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The Story of *Chevron*: The Making of an Accidental Landmark

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THE STORY OF *CHEVRON*: THE MAKING OF AN ACCIDENTAL LANDMARK

THOMAS W. MERRILL*

*Chevron U.S.A. Inc. v. NRDC is one of the most famous cases in administrative law, but it was not regarded that way when it was decided. To the justices who heard the case, Chevron was a controversy about the validity of the “bubble” concept under the Clean Air Act, not about the standard of review of agency interpretations of statutes. Drawing on Justice Blackmun’s papers, Professor Merrill shows that the Court was initially closely divided, but Justice Stevens’ opinion won them over, with no one paying much attention to his innovations in the formulation of the standard of review or his invocation of Presidential oversight as a reason to regard agencies as more appropriate interpreters than courts. Chevron was almost instantly seized upon as a major decision by the D.C. Circuit, however, and after establishing itself as a leading case there, it migrated back to the Supreme Court, where it eventually came to be regarded as a landmark decision by the Court that rendered it. The Story of Chevron raises interesting questions about the role of accidents and self-interested promotion in the making of great cases, as well as about how judicial mutations have shaped the development of administrative law.***

* Charles Evans Hughes Professor, Columbia Law School. This Article originally appeared as a chapter in *ADMINISTRATIVE LAW STORIES* (Peter L. Strauss ed., Foundation Press 2006), and is reprinted with the permission of Foundation Press, which is gratefully acknowledged. I have taken the liberty of modifying the text to incorporate some minor revisions and more up-to-date information found in Thomas W. Merrill, *The Story of Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.: Sometimes Great Cases Are Made Not Born*, which appears as a chapter in *STATUTORY INTERPRETATION STORIES* (William N. Eskridge, Jr., et al. eds., Foundation Press 2011), and Thomas W. Merrill, *Justice Stevens and the Chevron Puzzle*, 106 *Nw. U. L. REV.* 551 (2012). Many thanks to Brad Lipton and Daniel Boyle for research assistance.

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INTRODUCTION

*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*¹ is the Supreme Court's leading statement about the division of authority between agencies and courts in interpreting statutes. The two-step framework announced by *Chevron* for resolving such questions has taken the legal world by storm. In its relatively brief life span, *Chevron* has been cited in 11,760 judicial decisions and 2,130 administrative decisions.² It continues to accumulate judicial citations at the rate of about 1000 per year. It is eclipsed only by decisions like *Erie Railroad Co. v. Tompkins*³ (14,663 decisions) and *Bell Atlantic Corp. v. Twombly*⁴ (47,339 decisions). The company it keeps confirms its status as a leading decision prescribing the standard of review across a wide range of cases that come before the courts.

Chevron's significance goes far beyond its utility as a statement of the standard of review, however. This is revealed by its frequency of citation in law review articles. *Chevron* has been cited by 8,009 articles included in the Westlaw database.⁵ The fascination academics have for *Chevron* means it has now been cited far more than *Erie* (5,052), a decision Bruce Ackerman once described as the "Pole Star" for an entire generation of legal scholarship.⁶ Indeed, *Chevron's* frequency of citation in law review articles puts it in roughly the same league as *Marbury v. Madison*⁷ (8,492), which is

1. 467 U.S. 837 (1984). Although the West Reporter system, law reviews, and casebooks routinely get it wrong, the correct form of citation of the decision, following the official *U.S. Reports*, has no commas in the petitioner's name.

2. This and all following citation counts are based on Westlaw searches conducted on July 28, 2011.

3. 304 U.S. 64 (1938).

4. 550 U.S. 544 (2007).

5. *Chevron* has also been cited in 30 American Law Reports articles, 58 Westlaw journals, and over 3,600 miscellaneous other pieces of legal authority including digests, practice guides, circulars, and practitioner's handbooks.

6. BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 272 n.4 (1977).

7. 5 U.S. (1 Cranch) 137 (1803).

perhaps appropriate given that *Chevron* has been called the “counter-*Marbury*” for the administrative state.⁸

As suggested by its frequent appearance in law reviews, *Chevron* is also a controversial decision. The opinion marks a significant shift in the justification for giving deference to agency interpretations of law. Before *Chevron*, deference was justified largely on pragmatic grounds; after *Chevron*, deference has been justified largely in terms of implied delegations of authority from Congress. This shift in the theoretical underpinnings of the deference doctrine has made *Chevron* a magnet for commentators, with the result that “the *Chevron* doctrine” has been debated, analyzed, and measured in countless articles.

Legal revolutions are rare, and the general proposition for which *Chevron* stands—that courts should accept reasonable agency interpretations of statutes they are charged with administering—was not in and of itself revolutionary. The Court had said something similar in previous decisions.⁹ What was new was the way Justice John Paul Stevens creatively packaged this proposition in his opinion for a unanimous but short-handed Court of six justices. The *Chevron* opinion contains four significant innovations relative to previous judicial discussion.

First, the Court laid down a new two-step framework for reviewing agency statutory interpretations. At what was quickly dubbed “step one,” courts, using “traditional tools of statutory construction,” ask whether Congress had a “specific intention” with respect to the issue at hand.¹⁰ “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.”¹¹ But if no clear congressional intent can be discerned, then the court, at “step two,” determines whether the agency’s interpretation was a “permissible construction of the statute.”¹² The court should not ask whether the agency construction is the one “the court would have reached if the question initially had arisen in a judicial proceeding;” it is enough to show that “reasonable” interpreter might adopt the construction.¹³

This two-step framework seems innocuous enough, but in fact contained subtle but significant departures from prior law. That law had been something of a hodge-podge, but the conventional wisdom was that it

8. Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L.J. 2580, 2589 (2006).

9. See, e.g., *NLRB v. Hearst Publ’ns*, 322 U.S. 111, 131 (1944).

10. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9, 845 (1984).

11. *Id.* at 842–43.

12. *Id.* at 843.

13. *Id.* at 843 n.11, 844.

required courts to assess agency interpretations against multiple contextual factors, such as whether the agency interpretation was longstanding, consistently held, contemporaneous with the enactment of the statute, thoroughly considered, or involved a technical subject as to which the agency had expertise.¹⁴ The two-step formula provided no logical place for courts to consider these contextual factors.¹⁵

The two-step formula also implied that deference to the agency interpretation was all-or-nothing. If the court decided the matter at step one, the agency would get no deference (although the court might uphold the agency if it agreed that its interpretation was the one intended by Congress); if the court decided the matter at step two, the agency would get maximal deference. In contrast, the prior approach had seemed to suggest that any particular agency interpretation would get more or less deference along a sliding-scale, depending on how it stacked up against the traditional factors.

Second, *Chevron* departed from previous law by suggesting that Congress has delegated authority to agencies to function as the primary interpreters of statutes they administer. Sometimes, the Court noted, Congress expressly delegates authority to agencies to define specific statutory provisions by regulation. In these circumstances, the Court observed, agency regulations are “given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”¹⁶ The opinion then immediately noted that delegations can be implicit rather than explicit, and seemed to suggest that the same consequences would follow. By equating explicit and implicit delegations to agencies to fill in statutory gaps, the Court seemed to say that anytime Congress charges an agency with administration of a statute and leaves an ambiguity in the statute, it has impliedly delegated primary authority to the agency to interpret the statute. This vastly expanded the sphere of delegated agency lawmaking.

Third, *Chevron* broke new ground by invoking democratic theory as a reason for deferring to agency interpretations of statutes. In an unusual passage near the end of the opinion, the Court explained that judges “are

14. See, e.g., *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). See generally Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 562 (1985); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 972–75 (1992).

