. Second, I discuss the origins and setting of the *Chevron* principle, attempting to defend that principle by reference to certain understandings about both the administrative state and the nature of statutory interpretation.

A. *Historical Notes*

Before the rise of the regulatory state, the allocation of authority between the executive branch and the judiciary was relatively clear: it was for the courts, not the executive, to "say what the law is,"[33] at least in litigated cases. This understanding extended to interpretation of statutes no less than to interpretation of the Constitution.[34] Most statutory disputes did not involve the executive branch as a party. Since government almost always acted without the mediation of a policy-making, fact-finding administrative agency, it was only natural that questions of statutory meaning would be decided by the courts. And when the executive branch *was* a party, it was treated like any other litigant in the sense that its own views would not be entitled to special weight.[35]

The judicial power of interpretation existed even when the task of resolving ambiguities depended not only on statutory language and history, but also on assessments of what sort of approach would produce rationality or justice in federal law. When traditional sources of interpretation left doubt, ambiguities were sometimes resolved by precisely these assessments.[36] To be sure, assessments of this sort called for judicial inquiries into both policy and principle. But these inquiries were not especially troublesome, for judge-made regulatory principles—embodied in the common law of torts, contracts, and property—had been woven into the fabric of American public and private law from the out-

33. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

34. See, e.g., Brown v. United States, 12 U.S. (8 Cranch) 110, 127–28 (1814); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 41 (1800).

35. *Marbury* itself, involving issues of both statutory and constitutional meaning, is the most obvious example.

36. See, e.g., Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892) (interpreting a statute narrowly because of absurdity of "plain meaning" approach); Riggs v. Palmer, 115 N.Y. 506, 509–10, 22 N.E. 188, 189 (1889) (same). For examples during the New Deal era, see United States v. American Trucking Ass'n, 310 U.S. 534, 543 (1940); Armstrong Co. v. Nu-Enamel Corp., 305 U.S. 315, 333 (1938). For recent examples, see Public Citizen v. Department of Justice, 109 S. Ct. 2558, 2559 (1989); O'Connor v. United States, 479 U.S. 27, 31 (1986); Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 220–21 (1986).

set. Statutory interpretation that involved a measure of policy-making discretion existed comfortably in a legal order in which policy frequently had been determined by the judges.[37]

All this was changed by the creation in the twentieth century of a massive administrative apparatus, which was of course a self-conscious repudiation of regulation through the judiciary. For the twentieth century reformers, courts lacked the flexibility, powers of coordination, initiative, democratic accountability, and expertise necessary to deal with complex social problems.[38] The administrative framework resulting from these reform efforts disrupted every essential element of American constitutionalism, including its three cornerstones: The original conception of individual rights, the system of checks and balances, and federalism.[39]

Perhaps the most fundamental point is that the new framework called into question the original understanding that individual rights lay principally in immunity from governmental constraints.[40] For the New Dealers, individual rights were in fact a product of legal decisions; they were hardly prepolitical or even "negative." Having rejected the view that the common law system was part of the state of nature, the New Deal reformers saw government action as a necessary guarantor of economic productivity, distributive equity, and even rights, properly

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37. Because basic policy often had been a creature of the common law, subject to only intermittent statutory interference, it is misleading to suggest, as some do, see, e.g., J. Rabkin, supra note 9, at 6–18, that the period of judicial lawmaking is a creature of the late twentieth century. Of course the use of the Constitution as a source of judge-made law raises quite different questions from the use of the common law, especially because the former is much more difficult to correct through the political process.

38. See J. Landis, supra note 1, at 6–12; S. Skowronek, Building a New American State: The Expansion of National Administrative Capacities, 1877–1920, at 253–55, 263 (1982).

39. See generally P. Conkin, The New Deal 48–49, 51–78 (2d ed. 1975) (chronicling New Deal programs and criticisms against them by defenders of traditional conception of the American polity); R. Hofstadter, The Age of Reform 300–28 (1955) (comparing political thinking of New Deal, populism, and progressivism); B. Karl, The Uneasy State 128–29, 180–81 (1983) (arguing that even greater shakeup of American constitutionalism was averted during President Franklin Roosevelt's second term); J. Patterson, Congressional Conservatism and the New Deal (1967) (analyzing federal-state relations in the 1930s); J. Patterson, The New Deal and the States: Federalism in Transition 194–207 (1969) (detailing changes in state government during New Deal); see also Ackerman, Constitutional Politics/Constitutional Law, 99 Yale L.J. 453, 510–15 (1989) (contrasting New Deal-era growth of national government with that of Reconstruction era); Sunstein, supra note 1, at 425–30 (describing problems in administrative state, and arguing for system of "aggressive legislative, judicial, and executive control" to reproduce safeguards provided by original constitutional framework).

Of course regulatory programs, and administrative law, predated the New Deal. See S. Skowronek, supra note 38, at 165–211, 248–84. But it was the New Deal that signalled a large-scale reformation of the constitutional framework. See T. Lowi, The End of Liberalism 273–74 (2d ed. 1979).

40. For the points in this and the following paragraph, I draw on C. Sunstein, supra note 8, at 19–24, and Sunstein, supra note 1, at 437–52.

understood. In these circumstances, the common law catalogue of private rights was inadequate because it included both too much and too little—too much in the way of protection of rights of property and market ordering; too little because it excluded rights of economic security deemed indispensable in the wake of the Depression.

Institutional lessons followed from these substantive claims. Traditionally separated powers and the system of checks and balances seemed an obstacle to the enactment and implementation of protections at the national level. New governmental bodies—combining powers and not subject to the constraints of checks and balances—were necessary to carry out the agenda of the New Deal. Far from being a valuable safeguard against national tyranny, federalism appeared to be a faction-driven obstacle to necessary social change. So too, traditional legal constraints on administration seemed to defeat the goal of providing new entities with unique self-starting capacities, a high degree of democratic accountability, and, not incidentally, enthusiasm for the new regulatory missions set for the national government by Congress and the President.

It was inevitable that this set of claims—the continuing source of most major debates in American public law—would ultimately draw into question the idea that interpretation of regulatory statutes was for the judiciary alone. Indeed, during the constitutional and nonconstitutional judicial assault on administration, independent judicial interpretation of law was seen as a constitutional requirement under article III.[41] Judicial review was thought to serve identifiable substantive goals as well. Invoking the principle that statutes in derogation of the common law should be narrowly construed,[42] and insisting that interpretation of law was for judges, courts often sharply circumscribed administrative power by drawing on principles of private autonomy and free markets that regulation was intended to displace.[43]

The idea that courts, and not administrators, were responsible for discerning the meaning of statutes seemed to win legislative endorsement through the enactment of the APA in 1946.[44] That statute was a compromise between New Dealers enthusiastic about administrative power and conservative critics who saw this power as a veil for tyranny, particularly in the context of labor relations.[45] Despite its ambivalence on the question of agency autonomy, the APA appeared to endorse ju-

41. See Crowell v. Benson, 285 U.S. 22, 56–57 (1932).

42. For cases narrowly construing statutes modifying the common law, see FTC v. Eastman Kodak Co., 274 U.S. 619, 623–25 (1927); FTC v. American Tobacco Co., 264 U.S. 298, 305–06 (1924); FTC v. Gratz, 253 U.S. 421, 427–28 (1920); Shaw v. Railroad Co., 101 U.S. 557, 565 (1879). For a general discussion, see Fordbam & Leach, supra note 6, at 440–41.

43. See, e.g., *Eastman Kodak Co.*, 274 U.S. at 623–25; *American Tobacco Co.*, 264 U.S. at 305–06; *Gratz*, 253 U.S. at 427–28; Fordham & Leach, supra note 6, at 445–53.

44. See supra notes 4–5 and accompanying text.

45. See supra note 5 and accompanying text; see also Gellhorn, The Administrative

dicial control of administration and to direct courts to interpret statutes on their own. Thus the APA states: "To the extent necessary to decision and when presented, *the reviewing court shall decide all relevant questions of law, [and] interpret constitutional and statutory provisions* . . . ."[46]

Nevertheless, in the aftermath of the constitutional assault on administration, courts sometimes said that agencies were entitled to interpret the statutes that they administer, and that courts would defer as long as agency interpretations were reasonable.[47] This idea repre-

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Procedure Act: The Beginnings, 72 Va. L. Rev. 219 (1986) (recounting APA's creation and passage and arguing that vituperation gave way to calm reasoning).

46. 5 U.S.C. § 706 (1988) (emphasis added). Of course, it is possible that courts sometimes should resolve the relevant question of law by holding that statutory ambiguities are to be resolved by the agency. On that view, part of the answer to the legal question is that ambiguities are for agency resolution. But when Congress has not specifically conferred that power on the agency through the organic statute, that argument seems weak.

The legislative history emphasizes the need for judicial constraints on administration. See, e.g., Legislative History, Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d Sess. 305 (1946) (remarks of Sen. McCarran, Chairman, House Judiciary Comm.) ("I desire to emphasize the . . . provisions for judicial review, because it is something in which the American public has been and is much concerned, harkening back, if we may, to the Constitution of the United States, which sets up the judicial branch of the Government for the redress of human wrongs"); id. at 217 (Report of the Senate Judiciary Comm.) ("the enforcement of the bill, by the independent judicial interpretation and application of its terms, is a function which is clearly conferred upon the courts. . . . Judicial review is of utmost importance. . . . It is indispensable since its mere existence generally precludes the arbitrary exercise of powers not granted"); id. at 251, 311–12, 382–85.

The influential Attorney General's Committee on Administrative Procedure was uncertain on the point:

> The question of statutory interpretation might be approached by the court de novo and given the answer which the court thinks to be the "right interpretation." Or the court might approach it, somewhat as a question of fact, to ascertain, not the "right interpretation," but only whether the administrative interpretation has substantial support. . . . Thus, where the statute is reasonably susceptible of more than one interpretation, the court may accept that of the administrative body. . . . This may be particularly significant when the legislation deals with complex matters calling for expert knowledge and judgment.

Final Report of the Attorney General's Comm. on Administrative Procedure, *in* Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess. 90–91 (1941). Note, however, that the Attorney General's Committee is entitled to far less weight than the text of the APA and even its history in Congress, both of which argue for independent review. Moreover, the Committee may well have been biased against independent judicial review because it was allied with the institutional interests of the executive branch, and because it consisted in large part of New Deal enthusiasts skeptical about judicial checks on administration.

The useful treatment in Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 512–14, properly draws attention to this passage from the Attorney General's Committee's report. But it overstates the extent to which deference to administrative interpretations was contemplated by the APA as evidenced by its text and underlying purposes, both of which argue in favor of independent review.

47. See Mitchell v. Budd, 350 U.S. 473, 480 (1956) (deferring to Secretary of Labor's definition of " 'area of production' " in Fair Labor Standards Act, noting that Sec-

sented a firm endorsement of the allied principles, prominent during the New Deal, of administrative autonomy and limited judicial interference with the process of regulation. It also recognized that the very arguments that called for the rise of regulatory entities raised sharp questions about whether judicial interpretation of regulatory law should continue to be independent. *Marbury*, in short, no longer seemed well adapted to American public law. At the same time, many courts continued to insist that the interpretation of statutes was first and foremost a judicial task.[48]

It is ironic but true that this insistence became particularly pronounced in the 1960s and 1970s, a period in which those enthusiastic about regulation were especially dissatisfied with administrative autonomy. In this period, agencies appeared unenthusiastic about their mandates. The phenomenon of "capture" received widespread attention, and judicial controls seemed to be an important part of the project of ensuring that regulatory statutes, especially in the environmental area, would produce change in the real world.[49] In a surprising reversal of New Deal alliances, those who were critical of the effects of regulation in the 1980s were frequently insistent on administrative autonomy and the perverse effects of legalism[50]—whereas critics seeking to bring about greater regulatory protections saw administrative independence and autonomy as the problem rather than the solution.[51] The rule of law, including firm judicial constraints on the bureaucracy, was a mechanism for ensuring that agencies would carry out the will of Congress.

Before 1984, the law thus reflected a puzzling and relatively ad hoc set of doctrines about when courts should defer to administrative interpretations of law. All this was changed by *Chevron*.

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retary "fulfills his role when he makes a reasoned definition"); Federal Sec. Adm'r v. Quaker Oats Co., 318 U.S. 218, 227–28 (1943) (deferring to FDA administrator's rulemaking, noting "we have repeatedly emphasized the scope that must be allowed to the discretion and informed judgment of an expert administrative body. These considerations are especially appropriate where the review is of regulations of general application adopted by an administrative agency under its rule-making power in carrying out the policy of a statute with whose enforcement it is charged."); Gray v. Powell, 314 U.S. 402, 412 (1941) (deferring to Department of Interior definition of coal "producer" under Bituminous Coal Act); cf. Udall v. Tallman, 380 U.S. 1, 16–18 (1965) (deferring to Interior Secretary's interpretation of Executive Order, which was reasonable but not only possible interpretation).

48. See Packard Motor Car Co. v. NLRB, 330 U.S. 485, 492 (1947); NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130–31 (1944); Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 48–50 (2d Cir. 1976), aff'd sub nom. Northeast Marine Terminal v. Caputo, 432 U.S. 249 (1977).

49. See J. Freedman, Crisis and Legitimacy 3–12 (1978); Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1711–16 (1975).

