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CHEVRON MATTERS: HOW THE *CHEVRON* DOCTRINE REDEFINED THE ROLES OF CONGRESS, COURTS AND AGENCIES IN ENVIRONMENTAL LAW

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Has the *Chevron*¹ doctrine really affected the way that administrative lawyers think, how courts decide cases and how agencies behave? As recent as 1991, a co-author and I described *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (“*Chevron*”) as merely a “significant but subtle change in legal doctrine.”² In his oral presentation at this symposium, Professor Peter Shane was

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1. *Chevron, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984) (deferring to agency interpretation of its governing statute when Congress fails to explicitly express its intent). Of course, no case stands alone. There were precursors to *Chevron* including *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975), and *Chevron* would have had no meaning if it had not been followed in subsequent cases. Any case is both an epiphenomenon and a partial cause of what comes later. An opinion, particularly a Supreme Court opinion, represents and exemplifies underlying trends in the law, but also by reifying these trends in a particular text, it becomes a causal factor influencing subsequent developments. Unless the context indicates otherwise, references to *Chevron* throughout this article should be understood to refer to what is sometimes called “the *Chevron* doctrine,” the legal principles for defining deference in statutory constructions between courts and agencies, as stated in *Chevron* and refined in subsequent cases. See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *United States v. Mead Corp.*, 533 U.S. 218 (2001). It would be a fine topic for an article to address how the legal tests stated in the *Chevron* case differ from those in other cases, both before and after. In fact, many such articles have already been written. That is not the topic of *this* article, which is concerned instead with how the *Chevron* doctrine as a whole has affected the relationships of courts and agencies, particularly in the environmental area.

2. Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1026 (1991) (analyzing statistical data that offered support for proposition that *Chevron* caused subtle change in statutory interpretation and administrative law).

(1)

even more skeptical, speculating that *Chevron* merely changed the verbal formulas courts used, and implying that *Chevron* had little actual effect on judicial decisions.³ Both of these views are wrong. They may be plausible interpretations of *Chevron* based on the text in isolation, but they describe a road not taken by legal history as events actually developed. In retrospect, *Chevron* signified a fundamental paradigm-shift⁴ that redefined the roles of courts and agencies when construing statutes over which agencies have been given interpretive rights.⁵

Admittedly, *Chevron* is not the only trend that occurred in statutory construction over the last three decades. There has also been a pronounced rise in textualism,⁶ perhaps fueled at least in part by the first step of the *Chevron* analysis.⁷ Nevertheless, the *Chevron* doctrine changed the balance of power between courts and agencies.⁸ This in turn led to more policy initiatives by executive agencies, especially in the environmental area. Moreover, *Chevron* also changed the internal dynamics inside executive agencies by altering the relationships between officials within these agencies. In particular, *Chevron* reduced the relative power of lawyers within agencies and strengthened the voices of officials in other disciplines.

3. Peter M. Shane, *Ambiguity and Policy Making: A Cognitive Approach to Synthesizing Chevron and Mead*, 16 VILL. ENVTL. L.J. ____ (Spring 2005).

4. Cf. THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970) (discussing paradigm shifts in context of scientific revolutions, where anomaly disproves currently held scientific theory, resulting in new scientific theory, or paradigm shift, that accounts for anomaly).

5. *Chevron*, 467 U.S. 842-47 (implementing new theory of judicial review for interpreting agency's interpretation of its governing statute). Not every interpretation of a statute by an agency warrants *Chevron* deference. See, e.g., *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 160 (2000). "We are confident that Congress could not have intended to delegate a decision of such economic and political significance [as regulating tobacco] to an agency in so cryptic a fashion." *Id.* "We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." See *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

6. See, e.g., *MCI Telecommunications Corp. v. Amer. Telephone and Telegraph Co.*, 512 U.S. 218, 224-34 (1994) (using textualist canons of statutory construction); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351 (1994) (discussing rise of textualism).

7. See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 977 (1992) (analogizing *Chevron* deference to "on/off switch").

8. See Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2085-88 (1990) (explaining how *Chevron* changed relations between courts and agencies with regard to agency action and agency's interpretation of its governing statute).

I. THE EFFECTS OF *CHEVRON* ON ADMINISTRATIVE LAW.

“[W]hether an opinion becomes precedent depends on whether other judges cite it,” writes Jan Deutsch.⁹ According to this standard, *Chevron* is an important, even “notorious,” precedent.¹⁰ It is oft-cited and provides a useful and convenient “test” for judges and lawyers because it created a simple roadmap for analyzing the complex mysteries of how courts should defer to administrative agencies when construing statutes. *Chevron* is not merely a useful citation, rhetorical resource or codification, but instead is an important paradigm-shifting case that re-conceptualized the relative roles of courts and agencies when construing statutes over which agencies have been given interpretive rights.