15. Indeed, it appears *Chevron* has had a marked effect in reducing consideration of these factors by reviewing courts. See Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 46 (1998) (reporting that in 1995 and 1996, only 5% of the courts of appeals decisions that applied *Chevron* considered the traditional contextual factors).

16. 467 U.S. at 844.

not part of either political branch” and hence “have no constituency.”¹⁷ Agencies, while “not directly accountable to the people,” are subject to the general oversight and supervision of the president, who is elected by all the people. Hence, it is fitting that agencies, rather than courts, resolve “the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”¹⁸ The new emphasis on democratic theory reinforced the presumption of delegated interpretational authority, and seemed to offer a universal reason to prefer agency interpretations to judicial ones.

Fourth, *Chevron* introduced the theme of comparative institutional choice into statutory interpretation. Prior to *Chevron*, it was universally assumed that it is the province of the courts to “say what the law is,” including pronouncing on the meaning of statutes.¹⁹ After *Chevron*, courts and commentators gradually came to realize that other institutions (such as administrative agencies) may have a comparative advantage as interpreters, at least in some circumstances. This in turn introduced a meta-question into the theory and practice of statutory interpretation, namely determining the “preferred interpreter” before engaging in the process of interpretation. The full implications of this new perspective have yet to be fully assimilated, but it may ultimately revolutionize the process of statutory interpretation.²⁰

Most landmark decisions are born great—they are understood to be of special significance from the moment they are decided. But *Chevron* was little noticed when it was decided, and came to be regarded as a landmark case only some years later. This may be the most interesting aspect of the *Chevron* story—how a decision that was considered routine by those who made it came to be regarded as one of potentially transformative significance. Before we get to that part of the story, however, we need to understand what *Chevron* did decide, and why.

I. THE BUBBLE CONTROVERSY

When it was briefed and argued, no one thought *Chevron* presented any question about the court-agency relationship in resolving questions of interpretation. Instead, all understood the case to be about the “bubble concept,” a catchy phrase for a particular way of interpreting the term

17. *Id.* at 866.

18. *Id.* at 865–66.

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

20. For an example of this perspective, see ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006).

“stationary source” under the Clean Air Act.²¹ One cannot understand how Justice Stevens was able to obtain unanimous support for his provocative opinion, or why that opinion came to have such compelling power for lower court judges, without some sense of the controversy over the bubble.

Three different programs established by the Clean Air Act require that stationary sources of air pollution, like power plants and smelters, adopt strict technology-based limitations on emissions. Each program kicks in when firms either construct “new” stationary sources, or “modify” existing stationary sources. The programs impose much less demanding limitations on existing stationary sources. Yet each of the programs contains a critical ambiguity about the meaning of “source”: it is unclear whether this word refers to each *apparatus* that emits pollution within a plant, or whether it refers to the *entire plant*.

Under the apparatus definition, if a plant installs a new apparatus like a boiler with a smoke stack, this would be new source. Hence the new boiler would have to comply with tough technology-based controls. The plant-wide definition, in contrast, in effect puts an imaginary bubble over an entire industrial complex and looks at changes in the amount of pollution coming out of a hole at the top. Under this bubble definition, if a firm adds a new boiler with a smoke stack, but makes offsetting changes in other parts of the operation such that the net effect is to reduce or hold pollution levels unchanged, the addition of the new boiler would be neither a new source nor a modification of a source. Hence the change could be ignored for regulatory purposes.

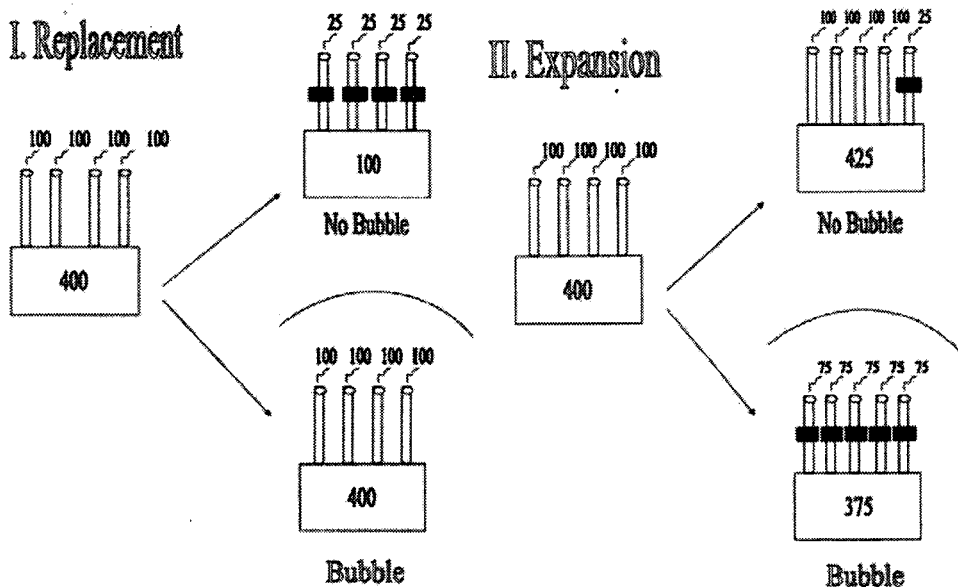
The bubble concept was controversial from the time it was first proposed in the early 1970s. Environmentalists generally opposed the bubble because they saw it as locking in the environmental status quo. Suppose a plant consists of four apparatuses, each of which emits 100 tons of pollution per year, for total emissions of 400 tons. A new apparatus subject to new-source controls would emit only 25 tons of pollution. Under the bubble concept, the plant could continue to rebuild itself indefinitely, replacing each uncontrolled apparatus with a new uncontrolled apparatus as the old one wore out. Each replacement would result in no net addition of pollution from the plant, and so the tough technology-based standards would never be triggered. After a while, the plant would consist of nothing but new apparatuses, and yet it would still be emitting 400 tons of pollution,

21. 42 U.S.C. §§ 7401–7671q. I will follow convention in citing to the section numbers of the Act as they appear in the Statutes at Large. Thus, Clean Air Act (CAA) § 111(a)(3), the definition of “stationary source” under Section 111 of the Act, corresponds to 42 U.S.C. § 7411(a)(3) in the United States Code.

rather than the 100 tons it would emit if each apparatus had been regulated. The objectives of the new source provisions would be evaded, and no further progress would be made in cleaning up the air, as the accompanying graphic illustrates.

Industry representatives and economists countered with a different example. Suppose, as before, a plant with four apparatuses, each emitting 100 tons in an unregulated state. Now suppose that the plant wants to expand output by adding a fifth apparatus. Under the narrow single-apparatus definition of source, the new apparatus would be subject to controls, and would emit 25 tons. So the plant would now emit a total of 425 tons. Under the bubble policy, however, the plant could escape technology-based controls if it could somehow hold total emissions from the plant to 400 tons or less. Suppose it could do this relatively cheaply by retrofitting the existing apparatuses with a device that reduces emissions from 100 to 75 tons and by installing the device on the new apparatus. The result would be to reduce total emissions from the plant from 400 (4×100) to 375 tons (5×75). Application of the bubble in this example could save the plant considerable money *and* would also result in a better outcome for the environment—375 tons of pollution per year versus 425 tons of pollution, again illustrated graphically.

Bubble Hypotheticals



As with other attempts to resolve policy disputes by hypothetical example, the outcome depends on the assumptions built into the example. The case for the single-apparatus definition turns on the assumption that there is a sharp discontinuity between old equipment and new equipment. Old equipment is highly polluting, too costly to retrofit, and will inevitably be replaced by new equipment because of technological obsolescence. Thus, the best policy is hang tough and insist that technology-based standards apply to each apparatus, because over the long run this will do the most to improve air quality. The case for the bubble concept rests on the assumption that there is more of a continuous function between the costs and benefits of retrofitting existing equipment versus installing new equipment. Sometimes retrofitting old equipment might yield more environmental benefits at lower costs than scrapping old equipment and replacing it with new. Thus, the best policy is to give firms general pollution-reduction goals combined with considerable flexibility in determining how to go about meeting those goals.