50. See J. Rabkin, supra note 9, at 3–6.

51. See, e.g., Farina, supra note 26, at 460–67.

B. *The* Chevron *Principle*

In *Chevron*, the Supreme Court confronted an important decision by the Environmental Protection Agency ("EPA") under the Clean Air Act.[52] The case involved permit programs in "nonattainment" states, that is, states that have not met federal ambient air quality requirements. These states are required to establish a permit program for "new or modified major stationary sources" of air pollution.[53] No new or modified source may receive a permit unless it meets stringent requirements.[54]

Before the 1980s, the EPA had treated as a "source" any pollution-emitting device in a plant.[55] If a plant had ten of these devices, it had to apply for a permit to modify any of them or to add a new one. In 1981, however, the EPA decided that it would not require a permit if the modification of an existing device or the installation of a new device did not increase total emissions from the plant.[56] In other words, the plant, and not each emitting entity within it, would be treated as a "source." This plantwide definition of source enabled a company to add or modify pollution-emitting devices as long as it reduced emissions from another part of the same plant, producing no aggregate increase in emissions. The question for decision in *Chevron* was whether the plantwide definition of "source" violated the Clean Air Act.[57]

The court of appeals held that it did.[58] For the lower court, the purpose of the nonattainment program was to bring about rapid state compliance with federal air quality requirements, and the plantwide definition of source was inconsistent with that overriding goal. The court was unable to point to a particular provision that barred the EPA's plantwide definition, but it said that that definition was inconsistent with the general purposes of the nonattainment program.[59]

The Supreme Court disagreed.[60] Rebuking the court of appeals for usurping the agency's policy-making authority, the Court said that nothing in the statute or its history spoke to the issue whether the plant or each emitting device within it amounted to a "source." The general purposes of the nonattainment program, embodying an effort to promote environmental quality with minimal restrictions on economic growth, were simply too broad to bear on that issue. Because Congress had not "directly spoken to the precise question at issue," the question

52. 42 U.S.C. §§ 7401–7642 (1988).

53. 42 U.S.C. § 7502(b)(6).

54. See 42 U.S.C. § 7503.

55. See Natural Resources Defense Council, Inc. v. Gorsuch, 685 F.2d 718, 720 (D.C. Cir. 1982), rev'd sub nom. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

56. See 40 C.F.R. § 51.165(a)(1)(i)–(ii) (1989).

57. See *Chevron*, 467 U.S. at 840.

58. See *Gorsuch*, 685 F.2d at 726.

59. See id.

60. See *Chevron*, 467 U.S. at 842.

was "whether the agency's answer is based on a permissible construction of the statute."[61] For the Court, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."[62] The Court thus created a two-step inquiry. The first question was whether Congress had explicitly foreclosed the agency's decision. The second was whether that decision was reasonable or permissible.

All this was sufficient to dispose of the specific problem in *Chevron*. Congress had not decided against a plantwide definition of source. Moreover, the agency's decision was an exceedingly reasonable means of accommodating the economic and environmental goals that underlay the Clean Air Act. Indeed, the plantwide definition achieved economic savings without jeopardizing environmental degradation, and may even have helped to diminish it.[63]

In addition, a principle of deference was appropriate in *Chevron*. The agency's fact-finding and policy-making competence, and its electoral accountability, were highly relevant to the issue of how "source" should be defined. In *Chevron* itself, the Court quite rightly implied that any principle of deference is a product of Congress's explicit or implicit instructions on that question. The central point is this: *Courts must defer to agency interpretations if and when Congress has told them to do so*.[64] And when agency competence is relevant, deference is particularly appropriate, since it is the most plausible instruction to attribute to Congress if the legislature has issued no clear statement on the point—a subject to which I return below.[65]

Since *Chevron* itself, the general principle of deference has been invoked on numerous occasions and produced considerable controversy. In *INS v. Cardoza-Fonseca*,[66] the Supreme Court appeared to say that *Chevron* would apply only in cases involving mixed questions of law and fact, rather than pure questions of law: courts would decide pure questions of law on their own. In a concurring opinion, Justice Scalia vigorously rejected this suggestion,[67] and the Court has failed to take it

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61. Id. at 842.

62. Id. at 844.

63. See R. Liroff, Reforming Air Pollution Regulation: The Toil and Trouble of EPA's Bubble 97–103 (1986); T. Tietenberg, Emissions Trading 188–202 (1985).

64. See Monaghan, supra note 28, at 6; Scalia, supra note 46, at 516. It is possible that constitutional problems sometimes will arise in these situations, see Farina, supra note 26, at 456, but that will be rare. Because the delegation to the agency to implement the statute is (by hypothesis) permissible, the delegation of power to give meaning to statutory terms should be seen as a legitimate part of the authority of implementation.

65. See infra notes 188–203 and accompanying text.

66. 480 U.S. 421, 446–48 (1987). *Cardoza-Fonseca* is discussed infra notes 99–103 and accompanying text.

67. See id. at 453–55. It is perhaps revealing that the executive branch is, in tbe relevant cases, dominated by the Republican party, whereas the Congress is dominated by Democrats. A principle of judicial deference to executive interpretations will, at least in the short run, increase the power of the Republican branch—one that is far less hos-

up in subsequent cases. In other cases the Supreme Court has held that at least arguably ambiguous statutes admitted of only a single interpretation, sometimes producing sharp dissenting opinions that invoked *Chevron*.[68] Most strikingly, the Supreme Court has rejected a number of agency interpretations of law even in the aftermath of *Chevron*.[69]

C. Chevron's *Rationale*

It is not my purpose here to say whether or not the analysis in *Chevron* was correct.[70] The nature and reach of the case can best be ascertained, however, by considering what might be said in its favor.

Before the discretionary, policy-making administrative agency became pervasive, the notion that courts would interpret the law, including federal statutes, seemed axiomatic. In the twentieth century, however, Congress frequently has delegated basic implementing authority to regulatory agencies, and the allocation of interpretive power has become far more complex. Any principles of deference to administrators must of course depend on congressional instructions, at least as a general rule.

When Congress has expressly said that deference is or is not ap-

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pitable to regulatory controls than Congress. This fact is probably not irrelevant to the debate over *Chevron*. See supra note 9.

68. See Dole v. United Steelworkers of Am., 110 S. Ct. 929, 936–38 (1990); Pittston Coal Group v. Sebben, 109 S. Ct. 414, 420–21 (1988); Connecticut Dep't of Income Maintenance v. Heckler, 471 U.S. 524, 537–38 (1985). For discussion, see infra notes 96–104 and accompanying text. Some Justices have suggested that *Chevron* also applies to an agency's views about its own jurisdiction. See *United Steelworkers of Am.*, 110 S. Ct. at 944 (White, J., dissenting); Mississippi Power & Light Co. v. Mississippi, 108 S. Ct. 2428, 2443–44 (1988) (Scalia, J., concurring); infra notes 128–139 and accompanying text.

69. See, e.g., Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 110 S. Ct. 2759, 2768 (1990) (rejecting ICC interpretation that would permit carrier to recover less than filed rate); Department of Treasury, IRS v. Federal Labor Relations Auth., 110 S. Ct. 1623, 1627 (1990) (rejecting FLRA interpretation of Civil Service Reform Act that would require IRS to bargain with union over union proposal); *United Steelworkers of Am.*, 110 S. Ct. at 938 (declining to defer to OMB interpretation of Paperwork Reduction Act that would authorize OMB to review agency rules mandating disclosure by regulated entities to third parties); Sullivan v. Zebley, 110 S. Ct. 885, 890 (1990) (rejecting social security regulations as inconsistent with statutory provision on child disability); *Pittston Coal Group*, 109 S. Ct. at 420 (rejecting Secretary of Labor's interim regulation on criteria for presumptive entitlement to black lung disease benefits); Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 368 (1986) (rejecting Federal Reserve Board definition of "bank" under Bank Holding Company Act).

70. See supra note 26 for criticisms, including my own. Notably, these criticisms do not take issue with the *Chevron* result. For defenses, see Pierce, The Role of Constitutional and Political Theory in Administrative Law, 64 Tex. L. Rev. 469, 486–88 (1985); Scalia, supra note 46, at 516–19; Strauss, One Hundred and Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action, 87 Colum. L. Rev. 1093, 1117–29 (1987); cf. Diver, Statutory Interpretation in the Administrative State, 133 U. Pa. L. Rev. 549, 592–99 (1985) (defending deference principle, but without discussing *Chevron*).

propriate, the matter is relatively simple.[71] As stated above, the text and background of the APA suggest a firm belief in the need for judicial checks on administration, particularly with respect to the interpretation of law.[72] The view that courts should always defer to agency interpretations is, therefore, a poor reconstruction of the instructions of the APA. It remains possible, however, that particular substantive statutes displace the APA and accord law-interpreting power to the agency. If so, the courts should defer in such cases on the ground that the relevant law *is* what the agency says that it is. The APA's provision for independent judicial interpretation of law is not inconsistent, then, with *Chevron*'s deference to the agency's interpretation if Congress has, under particular statutes, granted the relevant authority to administrative agencies.

Frequently, however, Congress does not speak in explicit terms on the question of deference. When this is so, the court's task is to make the best reconstruction that it can of congressional instructions.[73] And if Congress has not made a clear decision one way or the other, the choice among the alternatives will call for an assessment of which strategy is the most sensible one to attribute to Congress under the circumstances. This assessment is not a mechanical exercise of uncovering an actual legislative decision. It calls for a frankly value-laden judgment about comparative competence, undertaken in light of the regulatory structure and applicable constitutional considerations.

If all this is so, the *Chevron* approach might well be defended on the ground that the resolution of ambiguities in statutes is sometimes a question of policy as much as it is one of law, narrowly understood, and that agencies are uniquely well situated to make the relevant policy decisions. In some cases, there is simply no answer to the interpretive question if it is posed as an inquiry into some real or unitary instruction of the legislature. Sometimes congressional views cannot plausibly be aggregated in a way that reflects a clear resolution of regulatory problems, many of them barely foreseen or indeed unforeseeable.[74] In these circumstances, legal competence, as narrowly understood, is insufficient for decision. The resolution of the ambiguity calls for an inquiry into something other than the instructions of the enacting legislature. And in examining those other considerations, the institution entrusted with the decision must make reference to considerations

71. See Monaghan, supra note 28, at 25–26. But see Farina, supra note 26, at 468–69.

72. See supra notes 45–47 and accompanying text.

73. Cf. R. Dworkin, Law's Empire 337–38 (1986) (arguing that statutory interpretation is a process of making a statute "the best piece of statesmanship it can be" by finding "the best justification . . . of a past legislative event").

74. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865 (1984); cf. K. Arrow, Social Choice and Individual Values 10–11 (2d ed. 1963) (discussing difficulties in aggregating social desires to produce a social welfare function).

of both fact and policy.[75]

Chevron nicely illustrates the point. The decision about whether to adopt a plantwide definition of "source" required distinctly administrative competence because it called for a complex inquiry, not foreseen by Congress, into the environmental and economic consequences of the various possibilities. If regulatory decisions in the face of ambiguities amount in large part to choices of policy, and if Congress has delegated basic implementing authority to the agency, the *Chevron* approach might reflect a belief, attributable to Congress in the absence of a clear contrary legislative statement, in the comparative advantages of the agency in making those choices.

All this suggests that *Chevron* reflects not merely a particular view about who ought to interpret ambiguous statutes, but also, and perhaps more interestingly, a distinctive theory of interpretation. In the last generation it has frequently been suggested that the process of interpretation is often not merely a mechanical reconstruction of legislative desires.[76] Instead that process sometimes calls for an inquiry into questions of both policy and principle. Thus, for example, it has been said that statutory ambiguities should or must be sorted out on the basis of an assessment of which interpretation is "reasonable,"[77] or makes the statute "the best piece of statesmanship it can be,"[78] or takes account of appropriate background norms dealing with the functions and failures of the regulatory state.[79]

At least as a general rule, these suggestions argue powerfully in favor of administrative rather than judicial resolution of hard statutory questions. The fact-finding capacity and electoral accountability of the administrators are far greater than those of courts.[80] *Chevron* is best

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75. The question about whether deference is due to an administrative interpretation of law itself is an example. Congress has not explicitly resolved that question, and so it must be answered on the basis of an attempted reconstruction invoking extratextual considerations.

76. See infra notes 77–79. In an important respect that process is never mechanical, since it always depends on background norms. Even the easiest cases are decided by reference to norms and practices that are in fact present, but are so widely shared as to seem invisible. A denial that interpretive norms are at work should be taken as a reflection of interpretive unself-consciousness. Usually, of course, the norms are supported by a sufficiently broad consensus to make interpretation relatively simple—which, again, is not to say mechanical.

77. See H. Hart & A. Sacks, Materials for a General View of the American Legal System 1175 (tent. ed. 1956).

78. R. Dworkin, supra note 73, at 337–47. Note that Dworkin does not mean that the judge should interpret the statute so as to effectuate what she thinks is the best policy, but rather "to find the best justification . . . of a past legislative event." Id. at 338.

79. See Sunstein, supra note 26, at 462–68.

80. Some qualifications are necessary here. Of course "independent" agencies—those whose heads are appointed for fixed terms and are not subject to plenary removal power—are to a degree insulated from presidential policy making. But see Moe, Regulatory Performance and Presidential Administration, 26 Am. J. Pol. Sci. 197, 220–21

understood and defended as a frank recognition that sometimes interpretation is not simply a matter of uncovering legislative will, but also involves extratextual considerations of various kinds, including judgments about how a statute is best or most sensibly implemented. *Chevron* reflects a salutary understanding that these judgments of policy and principle should be made by administrators rather than judges.[81]

The point can be made more vivid by examining some of the characteristic problems in modern regulation.[82] Often the regulatory process is confounded by the difficulty of coordinating numerous statutes with one another. For example, the problems of air and water pollution are closely entangled. Efforts to control the one may aggravate the other, and there are complex interactions among various cleanup strategies. If the problems are treated separately, they will not be treated well. The EPA is charged with implementing numerous statutes, and it is in a far better position than the judiciary, reacting as it must to single cases, to respond to difficulties of this sort.[83]

Sometimes regulation is made more difficult because of the pervasive problem of changed circumstances. New developments involving technological capacity, economics, the international situation, or even law may affect regulatory performance. Congress is unable to amend every statute to account for these changes, a situation that creates a genuine problem for those who must apply the statute. Here as well, administrators are in a far better position than courts to interpret ambiguous statutes in a way that takes account of new conditions.[84] Or to put the point slightly differently: Because of its focus on individual cases, and because decisions are made after the dispute has arisen, the common law process has a significant advantage over legislation in its capacity to respond to changing conditions and mores. The shift from the common law to legislation, embodied in the New Deal, therefore gave rise to a serious risk of obsolescence, one that is often realized in practice.[85] In these circumstances, a grant of interpretive authority to

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(1982) (suggesting that NLRB's policies may be closely tied to those of the administration). Moreover, shifts in the judiciary are a predictable consequence of shifts in the administration, and in this sense courts are not wholly independent. Finally, agencies are sometimes subject to narrow or parochial pressures. Their decisions can hardly be said to track the public will in all cases. These qualifications do not, however, undermine the basic claim that the democratic pedigree of the agency is usually superior to that of the court.