In the environmental area, the United States Environmental Protection Agency (“EPA”) and other agencies gradually internalized and adapted to the additional interpretive discretion (i.e., the expanded power) that *Chevron* provided them.¹¹ Accordingly, EPA and other agencies are now more adventurous when interpreting and elaborating statutory law.¹² In what follows, I will describe in greater detail how *Chevron* changed EPA’s internal dynamics. At the outset, one example illustrates my basic thesis that *Chevron* matters. After Congress failed in 2003 and 2004 to enact the Bush Administration’s Clear Skies¹³ initiative designed to reduce air pollution via nationwide trading systems, EPA recently proposed a rule to implement pollution trading systems over most of the country under existing law.¹⁴ Before *Chevron*, EPA would not even imagine that it possessed the authority to work such fundamental reforms into a major statutory scheme without the benefit of statutory amendment.

9. Jan Deutsch, *Law as Metaphor: A Structural Analysis of Legal Process*, 66 GEO. L.J. 1339, 1346 (1978) (discussing that case is only influential when it is used by lawyers and cited by judges).

10. PETER L. STRAUSS, ET AL., *GELLHORN AND BYSE’S ADMINISTRATIVE LAW: CASES AND COMMENTS* 1032 (revised 10th ed., 2003) (noting *Chevron*’s notoriety in administrative law).

11. See Linda Cohen & Matthew Spitzer, *Solving the Chevron Puzzle*, 57 LAW & CONTEMP. PROBS. 67-68 (Spring 1994) (offering insightful prediction that remand rates would equilibrate as agencies became more aggressive in interpreting law under *Chevron*).

12. See *id.* (offering insightful prediction that remand rates would equilibrate as agencies became more aggressive in interpreting law under *Chevron*).

13. See The Clear Skies Act of 2003, available at <http://www.epa.gov/ebtpages/airairpoclearskies.html> (last modified Nov. 13, 2004) (setting forth Clear Skies Act).

14. Proposed Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Interstate Air Quality Rule), 69 Fed. Reg. 4566 (proposed January 30, 2004).

Thus, *Chevron* and its progeny created a fundamental change in the rules of the power struggle between the courts and executive agencies. Prior to *Chevron*, the lower federal courts primarily held the power to determine “what the law is” when a statute was unclear. Post-*Chevron*, a substantial portion of that power shifted from the judiciary to the Executive Branch.

Not only does *Chevron* shift this power from the Judicial Branch to the Executive Branch, but the nature of the power to interpret ambiguous or silent statutes also has become more significant by virtue of moving into the hands of the Executive Branch.¹⁵ The federal circuit courts that handle most administrative law cases¹⁶ are inherently decentralized and, therefore, generally lack the ability to uniformly agree upon and implement new directions in policy or policy reforms.¹⁷ Although courts can block or dampen policy initiatives and perhaps even insist that agencies address certain factors, they can only rarely and with great difficulty create new policy directions or trends on their own, at least in environmental law. On the other hand, the centralized Executive Branch is more likely to be guided by a more coherent political will or ideology. As such, it is better able to define and implement new policy over time. For instance, it is more capable of creating and effectuating a goal to make regulation more cost effective through the expanded use of risk assessment and benefit-cost analysis, or to expand environmental trading programs.

In *Chevron*, the Supreme Court reformed the law-making system by moving a substantial portion of the power to construe statutes to the Executive Branch. *Chevron* rendered the legal system more adaptable and more capable of undergoing substantial policy changes without the benefit of legislation. One might even speculate that the increased ability of the law-making system to adapt to new conditions without legislation may in turn help to account for

15. See Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 76 (2000) (criticizing *Chevron* majority for not stating more clearly that its “Two-Step” applied to both statutory ambiguities and silences). To be clear, *Chevron* applies both to statutory ambiguity and to statutory silence. *Id.*

16. See generally Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1105-06, 1119-20 (1987) (explaining that most judicial review of agency action must take place at mid-level appellate courts due to practical constraints on Supreme Court, and is, therefore, decentralized).

17. See JERRY L. MASHAW, ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM, CASES AND MATERIALS 799-800 (4th ed., 1998) (stating that judicial scrutiny is “intermittent” and “the ultimate effects of judicial review [are] quite unpredictable at the time of decision.”).

the relative paucity of significant environmental legislation since 1990.¹⁸ Historically, most environmental legislation followed in the wake of a crisis,¹⁹ but legislation is less necessary today because of the Executive Branch's post-*Chevron* powers to update and adapt existing legislation to meet emerging problems.²⁰

Thus, *Chevron* marked a significant way-station in the evolution of the so-called "Administrative State."²¹ *Chevron* remains a significant milestone in our evolving constitutional structure because it has given more policy discretion and law-making authority to administrative agencies, most of which are a part of the Executive Branch.²² This trend is a gradual, but fundamental, change in the nature of American government without the benefit of a constitutional amendment.²³

In the following section, I describe in more depth the changes that *Chevron* wrought and explain how they have affected environ-

18. See 1990 Clean Air Act Amendments, Pub. L. No. 101-549, 104 Stat. 2399 (1990) (signaling last major reworking of an environmental statute in United States). Since 1990, there has been some noteworthy environmental legislation of interstitial or amendatory quality, including the Safe Drinking Water Act Amendments of 1996 and the Food Quality Protection Act of 1996, but there has been nothing like the period of statutory creativity that characterized environmental law in the 1970s and 1980s.