II. BLOWING BUBBLES IN THE D.C. CIRCUIT

The Environmental Protection Agency's (EPA's) first encounter with the bubble debate came in connection with the administration of the New Source Performance Standards (NSPS) established by Section 111 of the Clean Air Act of 1970. The NSPS applied to "new sources," which were defined as "any stationary source, the construction or modification of which" begins after a NSPS for that category of sources is published.²² "Stationary source" was defined in turn as "any building, structure, facility, or installation which emits or may emit any air pollutant."²³ "Modification," for its part, was strictly defined to mean any change in a source "which increases the amount of any air pollutant emitted by such source."²⁴ EPA's initial regulations simply repeated the statutory definitions without clarifying whether "source" means apparatus or an entire plant.²⁵

In 1975, after a vigorous lobbying campaign by the nonferrous smelting industry, EPA endorsed a modest form of the bubble concept under Section 111.²⁶ EPA decided that "facility" means a single apparatus, and "source"

22. CAA § 111(a)(2).

23. *Id.* § 111(a)(3).

24. *Id.* § 111(a)(4).

25. *See* Standards of Performance for New Stationary Sources, 36 Fed. Reg. 24,875, 24,977 (Dec. 23, 1971).

26. Standards of Performance for New Stationary Sources, 40 Fed. Reg. 58,416 (Dec.

means either a single apparatus *or* a complex of apparatuses. Consistent with this “dual definition” of stationary source, EPA amended its regulations to define “source” to mean any “building, structure, facility, or installation” which “contains any one *or combination of*” facilities.²⁷ This definition implicitly *rejected* the bubble, which requires that “source” mean the entire plant. The agency nevertheless went on to endorse a qualified form of the bubble in a separate provision of the regulations dealing with the meaning of “modification.” Here, EPA provided that no modification would be deemed to occur when an “existing facility undergoes a physical or operational change” and the owner demonstrates that the “total emission rate of any pollutant has not increased from all facilities within the stationary source.”²⁸

On cross petitions for review by ASARCO (a firm in the nonferrous smelting industry) and the Sierra Club, a divided D.C. Circuit panel rejected the bubble concept “in toto.”²⁹ The majority opinion was written by Judge J. Skelly Wright,³⁰ a staunch liberal who was prone to see industry capture of administrative agencies in many of the regulatory controversies that came before him.³¹ Wright’s opinion portrayed the controversy as one in which EPA had caved in to industry by adopting a position “contrary to both the language and the basic purpose of the Act.”³²

As to the language of the Act, Judge Wright agreed with the Sierra Club that the “plain meaning” of “source” could not be defined to mean both “facility” and “combination of facilities” (although this was not the feature of the regulation that permitted the bubble—that was the definition of “modification”). With respect to the purposes of the Act, Judge Wright thought that the bubble would allow operators to evade their duty to install pollution control systems based on best available technology, as long as they could devise some way to keep total emissions from an entire plant from increasing. As he vividly put it, “[t]reating whole plants as single sources would grant the operators of existing plants permanent easements against

16, 1975).

27. *Id.* at 58,418 (amending 40 C.F.R. § 60.2) (emphasis added).

28. *Id.* at 58,419 (adding 40 C.F.R. § 60.14).

29. *ASARCO Inc. v. EPA*, 578 F.2d 319, 325 (D.C. Cir. 1978).

30. Judge Harold Leventhal joined Judge Wright’s opinion but wrote a separate concurrence. Judge George MacKinnon wrote a dissenting and concurring opinion.

31. See Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1065-66 (1997) (citing judicial and extra-judicial writings of Judge Wright exhibiting preoccupation with agency capture).

32. *ASARCO*, 578 F.2d at 328; see also *id.* at 329 (stating that EPA had supported the qualified bubble “by examples drawn from circumstances peculiar to the nonferrous smelting industry” which was an improper basis for regulations “setting standards for all industries”).

federal new source standards and the worst polluters would get the largest easements.”³³ Thus, the bubble was incompatible with the central purpose of Section 111, which Judge Wright said was to enhance air quality. Neither ASARCO nor the EPA petitioned for *certiorari*, so the bubble was dead for purposes of Section 111.

The 1977 Amendments to the Clean Air Act added two additional new source provisions to the Act. These provisions were applicable depending on whether air quality in a particular region is better than or worse than required by the National Ambient Air Quality Standards (NAAQS) established under the 1970 Act. New Part C, called Prevention of Significant Deterioration (PSD), was designed to impose limits on the ability of states to allow clean air to deteriorate downward toward the NAAQS level. New Part D, called Plan Requirements for Nonattainment Areas (nonattainment program or NAP), was designed to prod states to bring dirty air areas into compliance with the NAAQS. Each of these new Parts included, among its regulatory instruments, new source review provisions requiring states to adopt technology-based standards for certain new and modified sources. Neither of the new provisions made any further attempt to define “facility” or “source,”³⁴ nor was there any cross reference in either Part to the definition of “stationary source” in Section 111. Both Parts, however, expressly incorporated the definition of “modification” set forth in Section 111.³⁵

The 1977 Amendments were enacted after EPA had adopted the qualified bubble under Section 111, but before that policy had been struck down by *ASARCO*. When EPA issued regulations implementing the new PSD program,³⁶ it adopted for that program virtually the same qualified bubble concept that had been invalidated by *ASARCO*.³⁷ The agency reasoned that Congress, in adopting the 1977 amendments, had been made aware of the definition of “modification” EPA had adopted under Section 111. Thus, when Congress directed that “modification” have the same meaning for PSD purposes as under Section 111, it implicitly ratified EPA’s qualified bubble under PSD.³⁸

33. *Id.* at 329 n.40.

34. CAA § 302(j).

35. *Id.* § 169(2)(C) (PSD); *id.* § 171(4) (NAP). The incorporation of the definition of “modification” in the PSD program was added by a subsequent technical corrections amendment. See Pub. L. No. 95-190, § 14(a)(54), 91 Stat. 1393, 1402 (1977). It is codified as a parenthetical in CAA § 169(2)(C) (definition of “construction”).

36. 1977 Clean Air Act; Prevention of Significant Air Quality Deterioration, 43 Fed. Reg. 26,380 (June 19, 1978).

37. *Id.* at 26,394.

38. *Id.* at 26,403.

The PSD regulations were challenged in the D.C. Circuit in *Alabama Power Co. v. Costle*,³⁹ a massive judicial review proceeding that entailed dozens of issues besides the legality of the bubble policy. The panel issued a *per curiam* opinion summarizing its conclusions in June 1979, and issued its final opinion in April 1980. The final opinion was divided up by the three judges who heard the matter,⁴⁰ each judge writing a separate section. The challenge to the bubble was assigned to Judge Malcolm Wilkey, one of the court's more conservative and pro-business members.

Judge Wilkey concluded that the statutory definition of "stationary source" in Section 111 ("any building, structure, facility, or installation") was the meaning Congress intended EPA to apply under the PSD provisions.⁴¹ Accordingly, to the extent EPA had sought to expand the definition of major stationary source to include other terms (including "combination thereof"), it was invalid under *ASARCO*. Similarly, since Congress had specifically incorporated by reference the definition of "modification" under Section 111, EPA's freedom to define that term was also limited by *ASARCO*.