81. See Silberman, *Chevron*: The Intersection of Law & Policy, 58 Geo. Wash. L. Rev. 821, 822–24 (1990).

82. For a catalogue, see C. Sunstein, supra note 8, at 74–111.

83. Consider, for example, the problem of "scrubbers," discussed in B. Ackerman & W. Hassler, Clean Coal/Dirty Air 14–21 (1981). "Scrubbers" reduce air pollution from sulfur dioxide, but also produce sludge.

84. See the discussion of the *Maislin* case, infra notes 147–149 and accompanying text.

85. See G. Calabresi, A Common Law for the Age of Statutes 82 (1982). Calabresi argues for judicial responses to this problem through "overruling" statutes, which in his

administrators, allowing them to take changed circumstances into consideration, seems to be a valuable if partial corrective.[86] The result is to confer a power of adaptation on institutions that combine the judicial virtue of continuing attention to individual contexts and new settings with the legislative virtue of a fair degree of electoral accountability.

Sometimes regulation fails because of the excessive rigidity of statutory commands.[87] In light of the wide variety of contexts to which statutes must be applied, a degree of flexibility in implementation is quite healthy. Congress cannot possibly foresee all of the problems to be dealt with under broad statutory terms.[88] Statutory terms may offer ambiguous guidance to agencies that must establish regulations in complex areas.[89] Such agencies are in a much better position than courts to

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approach are to be treated as precedents. See also G. Gilmore, The Ages of American Law 95–98 (1977) (arguing for judicial overruling of outdated statutes). But a system in which administrators respond to changed conditions through statutory construction seems far preferable. Administrators have a better democratic pedigree and more knowledge with which to undertake this task. Moreover, changed circumstances often produce ambiguities that agencies are in a uniquely good position to resolve. See Sunstein, supra note 26, at 493–97.

86. See infra notes 141–150 and accompanying text (arguing that deference is appropriate when agency modifies or reverses prior interpretations); Scalia, supra note 46, at 518–19 (same).

87. A prominent example is the "best available technology" strategy in environmental statutes, which requires all firms to adopt the same technology. A far better strategy would allow for greater flexibility, allowing nontechnological means of reducing pollution—when that approach is effective and cheap—and permitting diversity in different parts of the country. See Ackerman & Stewart, Reforming Environmental Law: The Democratic Case for Market Incentives, 13 Colum. J. Envtl. L. 171, 178–88 (1988).

88. See supra note 87; infra notes 149, 216 (discussing cases); cf. E. Bardach & R. Kagan, Going by the Book: The Problem of Regulatory Unreasonableness 309–10 (1982) ("A busy and politically divided legislature has generally found it difficult to enact specific standards or to engage in detailed supervision or review of specific regulatory agency actions.").

89. An example is provided by an important recent case in which a court relied on a form of literalism to defeat a fully sensible administrative initiative. In American Mining Congress v. EPA, 824 F.2d 1177, 1180 (D.C. Cir. 1987), the EPA issued regulations to deal with the problem of disposal of material held for recycling. The EPA decided to control, as solid wastes, "secondary materials" (spent materials, sludges, byproducts, commercial chemical products, and scrap metals) unless these materials (a) are directly reused as an ingredient or as an effective substitute for a commercial product, or (b) are reused as a raw material substitute in the original manufacturing process. This definition meant that material burned for energy recovery or that is reclaimed or accumulated speculatively would be subject to government regulation as "solid waste."

The court of appeals rejected the definition. According to the court, the statutory definition of waste as "any garbage, refuse, sludge . . . and other discarded material," 42 U.S.C. § 6903(27), meant that the secondary materials were not subject to EPA regulation. 824 F.2d at 1179–85. According to the court, "discarded" means, simply, discarded as that term is understood in the dictionary, and materials that would flow from one production process to another were not "discarded." Id.

The problems with this analysis are twofold. First, the statutory definition of waste was not written with attention to the particular problems of materials held for recycling.

deal with these sorts of problems.

Perhaps most important, regulation often runs into difficulty because of the complex systemic effects of regulatory controls.[90] Statutes interact in surprising ways with markets, other statutes, and other problems. Unanticipated consequences are common. For example, regulation of new risks may exacerbate old risks; severe controls on the nuclear power industry may increase the need for coal-fired plants and thus aggravate health risks and other dangers from acid rain; a requirement that industry adopt the best available technology may well retard technological development in pollution control. Agencies are far better situated than courts to understand and counter these effects. A principle of deference might also increase Congress's incentive to provide specific guidance to administrators and simultaneously reduce the amount of regulatory litigation, its attendant costs, and the potential balkanization of federal law in a highly decentralized court system.[91]

In light of these considerations, the *Chevron* approach might be understood as the best reconstruction of legislative instructions on the question of deference. Of course the notion of reconstruction should not be taken as a mechanical application of some actual legislative decision; as we have seen, Congress has rendered no general decision about what institution should interpret the statutes it enacts.[92] In the absence of a clear resolution, however, a principle of deference might improve the operation of regulatory law and at the same time appropriately distribute authority between courts and agencies.

To be sure, such a reconstruction would not track legislative desires under every statute. By itself, an ambiguity is not a delegation of law-interpreting power, and it would be a major error to treat all ambiguities as delegations. In fact many regulatory statutes, especially in the environmental area, were passed in periods of considerable suspicion of agency performance. Congress has often believed that the pressures imposed on administrators lead them to regulate with insufficient vigor.[93] Congress's fear of agency bias or even abdication makes

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How the term "discarded" should be understood in this context is not a question that realistically can be resolved by reference to the dictionary. Second, the question whether these materials should be understood as "discarded" and thus treated as "waste" depended on a range of highly complex and particular inquiries of fact and policy. It is fully plausible that much of this material produced the same risks that the relevant statute was designed to prevent—indeed the problem of management of recycled industrial materials creates extremely serious hazards. Here the court should have deferred to the agency's expert judgment on a complex problem not foreseen by Congress, rather than using, in a mechanical way, a statutory term that is ambiguous with regard to the particular problem. Indeed, the case was an excellent one for application of *Chevron* on grounds of superior administrative competence.

90. For a catalogue of examples, see Sunstein, Paradoxes of the Regulatory State, 57 U. Chi. L. Rev. 407, 412–29 (1990).

91. See Silberman, supra note 81, at 824; Strauss, supra note 70, at 1117–29.

92. See supra note 73 and accompanying text.

93. See R. Harris & S. Milkis, The Politics of Regulatory Change 111 (1989).

it most doubtful that the legislature has sought deference to the agency under all circumstances. But even if the *Chevron* principle is not accurate in every case, it is perhaps as accurate as any bright-line alternative, and it therefore has the significant virtue of combining a fair degree of accuracy with a reasonably clear rule.[94]

II. *Chevron*'s Reach

The considerations marshalled thus far may not be decisive. Countervailing considerations, some of them taken up below, make it easy to understand the continuing debate over the wisdom of the *Chevron* principle.[95] But even if it is agreed that deference was appropriate in the context of *Chevron* and that the basic principle is sound, a large number of questions remain. Indeed, it is in the effort to sort out the reach of *Chevron* that a significant amount of the allocation of authority between courts and agencies, and among courts, agencies, and Congress, will occur. I attempt in this section to describe the unresolved questions and to suggest how they might be treated. I do not deal here with cases of conflict with other interpretive principles, a problem treated in Part III. For present purposes I assume that *Chevron* provides the only applicable principle.

A quite general conclusion emerges from the discussion: *Chevron* is inapplicable when the particular context suggests that deference would be a poor reconstruction of congressional desires. The clearest case is provided when the agency has not been accorded implementing authority at all, but the same concern arises when the agency is for some other reason at a clear comparative disadvantage to courts. This latter category includes cases of likely bias and, somewhat more controversially, cases involving questions of jurisdiction.

A. *Just How Ambiguous?*

Chevron does not say how ambignous a statute must be in order for the agency view to control. If any ambiguity triggers the deference rule—if the agency wins whenever a reasonable person could be persuaded that more than one interpretation exists—the principle will be extraordinarily broad. Indeed, Justice Kennedy has gone so far as to suggest that the agency view should prevail if the statute is "arguably ambiguous."[96]

The Court's own decisions, however, suggest that the mere fact of a plausible alternative view is insufficient to trigger the *Chevron* rule.[97]

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94. See Scalia, supra note 46, at 520–21.

95. See supra notes 26 & 70.

96. K mart Corp. v. Cartier, Inc., 108 S. Ct. 1811, 1818 n.4 (1988).

97. See Bowen v. Georgetown Univ. Hosp., 109 S. Ct. 468, 473–74 (1988). In several other recent cases, a majority of the Court has held that an agency interpretation directly conflicted with congressional instructions, see, e.g, Dole v. United Steelworkers of Am., 110 S. Ct. 929, 938 (1990); Public Employees Retirement Sys. v. Betts, 109 S.

No verbal formulation will be completely helpful here, relying as it must on undefined defining terms.[98] But perhaps this will do: If the court has a firm conviction that the agency interpretation violates the statute, that interpretation must fail. This is so even if a reasonable person might accept the agency's view.

Consider, for example, *INS v. Cardoza-Fonseca*.[99] That case involved the meaning of a statutory provision allowing the Attorney General to grant asylum to an alien unable or unwilling to return to his home country " 'because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.' "[100] The Immigration and Naturalization Service ("INS") defined "well-founded fear" to mean that an alien must show that it is more probable than not that she would be subject to persecution. Invoking the statutory text and history, the Court rejected the agency's view. In a concurring opinion, Justice Scalia said that the agency view would warrant deference if there were ambiguity, but that the statutory text was clear.[101]

In fact, however, reasonable people certainly could differ on whether "a well-founded fear" required a showing of probability of persecution. Although the Court's interpretation ultimately was persuasive as a matter of both text and history, neither of these sources was unambiguous on the point.[102] The outcome in the case thus suggested that the mere fact of a plausible agency view is insufficient for deference.[103]

An approach of this sort appears to be a sound understanding of *Chevron* insofar as the case recognizes the primacy of legislative instructions over administrative will.[104] Even in the aftermath of the New Deal, it is for Congress, not the agencies, to make the law. Any inter-

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Ct. 2854, 2863–64 (1989), even though the dissenters demonstrated that there was a plausible alternative construction, see, e.g., *United Steelworkers of Am.*, 110 S. Ct. at 939 (White, J., dissenting); *Betts*, 109 S. Ct. at 2870–71 (Marshall, J., dissenting). For other examples, see cases cited infra note 103.

98. See Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951).

99. 480 U.S. 421 (1987).

100. Id. at 423 (quoting 8 U.S.C. § 1101(a)(42) (1982)).

101. See id. at 452–55 (Scalia, J., concurring in the judgment).

102. As the dissenting opinion established, see id. at 459–61 (Powell, J., joined by Rehnquist, C.J., and White, J., dissenting).

103. This conclusion is complicated by the fact that in *Cardoza-Fonseca* the Court doubted whether deference was due to the agency's view on a "pure question of statutory construction," id. at 446, but it is confirmed both by Justice Scalia's opinion in the case and by the outcomes in Pittston Coal Group v. Sebben, 109 S. Ct. 414, 420 (1988), and Sullivan v. Zebley, 110 S. Ct. 885, 894–97 (1990). In both cases, the majority found that the agency's interpretation was contrary to congressional instructions, although the dissenters argued, plausibly, that the agency's reading of the statute was reasonable. Compare *Pittston Coal Group*, 109 S. Ct. at 420, with id. at 425 (Stevens, J., dissenting); and compare *Zebley*, 110 S. Ct. at 894–95, with id. at 898 (White, J., dissenting).

104. See also ETSI Pipeline Project v. Missouri, 108 S. Ct. 805 (1988), in which the Court rejected the use of *Chevron* on the ground that "the Executive Branch is not per-

pretive approach must recognize that principle of priority. An understanding that would allow the agency to prevail merely because there is some room for disagreement would pose an undue threat to the basic principle of congressional supremacy in lawmaking, risking as it would administrative subversion of statutory standards. Of course it remains true that under *Chevron*, the agency will prevail even if the court would have chosen otherwise had it been entrusted with the power to decide the issue in the first instance.

B. *The Breadth of the Deference Principle and Its Limitations*

In this section, I explore possible limitations on the *Chevron* principle. The most plausible limitations are those that can be inferred from actual congressional instructions and, where Congress has not spoken, from a reading of congressional purposes in light of the relevant structural principles. Under this approach, *Chevron* is inapplicable when Congress has not granted the agency law-interpreting power at all and also in cases involving likely bias, most notably jurisdictional determinations.

1. *Limitation to Legislative Rules or to Other Congressional Delegations of Law-Interpreting Power.* — *Chevron* involved a "legislative rule," that is a rule issued by an agency pursuant to a congressional grant of power to promulgate regulations. For reasons suggested above, it is plausible to think that the legislative grant of rulemaking power implicitly carries with it the grant of authority to interpret ambiguities in the law that the agency is entrusted with administering.[105] Somewhat more broadly, *Chevron* might be taken to suggest that whenever an agency is entrusted with implementing power—whether to be exercised through rulemaking or adjudication—agency interpretations in the course of exercising that power are entitled to respect so long as they are reasonable.