19. See E. Donald Elliott, et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 318-19 (1985) (observing that most major environmental legislation follows environmental crisis).

20. See generally Ruth Harlow, *The EPA and Biotechnology Regulation: Coping with Scientific Uncertainty*, 95 YALE L.J. 553 (1986) (noting how United States could and did use *Chevron* to modify existing statutes rather than try to get new statute enacted). For example, rather than pass a new statute to regulate biotechnology (as did many other countries), through administrative interpretation of an existing statute, the United States *adapted* a statute passed to deal with chemicals to the quite different risks presented by biotechnology. *Id.*

21. See generally B. SCHWARTZ, ADMINISTRATIVE LAW 149 (2d ed., 1984) (offering view on "Administrative State"). The term "Administrative State" is often used but rarely defined. It appears to mean the rise of administrative agencies to greater power and prominence in our governmental structure. For example, Professor Bernard Schwartz observed that during the 1970s the "center of gravity" of government policy-making — not just administrative law, but the entire American government — shifted into the notice-and-comment rule-making process. *Id.*

22. See Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 93-94 (1985) (noting that *Chevron* had effect of putting more legislative policy-making discretion in hands of agencies, and thus Executive Branch).

23. For differing views on whether these fundamental changes in the structure of the American government are good or bad, compare Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984) (positing that, normatively, shared policy-making discretion throughout the Executive and Legislative Branches is favorable) with DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993) (pointing out dangers in different branches of government sharing legislative policy-making discretion).

mental law. I will begin with a discussion of empirical evidence that elucidates *Chevron's* effects. Then, I will touch upon my own experience with *Chevron* as General Counsel of EPA. Finally, I will offer a normative perspective on *Chevron's* effects on Administrative Law.

II. HOW *CHEVRON* CHANGED ADMINISTRATIVE LAW.

In the 1960s and 1970s, courts reviewing agency action were typically quite aggressive in reviewing "questions of law." How a court should interpret an agency's governing statute was a prototypical question of law for the court.²⁴ To be sure, courts gave some deference to an agency's views for a variety of peripheral reasons; for example, agency personnel may have been involved in drafting the statute.²⁵ But fundamentally, determining a statute's meaning was a "question of law," and, echoing Chief Justice John Marshall in *Marbury v. Madison*, it was for the courts to say what the law is.²⁶ *Chevron* changed this, at least when an agency's interpretation of its governing statute was at issue.

Chevron fundamentally re-conceptualized the relationship between courts and agencies by adopting a standard of review whereby courts, instead of reviewing statutory ambiguities strictly *de novo*, frequently deferred to an agency's interpretation of its governing statute. There are two independent steps to this standard of review, which is commonly referred to as the *Chevron* Two-Step:

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

24. See LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 589, 590 (1965) (construing courts as guarantors of "coherence" in the law). See, e.g., *McKart v. United States*, 395 U.S. 185, 201-02 (1969) (stating that parties need not exhaust administrative remedies on pure questions of law because those are for court to decide).

25. See *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (noting one reason courts deferred to agency interpretations prior to *Chevron*).

26. See Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 2 (1983) (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803)) (pointing out that courts considered themselves ultimate interpreters of law).

essary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.²⁷

In the first step, the *Chevron* court held that if Congress had decided "the precise question at issue," its decision was binding, but the *Chevron* court also stated that Congress sometimes fails to anticipate every question that may arise under a statute and may not express an intention as to what a statute means with respect to those unanticipated questions.²⁸ This first step is breath-taking in its implications. Courts used to conceive of a statute as a package of instructions that, once decoded, will answer every conceivable question that might arise. In *Chevron*, however, the Court adopted the far more realistic view that most members of Congress probably never even think about many questions that might arise subsequently under a statute they enact, much less form a consensus on them. This first move in *Chevron* rejected the prior legal fiction that Congress had an imminent, if unconscious, "intention" on every conceivable question that might arise and that it was the role of courts to "find" Congress' intentions on every question when interpreting a statute. This first step was part and parcel of a broader trend by the Supreme Court in the 1980s to (1) invalidate the idea that individual members of Congress could make binding law by legislative history or other individual actions,²⁹ and (2) to instead insist that binding law can be made by the legislature only if it follows the formal process for passing a statute: approval by a majority of both houses, subject to veto by the President.³⁰

In the second step, the *Chevron* court held that if Congress did not make a decision on the exact question at issue, the default rule is that Congress has implicitly delegated the authority to fill in the

27. *Chevron*, 467 U.S. at 842-45 (setting forth *Chevron* Two-Step).

28. *Id.* (noting that Congress may not always anticipate every scenario to which statute could conceivably apply, and, therefore, statute may be ambiguous as to those unanticipated scenarios).

29. *Brock v. Pierce County*, 476 U.S. 253, 263 (1986) (stating that floor statements by individual legislators may be considered but are not controlling). See also Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990) (identifying and disapproving of trend by Supreme Court to give legislative history less binding weight than in past).