Judge Wilkey recognized that these rulings might impose regulatory burdens on industry and EPA. He sought to soften the blow by indicating that EPA had broad discretion to define the component terms of the statutory definition of "source" (building, structure, facility, or installation) in different ways in order to advance the purposes of different new source programs.⁴² In particular, Judge Wilkey noted that the occasions for review of modifications would be reduced because the bubble definition of source would be used for these purposes.⁴³

Judge Wilkey spent little time considering the text of the statute in reaching the conclusion that the bubble was a permissible definition of "source" in the context of the PSD program. Instead, the focus was on policy. He made two principal points. First, in the dynamic American economy, "alterations of almost any plant occur continuously." To apply the definition of "modification" to any individual apparatus would result in burdensome and repetitious PSD review of many "routine alterations of a plant."⁴⁴ Second, the PSD program was designed to prevent deterioration of air quality, not enhancement of air quality. Thus, any definition other than the bubble "would be unreasonable and contrary to the expressed

39. 636 F.2d 323 (D.C. Cir. 1980).

40. The panel consisted of Judges Leventhal, Robinson, and Wilkey.

41. *Id.* at 395-96.

42. *Id.* at 397.

43. *Id.* at 400.

44. *Id.* at 401.

purposes of the PSD provisions of the Act.”⁴⁵ Whereas Judge Wright had implied that the bubble was unlawful in any form under Section 111, the Wilkey opinion seemed to say that the bubble concept was required under the PSD program.

The third leg of the new source review stool was the nonattainment program, also added by the 1977 amendments. Here, EPA engaged in a series of zigzag efforts to clarify whether the bubble should apply. In a Notice of Proposed Rulemaking issued in response to the June 1979 *per curiam* order in *Alabama Power*,⁴⁶ EPA proposed a qualified bubble definition of source that could be used by states in full compliance with Part D requirements, while laggard states would have to use the apparatus definition.⁴⁷ After the D.C. Circuit’s full opinion in *Alabama Power* issued,⁴⁸ EPA determined that the bubble had to be prohibited for all purposes under the Part D program. The circuit court had ruled that the bubble was inappropriate under programs designed to improve air quality, and the nonattainment program was designed to improve air quality.⁴⁹

The election of Ronald Reagan as President in 1980 marked a major shift in executive branch policy toward environmental and safety regulation. The philosophy of deregulation, emphasizing the use of markets and market-imitating mechanisms rather than centralized regulatory controls, got its start earlier, as applied to traditional transportation and infrastructural industries like airlines, trucking, railroads, telephones and utilities.⁵⁰ The Reagan Administration broke new ground by extending this philosophy to environmental and safety regulation. Consistent with this new direction in policy, EPA announced that it had decided to reconsider issues related to the definition of “source” under the nonattainment and PSD new source review programs, as part of “a Government-wide reexamination of regulatory burdens and complexities that is now in progress.”⁵¹ The upshot was that the agency decided to

45. *Id.*

46. The *Alabama Power* panel released an order with a summary of its ruling in June 1979, but released its full opinion only in December, which was then further revised in April 1980.

47. Requirements for Preparation, Adoption, and Submittal of State Implementation Plans, 44 Fed. Reg. 51,924, 51,934 (Sept. 5, 1979).

48. Requirements for Preparation, Adoption, and Submittal of State Implementation Plans, 45 Fed. Reg. 52,676 (Aug. 7, 1980).

49. *Id.* at 52,746.

50. For general background, see Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323 (1998).

51. Requirements for Preparation, Adoption, and Submittal of Implementation Plans, 46 Fed. Reg. 16,280, 16,281 (Mar. 12, 1981). EPA did not propose to revisit the definition of “source” under the NSPS, apparently on the ground that this would contravene the

permit the states, at their election, to adopt an *unqualified* bubble definition of source for both PSD and nonattainment purposes.⁵² The change was justified on the ground that allowing the states to choose the bubble definition would give them “much greater flexibility in developing their nonattainment . . . programs.”⁵³

The new 1981 regulations were challenged in the D.C. Circuit by three environmental groups, led by the Natural Resources Defense Council. The case was assigned to a panel composed of Judges Abner Mikva, Ruth Bader Ginsburg, and William Jameson (a visiting senior district judge from Montana). Judges Mikva and Ginsburg were both relatively liberal Carter appointees. Judge Mikva would later resign to serve as White House Counsel to President Clinton, and Judge Ginsburg would later be appointed to the Supreme Court by Clinton.

The decision was unanimous to vacate EPA’s regulations. Judge Ginsburg’s opinion for the court, stripped of details about the statutory and regulatory background, reduced to a syllogism.⁵⁴ *Alabama Power* and *ASARCO* “establish as the law of this Circuit a bright line test for determining the propriety of EPA’s resort to a bubble concept.”⁵⁵ This test provided that the bubble “is mandatory for Clean Air Act programs designed merely to maintain existing air quality,” but is inappropriate “in programs enacted to improve the quality of the ambient air.”⁵⁶ “The nonattainment program’s *raison d’être* is to ameliorate the air’s quality in nonattainment areas sufficiently to achieve expeditious compliance with the NAAQS.”⁵⁷ Ergo the bubble could not lawfully be used under the nonattainment program.

Judge Ginsburg made no attempt to determine whether the bubble concept could be squared with the statutory meaning of “stationary source,” and she agreed with EPA that the legislative history was “at best contradictory.”⁵⁸ The opinion also gave short shrift to EPA’s judgment that application of the bubble, at least in the context of the nonattainment program, would not interfere with efforts to achieve further improvements

judgment in *ASARCO*.

52. Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 50,766 (Oct. 14, 1981).

53. *Id.* at 50,767.

54. *Natural Res. Def. Council v. Gorsuch*, 685 F.2d 718 (D.C. Cir. 1982).

55. *Id.* at 726.

56. *Id.*

57. *Id.* at 726–27.

58. *Id.* at 727 n.39. Indeed, the opinion “express[ed] no view on the decision we would reach if the line drawn in *Alabama Power* and *ASARCO* did not control our judgment.” *Id.* at 720 n.7.

in air quality. This was dismissed with the observations that it was inconsistent with the agency's view a year earlier, and the agency had not cited "any study, survey, or support" for its new position.⁵⁹ Ordinarily, this would be an appropriate judicial response to a change in agency policy.⁶⁰ Here, however, EPA's previous position had been justified largely on the ground that it was required by the D.C. Circuit's decisions in *ASARCO* and *Alabama Power*. The demand for consistency in this context amounted to privileging policy judgments previously reached by the D.C. Circuit.

Still, it is ironic in retrospect that Judge Ginsburg's opinion was the one to be singled out for further review by the Supreme Court. Of the three D.C. Circuit decisions dealing with the bubble controversy, the Ginsburg opinion is the most restrained, in the sense of attempting to resolve the issue through a good faith reading of existing legal authorities (in this case, circuit precedent). The result reached—invalidation of the bubble in dirty air areas—was no doubt one that was congenial to Judge Ginsburg and her relatively liberal colleagues. But one does not get the impression that Ginsburg was actively manipulating the arguments to reach this result. In contrast, both Judge Wright's opinion in *ASARCO* and Judge Wilkey's opinion in *Alabama Power* reflected transparent attempts to reach ends consistent with the author's views of appropriate policy. The bubble controversy suggests that D.C. Circuit judges were prone to substitute their own preferences for those of EPA. But the most flagrant practitioners of this activism were not directly implicated in the case that eventually went before the Supreme Court.

III. AN INAUSPICIOUS DEBUT

In tracking the progress of *Chevron* in the Supreme Court there are a number of sources to draw upon. The petitioning papers and merits briefs are available, as is the transcript of oral argument. Robert Percival has previously reported on information gleaned from Justice Thurgood Marshall's and Justice Harry Blackmun's papers.⁶¹ Blackmun's papers in particular shed significant new information on the Court's internal deliberations. Unlike Marshall, who did not participate in either the argument or decision in *Chevron*, Blackmun was involved from beginning to

59. *Id.* at 727 n.41.