If this is the basis for *Chevron*, the principle of deference does not extend to interpretations by agencies that have not been granted the authority to interpret the law. For example, agencies that have been entrusted with the power to prosecute violations but not to make rules lack the pedigree that is a prerequisite for deference. It follows that even if an agency has been given the power of interpretation through rulemaking, it is not entitled to deference if it did not exercise rulemaking power in the particular case.[106] It follows even more clearly that mere litigating positions are not entitled to deference.[107] And if this is

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mitted to administer the Act in a manner that is inconsistent with the administrative structure that Congress enacted into law." Id. at 817.

105. See supra notes 92–94 and accompanying text.

106. Thus, for example, an agency that has been given power to make rules, but that simply announces a view one way or another without going through the rulemaking process, would not receive deference. See the cases involving "interpretive rules," cited infra note 110.

107. See Bowen v. Georgetown Univ. Hosp., 109 S. Ct. 468, 473 (1988) ("We have never applied [*Chevron*] to agency litigating positions that are wholly unsupported by

so, *Chevron* applies only when an agency is exercising the power to make rules or otherwise carrying out legislatively delegated interpretive authority.

This basic idea goes a long way toward making sense of the entire dispute over the reach of *Chevron*. In a recent case, the Court made precisely this point, suggesting that a "precondition to deference under *Chevron* is a congressional delegation of administrative authority."[108] Indeed, Justice Scalia, an enthusiastic defender of the *Chevron* principle, has argued for a distinction very much like this one.[109] If agencies are simply interpreting a statute, but have not been granted the power to "administer" it, the principle of deference should not apply. And if *Chevron* does not apply outside of the context of delegations of law-interpreting power, it is consistent with a well-established body of previous law.[110]

2. *Pure Questions of Law Versus Application of Law to Fact.* — Before *Chevron*, the law might have been described roughly in the following way: Agency decisions that involve pure issues of law are subject to independent judicial examination. No judicial deference is appropriate because strictly legal competence is sufficient to resolve the question. But decisions that involve the application of law to fact call for a different standard, since the agency's specialized fact-finding capacity and accountability are highly relevant. Courts therefore should defer to agency decisions of this latter sort.[111]

We might distinguish, for example, between (a) the question whether the Occupational Safety and Health Act requires the Secretary of Labor to show a "siguificant risk" before regulating a carcinogen and

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regulations, rulings, or administrative practice."); Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys., 468 U.S. 137, 143 (1984) ("post hoc rationalizations by counsel for agency action are entitled to little deference"); United States v. Western Elec. Co., 900 F.2d 283, 297 (D.C. Cir. 1990) (no deference to interpretation of Justice Department in civil or criminal case).

108. Adams Fruit Co. v. Barrett, 110 S. Ct. 1384, 1390 (1990); see also Massachusetts v. Morash, 109 S. Ct. 1668, 1673 (1989) (emphasizing that agency had been given specific authority to define technical terms).

109. See Crandon v. United States, 110 S. Ct. 997, 1011 (1990) (Scalia, J., concurring in the judgment).

110. See General Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976) (EEOC interpretations of Title VII given less deference because it lacks authority to promulgate rules and regulations pursuant to that statute); Skidmore v. Swift & Co., 323 U.S. 134, 137–40 (1944) (where Congress did not delegate interpretive authority to the agency, its findings may be persuasive but are not controlling); Gibson Wine Co. v. Snyder, 194 F.2d 329, 332 (D.C. Cir. 1952) (less deference given to interpretive ruling that had been exempted from approval by secretary, hearing prior to promulgation, and APA rulemaking procedure).

111. See NLRB v. Hearst Publications, 322 U.S. 111, 130 (1944). See generally Breyer, supra note 8, at 397–98 (arguing for a similar distinction). At times, however, courts seemed to defer to agency decisions even on pure questions of law. See, e.g., Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 167–70 (1982); Gray v. Powell, 314 U.S. 402, 411 (1941).

(b) the question whether benzene, an acknowledged carcinogen, creates a "significant risk."[112] For the first question, strictly legal expertise seems relevant. For the latter question, it is the agency that has a comparative advantage. Deference might be accorded on the latter but not the former. Similarly, in the leading pre-*Chevron* case, the Supreme Court appeared to decide independently the purely legal question whether the statutory term "employees" included independent contractors, but to defer to the National Labor Relations Board ("NLRB") on the mixed question whether newsboys qualified as employees within the National Labor Relations Act.[113]

This approach has a good deal to be said in its favor. Above all, it is a plausible reconstruction of Congress's interpretive instructions. If the agency is simply saying what the statute means, it is making a decision that at least ordinarily calls into play distinctly legal competence. The best inference is probably that Congress wants courts to answer these inquiries. But the agency's own capacities are conspicuously pertinent when it is applying law to fact, and in these cases the best reconstruction of legislative instructions is that the decision is for the agency. It is not surprising that several courts, including the Supreme Court in a post-*Chevron* opinion written by Justice Stevens,[114] have accepted precisely this line of argument.

There are, however, at least three problems with this approach. First, the resolution of statutory ambiguities may call for the agency's specialized capacities, even if the issue appears to be purely one of law. It is at least plausible that the agency's competence is relevant to the question whether a statute regulating carcinogens requires the agency to show a "significant risk." The resolution of the ambiguity might well call for an understanding of the disadvantages and advantages of any requirement of this sort. As we have seen, resolution of ambiguities often calls for an assessment of issues of policy and principle.[115] That assessment is best made by agencies rather than courts.

Second, the line between purely legal and mixed questions is extremely thin. In some cases it will be hard to tell on which side of the line a particular question falls. A broader approach to *Chevron*, applying the rule of deference in all cases, has the virtue of simplicity and ease of application.[116] Third, *Chevron* itself quite plausibly involved a pure question of law rather than application of law to fact.[117] The distinction between the two is therefore in some tension with *Chevron* it-

112. See Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980).

113. *Hearst Publications*, 322 U.S. at 128–30; see also Byse, supra note 26, at 262–64 (suggesting a similar distinction).

114. See INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987).

115. See supra notes 75–81 and accompanying text.

116. See Scalia, supra note 46, at 517.

117. See *Cardoza-Fonseca*, 480 U.S. at 454–55 (Scalia, J., concurring).

self. Even in pure questions of law, then, deference is probably due unless there is some independent reason for distrusting the agency.

3. *Cases Involving the Agency's Specialized Competence.* — Even if the distinction between purely legal and mixed questions cannot be sustained, perhaps courts should use the considerations that it embodies in order to give deference when, simply, it is due. Deference is due when a matter within the agency's competence is at issue; courts should review agency decisions independently when it is not. On this account, the problem with the distinction between mixed questions and pure questions of law is that it is too crude and indirect a proxy for the relevant question, which is the comparative competence of the agency and the court. In *Chevron*, deference was appropriate because the agency's competence was highly relevant, whether or not the question was a "pure" one of law. So too, an agency's competence is relevant in deciding, for example, whether newsboys qualify as employees within the meaning of the National Labor Relations Act,[118] or whether there should be a de minimis exception to a statutory ban on the use of carcinogens as food additives.[119] In the latter case, the consequences of the exception probably bear on the meaning of the statute.[120] The line between independent review and *Chevron*'s deference, then, should turn directly on questions of relative competence.

This position has much to be said in its favor. Indeed, it is difficult to quarrel with the proposition that courts should defer when, and only when, agencies have a comparative advantage. That proposition is one to which Congress is highly likely to subscribe and should therefore be attributed to Congress when the national legislature has not spoken. It is highly likely that some version of this idea is and will remain the law, whether or not it is explicitly adopted by reviewing courts.

The principal problem with the use of this idea as a test for determining whether deference is due is that the inquiry into comparative competence in particular cases will be complex. By contrast, a bright-line rule of deference has the comparative virtue of simplicity. Moreover, a broader approach to *Chevron* would reflect a recognition that administrative competence is implicated in many hard cases of statutory

118. See NLRB v. Hearst Publications, 322 U.S. 111, 128–30 (1944).

119. See Public Citizen v. Young, 831 F.2d 1108, 1122 (D.C. Cir. 1987), cert. denied, 108 S. Ct. 1470 (1988); see also Pension Benefit Guar. Corp. v. LTV Corp., 110 S. Ct. 2668, 2676–79 (1990), in which the Court accepted the agency's interpretation after considering Congress's interpretive instructions and concluding that neither they nor "any of the other traditional tools of statutory construction compel" a conclusion contrary to the agency's interpretation. Id. at 2677. The Court also considered the rationality of the agency's interpretation and concluded that "the judgments about the way the real world works that have gone into the [agency's interpretation] are precisely the kind that agencies are better equipped to make than are courts. This practical agency expertise is one of the principal justifications behind *Chevron* deference." Id. at 2679 (footnote omitted).

120. This point is argued in Sunstein, supra note 26, at 496–97.

construction. For these reasons, an ad hoc inquiry into administrative competence would be an exceptionally poor way to handle the question whether *Chevron* applies. The relevant considerations can be captured more sensibly by creating more general exceptions to the deference principle.

4. *Agency Jurisdiction.* — Does an agency have the authority to decide on its own jurisdiction? *Chevron* does not say. At least if the distinction between jurisdictional and nonjurisdictional determinations could be easily and sharply drawn, it would be tempting to say that *Chevron* is inapplicable to the former. If, for example, the Federal Communications Commission ("FCC") is deciding whether it has the power to regulate cable television,[121] or the NLRB whether it can regulate independent contractors,[122] one might think that the rule of deference ought not to apply. In Anglo-American law, those limited by law are generally not empowered to decide on the meaning of the limitation.[123] When Congress creates an agency, perhaps it should be understood not to have given the agency the authority to decide on the extent of its own powers.

The issue has been discussed by two Justices skeptical of the distinction between jurisdictional and nonjurisdictional issues,[124] and by

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121. See United States v. Southwestern Cable Co., 392 U.S. 157, 165–67 (1968).

122. See *Hearst Publications*, 322 U.S. at 120.

123. See The Federalist No. 78 (A. Hamilton); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("To what purpose are powers limited . . . if these limits may, at any time, be passed by those intended to be restrained?"). There are some notable exceptions. The most important is the judiciary, which can interpret constitutional provisions and statutes conferring jurisdiction on it. See also Katzenbach v. Morgan, 384 U.S. 641, 648–51 (1966) (suggesting that Congress can define substantive content of fourteenth amendment, and to that extent its own powers under § 5 of that amendment).

124. See Dole v. United Steelworkers of Am., 110 S. Ct. 929, 944 (1990) (White, J., dissenting); Mississippi Power & Light Co. v. Mississippi, 108 S. Ct. 2428, 2442–45 (1988) (Scalia, J., concurring). Justice Scalia's argument has considerable force:

> [I]t is plain that giving deference to an administrative interpretation of its statutory jurisdiction or authority is both necessary and appropriate. It is *necessary* because there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority. To exceed authorized application is to exceed authority. Virtually any administrative action can be characterized as either the one or the other, depending upon how generally one wishes to describe the "authority." And deference is *appropriate* because it is consistent with the general rationale for deference: Congress would naturally expect that the agency would be responsible, within broad limits, for resolving ambiguities in its statutory authority or jurisdiction.

Id. at 2444 (citations omitted).

The principal weakness in this argument is the claim about Congress's natural expectation. In most cases, Congress probably has no expectation one way or the other. The depiction of its expectations is largely an act of construction rather than discovery. Moreover, there are good reasons to believe that the best reconstruction of Congress's desires is in favor of independent judicial review here, because of the risk of bias and self-dealing on the agency's part. Finally, the distinction between jurisdictional and

others insistent on that distinction.[125] In a few cases the Court appears to have deferred to agency decisions on questions that were at least plausibly jurisdictional.[126] In a recent case, however, the Court said

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nonjurisdictional decisions is in fact "discernible," at least if it is understood in the way suggested infra at notes 136–139 and accompanying text.

Note, however, that the idea that agencies are likely to be biased when extending their authority, but not when they are limiting it, tends to build into deference doctrine an antiregulatory "tilt," one that is likely to be inconsistent with the very decision to create the agency in question. See infra notes 136–139 and accompanying text.

125. See *Mississippi Power & Light Co.*, 108 S. Ct. at 2446–47 (Brennan, J., dissenting, joined by Marshall and Blackmun, JJ.) (citations omitted):

> Our agency deference cases have always been limited to statutes the agency was "entrnsted to administer." Agencies do not "administer" statutes confining the scope of their jurisdiction, and such statutes are not "entrusted" to agencies. Nor do the normal reasons for agency deference apply. First, statutes confining an agency's jurisdiction do not reflect conflicts between policies that have been committed to the agency's care, but rather reflect policies in favor of limiting the agency's jurisdiction that . . . may indeed conflict . . . with the agency's institutional interests in expanding its own power. Second, for similar reasons, agencies can claim no special expertise in interpreting a statute confining its jurisdiction. Finally, we cannot presume that Congress implicitly intended an agency to fill "gaps" in a statute confining the agency's jurisdiction, since by its nature such a statute manifests an unwillingness to give the agency the freedom to define the scope of its own power.

The D.C. Circuit has also suggested that deference may not be appropriate on jurisdictional questions. See The Business Roundtable v. SEC, 905 F.2d 406, 413–14 (D.C. Cir. 1990); New York Shipping Ass'n v. Federal Maritime Comm'n, 854 F.2d 1338, 1363 (D.C. Cir. 1988) ("[I]t would . . . be inappropriate for us to defer to the agency where, as here, it is interpreting not the meaning of a statute that Congress has charged it to administer, but rather a statute merely delimiting its jurisdiction as against that of the authorities charged with administration of the labor laws."); National Wildlife Fed'n v. ICC, 850 F.2d 694, 699 n.6 (D.C. Cir. 1988) (agency interpretation serving to increase its own authority or jurisdiction raises special concerns).

The weaknesses in Justice Brennan's analysis are twofold. First, parts of the analysis assume that the jurisdictional limitation is clear, in which case the decision about deference is irrelevant. Second, agency expertise may in fact be relevant to a jurisdictional question, as noted in the text.