30. *INS v. Chadha*, 462 U.S. 919, 946-59 (1983) (explaining that Congress must comply with presentment and bicameralism procedures to pass laws).

statutory gaps to the relevant agency.³¹ This gave agencies significant new interpretive and policy-making power because now *they, not the courts of appeals, made policy in the gaps left by Congress' silence.*

One interesting question that the *Chevron* opinion did not answer is where this rule of implied delegation comes from?³² Is the rule constitutionally-based? Is it merely a rebuttable presumption that can be overturned by Congress? We are not told in *Chevron*, for the Court merely asserted as an *ipse dixit*, without justification, that if Congress has not resolved a particular question when enacting a statute, then it is for the agency to resolve that question.³³

Subsequent cases have clarified that only statutes directing an administrative agency to execute the statute's provisions are those that grant an implied delegation of *Chevron* deference to that agency.³⁴ Assuming that Congress has not "spoken to the issue" in question in a statute, i.e., it has made no conscious policy decision as to a particular issue (the so-called *Chevron* Step One inquiry), and assuming a statute implicitly grants interpretive authority to an agency, that agency's interpretation of the statute must be upheld if it is "reasonable."³⁵ This second step of the *Chevron* Two-Step is subject only to the weak judicial check that the agency's decision must be "reasonable," a standard that applies anyway to virtually all aspects of administrative decisions that are subject to judicial review. On a few occasions, courts have found that an agency's interpretation fails the *Chevron* Step Two test of reasonableness, but such outcomes are rare, particularly in the Supreme Court.³⁶

A. External Evidence that *Chevron* Matters.

My colleague and friend, Professor Peter Shane, had a valid point perhaps that as an *a priori* analysis of legal prose, the *Chevron* Two-Step might have had little effect on subsequent cases and administrative law generally. There is only one problem with the

31. *Chevron*, 467 U.S. at 842-45 (setting forth the deference courts should give agencies when statute is "silent" or ambiguous).

32. See Sunstein, *supra* note 10, at 2085-91 (questioning origin of *Chevron's* "implied delegation" language).

33. *Chevron*, 467 U.S. at 843-45 (stating that agency should "fill" gaps Congress left, intentionally or unintentionally, in statute).

34. See *supra* note 7 and accompanying text for an explanation of when *Chevron* applies.

35. *Chevron*, 467 U.S. at 843, 865-66 (stating that court should defer to agency interpretation of gap or ambiguity in statute so long as agency interpretation is reasonable and is "permissible construction" of statute).

36. See, e.g., AT&T Corp. v. Iowa Util. Bd., 529 U.S. 366 (1999) (declining to defer to some FCC interpretations because they failed reasonableness standard).

Shane hypothesis: it is not true empirically. “The life of the law has not been logic; it has been experience,” as then-professor Oliver Wendell Holmes Jr. reminds us.³⁷ In fact, *Chevron* has been a highly significant decision and the opinion manifests³⁸ a broader trend in the law that changed behavior quite significantly both inside agencies and in the power relationships between agencies and courts.

I observed these changes both as an academic and as a participant. Just before I was appointed EPA General Counsel in 1989, my colleague at Yale, Peter Schuck, and I completed a three-year empirical study that examined whether *Chevron* actually affected the patterns of subsequent cases and the degree of deference that reviewing courts gave to agency decisions. In 1991, *Duke Law Journal* published the results of that study in an article called *To the Chevron Station*.³⁹ “A central goal of our study was to determine whether . . . the *Chevron* decision . . . actually affect[ed] the subsequent behavior of lower courts in reviewing administrative decisions.”⁴⁰ We studied a six-month period of time prior to *Chevron* and a six-month period of time after the Supreme Court clarified and reiterated the *Chevron* doctrine in *INS v. Cardozo-Fonseca*⁴¹ to ascertain whether there was any difference in the pattern of appellate results that occurred in those two periods. What we found was quite striking. We found a statistically significant increase in the level of deference the courts were paying to agency decisions. In other words, the pattern of courts affirming agency decisions went from approximately 71% to approximately 81%, and this change is highly statistically significant because of the large number of cases considered.⁴² We also found

37. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 5 (Little, Brown ed., 1881).

38. Of course, no case stands alone. There were precursors to *Chevron*, and *Chevron* would have had no meaning if it had not been followed in subsequent cases. Any case is both an epiphenomenon that represents and exemplifies underlying trends in the law. By reifying these trends, a case becomes a causal factor in the subsequent development of the law. For my views on these and related jurisprudential issues, see generally E. Donald Elliott, *Holmes and Evolution: Legal Process as Artificial Intelligence*, 13 J. LEGAL STUD. 113 (1984). Unless the context indicates otherwise, references to *Chevron* throughout this article should be understood to refer to what is sometimes called “the *Chevron* doctrine,” the legal principles for defining deference between courts and agencies, as stated in *Chevron* and refined in subsequent cases. See *supra* note 2 and accompanying text.

39. See Schuck & Elliott, *supra* note 3, at 996-1007, 1026 (publishing results of Schuck and Elliott’s three year empirical study).