60. Courts frequently respond to agency deviations from prior policy by requiring an explanation or new evidence in support of the change, a requirement sometimes called the "swerve doctrine." See, e.g., *Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34 (1st Cir. 1989).

61. Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Blackmun Papers*, 35 ENVTL. L. REP. 10,637, 10,642-43 (2005); Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 13 ENVTL. L. REP. 10,606, 10,613 (1993).

end. More importantly, Blackmun was probably the most meticulous note-taker among the justices during the time he sat on the Court.

After the D.C. Circuit denied petitions for rehearing *en banc*, Chevron U.S.A. Inc. filed a petition for *certiorari* in December 1982, thereby securing its name on the caption of the decision. The American Iron and Steel Institute, an industry trade association, filed a separate petition in January 1983. The Solicitor General, who controls litigation by the executive branch (including EPA) in the Supreme Court, took considerably longer to decide what to do. A critical factor no doubt was the large controversy then brewing in Washington about how reviewing courts should respond to the Administration's aggressive new deregulation initiative.⁶² The Supreme Court had pending before it *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,⁶³ in which the Reagan Administration, citing costs and uncertain benefits, had rescinded a mandatory automobile passive restraints rule adopted by the Carter Administration. The order had been set aside by the D.C. Circuit because the agency had failed to consider alternatives to rescission. In the Supreme Court, the Reagan Administration was arguing that courts should give greater deference to agencies when they deregulate than when they regulate, and that under the more lenient standard, the air bag rescission should be upheld.

The bubble controversy presented another example of an Administration deregulation initiative invalidated by the D.C. Circuit. No doubt the proponents of deregulation within the Administration pressed the Solicitor General to seek further review in *Chevron* in order to press ahead in the campaign for deregulation. This advocacy may have tipped the balance in favor of filing a government petition in *Chevron*, even though there was no circuit conflict and the decision below simply followed two previous decisions of the D.C. Circuit, neither of which the government had seen fit to challenge.

For whatever reasons, the Solicitor General did not file the petition on behalf of EPA until March 1983. Given the lateness of the government's filing, *State Farm* was decided before the Court could act on the petitions in *Chevron*. As it turned out, *State Farm* rejected the Administration's appeal for greater deference to deregulation orders, and affirmed the D.C. Circuit's decision invalidating rescission of the passive restraints rule, providing a significant setback to the Administration's deregulation campaign. It is hard to say how this outcome influenced *Chevron*, which was then briefed

62. For scholarship reflecting the controversy, see Cass Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177 and Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505 (1985).

63. 463 U.S. 29 (1983).

and argued the following term. The setback in *State Farm* may have tempered some of the arguments that the Solicitor General and the other petitioners advanced in support of reversal. It is also possible—although there is no direct evidence for this—that it may have caused some of the justices to tilt more toward the government in *Chevron*, if only to avoid the impression that the Court was taking sides in the deregulation debate.

In all events, there is nothing in the three petitions suggesting that the parties were asking the Court to reconsider basic questions of court-agency relations. The focus was on the practical significance of the bubble concept, the confusion produced by the three D.C. Circuit decisions, and the claim that the D.C. Circuit had overstepped established bounds of judicial review. For example, the Solicitor General's petition for *certiorari* said, "[t]he decision of the court of appeals is contrary to well established limits upon the scope of judicial review of administrative action," citing previous decisions deferring to "reasonable" interpretations by the Administrator of the Clean Air Act.⁶⁴

Similarly, there is nothing in the merits briefs to suggest that the case was seen as a vehicle for a major statement about statutory interpretation. The Solicitor General's brief was prepared under the supervision of Paul Bator, who had just arrived from Harvard Law School as the first "political" Deputy Solicitor General.⁶⁵ The Bator brief advanced two themes that appear to have influenced Justice Stevens. First, the brief hammered on the idea that the 1977 Amendments had not one purpose—improving air quality in dirty air areas—but two purposes: improving air quality *and* accommodating further economic growth in dirty air areas. This "two purposes" idea was to become the linchpin of Justice Stevens' argument that Congress had left the definition of source to be resolved by the agency in light of these somewhat conflicting objectives.⁶⁶ Second, the Bator brief planted the idea that "implied delegations" to agencies to fill gaps in statutes should be treated no differently than express delegations of gap-filling authority. This idea, which was quite novel in the context of determining the standard of review of agency legal determinations, was presented by the brief as a faithful representation of existing law.⁶⁷ Justice

64. Petition for *Certiorari*, *Adm'r, Envtl. Prot. Agency v. Natural Res. Def. Council, Inc.*, 1982 LEXIS U.S. Briefs 1591 at *30 (Mar. 25, 1983).

65. For more on the background of the Bator appointment, see CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* 28–30 (1991).

66. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 851–53 (1984).

67. Both the Bator brief and Justice Stevens quoted the following line from *Morton v. Ruiz*, 415 U.S. 199, 231 (1974): "The power of an administrative agency to administer a

Stevens took the bait and offered a similar depiction of the law in his *Chevron* opinion. In other respects, however, Justice Stevens largely ignored the government's brief.⁶⁸

The brief filed by respondent NRDC may have been more significant, given what it did *not* say. NRDC's position in the D.C. Circuit had been a strong one. Circuit precedent—*ASARCO* and *Alabama Power*—made the legality of the bubble turn on whether the Clean Air Act program in question was designed to enhance or maintain air quality, and the nonattainment program was designed to enhance air quality. But when the case moved up the judicial hierarchy to the Supreme Court, the bottom fell out from under NRDC's position. The Supreme Court was not bound by *ASARCO* or *Alabama Power*, and would consider the legality of the bubble in terms of the primary statutory sources—the language and legislative history of the Clean Air Act. To make matters more difficult, EPA's 1981 regulations avoided the internal inconsistency in the regulatory definition of "source" that Judge Wright had exploited in *ASARCO*. Accordingly, the only argument left to NRDC was that the statutory term "source" must always mean apparatus, and can never mean plant. Its brief gamely attempted to support this claim through a laborious reconstruction of the legislative history of the new source programs, interwoven with the administrative history of the bubble. But NRDC made no attempt to defend the court of appeals' decision—usually a telltale sign of weakness.

The most striking aspect of the briefs is the absence of any direct antecedent for the two passages for which *Chevron* is most famous, namely the "two-step" approach to review questions of law, and the justification of deference to agencies in terms of their relationship to the president. Justice

congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." This statement, however, was addressed to agency authority to issue regulations, not the deference owed to agency interpretations of statutes. In the context of determining the deference owed to agency interpretations, the Court had previously applied the arbitrary and capricious standard only in cases in which Congress had *explicitly* delegated authority to the agency to define a statutory term or prescribe a method of executing a statutory provision. *See, e.g., United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982); *Batterton v. Francis*, 432 U.S. 416, 424–26 (1977).

68. For example, one of the major themes of the government's presentation was federalism. EPA's regulations, the Bator brief repeatedly stressed, simply gave states the choice whether to adopt the narrow ("apparatus") definition of "source" or the broad ("bubble") definition in their implementation plans. In contrast, said the brief, the respondents and the D.C. Circuit wanted to put the states in a federal straitjacket. Justice Stevens barely touched on federalism in his opinion, however, and instead developed a powerful separation of powers theme that was not foreshadowed in the government's presentation.

Stevens apparently came up with these innovations on his own.