126. See Massachusetts v. Morash, 109 S. Ct. 1668, 1672–74 (1989) (deferring to Secretary of Labor's definition of "employee welfare benefit plan," which effectively limited jurisdiction); K mart Corp. v. Cartier, Inc., 108 S. Ct. 1811, 1817–18 (1988) (Kennedy, J., plurality opinion) (deferring to Customs Service interpretation of its power to regulate "gray-market goods" infringing on trademark rights); id. at 1827–28 (Brennan, J., concurring) (same); EEOC v. Commercial Office Prods. Co., 108 S. Ct. 1666, 1671 (1987) (deferring to EEOC interpretation of statute governing timely filing of complaints); NLRB v. Food & Commercial Workers United Union, Local 23, 108 S. Ct. 413, 421–26 (1987) (deferring to regulations that failed to provide for judicial review of informal settlement); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 845 (1986) (deferring to commission's assertion of jurisdiction over counterclaims); Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 233 (1986) (though statute could reasonably be construed to require agency action under certain circumstances, secretary's decision to withhold this action is reasonable and accorded deference); Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 125–26 (1985) (deferring to EPA's narrow construction of requirements it could "modify" under § 301 of the Clean Water Act).

that while "agency determinations within the scope of delegated authority are entitled to deference," an agency " 'may not bootstrap itself into an area in which it has no jurisdiction.' "[127] The passage suggests that jurisdictional determinations will not receive deference. But it is somewhat ambiguous, and there is as yet no clear answer to this question.

Because congressional instructions are crucial here, courts should probably refuse to defer to agency decisions with respect to issues of jurisdiction—again, if we assume that the distinction between jurisdictional and nonjurisdictional questions is easily administrable. The principal reason is that Congress would be unlikely to want agencies to have the authority to decide on the extent of their own powers. To accord such power to agencies would be to allow them to be judges in their own cause, in which they are of course susceptible to bias.

Consider, for example, *Dole v. United Steelworkers of America*.[128] There the issue was whether the Office of Management and Budget ("OMB") had the authority under the Paperwork Reduction Act of 1980[129] to approve or disapprove agency rules requiring regulated entities to disclose information directly to consumers, employees, or others. OMB argued that the statutory words allowing it to review rules regarding the " 'obtaining or soliciting of facts by an agency through . . . reporting or recordkeeping requirements' " included disclosure rules.[130] The Court concluded otherwise, saying that the words "by an agency" meant information gathered by the agency for its own use rather than for disclosure to others.[131] Because the Court found the statute unambiguous in denying reviewing authority to OMB, it did not have to explore the issue of deference. But it would have seemed exceedingly odd to suggest that OMB should be allowed to resolve ambiguities in a statute governing its own jurisdiction. The danger of bias and self-dealing is so great as to make OMB an interested party.

As Justice Scalia has emphasized, however, there would be some difficulty in administering the sometimes elusive distinction between jurisdictional and nonjurisdictional questions.[132] In some cases in which an agency is said to have exceeded its authority, or acted unlawfully, it might also be said to have exceeded its jurisdiction.[133] Moreover, agency expertise and accountability are often relevant to the resolution

127. Adams Fruit Co. v. Barrett, 110 S. Ct. 1384, 1391 (1990) (quoting Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 745 (1973)).

128. 110 S. Ct. 929 (1990).

129. 44 U.S.C. §§ 3501–3520 (1988).

130. *United Steelworkers of Am.*, 110 S. Ct. at 934 (quoting 44 U.S.C. § 3502(4)).

131. Id. at 934–35.

132. See supra note 124. Consider the failed effort to maintain a similar distinction in Crowell v. Benson, 285 U.S. 22 (1932), discussed in L. Jaffe, Judicial Control of Administrative Action 87–90, 624, 640–53 (1965).

133. See, e.g., K mart Corp. v. Cartier, Inc., 108 S. Ct. 1811, 1818–19 (1988). In fact, however, this case, like others cited in supra note 126, did not involve truly jurisdic-

of a jurisdictional ambiguity. In the absence of a clear congressional answer to the question, for example, the comparative competence of the FCC might well bear on whether federal regulatory authority extends to cable television.[134] When Congress has not spoken clearly, whether the Commodity Futures Trading Commission has adjudicative authority over common law counterclaims might well depend on the consequences of the exercise of that authority for the fair and efficient administration of the Commodity Exchange Act.[135] For these reasons, it would be at least plausible to suggest that a general rule of deference would be preferable even on jurisdictional questions, because of its greater ease of application and because the agency's competence bears on the resolution of jurisdictional ambiguities.

Probably the best reconciliation of the competing considerations of expertise, accountability, and partiality is to say that no deference will be accorded to the agency when the issue is whether the agency's authority extends to a broad area of regulation, or to a large category of cases, except to the extent that the answer to that question calls for determinations of fact and policy.[136] On this approach, there is no magic in the word "jurisdiction." Instead, the question is whether the agency is seeking to extend its legal power to an entire category of cases, rather than disposing of certain cases in a certain way or acting in one or a few cases. This distinction it is not always extremely sharp, and it will call for an exercise of judgment. But in the vast majority of cases, it is easily administered.

It should also follow that agencies will not receive deference when they are denying their authority to deal with a large category of cases.[137] Here too the agency determination is jurisdictional. Here too there is a risk of bias, in the form not of self-dealing, but instead of an abdication of enforcement power. Because abdication has been a major legislative fear,[138] and because deference doctrine should not contain an antiregulatory bias, *Chevron* should be inapplicable here as well.[139]

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tional determinations by the definition offered at infra notes 135–139 and accompanying text.

134. See supra note 121 and accompanying text.

135. See Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 845 (1986). In the same vein, see EEOC v. Commercial Office Prods. Co., 108 S. Ct. 1666, 1671 (1988), in which the Court deferred to the EEOC's determination that it had jurisdiction over a complaint filed with it 290 days after dismissal by the state—in the face of a provision stating that the EEOC had jurisdiction, and the complaint was timely filed, only if state proceedings "have been earlier terminated."

136. It would follow that no deference was appropriate in *Dole*, discussed supra notes 128–131 and accompanying text, because the agency's competence was irrelevant to the question of statutory meaning.

137. Cf. Heckler v. Chaney, 470 U.S. 821, 833 n.4 (1985) (suggesting that judicial review of agency inaction might be available in the face of an abdication of enforcement power); id. at 839 (Brennan, J., concurring) (same).

138. See supra text accompanying note 93.

139. See Kerr-McGee Chem. Corp. v. NRC, 903 F.2d 1, 7 (D.C. Cir. 1990).

5. *Agency Bias.* — We might generalize the discussion of jurisdictional determinations by supposing that the question at issue is one with respect to which agency bias is peculiarly likely to be at work. The agency might be deciding whether its own decisions are reviewable, whether it has the power to issue fines, whether its authority extends to new or unforeseen areas, or, perhaps more controversially, whether it is compelled to undertake action that it prefers not to undertake—for example, vigorous enforcement of federal environmental controls—perhaps because of the pressures imposed by well-organized private groups. In all of these cases, the likelihood of agency bias and self-dealing might be serious. It would be peculiar, therefore, to defer to the agency's views. This issue is one of particular importance, especially in a period in which Congress is likely to be enacting regulatory controls toward which the executive branch has expressed ambivalence.[140]

If *Chevron* applies only when the agency has been delegated lawmaking authority, much of this problem will disappear. To be sure, an agency's view that its own decisions are unreviewable, that it need not undertake certain action, or that it has (or does not have) the power to issue fines will amount to an "interpretation." But the expression of these views is unlikely to be part of the exercise of authority that has been congressionally granted. In these cases, an agency's claim of immunity from the judiciary could not easily be seen as part of its delegated rulemaking power. In rare cases, however, an agency might interpret a statute in a way that predictably lines up with agency self-interest or bias even while exercising delegated authority. In these cases, the rule of deference should probably be inapplicable, since deference would be a poor reading of congressional instructions.

Chevron's principle of deference, then, is an attempted reconstruction of congressional instructions, one that is responsive to the comparative advantages of the agency in administering complex statutes. It follows that the principle is inapplicable when the best reconstruction argues against deference. We have seen that when the agency has not been accorded law-interpreting power, no deference is due. Independent judicial assessments are also appropriate in other contexts involving predictable bias, most notably jurisdictional determinations, but also in other cases in which the agency's self-interest is conspicuously at stake.

6. *Agency Views that Are New or that Depart from Past Practices.* — Before *Chevron*, agency decisions were entitled to deference if they were longstanding, consistent, and contemporaneous; but new interpreta-

140. The new Clean Air Act, Pub. L. No. 101-549, 104 Stat. 2399 (1990), is a plausible candidate for this analysis. See, e.g., Benhan, Clean Air Bill Gets Harder Look Amid Crisis, Investor's Daily, Aug. 29, 1990, at 1; Lobsenz, Administration Ups Clean Air Cost Estimate, United Press Int'l, Aug. 2, 1990 (available on NEXIS).

tions were subject to more stringent judicial scrutiny.[141] The reasons for this distinction never have been entirely clear. Perhaps the special deference accorded to longstanding interpretations embodied an effort to import principles of stare decisis into administrative processes in order to protect reliance and expectations. Perhaps the distinction was part of an effort to constrain administrative wilfulness or the use of "politics," perhaps understood as interest group power, to distort statutory meaning. Perhaps this distinction was built on a belief that a longstanding interpretation probably tracked congressional will, at the stage of enactment and after, and was therefore correct as a matter of statutory meaning. If these were the underlying ideas, an agency decision that was novel or merely one of an inconsistent line of decisions would not warrant deference. That decision would hardly protect expectations and reliance, and it could not confidently be said to be a correct understanding of what Congress wanted.

On several occasions after *Chevron* the Court has reasserted precisely this position.[142] But if *Chevron* is right, this position is wrong, or at least it draws the distinction between longstanding and novel interpretations too sharply.[143] As we have seen, *Chevron* is best defended in part as a means of counteracting problems of rigidity, obsolescence, and changed circumstances in the regulatory process.[144] The problem of changed circumstances is a serious one for textual commands, which are difficult to amend in light of competing demands on the legislators' time. As a result, courts have sometimes taken account of changed circumstances in order to render a novel interpretation, one that makes sense of those commands or even remains faithful to them in light of new developments.[145] But because of their fact-finding capacities, electoral accountability, and continuing attention to changed circumstances, agencies are far better situated than courts to soften statutory

141. See, e.g., EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 600 n.17 (1981); Andrus v. Shell Oil Co., 446 U.S. 657, 667–68 (1980); NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974); Massachusetts Trustees v. United States, 377 U.S. 235, 241 (1964); Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933). But see American Trucking Ass'n v. Atchinson T. & S.F. Ry., 387 U.S. 397, 416 (1967) (upholding ICC alteration of 25-year-old interpretation because agency decided that original interpretation had been incorrect).

142. See Robertson v. Methow Valley Citizens Council, 109 S. Ct. 1835, 1848 (1989); INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987); cf. Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 110 S. Ct. 2759, 2768 (1990) (agency cannot modify interpretation of statute to conflict with court's prior construction); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 846 (1986) ("It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.' ") (quoting NLRB v. Bell Aerospace Co., 416 U.S. at 274–75).

143. See Scalia, supra note 46, at 517.

144. See supra notes 74–81 and accompanying text.

145. See Sunstein, supra note 26, at 493–94.

rigidities or to adapt their terms to unanticipated conditions.[146]

All this might suggest that an agency's new interpretations should be entitled to the same basic deference as old ones. Agency decisions about the meaning of ambiguous statutes often turn in part on questions of policy. For an agency to interpret a statute one way rather than another is for it to set out a view that is permissible rather than mandatory. Under *Chevron*, agency views receive deference not because they capture a unitary intended meaning, but because the resolution of statutory ambiguities should be undertaken by accountable, specialized administrators, not by courts. Under this approach, it matters relatively little whether the agency decision is longstanding and consistent or not. Regulatory shifts from one administration to another should be entirely expected and indeed welcomed as a healthy part of democratic self-government or as a recognition of changed circumstances. So long as the statute is ambiguous, those shifts reflect legitimate changes of policy. One might expect, then, that after *Chevron* agency decisions will be entitled to deference even if they are novel.

The question is somewhat more complex, however, than the discussion thus far suggests. As we have seen, a longstanding agency interpretation might receive deference because of an interest in a form of administrative stare decisis. If this is so, a new interpretation is entitled to somewhat less deference than one that is longstanding. In a recent case, the Supreme Court has recognized this point and, indeed, gone somewhat further. In a partial qualification of *Chevron*, the Court held in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*[147] that agencies may not depart from an agency interpretation that the Court has upheld, even in the face of changed circumstances.[148] The case should probably be read to say that an agency may not depart from an interpretation that the Court has held to be statutorily mandated. It should not be taken to say that a merely permissible interpretation is set in stone, or that an agency may not take account of changed circumstances in giving meaning to an ambignous mandate, or a mandate that new developments have rendered ambignous.[149]

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146. See supra text accompanying notes 84–86.

147. 110 S. Ct. 2759 (1990).

148. See id. at 2768 ("Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning."); accord California v. FERC, 110 S. Ct. 2024, 2029 (1990).

149. See id. at 2770 (emphasizing that although it has "both the authority and expertise generally to adopt new policies when faced with new developments in the industry," agency "does not have the power to adopt a policy that directly conflicts with its governing statute"); id. at 2771–72 (Scalia, J., concurring) (emphasizing the statutory text). This is not to say that *Maislin* was correctly decided. The case involved a decision by the Interstate Commerce Commission ("ICC") to permit a shipper not to pay the rate filed with it ("filed rate") when the shipper and the carrier had privately negotiated a lower rate. According to the ICC, two changed circumstances required this shift. First, carriers and shippers had frequently negotiated lower rates that were not filed with the

Two conclusions follow. First, and most importantly, agencies should be allowed to depart from interpretations by prior administrations, certainly in the face of changed conditions, but also to reflect new views about policy. What is necessary is that the new interpretation be explained as reasonable in light of statutorily permissible factors.[150] Second, new departures should be accorded somewhat less deference than longstanding interpretations, for reasons analogous to those that justify stare decisis in the judicial context.