40. *Id.* at 1026 (stating purpose of study).

41. See generally 480 U.S. 421 (1987) (holding that immigration judge and Board of Immigration Affairs erred in applying wrong standard of proof; they should have applied *Chevron*).

42. Schuck & Elliott, *supra* note 3, at 1038-41 (setting forth empirical findings).

and controlled for a variation of what we call a “reasons displacement effect.”⁴³ This is the hypothesis that agencies might change the grounds on which they base their decisions because of the interpretive power received from *Chevron*.⁴⁴ We also found that agencies changed the basis for their decisions on a statistically significant level. Since our study, a number of other empirical studies confirmed the effects of *Chevron* on the relationships between courts and agencies.⁴⁵ So, while it is plausible to hypothesize that *Chevron* did not have a significant effect, when one actually looks at the data, one can plainly see that *Chevron* did have a measurable and significant effect on the degree of deference that courts give to agency constructions of statutes.

Some have criticized our study for not explicitly considering and ruling out factors that might have accounted for the changed pattern of results we observed.⁴⁶ We did, however, consider and rule out many potential explanations, such as the changing membership and political composition of the lower courts. Although I do agree with the critics that, in retrospect, our published study should have addressed this issue in more depth, the external evidence is nevertheless clear that *Chevron* matters. *Chevron* did in fact tilt the power balance between courts and agencies in the direction of greater deference to agency interpretations of statutes.

43. *Id.* at 1043 (describing “reasons displacement effect” in agency context).

44. *Id.* (explaining that date indicates that *Chevron* also caused agencies to begin changing grounds on which they based their decisions, in addition to courts).

45. See generally Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study on the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1 (1998) (offering empirical data that supports hypothesis that *Chevron* had significant effect on judicial review of agency interpretations); Richard Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997) (offering empirical data that supports hypothesis that *Chevron* had significant effect on judicial review of agency interpretations); Christopher H. Schroeder & Robert L. Glicksman, *State Farm and EPA in the Courts of Appeals During the 1990s*, 31 ENVTL. L. REP. 10,371 (April, 2001) (offering empirical data that supports hypothesis that *Chevron* had significant effect on judicial review of agency interpretations).

46. Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 36-37 (2002).

Schuck and Elliot, relying on quantitative evidence, report that the percentage of administrative agency decisions that appellate courts affirmed in 1984 (that is, prior to *Chevron*) was 70.9; after *Chevron*, that figure rose to 81.3. Does this necessarily mean that *Chevron* caused an increase . . . in judicial deference to agencies? Of course not. It is possible that the increase (decrease) would have occurred (or, perhaps would have been greater) in the absence of *Chevron*.

Id.

B. Testimony that *Chevron* Matters Inside Agencies.

Chevron's importance is also demonstrated by the change it caused in the dynamics inside agencies. When I was appointed EPA General Counsel in 1989, most of the lawyers I worked with were still doing business the old way, imposing their views of the "best interpretation" of the statute on the program offices based on statutory wording and legislative history. As General Counsel, I tried to redefine the way the General Counsel's Office ("OGC") functioned within EPA by incorporating the paradigm shift brought about by the *Chevron* decision. I gave up trying to explain *Chevron* to the other lawyers in the OGC and concluded that they just would not believe it from me, wild-eyed academic from Yale that I was. So I brought in Pat Wald, then chief judge of the D.C. Circuit, and Cass Sunstein from the University of Chicago, to speak at an all-lawyers' meeting. They spoke to the lawyers in the OGC about *Chevron*, and the lawyers finally began to believe that *Chevron* really did change things. From that point on, as a result of *Chevron*, we started to change the way that we did business.

The fundamental difference between the role of EPA OGC (and probably in any other agency as well) pre-*Chevron* and post-*Chevron* is this: pre-*Chevron*, OGC usually gave its legal advice as a point estimate, e.g., "the statute means this. There is only one meaning to the statute. We in OGC are the keepers of what the statute means. The statute speaks to every question, and you must follow what we in OGC tell you is the correct/best interpretation of the statute or you will lose in court." In other words, the pre-*Chevron* conception of a statute was as a prescriptive text having a single meaning, discoverable by specialized legal training and tools. This "single-meaning" conception of statutes created a very powerful role for lawyers and OGC within agencies. The privileged role for lawyers in defining what the statute required on every issue in turn led to a great deal of implicit policy-making by lawyers in OGC. They may have in all good faith believed that they were divining the one true and correct meaning of the statute, but intentionally or unintentionally, they may have smuggled a great deal of their policy preferences into their legal advice. As EPA's General Counsel, I tried to get our lawyers to separate their legal opinions from their policy advice and to differentiate between the two.

Post-*Chevron*, the form of OGC opinions is no longer a simple point estimate of what a statute means. Rather, OGC opinions now attempt to describe a permissible range of agency policy-making discretion that arises out of a statutory ambiguity. Post-*Chevron*, stat-

utes no longer possess a single prescriptive meaning on many questions; rather, they describe what I call a “policy space,” a range of permissible interpretive discretion, within which a variety of decisions that the agency might make would be legally defensible to varying degrees. So the task of OGC today is to define the boundaries of legal defensibility, and thereby to recognize that often there is more than one possible interpretation of the meaning of key statutory terms and concepts. The agency’s policy-makers, not its lawyers, should decide which of several different but legally defensible interpretations to adopt.