Nor does the transcript of oral argument reveal much of significance. Justices Thurgood Marshall and William Rehnquist were both absent from the bench because of health problems. Bator argued for the petitioners; David Doniger, a seasoned environmental lawyer, for the respondents. The questioning was dominated by Justices White, Stevens, and Brennan, and was directed more toward Bator than Doniger. Justice Blackmun's notes taken at argument suggest that the colloquy left little impression on him. He observed at the end of Doniger's presentation: "Few questions—no one wishes to venture out."

Two days after the argument, on March 2, 1984, the justices assembled to conference about the case. We learn the following from Justice Blackmun's notes. Although the decision would ultimately be unanimous, the vote at conference was 4-3 to reverse the D.C. Circuit's decision. Justices White, Blackmun, Stevens and Powell voted to reverse. Chief Justice Burger and Justices Brennan and O'Connor voted to affirm. This unusual lineup is confirmed by the fact that Justice White assigned the opinion to Justice Stevens.⁶⁹ White would have the power of assignment only if he were the most senior Justice in the majority at conference, which would require that both Burger and Brennan be in dissent. Blackmun's notes further reveal that each of the justices voting to reverse was tentative or doubtful about this disposition. Blackmun put a "?" after the "-" sign beside the name of each of the justices voting to reverse, presumably indicating that each of these justices expressed some hesitancy about his vote.

As best I can make out from Blackmun's notes, the conference discussion went something like this.⁷⁰ Chief Justice Burger started things off with a speech about how the D.C. Circuit was going "pretty far" in environmental cases, and the Supreme Court was going to have "to settle" this. He suggested the way to do so was by affirming. Blackmun expressed his puzzlement with this reasoning by putting "???" next to the Chief Justice's proposed disposition. Burger's comments, as recorded by Blackmun, suggest that the Chief Justice had only the most tenuous grasp of the issues in the case.

Justice Brennan spoke next. Blackmun's notes suggest that Brennan was much more on top of things, and did his best to convince the conference to affirm. He gave a crisp summation of the bill of indictment against the

69. See *infra* for a discussion of the evidence for this.

70. I clerked for Justice Blackmun in the 1978-79 term but cannot claim any expertise in deciphering his notes about conference, since he ordinarily provided his clerks with an oral summary of the conference and did not share the notes themselves.

bubble, consistent with the views expressed by his friend, Judge Wright, in *ASARCO*. The dual definition of source was troublesome because it allowed EPA to “have it both ways”; the result might not be “what Congress intended”; the bubble would grant a plant a “perpetual” right to “pollute at achieved level”; EPA had changed directions and hence was not entitled to much deference.

The discussion then turned to Justice White. Blackmun’s notes indicate White started out by saying he was “very shaky” but inclined to reverse. He indicated that he had been persuaded by *Alabama Power*. Blackmun’s notes do not elaborate on what White meant by this. On its face, the comment is puzzling, since Judge Ginsburg writing for the D.C. Circuit had relied on *Alabama Power* in holding the bubble unlawful in the context of the nonattainment program. Perhaps White was referring to Judge Wilkey’s more general discussion in *Alabama Power* about the definition of “source,” and to his conclusion that the language was broad enough to allow EPA to define source differently under different programs, but this is speculation. In any event, after White spoke, Blackmun’s notes indicate that Chief Justice Burger interjected: “& I might join;” in other words, Burger might join an opinion to reverse.

With Marshall absent, the next speaker was Justice Powell. Although Blackmun also marked Powell down as voting to reverse with a question mark, Powell’s comments seemed to follow fairly consistently the line taken in the industry briefs. He said the statute was “complicated” and deference was due to an agency “redetermination” of its policy. He too cited *Alabama Power* as supporting reversal, without recorded elaboration. Powell also observed that the states have primary responsibility for the nonattainment program. “On policy,” he said, the decision below would pose a problem for “economic growth” and serve as a “disincentive” (presumably he meant to plant modernization). Justice Rehnquist ordinarily would go next, but in his absence the next speaker was Justice Blackmun himself. Blackmun naturally did not take notes about his own comments, but his notes on the case written shortly before the conference reveal that he had had trouble making up his mind. Although he marked “-” at the bottom of his notes, meaning reverse, one can clearly see beneath this mark that he had originally written and later erased “+?”—suggesting that his initial disposition was to affirm, although he had doubts about this. There is no way to tell from the notes when Blackmun erased the “+?” and wrote “-” over the top, although presumably it was sometime after his initial preparation for the argument and before he spoke at conference. Blackmun’s law clerk had written a bench memo urging affirmance, and possibly this influenced the Justice’s initial response, but he must have changed his mind while giving the matter further consideration.

After Blackmun came Justice Stevens. Blackmun's notes record the following interesting remarks. Stevens began by saying he was "not at rest." Ideally, he observed, the definition of source ought to be the same throughout the statute. In a mild rebuke to Justices White and Powell, Stevens said he was not sure that *Alabama Power* was completely controlling. The agency interpretation, however, was a "permissible reading" of the statute. The House Report (by which he presumably meant the House Conference Report) was "confusing!" He concluded: "When I am so confused, I go with the agency."

Justice O'Connor, the newest Member of the Court, spoke last. Her remarks betray a certain lack of sophistication. After voting to affirm the lower court, she nevertheless indicated that the "bubble made sense as a concept." The stumbling block for her seemed to be that the legislative history provided no support for the EPA position. She concluded: "Industry is suffering" and said the matter was "very painful for me."

What is one to make of this? Perhaps the most obvious point is that there is nothing in the conference notes to suggest that the justices regarded *Chevron* as a watershed case about the standard of judicial review. The case presented nothing more than a puzzle about the legality of the bubble concept. It is also interesting to note that the justices were quite focused on what the legislative history did or did not say, and seemed quite conscious of the lower court opinions. In contrast, Justice Blackmun's notes record no comment from any justice about the specific language of the statute. *Chevron* was decided at a time when the Court's statutory interpretation opinions were devoted primarily to a search for legislative intentions as revealed by legislative history. The conference notes suggest that the justices thought about statutory interpretation questions the same way in their deliberations.

What we did not know before, and is potentially significant in explaining what happened, is that the conference vote was closely divided (4-3) and that the justices, with the possible exception of Justice Brennan, all expressed uncertainty or ambivalence about the proper outcome. This meant that the assignment to write the majority opinion was an especially challenging one. In order to hold a majority, the opinion writer would have to unravel the legal complexities about the bubble concept in a persuasive way, and would have to devise some way of framing the issue that the doubters would find compelling.

One especially valuable document in the Blackmun papers is something he called his "Opinion Log Sheet" which he kept for each argued case. It is from this document that we learn Justice White, the senior justice voting with the majority, assigned the opinion to Justice Stevens. The assignment came on March 2, 1984, the same day as the conference, suggesting that

White may have acted quickly to assert his prerogative, perhaps to forestall any attempt by the Chief Justice to assign the case (on the ground that he had changed his mind and had decided to join the majority to reverse).⁷¹

Justice Stevens' took over three months to prepare his opinion. This was not an unusually long period of time, but in the context of a case argued at the end of February, it meant that the draft opinion was not circulated until June 11, only about three weeks before the justices were scheduled to adjourn for the year. By this time in the annual opinion-writing cycle, the justices were immersed in a frenzy of effort to get the last, most difficult decisions out the door.⁷² In effect, the other justices were given virtually no time to consider drafting concurring or dissenting opinions, or even to suggest modifications to the Stevens' draft.