C. Chevron's *Second Step: The Reasonableness of the Agency's Interpretation*

I have noted that *Chevron* sets out a two-step process for analyzing agency interpretations. Even if Congress has not directly addressed the issue in question, and even if deference is due, the agency's decision must be "reasonable."[151] The Supreme Court has given little explicit guidance for determining when interpretations will be found reasonable. In most of the cases rejecting an agency's view, the Court has relied on the first step of *Chevron*, finding an explicit congressional decision on the point.

ICC. In some of those cases, the carrier later filed for bankruptcy, and the trustee billed the shipper for the difference between the tariff and the negotiated rate. The ICC concluded that in these circumstances it would be unfair and irrational not to consider the shipper's equitable defenses to a claim for undercharges. Second, the Motor Carrier Act of 1980, significantly deregulating the motor carrier industry, justified the change in policy, since under the new circumstances of competition strict application of the filed rate was unnecessary to deter discrimination. See id. at 2762–64.

In rejecting the ICC's position, the Court emphasized some of its early decisions, e.g., Louisville & N. Ry. v. Maxwell, 237 U.S. 94 (1915); Texas & P. Ry. v. Mugg, 202 U.S. 242 (1906), creating a requirement of strict adherence to the filed rate requirements and disallowing equitable defenses to collection of the filed tariff. See *Maislin*, 110 S. Ct. at 2766–67. But it is not clear that those decisions meant that the agency's view was required rather than merely permitted, and in any case statutory changes had converted a system of regulated monopoly into an extremely competitive market. Nothing in the statute's text expressly prohibited the agency's shift in position. The central statutory term is "reasonable," and the change in the nature of the industry made it plausible for the agency to find reasonable what was once unreasonable. Indeed, the agency's shift adapted legislative instructions sensibly to new conditions; little or nothing could be said, as a matter of sound policy, against the agency's view. It is in these circumstances that deference to the agency, rather than mechanical use of an ambiguous statute, is especially appropriate. Cf. supra note 89, infra note 216 (discussing mechanical definition of "solid waste"). But see Pittston Coal Group v. Sebben, 109 S. Ct. 414, 419–21 (1988) (literal interpretation used to forbid agency from reaching sensible result not realistically inconsistent with statute); Public Citizen v. Young, 831 F.2d 1108, 1113 (D.C. Cir. 1987) (mechanically interpreting Delaney Clause of Color Additive Amendments of Food, Drug & Cosmetic Act to forbid agency from allowing de minimis exceptions), cert. denied, 108 S. Ct. 1470 (1988).

150. See NLRB v. Curtin Matheson Scientific, Inc., 110 S. Ct. 1542, 1549 (1990); Robertson v. Methow Valley Citizens Council, 109 S. Ct. 1835, 1848–49 (1989); King Broadcasting Co. v. FCC, 860 F.2d 465, 470–71 (D.C. Cir. 1988).

151. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843–44 (1984).

On the question of reasonableness, it seems clear that the agency must be given considerable latitude. But this is not to say that the agency may do whatever it wishes. The reasonableness inquiry should probably be seen as similar to the inquiry into whether the agency's decision is "arbitrary" or "capricious" within the meaning of the APA.[152] That inquiry requires the agency to give a detailed explanation of its decision by reference to factors that are relevant under the governing statute.[153] And while some decisions will be reversed or remanded under this approach,[154] it is clear that within a wide range the choice of policy is for the agency.[155]

III. Interpretive Principles

Thus far I have discussed the *Chevron* principle as if it stood alone—that is, as if it provided the only applicable interpretive principle, and was not in conflict with other possible principles. In fact, however, the principle of deference is merely one of a large number of interpretive principles or norms playing a major role in statutory construction as that process occurs in courts, agencies, and elsewhere. In some cases in which *Chevron* would otherwise govern, other interpretive norms may require a rejection of the agency's position.

In this Part, I discuss the relationship between *Chevron* and other relevant principles. I conclude that *Chevron* is plainly overcome by principles that help to ascertain congressional instructions. Norms calling for an explicit legislative statement before certain results may be reached also overcome the principle of deference; the reason is that those norms are designed to ensure congressional deliberation on the questions involved. The same is true for other norms designed to counteract governmental bias or to protect legislative processes. Norms against regulatory irrationality or absurdity, however, are usually defeated by *Chevron*, since determinations of rationality are for agencies rather than courts.[156]

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152. 5 U.S.C. § 706 (1988); see Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."); Silberman, supra note 81, at 827-28.

153. See *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 41–44; Wint v. Yeutter, 902 F.2d 76, 79–84 (D.C. Cir. 1990); General Motors v. NHTSA, 898 F.2d 165, 172 (D.C. Cir. 1990); Silberman, supra note 81, at 827.

154. See Associated Gas Distribs. v. FERC, 893 F.2d 349, 359 (D.C. Cir. 1989); Silberman, supra note 81, at 827.

155. See Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 100–06 (1983); *General Motors*, 898 F.2d at 171–72.

156. To say this is not to deny that *Chevron*'s second step requires an inquiry into reasonableness, as does the APA, 5 U.S.C. § 706 (1988). The point is that in the aftermath of *Chevron*, courts should be reluctant to use norms against irrationality to invali-

A. *In General*

Notwithstanding Karl Llewellyn's celebrated effort to demolish the canons of construction by showing their tendency toward vacuity and self-contradiction,[157] interpretive principles of various sorts continue to be an important part of current law.[158] Statutory ambiguity is common. In the face of ambiguity, outcomes must turn on interpretive principles of various sorts; there is simply no other way to decide hard cases.[159] Any volume of the Federal Reporter or the United States Reports will turn up a wide range of interpretive principles. These principles exist not only because they are indispensable to decision, but also because many of them reflect grammatical, institutional, or substantive understandings that have or warrant widespread support.

The point goes deeper still. Whether there is ambiguity—the nominal trigger for deference under *Chevron*—is a function not "simply" of text, but of text as it interacts with principles of interpretation, some of them deeply engrained in the legal culture or even the culture more generally. A major current task is to assigu *Chevron* its place within the universe of these principles. That task raises the question of what constitutes "ambiguity" and of why and when "ambiguity" is a sufficient reason for deference.

For present purposes it will be useful to begin by distinguishing among three sorts of interpretive principles. All of them are pervasive. *Syntactic principles* help to discern statutory meaning in the particular case. Courts sometimes rely on explicit and implicit *interpretive instructions* from Congress about how statutes should be construed. *Substantive principles* attempt to carry out policies, some of them with constitutional status, that cannot be tied to any legislative judgment.

Syntactic principles include a wide range of practices and ideas: not merely the ordinary rules of language, but also the frequently stated notions that a specific provision will trump a general provision when there is a conflict;[160] that when general words follow a particular

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date agency decisions, since the agency is in a better position to judge whether a particular rule is rational or not.

157. See Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed, 3 Vand. L. Rev. 395 (1950).

158. I will use the terms "canons," "norms," and "interpretive principles" interchangeably in this discussion.

159. In fact, interpretive principles are at work even in easy cases, or those appearing to contain no ambiguity. Cases are easy only when and because the relevant interpretive principles are not a matter of dispute. See Sunstein, supra note 26, at 464–65. There are no easy cases without interpretive principles, which are necessary to give context, and hence meaning, to language. To say that interpretive principles are not at stake is actually to say that the relevant principles are supported by a consensus, so that there is no dispute about their application or meaning.

I deal here with interpretive principles that are conspicuous or contestable, in the sense that they are self-consciously invoked as part of the process of resolving ambiguities or cases otherwise in or close to equipoise.

160. See Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702, 2722 (1989).

enumeration, they will be defined by reference to the particular enumeration;[161] that every word in a statute will be given effect;[162] that when Congress has specified the category of people entitled to a good, there might be an inference that the people not expressly mentioned are not so entitled.[163] Some of these principles are controversial, and their application in particular cases will of course be a source of dispute. But the use of syntactic principles, as a way of discerning legislative instructions, is an ordinary part of statutory interpretation.

Interpretive instructions include, least controversially, explicit legislative guidance about statutory interpretation. The first provisions of the United States Code provide a long list of these instructions,[164] and other more particular statutes furnish similar guidance.[165] Some principles of interpretation reflect implicit rather than explicit interpretive instructions. Thus, for example, the idea that statutes will be construed to be valid rather than invalid,[166] and the principle that appropriations statutes will be narrowly construed,[167] seem to be an accurate reconstruction of likely legislative wishes. Congress would prefer validation to invalidation, and its own rules and practices limit the consequences of appropriations measures.

Substantive principles are sometimes highly controversial, but they play an extremely prominent role in statutory interpretation. Some of these principles are designed to allocate authority among various governmental entities. Some of them are more frankly designed to produce particular outcomes. Many of these principles are constitutionally inspired, as in the idea that federal statutes will not lightly be construed so as to preempt state law;[168] that judicial review of agency action will be presumed available;[169] that statutes will be construed so as not to interfere with the power of the President.[170] Some of these principles serve other defensible substantive goals; these include the idea that exemptions from the antitrust and tax laws will be narrowly construed,[171]

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161. See Hughey v. United States, 110 S. Ct. 1979, 1984 (1990); Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6, 110 S. Ct. 424, 439 (1989). But see United States v. Powell, 423 U.S. 87, 90–91 (1975) (rejecting *ejusdem generis* principle where it would suggest a reading of the statute that conflicts with congressional will).

162. See Crandon v. United States, 110 S. Ct. 997, 1008 (1990) (Scalia, J., concurring in the judgment).

163. See, e.g., Block v. Community Nutrition Inst., 467 U.S. 340, 347 (1984).

164. 1 U.S.C. §§ 1–6 (1988).

165. See generally R. Dickerson, The Interpretation and Application of Statutes 262–81 (1975) (discussing examples).

166. See Communications Workers of Am. v. Beck, 108 S. Ct. 2641, 2657 (1988).

167. See TVA v. Hill, 437 U.S. 153, 190–91 (1978).

168. See Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 108 S. Ct. 1350, 1355 (1988).

169. See Johnson v. Robison, 415 U.S. 361, 367 (1974).

170. See Dames & Moore v. Regan, 453 U.S. 654, 681–82 (1981).

171. See, e.g., United States v. Wells Fargo Bank, 108 S. Ct. 1179, 1183 (1988) (taxation); Michigan Citizens for an Indep. Press v. Thornburgh, 868 F.2d 1285, 1299

that statutes will be interpreted so as not to apply retroactively,[172] that implied repeals will be disfavored,[173] and that federal statutes and treaties will be construed generously to the Indian tribes.[174] The category of substantive norms is not fixed but changes over time, with new assessments of what norms are well adapted to the functions and failures of government.

B. Chevron *and the Interpretive Principles*

What bearing does *Chevron* have on the principles of construction? Notably, *Chevron* itself creates an interpretive principle, and if it is to be defended, it must probably be as one that reflects implicit interpretive instructions or that satisfies institutional goals.[175] It is not difficult to imagine a conflict between the *Chevron* principle and one or more of the other interpretive principles. Imagine, for example, that an agency interprets a statute in a manner that raises a serious constitutional question, preempt state law, or unfavorably to the Indian tribes. The problem has arisen specifically in cases in which agency interpretations competed with the norms against retroactivity[176] and against implied exemptions from antitrust laws.[177]

In these cases, the issue is whether *Chevron* will displace or be displaced by otherwise applicable interpretive norms. That issue in turn implicates a wide range of questions about the relationships among different interpretive norms, created as they were in vastly different periods and designed for dramatically different institutional arrangements and substantive concerns. Here as well the traditional legal culture is confronted by an administrative system built on a novel set of substantive and institutional premises.

In the discussion that follows, I propose to answer these questions by disentangling the functions of interpretive norms and by examining their relationship with *Chevron*. Not surprisingly, the answers require an assessment of the interaction between the original constitutional framework and governmental structures that self-consciously depart from that framework. Each of the norms outlined here might fall in more than one category, and the judgment about which category applies will be contestable. The particular judgments are less important than the general conclusion that norms that serve different functions will interact with *Chevron* in different ways. I order the norms in se-

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(D.C. Cir.) (R.B. Ginsburg, J., dissenting) (antitrust), aff'd mem., 110 S. Ct. 398 (1989) (equally divided court).

172. See Bowen v. Georgetown Univ. Hosp., 109 S. Ct. 468, 471 (1988).

173. See TVA v. Hill, 437 U.S. 153, 189–90 (1978).

174. See Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985).

175. See supra notes 73–94 and accompanying text; Scalia, supra note 46, at 517.

176. See *Georgetown Univ. Hosp.*, 109 S. Ct. at 471.

177. See Michigan Citizens for an Indep. Press v. Thornburgh, 868 F.2d 1285, 1292 (D.C. Cir.), aff'd mem., 110 S. Ct. 398 (1989) (equally divided court).

quence, beginning with those that pose the strongest case for overcoming *Chevron* and ending with those that in all likelihood should be defeated by agency interpretations.

C. *Syntactic Norms and Interpretive Instructions*

It seems clear that agency interpretations will not prevail when they conflict with syntactic norms. *Chevron* speaks of "the unambiguously expressed intent of Congress" as the basis for rejecting an agency's view, and many syntactic principles are explicitly designed to help capture legislative instructions. The idea that specific terms prevail over general,[178] that each word in a statute will be construed to have independent meaning,[179] and that words will be taken in the context of the statute as a whole,[180] are part of the process of uncovering "legislative intent."[181] These norms therefore overcome the agency's view, at least if they operate reliably in the case at hand. The Supreme Court has indicated as much in so many words.[182]

The agency interpretation will also be defeated when Congress has issued interpretive instructions. When explicit instructions appear in the statutory text, they should prevail over contrary agency interpretations. Interpretive instructions that do not appear on the face of the statute, but that derive from the legislative history or background of the statute, or from understandings about likely legislative desires, are also part and parcel of the process of discerning Congress's instructions (its "intent"). These instructions should also prevail over conflicting agency views.