Chevron opened up and validated a policy-making dialogue within agencies about what interpretation the agency *should* adopt for policy reasons, rather than what interpretation the agency *must* adopt for legal reasons. I believe that this expanded policy dialogue is productive and that it takes place more inside EPA today than it did pre-*Chevron*, and normatively, that is a good thing. For example, it is good that *Chevron* has increased the weight given to the views of air pollution experts in the air program office relative to the lawyers in OGC.

A second effect of the *Chevron* decision is somewhat more subtle. Post-*Chevron*, lawyers in an agency often have to say that the right answer to a question of agency authority is not “you can or cannot do it,” but rather that “it depends.” That legal advice usually provokes a rejoinder: “And what does it depend on?” Because of the nature of the “*Chevron* deference” that courts now give to agencies, the answer is usually that whether an agency’s interpretation of its authority will be upheld depends on how strong its reasons are; it depends on what justifications the agency would be able to give for a policy. In other words, whether a court will uphold an agency’s interpretation of its authority depends on contingent, consequentialist justifications. It depends on what one can write into a preamble justifying an interpretation in terms of factual support and policy justifications.

This refocusing of the dialogue inside the agency to the consequences of adopting particular policies is also an extremely good thing. By refocusing the question of legal authority on the strength of an agency’s justification for a proposed policy, *Chevron* displaces the dialogue about whether something is legal in the abstract to a consideration of anticipated consequences in the real world.⁴⁷

47. Cf. THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT 193 (1935) (condemning practice of courts to declare laws “valid or invalid on the analogy of books rather than on a present investigation of facts”).

Chevron moved the debate from a sterile, backward-looking conversation about Congress' nebulous and fictive intent to a forward-looking, instrumental dialogue about what future effects the proposed policy is likely to have. Shifting the focus to questions like which policy choice is actually likely to do a better job of cleaning up the air is a progressive change. This question is ultimately more important than courts imagining what some inexperienced congressional staffer might or might not have intended when writing legislative history.

The effect of *Chevron* on the internal dynamics of agency decision-making is significant and positive. *Chevron* is significant for reducing the relative power of lawyers within EPA and other agencies and for increasing the power of other professionals. At the margins, agency decisions after *Chevron* reflect more weight on policy choices and less on legalistic interpretations.

III. A NORMATIVE PERSPECTIVE ON WHAT *CHEVRON* WROUGHT.

Before delving into a normative debate regarding *Chevron's* effects, it is important to briefly review the institutional changes *Chevron* has wrought. From a historical perspective, one of the major constitutional changes in American law in the 20th century is the rise of administrative law-making as a dominant mode of legal decision-making.⁴⁸ *Chevron* is the culmination of a process of differentiation in which agencies have come to be recognized as a part of the Executive Branch. As such, it is increasingly recognized that agencies no longer exercise law-making authority derivatively as the mere "agent" of Congress, but they also exercise law-making authority independently as part of the Executive Branch once a delegation has been made.⁴⁹

As argued above, *Chevron* fundamentally re-conceptualized the nature of those statutes over which an agency has been given interpretative rights, e.g., environmental statutes administered by EPA. *Chevron* changed the pre-*Chevron* view that when Congress enacts statutes, it prescriptively addresses every question that may arise to the post-*Chevron* conceptualization that Congress rarely anticipates every unanswered question, or at least rarely reaches the necessary

48. See WILLIAM N. ESKRIDGE, JR., ET AL., *LEGISLATION: CASES AND MATERIALS ON STATUTES AND THE CREATION OF PUBLIC POLICY* 742 (3d ed. 2001) (explaining rise in judicial use of textual canons of statutory construction in place of other canons).

49. See generally Emily S. McMahon, *Chadha and the Non-Delegation Doctrine: Defining a Restricted Legislative Veto*, 94 *YALE L.J.* 1493, 1494-95 (1985) (noting increasing shift of policy-making authority from Congress to Executive Branch).

consensus of a majority in both houses on an “intent” with regard to every question. Because of *Chevron*, agencies now hold interpretive rights over those unanswered questions.

Within this realm of discretion, it is neither a legislative nor judicial function, but rather an executive function for an agency, acting under presidential supervision, to answer statutory questions left open by Congress. The “answer” that an agency chooses will reflect the agency’s policy choices, as supervised by the White House. This is a major shift of power to the Executive Branch and away from congressional staff and lower federal courts.