The official paper trail of memos following circulation of the draft reveals the following. Justices Marshall and Rehnquist responded with memos on June 12 confirming that they should be shown as taking no part in the decision in the case. Justice White, the assigning Justice, responded the next day with a memo designed to give the Stevens' effort a boost: "Please join me in your very good opinion in this case." On the 14th, Stevens circulated a revised draft. Justice O'Connor then circulated a memo indicating that after the argument, she had inherited a remainder interest in trust in one of the companies in the case, and she was therefore recusing herself. The Court was down to a bare quorum of six participating justices. That same day, Justice Brennan circulated a memo stating tersely: "Please join me." He offered no explanation for his change of position from conference, where he had voted decisively to affirm. Then, on June 18, Justice Blackmun, the Chief Justice, and Justice Powell joined in quick succession. The only comment beyond the perfunctory was from the Chief Justice, who declared with typical sangfroid: "With others, I am now persuaded you have the correct answer to this case." Another Stevens draft, with further minor changes, was circulated on June 19. The decision was released June 25.

This record of correspondence as preserved in the Blackmun papers strongly suggests that no justice made any recommendations for modifications in the Stevens opinion. Certainly, no recommendations were made by formal memorandum addressed to the whole conference. It is

71. Stories abound that Chief Justice Burger would occasionally switch his vote after conference in order to control assignment of the majority opinion. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 64–66, 171 (1979).

72. *Chevron* was part of an avalanche of opinions handed down at the end of the 1983 term—a total of 39 decisions from June 25 (when *Chevron* was released) to July 5 (when the term finally ended). A fair number of these cases had been sitting on the docket longer than *Chevron*.

conceivable that informal suggestions were made, either by private memo or via law clerks. But if any such suggestions were made, they had only the most modest impact. The draft opinion circulated on June 14 indicates that it differs from the original draft only in terms of minor stylistic changes and one new footnote.⁷³ And the June 14 draft is virtually identical to the opinion as released on June 25. If any justice harbored reservations about Stevens' effort, those reservations were obviously suppressed in light of all the other tasks that had to be completed to get to the end of the term.

Of the three preliminary drafts circulated by Justice Stevens, only the draft of June 14, which was the one reviewed by Justice Blackmun, is preserved in his papers. As was his custom, Justice Blackmun marked in pencil throughout the draft, indicating by small circles what he regarded as errors in spelling, grammar, and citation style. There are three arguably more revealing marginal comments.

In the margin opposite footnote 34, Justice Blackmun has written "footnotes!" The opinion is more than ordinarily loaded down with footnotes, and the remark may reflect a sense of tedium in having to forge through these complex materials. In the margin opposite the concluding sentence of the section of the opinion devoted to legislative history, Justice Blackmun has written "yes." That sentence reads: "We conclude that it was the Court of Appeals, rather than the Congress or any of the decisionmakers who were authorized by Congress to administer this legislation, that was primarily responsible for the 1980 position taken by the agency."⁷⁴ It is possible this may have been the point in reading when Justice Blackmun became fully convinced by Stevens' argument.⁷⁵ And on the first page of the opinion, in the top left hand corner, Justice Blackmun has written simply: "Whew!" In context, it is safe to say that this was an expression of admiration for Justice Stevens' handiwork, and perhaps also a sense of relief that the opinion handled the complicated issue in a way that absolved Justice Blackmun of any further engagement with the matter.

"Whew!" may in fact provide the best clue as to how the Court came to render such an emphatic and unanimous opinion in *Chevron*. Given that he thought he had precarious support, Justice Stevens presumably worked especially hard to produce a persuasive opinion. The result is impressive in its craftsmanship. The opinion frames the standard of review in a bold new

73. The new footnote is number 22 in the opinion. It simply reports that the dispute in the case concerns the meaning of the term "major stationary source," not the term "proposed source." See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 849 n.22 (1984).

74. *Chevron*, 467 U.S. at 864.

75. Justice Blackmun recorded no reaction to the passages in the next section of the opinion about the illegitimacy of judges resolving contested policy questions.

way designed to maximize the strengths and minimize the weaknesses of the disposition for which Stevens was arguing. It meticulously dissects the statutory and legislative history arguments. It ends on a high note designed to carry the reader away with a paean to democracy and judicial restraint. Circulated to his colleagues in the midst of the end-of-term crunch, this over-achieving opinion more than carried the day—it swept the field.

IV. THE CONSTRUCTION OF A LANDMARK

There is no evidence that Justice Stevens understood his handiwork in *Chevron* as announcing fundamental changes in the law of judicial review. Both before and after *Chevron* was decided, Justice Stevens authored opinions that analyzed agency interpretations using the traditional factors approach that pre-dated *Chevron*, and that many believe were superseded by *Chevron*.⁷⁶ In later years, when asked about his most famous opinion, Justice Stevens would respond that he regarded it as simply a restatement of existing law, nothing more or less.⁷⁷

The most striking evidence that Justice Stevens had no desire to modify the status quo is provided by the remarkable *Cardozo-Fonseca* episode that occurred less than three years after *Chevron* was decided.⁷⁸ *Cardozo-Fonseca* was an immigration case, in which the Justice Department sought *Chevron* deference for its interpretation of the legal requirements for establishing asylum in the United States. Writing for the Court, Justice Stevens stated that no deference was appropriate, because the issue was a “pure question of statutory construction for the courts to decide.”⁷⁹ The discussion strongly implied that *Chevron*-style deference was limited to questions of “law-application,” with “pure questions of law” being reserved for independent judicial determination. There was support for such a distinction in pre-*Chevron* case law.⁸⁰ But the distinction is in apparent conflict with *Chevron*, which drew no such dichotomy, and the issue in *Chevron* itself should probably be regarded as a pure question of law—

76. See *Conn. Dep’t of Income Maint. v. Heckler*, 471 U.S. 524 (1985) (Stevens, J.); *Aluminum Co. of Am. v. Cent. Lincoln People’s Util. Dist.*, 467 U.S. 380, 402–03 n.3 (1984) (Stevens, J., dissenting).

77. Justice Stevens is a graduate of Northwestern Law School, where I formerly served as the John Paul Stevens Professor of Law. In that capacity, I was occasionally invited to attend public events at which Justice Stevens agreed to speak when he came to Chicago. I recall at least two occasions when someone in the question-and-answer session after the speech asked him a version of the “what did you intend when you wrote *Chevron*?” question. The answer was always that he regarded it simply as a restatement of established law.

78. See *INS v. Cardozo-Fonseca*, 480 U.S. 421 (1987).

79. *Id.* at 446.

80. See GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 428–430 (3d ed. 2004).

whether “source” should be defined as apparatus or plant. That Stevens would seek to deflate his *Chevron* opinion in this manner strongly suggests that he had no design to change the multi-faceted approach to judicial review of questions of law. Certainly he had no intention to restrict his own discretion in future cases to call upon aspects of the traditional approach that were downplayed in *Chevron*.⁸¹

Nor is there any evidence that Justice Stevens’ colleagues on the Court perceived *Chevron* as some kind of watershed decision, either when it was decided or for some time afterwards. We have already seen that the opinion generated no substantive comment from any member of the Court when it was circulated in June of 1984. Further evidence that the justices regarded *Chevron* as just another case is provided by the next term’s decisions. Although there were 19 argued cases in the next term that presented some kind of question about whether the Court should defer to an agency interpretation of statutory law, *Chevron* was cited in only one of those cases.⁸² Based on its initial trajectory as a precedent in the Supreme Court, *Chevron* seemed destined to obscurity.