The question is somewhat more difficult when the interpretive instructions are implicit rather than explicit—as, for example, in the notion that appropriations statutes will be narrowly construed, or that statutes will be construed so as to be valid rather than invalid.[183] The

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178. See Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702, 2722 (1989).

179. See Crandon v. United States, 110 S. Ct. 997, 1008 (1990) (Scalia, J., concurring in the judgment).

180. See, e.g., id. at 1001; Community for Creative Non-Violence v. Reid, 109 S. Ct. 2166, 2173–74 (1989).

181. There is considerable controversy, inside and outside of the Court, about the notion of "legislative intent." In fact, this notion is often an unhelpful fiction, treating a collective body as if it had a unitary idea about how to resolve cases. See, for citations and discussion, Sunstein, supra note 26, at 428–34. For present purposes, I use terms like "meaning" or "instructions" so as not to call up this controversial question; these terms should be seen as synonymous with "intent" as that idea is understood in *Chevron*.

182. See Dole v. United Steelworkers of Am., 110 S. Ct. 929, 934–37 (1990); Connecticut Dep't of Income Maintenance v. Heckler, 471 U.S. 524, 529–30 (1985); Consolidated Rail Corp. v. ICC, 896 F.2d 574, 578–80 (D.C. Cir. 1990). But see Cheney R.R. v. ICC, 902 F.2d 66, 68–69 (D.C. Cir. 1990) (agency view overcomes *expressio unius* canon). The view that the *expressio unius* principle is defeated by *Chevron* seems correct, since that canon is a questionable one in light of the dubious reliability of inferring specific intent from silence. See id. at 69.

183. See supra notes 166–167 and accompanying text.

problem here is that implicit interpretive instructions are in a sense a judicial rather than a legislative creation—a formulation of legislative will that, while highly plausible, has been nowhere expressly stated, and that may therefore be controversial. As the interpretive instructions track legislative desires more controversially, they come closer to falling into the category of substantive or institutional principles, which provide a weaker case for rejection of *Chevron*. But when the principle is closely traceable to a likely congressional judgment, it plainly defeats the *Chevron* principle. The Court has so indicated in cases before and after *Chevron*.[184]

D. *Norms that Require an Explicit Legislative Statement*

The discussion thus far has involved norms that are invoked to uncover congressional "intent." The remaining categories of norms do not involve legislative instructions or "intent" at all. It is plausible to suggest that these norms should always be trumped by *Chevron*. In *Chevron*, after all, the Court emphasized that the agency's view will prevail unless there is a direct congressional judgment to the contrary. When a court is dealing with norms that do not relate to congressional instructions, it seems reasonable that the agency's view should prevail. On this account, only intent and intent-related canons can defeat the agency's view.[185]

On the other hand, *Chevron* does refer to and endorse the "traditional tools of statutory construction."[186] This point has frequently been emphasized in subsequent cases.[187] Constitutionally inspired norms, along with many others that serve institutional or substantive goals, stand as part of those traditional tools. If the traditional tools include the substantive norms, then these norms can defeat agency interpretations consistently with *Chevron*. In many cases, powerful arguments support this conclusion.

It will be useful to begin with norms designed to require that statutes contain an explicit statement from Congress. "Clear statement" principles are omnipresent in current law. A subset of the category of interpretive norms, they are designed to ensure an unambiguous state-

184. See DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 108 S. Ct. 1392, 1397 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); TVA v. Hill, 437 U.S. 153, 189–91 (1978) (rejecting agency interpretation in part because of norm in favor of narrow construction of appropriations statutes).

185. See Michigan Citizens for an Indep. Press v. Thornburgh, 868 F.2d 1285, 1292–93 (D.C. Cir.), aff'd mem., 110 S. Ct. 398 (1989) (equally divided court).

186. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 n.9 (1984).

187. See, e.g., Dole v. United Steelworkers of Am., 110 S. Ct. 929, 934 (1990); NLRB v. United Food & Commercial Workers Union, Local 23, 108 S. Ct. 413, 421 (1987); INS v. Cardoza-Fonseca, 480 U.S. 421, 447–48 (1987).

ment from Congress before allowing certain results to be reached. One of their targets is governmental outcomes that reflect views that can be traced only to the executive branch, and not to the national legislature as well. Principles that require a clear legislative statement, I argue, overcome *Chevron*.

1. *Constitutionally Inspired Norms*. — Many substantive norms have constitutional foundations. Examples include the principle that statutes ordinarily will be construed to be valid rather than invalid, to steer clear of serious constitutional doubts, so as not to intrude on the traditional power of the President or preempt state law.[188] Principles of this sort require a clear statement from Congress before courts will interpret statutes as intruding into constitutionally troublesome areas.

If these principles cannot be understood as a way of discerning legislative instructions, and if Congress can displace them with a clear statement, how might they be defended? The process of statutory construction is often thought to be a means of discerning the meaning of statutory words, and here substantive principles might be considered irrelevant or indeed illegitimate. By using these principles, courts decide cases of statutory meaning by reference to something external to legislative desires, even though the interpretation in question would not ordinarily violate the Constitution.

There are, however, at least three reasons for the continued use of constitutionally inspired interpretive principles. First, it is sometimes impossible to decide hard cases without resorting to these principles. Some cases are genuinely in equipoise, and courts (or agencies) need tie breakers. It is hard to object to tie breakers that are rooted in constitutionally grounded structural principles.

Second, some principles are justified as an effort to ensure legislative rather than merely administrative deliberation about constitutionally troublesome issues.[189] This idea is itself based on considerations of constitutional structure. For example, the Supreme Court no longer enforces the nondelegation doctrine with much vigor, and probably for good reasons.[190] But in the wake of the downfall of that doctrine, the use of constitutionally based clear statement principles serves as a nar-

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188. See supra notes 168–170 and accompanying text.

189. The point is explicitly recognized, in rejecting the *Chevron* principle in favor of the principle of state autonomy, in California State Bd. of Optometry v. FTC, 910 F.2d 976, 981–82 (D.C. Cir. 1990).

190. That "Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." Field v. Clark, 143 U.S. 649, 692 (1892). The Court has not struck down a statute on nondelegation grounds since the New Deal. For a justification of its unwillingness to do so, see Stewart, Beyond Delegation Doctrine, 36 Am. U.L. Rev. 323, 328–29 (1987). For some opposing views, see Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 673–75, 685–87 (1980) (Rehnquist, J., concurring), and sources cited id. at 687 n.6; J. Ely, Democracy and Distrust 131–34 (1980).

rower and more targeted means of ensuring that Congress, rather than bureaucrats, will deliberate on questions that raise serious constitutional difficulties or intrude into constitutionally sensitive areas.

In this respect, clear statement principles operate like the nondelegation doctrine. Both have roots in article I, and these principles can be understood as a second-best surrogate for that doctrine—a surrogate that is responsive to the intrusiveness and unwieldiness of a large-scale judicial revival of the nondelegation doctrine. In *Kent v. Dulles*,[191] for example, the Supreme Court held that a seemingly open-ended grant of authority to the President to issue and deny passports did not include the power to refuse to allow Communists to leave the country because of their political commitments.[192] The decision should be understood as an effort to ensure that the national legislature, not simply the executive branch, has deliberated on a question raising difficult constitutional questions relating to freedom of expression and the right to travel. This approach therefore responds to the delegation problem that would result from a decision to allow the executive branch to undertake constitutionally troublesome acts pursuant to an open-ended delegation of authority.

Third, clear statement principles help to promote fidelity to constitutional norms that, while having a solid constitutional pedigree, are judicially underenforced.[193] Because judicial invalidation of statutes is troublesome in a constitutional democracy, courts are properly reluctant to enforce the Constitution with the vigor that might be appropriate for institutions having a better electoral pedigree. Since the Court "underenforces" the Constitution, certain constitutional norms in fact reach beyond the place where courts have vindicated those norms. It follows that an aggressive judicial role in statutory interpretation, one that removes statutes from the terrain of constitutional doubt, will promote greater conformity with norms that in fact do have constitutional status.

When constitutionally based norms conflict with an agency's interpretation, it is highly probable that the agency's view will not prevail. As we have seen, the Supreme Court has held that a statute apparently conferring broad power to forbid Americans from leaving the country would not be interpreted to allow the Secretary of State to deny passports to American citizens who were members of the Communist

191. 357 U.S. 116 (1958).

192. See id. at 129–30.

193. See generally Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1213–28 (1978) (arguing that courts are constrained by their institutional role from fully enforcing constitutional norms). The point is reflected in the fact that the Supreme Court often interprets constitutional provisions with reference to its own limited fact-finding and policy-making competence. See, e.g., Bowers v. Hardwick, 478 U.S. 186, 194–95 (1986); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 442–43 (1985); Rostker v. Goldberg, 453 U.S. 57, 70–71 (1981).

party.[194] According to the Court, a general grant of authority to the executive branch should not allow the Secretary of State to intrude on what might be a constitutionally protected right to travel. If Congress intends to authorize this result, it must express its will clearly.[195] Indeed, in a large number of cases, many of them postdating *Chevron*, the Court has invoked constitutionally inspired principles in order to reject agency interpretations of law.[196] The most conspicuous of these principles is the idea that ambiguous statutes will be construed so as not to raise serious constitutional questions.

It is thus implausible that, after *Chevron*, agency interpretations of ambiguous statutes will prevail even if the consequence of those interpretations is to produce invalidity or to raise serious constitutional doubts. The very reason for the interpretive principle in favor of avoiding invalidity or serious doubts is to ensure explicit *congressional* authorization before certain results may be reached. As the Court held in unambiguous terms in *DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*,[197] a statute should not be interpreted to confer that authority simply on the agency's say-so.

Other constitutionally inspired principles will produce a similar tension with *Chevron*. For example, the idea that judicial review of ad-

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194. See *Kent*, 357 U.S. at 130; supra notes 191–192 and accompanying text.

195. In *Kent* and related cases, the link between the clear statement principle and the nondelegation doctrine is especially conspicuous: courts demand a clear statement from the principal lawmaker and do not regard a vague or general grant of authority as genuine democratic authorization for constitutionally troublesome decisions.

196. See DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 108 S. Ct. 1392, 1397 (1988) (construing NLRA narrowly to avoid potential first amendment problem); Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 645–46 (1980) (construing OSHA narrowly so as to avoid unconstitutional delegation); NLRB v. Catholic Bishop, 440 U.S. 490, 507 (1979) (construing NLRA narrowly so as to avoid violation of free exercise clause).

But see Massachusetts v. Secretary of HHS, 899 F.2d 53, 59–64 (1st Cir. 1990) (en banc); Planned Parenthood Fed'n of Am. v. Sullivan, 913 F.2d 1492, 1497–98 (10th Cir. 1990); New York v. Sullivan, 889 F.2d 401, 407–10 (2d Cir. 1989), cert. granted sub nom. Rust v. Sullivan, 110 S. Ct. 2559 (1990), in which lower courts have held that the Department of Health and Human Services (HHS) has the statutory authority to deny funds for clinics that counsel pregnant women about abortion but that do not actually perform abortions. Under the relevant statute, HHS must deny funds to clinics in which "abortion is [used as] a method of family planning." 42 U.S.C. § 300a-6 (1988). There is a substantial question about whether those cases were rightly decided. (The issue is currently before the Supreme Court in *Rust*.) Serious constitutional questions would be raised by a congressional effort to prevent clinics from speaking to patients about the abortion alternative, and the text of the statute is ambiguous. In the absence of a clear legislative statement, it should probably be interpreted so as to avoid the constitutional question.

197. 108 S. Ct. 1392 (1988). The Court noted that it normally would defer to the agency, but "[a]nother rule of statutory construction [is] pertinent here: where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." Id. at 1397.

ministrative action will be presumed available[198] and the principle that federal statutes will not lightly be taken to preempt state law[199] might well conflict with agency interpretations.

In these cases too, the *Chevron* principle will probably be held inapplicable.[200] These norms are in significant part an effort to promote congressional—rather than executive or bureaucratic—deliberation on certain issues, and to cabin executive officials by calling for express legislative authorization. If constitutionally inspired interpretive norms are understood in this way, they cannot be trumped by *Chevron*. The comparative advantages of the agencies are not at stake when a constitutional norm that argues in favor of legislative deliberation is involved; indeed, the institutional considerations counsel against acceptance of the agency's view.

2. *Nonconstitutional Norms Designed to Require a Clear Congressional Statement*. — A number of norms without constitutional status are also designed to ensure a clear congressional statement before certain results might be reached. By limiting administrative discretion to make law, these interpretive principles also act as surrogates for, or particularized versions of, the nondelegation doctrine. This is so even though the principles cannot be linked cleanly to a constitutional provision.

Principles of this sort have been used throughout the history of American law. They require the legislature to express itself clearly if it wants to depart from ordinary understandings about the scope and nature of regulatory policy. Though these understandings are at best indirectly rooted in the Constitution, they draw considerable weight from history, usual practice, and time-honored notions of equity and comity. They require general legislative authorization for new departures.

Examples include the principle that appropriations statutes do not amend substantive statutes,[201] the presumption against retroactivity,[202] and the idea that laws will apply only within the territory of the United States.[203] Because these norms also are designed to produce a clear

198. See Johnson v. Robison, 415 U.S. 361, 367 (1974).

199. See Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 108 S. Ct. 1350, 1355 (1988).

200. The Supreme Court so indicated in Bennett v. Kentucky Dep't of Educ., 470 U.S. 656, 670 (1985), in which it suggested that it was "reluctant" to apply *Chevron* in a case involving an ambiguous statute governing the obligations imposed on states due to acceptance of federal funding. See also California State Bd. of Optometry v. FTC, 910 F.2d 976, 981–82 (D.C. Cir. 1990) (invalidating FTC rule despite *Chevron* because of federalism canon); Amalgamated Transit Union v. Skinner, 894 F.2d 1362, 1368 (D.C. Cir. 1990) (invalidating drug testing regulations in part by reference to concerns of federalism).