One result of this *Chevron* induced shift of power to agencies within the Executive Branch, as mentioned earlier, is that agency experts are making more policy decisions rather than agency lawyers and federal courts. Thus, *Chevron* represents a culmination of the vision articulated by the first generation of administrative lawyers in the 1930s that “expertise” would play a greater role than “legalism” in our law. For example, James Landis, the intellectual father of administrative agencies in the 1930s, wrote “[t]he administrative process is, in essence, our generation’s answer to the inadequacy of the judicial and legislative processes.”⁵⁰ Landis and his colleagues argued that the common law tends to become a closed system that is not sufficiently receptive to information from other disciplines. They argued for a system in which technical knowledge and expertise from disciplines in addition to law would play a larger role in shaping public policy. In the words of Landis’ Harvard contemporary, Felix Frankfurter, the role of expertise would be to expand “the area of accredited knowledge as the basis of action” in the “intricate and technical facts” of a complex modern society.⁵¹ In a remarkable passage that foreshadowed by 50 years what later became the *Chevron* doctrine, Landis even argued that “questions of law” for courts should be limited to those questions on which lawyers have particular expertise:

*Our desire to have courts determine questions of law is related to a belief in their possession of expertness in regard to such questions. It is from that very desire that the nature of questions of law emerges. For, in the last analysis, they seem to me to be those questions that lawyers are equipped to decide.*⁵²

50. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 46 (1938).

51. FELIX FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* 151-52 (1930).

52. Landis, *supra* note 50, at 152 (original italics).

In a sense, then, *Chevron* represents the culmination of the vision articulated by Landis and his colleagues in the 1930s that expertise would play a larger role in public policy.

The word *expertise* has subtly changed its connotation since the 1930s. What Landis and his generation meant is not necessarily people in white coats who know a lot about statistics, but rather people who work in a particular area and know it by experience⁵³ or what we might call today “specialists.” The word in German for what Landis meant is *sachverständige*, which literally means “a person who understands the thing.”

Normatively, I don’t believe that only “people who understand the thing,” experts, should make the rules.⁵⁴ As Judge Weinstein said to me one time when I spoke with him about the increased emphasis on expertise in German law, “Don, don’t you realize that’s what the struggle against authoritarianism in World War II was all about?” He had a valid point. There must be a balance between democratic policy-making and politics on the one hand, and expertise on the other. It is possible to imagine a hypothetical legal system where experts have too much power and authority. My mentor, Judge David Bazelon, was concerned that we might end up with too much expertise in the law and be governed by un-elected experts.⁵⁵ Although things might have worked out that way, they have not thus far. At least in environmental law, there is little danger that experts have too much power in administrative agencies. Rather, the pressing problem today is that EPA responds too much to politics and not enough to the technical expertise of the program offices.⁵⁶

The challenge, in my view, is how to inject more expertise into policy-making or how to receive more input from the *sachverständige*. As another Bazelon clerk, Steve Goldberg, a Professor at Georgetown University Law School observed, “[r]egulatory agencies are regularly accused of being ‘captured’ by industry, consumer

53. Cf. FED. R. EVID. 702 (permitting expert testimony on matters involving “scientific, technical or other specialized knowledge . . . [by] a witness qualified . . . by knowledge, skill, experience, training, or education”) (emphasis added).

54. E. Donald Elliott, *Strengthening Science’s Voice at EPA*, 66 LAW & CONTEMP. PROBS. 45, 48 (Autumn, 2003). “While I favor strengthening science’s voice in EPA decisions, I am not an imperialist for science. I do not believe that science alone should determine policy, nor that regulation should always wait until science is clear.” *Id.*

55. See, e.g., David L. Bazelon, *Coping With Technology Through the Legal Process*, 62 CORNELL L. REV. 817, 820 (1977) (explaining “the perils of wizardry,” or threat that expertise might dominate our public decision-making).

56. See Elliott, *supra* note 54, at 45, 48; E. Donald Elliott et al., *Science, Agencies, and the Courts: Is There a Crowd?*, 31 ENVTL. L. REP. 10,125 (January 2001).

groups, members of Congress, or bureaucratic inertia. They are never accused, however, of being captured by scientists.”⁵⁷ Although there are potential problems with too much expert policy-making, there is little concern at this time that scientists are going to take over the world and push out the politicians.

The ultimate effect of *Chevron*, in my opinion, has been to give somewhat more weight to expertise, both inside agencies and in the legal system as a whole. Because of *Chevron*, air policy can now be made more by air policy experts in EPA’s air program office and less by the lawyers in OGC or the staffers in Congress, neither of whom have as much expertise as the career experts in the program offices. In general, I contend this is a good thing.

Of course, good policy requires an amalgam of disciplines. Both agency lawyers and congressional staffers have valid perspectives that should be taken into account. Although their views and contributions should not be excluded, neither should the views of those with specialized policy experience and expertise. At the margins, *Chevron* broadens and enriches the policy dialogue within agencies by shedding the legal formalism that had previously dominated agencies.

Why is that a good thing? Principally, it is a good thing because an increased input by experts into the policy-making process at the margins is likely to result in better policy. Few would argue that an ambient air quality standard grounded more in solid science and less on administrative guesswork is a bad thing.