201. See TVA v. Hill, 437 U.S. 153, 190–91 (1978).

202. See, e.g., Bowen v. Georgetown Univ. Hosp., 109 S. Ct. 468, 472 (1988). This idea has some connection with the due process and ex post facto clauses, although these clauses usually would not be violated by retroactive application of statutes.

203. See, e.g., Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949).

statement from Congress, they probably cannot be defeated by the agency's contrary view.

To be sure, the argument for this result is weaker than in the case of constitutionally inspired norms, and perhaps some nonconstitutional norms can be defeated by an agency interpretation. But if the norm is an effort to require a clear legislative statement, it should usually prevail. For example, the idea that statutes generally will apply only within the territory of the United States is an attempt to conform to the reasonable expectations of both the legislature and affected persons. It also performs an important function in sorting out the relations between domestic law and that of other nations. An administrative agency should not be permitted to displace a principle designed to ensure that if American law is to apply outside of American borders, Congress must say so explicitly. Quite similar ideas account for the presumption against retroactivity—a straightforward effort to promote reasonable expectations—and the notion that appropriations measures, usually assembled quickly and without much deliberation, will not be taken to amend substantive statutes. Since these norms are intended to require legislative deliberation, *Chevron* should not overcome them.

E. *Norms Designed to Counteract Administrative or Governmental Bias*

Some interpretive norms are intended to respond to systemic biases in governmental processes and thus to promote principles of fair dealing. These norms are not designed merely to require a clear statement from Congress; they represent a quite general effort to resolve ambiguities in a way that fairly allocates both burdens and benefits in governmental processes. The idea that treaties and statutes should be construed generously to the Indian tribes is a prominent example.[204] This principle is designed to require a clear congressional statement before allowing a statute to be interpreted unfavorably to a group that has been mistreated in the past. Similarly, criminal statutes are interpreted favorably to criminal defendants[205] and to require mens rea.[206] The same idea accounts for the notion that it is not for agencies to

204. See Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985). For a discussion of how ideas of this sort might be justified, see Eskridge, supra note 31, at 1047–48; Sunstein, supra note 26, at 483–84.

205. See Crandon v. United States, 110 S. Ct. 997, 1001–02 (1990); Liparota v. United States, 471 U.S. 419, 427 (1985); United States v. Bass, 404 U.S. 336, 347 (1971); United States v. Nofziger, 878 F.2d 442, 452 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 564 (1989).

206. See Morissetti v. United States, 342 U.S. 246, 250–53 (1952). But see United States v. Park, 421 U.S. 658, 670 (1975) (corporate agent may be sued under criminal statute, even absent mens rea showing); United States v. Dotterweich, 320 U.S. 277, 281 (1943) (corporate agent with "responsible relation to a public danger" may be charged with violating criminal statute).

decide whether statutes impose on them the duty to act at all.[207]

It would be odd to suggest that these principles can be overcome by an agency interpretation. Principles of this sort are self-conscious efforts to counteract administrative or governmental bias, by requiring an express congressional judgment on the point before allowing certain results to be reached. These principles should not be overridden simply because the agency wants them to be.

F. *Norms Designed to Protect Legislative Processes*

Some norms are designed to protect the legislative process by increasing rationality and integrity in that process. In this category belong the ideas that implied repeals are disfavored; that exemptions from taxation or antitrust will be narrowly construed; and that appropriations statutes will rarely be understood to amend substantive statutes.[208]

There is a legitimate argument that *Chevron* overcomes norms of this sort. Through these norms, courts attempt to coordinate statutes with one another and to promote the coherence of statutory law. The agency is in a superior position to perform that task. Its expertise and experience with related statutes make it better able to fit statutes with one another or to coordinate seemingly inconsistent enactments.[209] Norms designed to promote the coherence of statutory law probably should counteract the agency's view if, but only if, the purpose of the relevant norm is to ensure a clear congressional statement or to carry out likely interpretive instructions from the legislature. If the norm merely reflects the court's own view about how statutes ought to be fit together, *Chevron* should require the agency's position to prevail. This conclusion is consistent with the *Chevron* Court's recoguition that in the aftermath of the rise of the administrative state, the role of coordinating and making sense of regulatory enactments falls principally on agencies rather than judges.

G. *Norms Against Regulatory Irrationality*

The strongest cases for allowing *Chevron* to prevail involve norms

207. See Dunlop v. Bachowski, 421 U.S. 560, 574–76 (1975); Public Citizen v. NRC, 901 F.2d 147, 153–56 (D.C. Cir. 1990); Natural Resources Defense Council, Inc. v. Train, 545 F.2d 320, 327 (2d Cir. 1976); cf. Ohio v. Department of Interior, 880 F.2d 432, 447–48 (D.C. Cir. 1989) (invalidating regulations embodying market-oriented valuation of natural resources).

208. See supra notes 167, 171, 173 and accompanying text.

209. See supra notes 90–91 and accompanying text. The environmental area is a conspicuous example. The Clean Air Act, 42 U.S.C. §§ 7401–7642 (1988), includes a large number of awkwardly related provisions, and the EPA is uniquely able to have an overview of the system as a whole. Moreover, the Clean Air Act relates to the Clean Water Act, 33 U.S.C. §§ 1251–1387 (1988), in important ways, with regulation of the air, for example, possibly increasing pollution of the water. The EPA is in a special position to take account of these effects.

that are designed to counteract absurd or unjust results. The judgment about what approach is absurd or unjust is likely to be made by reference to traditional legal understandings. At least in general, a contrary administrative judgment ought to be respected. Indeed, a decision by the court to apply its own judgment in this context would, in effect, substitute a judicial for an administrative determination in circumstances in which Congress has delegated policy-making power to the agency.

An example of the central idea here is the time-honored view that general language ought not lightly be taken to require irrational or absurd consequences.[210] General language is quite frequently overinclusive—in the sense that it has unforeseen but perverse applications—and courts usually will not interpret the statutory text to apply if it would produce absurdity that was not clearly intended by Congress. More particular versions of this idea, with some support in the cases, are that de minimis exceptions will be permitted[211] and that the costs and benefits of regulation will usually be subject to some sort of weighing process.[212]

In these areas, displacement of ordinary interpretive norms by the agency's view is highly plausible. The agency's specialized fact-finding capacity and policy-making competence are highly likely to be relevant in resolving any ambiguities. Here the court ought to be especially cautious in attributing irrationality or absurdity to the agency's view. It is the agency that is most likely to be in a good position to know whether the application, taken in context of the statutory scheme as a whole, is in fact irrational or absurd.

It follows that, while courts have held that de minimis exceptions to regulatory statutes are usually permitted, agencies should be permitted to decide that de minimis exceptions should not be allowed, because (for example) of the high costs of inquiry into whether a particular exception is or is not de minimis.[213] Whether or not this is a persuasive argument, the agency is in a better position than the courts to decide. The salutary interpretive principle in favor of de minimis

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210. See, e.g., Public Citizen v. Department of Justice, 109 S. Ct. 2558, 2559 (1989); O'Connor v. United States, 479 U.S. 27, 31 (1986); Church of the Holy Trinity v. United States, 143 U.S. 457, 459–60 (1892).

211. See, e.g., Alabama Power Co. v. Costle, 636 F.2d 323, 360–61 (D.C. Cir. 1979); Monsanto Co. v. Kennedy, 613 F.2d 947, 955–56 (D.C. Cir. 1979).

212. See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 54–55 (1983); Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 655–57 (1980) (plurality opinion); Natural Resources Defense Council, Inc. v. EPA, 824 F.2d 1146, 1163–65 (D.C. Cir. 1987). But see American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 508–12 (1981) ("to the extent feasible" does not require cost-benefit analysis).

213. See Latin, Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine-Tuning" Regulatory Reform, 37 Stan. L. Rev. 1267, 1328–32 (1985).

exceptions, therefore, ought not to defeat an agency construction to the contrary.

For another example, there may be a question of whether courts are authorized to require a showing of "irreparable injury" and to conduct the ordinary form of balancing before issuing an injunction. The question is of considerable importance to environmental policy. One answer to this question can be found in the Supreme Court's interpretive principle in favor of equitable balancing.[214] Whether or not this principle is justified, it should be defeasible upon a showing that the agency disagrees. The Court's choice of a background rule here is not realistically attributable to Congress; it represents instead a contestable judgment about how the statute is best implemented. On that score, the agency's contrary judgment should prevail.

In many other cases, the meaning of a statute turns at least in part on the rationality of one or another interpretation.[215] When this is so, deference is due to the agency's view, unless it is inconsistent with an interpretive norm having another source, or unless the absurdity or irrationality is so palpable as to be something on which reasonable people could not differ. Significantly, it would follow that an agency should be permitted to depart from the literal meaning of the statute in cases involving issues that Congress has not specifically considered, especially when such departures plausibly make sense of the statute in light of Congress's general purposes.[216]

This idea has potentially broad consequences. In the period of common law ordering, courts often departed from the literal meaning of statutes in cases in which literalism produced absurdity or irrationality. In the modern period, similar departures should also be expected, but here the principal agent is the agency rather than the judiciary. The task of softening rigid statutes, and of adapting them to unantici-

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214. See Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 544–46 (1987); Weinberger v. Romero-Barcelo, 456 U.S. 305, 311–13, 320 (1982).

215. See, e.g., *American Petroleum Inst.*, 448 U.S. at 628–30 (rejecting one interpretation in part because that interpretation would require huge expenditures by regulated industries for few gains in terms of health and safety); Natural Resources Defense Council, Inc. v. EPA, 824 F.2d at 1159 n.6 (same under ambiguous provision of Clean Air Act); see also EEOC v. Commercial Office Prods. Co., 108 S. Ct. 1666, 1674 (1988) (deferring to agency interpretation in part because alternative view would lead to "absurd or futile results").

Of course, the agency's position must be assessed for arbitrariness under § 706 of the APA, see supra notes 152–155 and accompanying text, and for reasonableness under *Chevron*'s step two, see supra notes 151–155 and accompanying text.

216. As suggested supra note 89, this idea casts doubt on the decision in American Mining Congress v. EPA, 824 F.2d 1177, 1193 (D.C. Cir. 1987), in which the court relied on the literal meaning of the word "discarded" to forbid the EPA from applying solid waste regulations to materials held for recycling. It is implausible to think that Congress considered the exceptionally complex issues of policy in *American Mining Congress*. In light of the complexities, deference was due to an agency that had thought long and hard about the problem. See supra note 149.

pated or changed circumstances, has fallen principally to nonjudicial actors.

CONCLUSION

Many disputes in contemporary public law involve the relationship between original constitutional principles and a twentieth century governmental apparatus that was created in self-conscious rejection of those principles. *Chevron*, a kind of counter-*Marbury* for the administrative state, is one of many efforts at synthesis. Despite its seemingly technical character, the *Chevron* principle—in far more substantial ways than more visible decisions of the 1980s—has altered the fabric of modern public law, influencing an enormous range of substantive outcomes in the process.

In these circumstances, the controversy over the principle is hardly surprising. *Chevron* has been defended as a plausible reconstruction of legislative instructions, one that amounts to a desirable device for allowing the will of democratically controlled, specialized agencies to prevail over that of unaccountable, generalist judges. In particular, the principle might serve as a means of counteracting characteristic problems in the regulatory process—including, above all, the problems posed by lack of coordination, changed circumstances, statutory rigidity, and complex systemic effects. For the resolution of these problems, agencies have significant advantages over courts. On the other hand, *Chevron* has been criticized as an inaccurate reading of congressional instructions and as a departure from the principle, central to the system of checks and balances, that those limited by law ought not to be allowed to decide on the meaning of the limitation.

Both the defenses and the criticisms have force in particular contexts. The effort to mediate between them calls for an attempt to sort out the relationship between the New Deal reformation and the principles of institutional authority that preceded it. More narrowly, it calls for an assessment of likely congressional instructions, often undertaken in the absence of clear legislative guidance and therefore based on an understanding of relevant institutional capacities and biases. I have suggested that the *Chevron* principle does not apply unless Congress has given law-interpreting power to the agency. This basic principle calls for deference to an agency's determination when the agency has been granted the basic authority to implement the statute through rulemaking or adjudication. It argues against deference most powerfully when there has been no grant of implementing power at all, but also when an agency has been granted but has not exercised implementing power, when it is deciding on its own jurisdiction, or when it is otherwise likely to have a bias.

Whether or not a narrow formulation of the *Chevron* principle is desirable, it is possible to find a place for the competing considerations by exploring the relationship between that principle and other norms

of statutory interpretation. Indeed, it is precisely here that the legal system will resolve many of the struggles over the roles of Congress, agency, and court in the development of federal regulatory law.

When the relevant interpretive norm is part of an effort to discern legislative instructions, *Chevron* is uncontroversially subordinate to that norm. Harder questions arise in cases involving norms that serve substantive or institutional goals not directly connected to a congressional judgment. When these norms are traceable to constitutional considerations, or to other efforts to ensure a clear congressional statement before government may go forward on a particular matter, the *Chevron* principle should be overcome. And when the norm is an effort to counteract some form of bias, *Chevron* should be inapplicable. The *Chevron* principle should prevail, however, when the relevant norm reflects an effort to promote rationality in regulation and when it is intended to ensure coherence and integrity in the administrative process. Here deference to the agency is especially important.

The meaning of a statute can usually be discerned without the benefit of interpretive principles of the sort that I have discussed here.[217] But cases of ambiguity are frequent, and it is in these cases that *Chevron* and other interpretive principles are called into play. By developing a clear view of the relationship among those principles, we might ultimately be able to reconcile *Chevron*, even in its broader formulations, with approaches to statutory interpretation that help to discipline the administrative state through legal constraints on the exercise of public power. A reconciliation of this sort would count as one among a wide range of steps designed to adapt a legal system founded on common law principles to the aspirations and pathologies of the administrative state.

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217. But see supra note 159.