The increased role of expertise in agency decision-making that *Chevron* spawned has had an additional, normatively positive impact on administrative law; it has arguably increased the democratic legitimacy of the administrative state because it has led to less reliance on equivocal legislative history and more on the science-based determinations that Congress authorized agencies to make.⁵⁸ The

57. Steven Goldberg, *The Reluctant Embrace: Law and Science in America*, 75 GEO. L.J. 1341, 1365-66 (1987).

58. See generally JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 152-53 (1997). “Strangely enough, it may make sense to imagine the delegation of political authority to administrators as a device for improving the responsiveness of government to the desires of the general electorate.” *Id.* *Chevron*’s arguable improvement on the democratic process is evident in the *Chevron* Step One analysis; Justice Stevens required a classic textual inquiry into a statute’s ambiguous language. See *Chevron*, 467 U.S. at 842-45. If no clear outcome can be reached from a statute’s text, that is, “Congress has not spoken to the issue,” then a reviewing court should defer to the agency’s interpretation; it should not delve into legislative history and pick a statement on the legislative record that supports the particular judge’s policy preferences on how to resolve a statutory ambiguity. *Id.* Because Congress delegates to agencies the au-

central insight underlying the *Chevron* decision is that Congress is a collective body, not a single human mind. Under our Constitution, Congress can make binding law only when a measure is passed by two houses and is subject to veto by the President. Floor statements by individual members of Congress, or committee report language, do not create binding law. Therefore, *Chevron* recognized the normative proposition that statutory interpreters should give floor statements less weight, especially in the context of an agency using its expertise to interpret an ambiguity in its governing statute.

As such, *Chevron* was part of a broader movement in separation of powers law, along with *Chadha*,⁵⁹ the legislative veto case, and more importantly perhaps, *Brock v. Pierce County* (“*Brock*”).⁶⁰ In *Brock*, the Supreme Court declared that statements by individual legislators are entitled to some weight but they are not binding.⁶¹ Thus, the Supreme Court has itself recognized that the statement of an individual legislator on the *Congressional Record* is not the equivalent in juridical authority to a statute.

The problems of so-called designer legislative history have been well documented in the environmental area.⁶² For example, when Congress passed the 1990 Clean Air Act Amendments, there were 50 pages of legislative history inserted into the *Congressional Record*. The statements made in that legislative history were never actually made on the House or Senate floor. Nor did anyone have a chance to respond to or question the legislative history. Yet, because it had been inserted into the *Congressional Record*, it was argued that the legislative history constituted binding congressional intent, which courts were required to enforce. This is precisely one of the evils at which *Chevron* took aim.

thority to make legislative rules to effectively execute a statute, *not* the judiciary, the democratic process is better served when a court defers to an agency's interpretation of a statutory ambiguity, rather than make up its own.

59. See *Chadha*, 462 U.S. at 956-59 (emphasizing bicameral limitations on congressional legislation and separation of powers).

60. 476 U.S. 253, 263 (1986) (suggesting that floor statements should be considered but are not controlling, thereby giving less importance to notion that there is such thing as legislative intent that must be adhered to).

61. See *id.* (stating that floor statements by Congress were evidence of statutory meaning, but did not bind courts interpreting statute).

62. See generally BRUCE ACKERMAN & WILLIAM HASSLER, CLEAN COAL/DIRTY AIR: OR HOW THE CLEAN AIR ACT BECAME A MULTIBILLION-DOLLAR BAIL-OUT FOR HIGH-SULFUR COAL PROCEDURES AND WHAT SHOULD BE DONE ABOUT IT (1981) (discussing problems that arise when Congress inserts post hoc statements in Congressional Record, which may illegitimately skew judicial interpretation of environmental statutes).

Prior to *Chevron*, the law rested on a loose and imprecise metaphor that analogized statutes to narrative texts created by a single human author and assumed that a coherent and consistent “intent” existed for each action taken by Congress. *Chevron* proceeds from a much more realistic premise about Congressional action, namely, that most of a statute is ridden with gaps and ambiguities. Most of a statute is empty. Most of the questions that come up later are not questions that Congress thought about. They are not questions on which there was the necessary majority consensus in both the House and Senate, subject to a possible Presidential veto. Most of the issues that arise subsequently need to be decided in the first instance by someone, but it is pure legal fiction to assert that Congress had already decided them previously. When a court says it is “enforcing congressional intent” based on a statement by an individual staff member written into legislative history, the court’s authority is dubious at best as a matter of democratic theory. Rather, the court is probably making the decision itself, then arguing as a legitimating legal fiction that it is required to make the decision by legislative history or narrative consistency. As a matter of democratic legitimacy, it is usually better that an agency with the relevant expertise make the decision under the very active policy supervision of the press and the elected President, as represented by the Office of Management and Budget policy review process.

In conclusion, *Chevron* is a healthy development. It is a significant mid-course correction in the life and development of administrative agencies. *Chevron* is a positive development because at the margins, the *Chevron* doctrine gives agencies greater authority to make policy and also empowers experts in the program offices within agencies to have a larger role in deciding policy. Normatively, I contend that the increased role of expertise in administrative decision-making, in addition to the interpretation of complex environmental statutes, is preferable to the covert judicial policy-making that occurs when agencies are not given a seat at the statutory interpretation table.