But *Chevron* was not to be relegated to obscurity, quite the contrary. We can trace the ascendancy of the *Chevron* “two-step” approach to judicial review in the Supreme Court’s own body of decisional law. Beginning with the 1985–86 term, *Chevron* began to appear with increasing frequency in the Court’s opinions. Six cases applied the *Chevron* framework in 1985–86, two the next term, and five the term following that.⁸³ By the end of the 1980s, the percentage of deference cases in the Supreme Court adopting the *Chevron* framework had risen to around 40%; by the early 1990s it was up to around 60%.⁸⁴ Soon the Court began to debate, in the course of resolving particular stationary questions, whether the *Chevron* approach should apply or not. Thus, questions arose as to whether *Chevron* applies to pure questions of law, whether *Chevron* applies to legal issues that arise in judicial rather than administrative proceedings, and whether *Chevron* trumps statutory interpretation precedents established in previous court cases.⁸⁵

81. Many years later, in *Negusie v. Holder*, 129 S. Ct. 1159 (2009), Justice Stevens authored a concurring opinion in which he again took the position that *Chevron* does not apply to pure questions of law.

82. *Chem. Mfrs. Ass’n v. Natural Res. Def. Council*, 470 U.S. 116 (1985). For overall data on the 1984 Term, see Merrill, *supra* note 14, at 1038–39.

83. Merrill, *supra* note 14, at 1036–38.

84. See data presented in Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L. Q. 351, 359–60 (1994).

85. See *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990) (judicial proceedings); *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) (judicial precedent); *INS v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (pure questions of law). For an overview of these and other issues about the scope of *Chevron* that have arisen, see Thomas W. Merrill &

Eventually, the Court was granting *certiorari* and devoting entire cases to questions about the scope of “the *Chevron* doctrine,” such as whether it applies to interpretations announced in agency adjudications or opinion letters.⁸⁶

How did *Chevron*, after such an inauspicious beginning, acquire this status as a core precedent of administrative law? Two explanations seem most plausible. The first focuses on the D.C. Circuit, and posits that *Chevron* became a leading case initially in the D.C. Circuit, and then migrated back to the Supreme Court along with personnel who had previously served in the D.C. Circuit. The second focuses on the role of the Executive Branch, and posits that Justice Department lawyers, perceiving the advantages of *Chevron*’s expanded rule of deference to administrative interpretations, became persistent and eventually successful proselytizers for use of the *Chevron* standard in reviewing agency interpretations of law.

The role of the D.C. Circuit in establishing *Chevron* as a landmark has been suggested by others,⁸⁷ and is broadly consistent with much of the data about *Chevron*’s rise from obscurity. The D.C. Circuit is the court that hears the highest percentage of cases involving judicial review of agency action. Many of these cases involve disputes over whether to defer to agency interpretations of law. If the D.C. Circuit were to adopt *Chevron*’s “two-step” formula as the dominant standard for judicial review of questions of law, it could then have been transplanted back to the Supreme Court by employees of the D.C. Circuit who were promoted to service on the Supreme Court. The most prominent of these promoted employees, of course, was Antonin Scalia, who was a judge on the D.C. Circuit when *Chevron* was handed down in 1984, and was elevated by President Reagan to the Supreme Court in 1986, where he promptly became the Court’s foremost champion of *Chevron*. In addition, a disproportionately large number of Supreme Court law clerks serve as clerks to D.C. Circuit judges before they go on to clerk for justices on the Supreme Court. They too would be familiar with *Chevron*, and would be expected to turn to its two-step formula in drafting opinions for Supreme Court justices dealing with judicial review of questions of law.

Some evidence tending to support this reverse-migration hypothesis is provided by the previously mentioned *Cardozo-Fonseca* episode. The case was decided in Justice Scalia’s first year on the Supreme Court, and the junior Justice took it upon himself to write a concurring opinion chastising

Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833 (2001).

86. See *United States v. Mead Corp.*, 533 U.S. 218 (2001) (opinion letters); *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999) (agency adjudication).

87. See LAWSON, *supra* note 80, at 449.

Justice Stevens for his "eagerness to refashion important principles of administrative law in a case in which such questions are completely unnecessary to the decision and have not been fully briefed by the parties."⁸⁸ Justice Scalia objected to Justice Stevens' suggestion that *Chevron* concerned only questions of law application, observing that *Chevron* "has been an extremely important and frequently cited opinion, not only in this Court but in the Courts of Appeals."⁸⁹ In effect, the newly arrived Justice from the D.C. Circuit was telling his colleagues that *Chevron* was already entrenched in the practice of judicial review in the D.C. Circuit, and major revisions could be destabilizing.

In order to shed further light on the reverse-migration hypothesis, I examined all decisions of the D.C. Circuit citing to *Chevron* during the first three years after the decision was handed down. The survey provides further evidence confirming the broad outlines of the hypothesis. The D.C. Circuit picked up on the *Chevron* two-step framework for reviewing agency determinations of law very quickly. One early decision, *Rettig v. Pension Benefit Guaranty Corp.*,⁹⁰ provided an elaborate paraphrase of the two-step idea, in effect adopting it as the law of the Circuit. In all, the D.C. Circuit handed down 23 decisions citing to *Chevron* in the first year after the decision was announced. This grew to 40 in the second year, and 64 in the third year after the decision was announced. This is a disproportionately large percentage of *Chevron* citations relative to other courts of appeal.⁹¹ By the end of the second year, *Chevron* was already regarded as boilerplate doctrine in the Circuit. One finds statements from this period describing *Chevron* as the "now familiar framework," the "familiar two-step framework," the "familiar dictates," or the standard that applies "as always" in reviewing agency interpretations.⁹²

There has occasionally been speculation that *Chevron* was embraced with particular fervor by the newly-appointed Reagan judges on the D.C.

88. *Cardozo-Fonseca*, 480 U.S. at 455 (Scalia, J., concurring in the judgment). There is irony in this accusation, given that *Chevron*, the "important principle of administrative law," was itself less than three years old and had been "established" in a decision in which the issues it dealt with had also not been briefed by the parties.

89. *Id.* at 454.

90. 744 F.2d 133, 150-51 (D.C. Cir. 1984).

91. The D.C. Circuit citations represent about 40% of all citations to *Chevron* at the court of appeals level during the first three years. Today, by contrast, D.C. Circuit citations to *Chevron* have fallen to about 17% of all court of appeals citations.

92. See *Natural Res. Def. Council v. Thomas*, 805 F.2d 410, 420 (D.C. Cir. 1986) (Wald, C.J.) ("dictates"); *Int'l Bhd. of Teamsters v. ICC*, 801 F.2d 1423, 1426 (D.C. Cir. 1986) (Starr, J.) ("familiar two-step"); *Transbrasil S.A. Linhas Aereas v. DOT*, 791 F.2d 202, 205 (D.C. Cir. 1986) (Wald, C.J.) ("always"); *Inv. Co. Inst. v. Conover*, 790 F.2d 925, 932 (D.C. Cir. 1986) (Starr, J.) ("familiar framework").

Circuit.⁹³ One can tell a plausible story in support of this surmise. During these years, the D.C. Circuit was closely divided between Republican and Democratic appointees. The Democratic judges were likely somewhat hostile to the deregulatory initiatives of the Reagan Administration, and would seek some way to strike them down. In contrast, the newly-appointed Republican judges (who were gradually growing in number), would be eager to find some way to uphold these initiatives. Perhaps these Republican judges seized upon *Chevron* as the most effective weapon at hand for upholding controversial administrative decisions.

The data, however, provide no support for such a supposition during the first two years after *Chevron* was decided. The judge who cited *Chevron* most frequently during these years was Judge Patricia Wald, a Carter appointee. She was the author of *Retting*, and is perhaps the judge most responsible for the rapid assimilation of the two-step framework in the D.C. Circuit. Judge Wald cited *Chevron* in 13 opinions in the first two years, easily outdistancing the top Republican citer, Judge Kenneth Starr, who cited the case in 8 opinions. Indeed, Democratic appointees out-cited *Chevron* relative to Republican appointees 38 to 21 in the first two years, and out-cited Republicans 62 to 53 over all three years.

There are some interesting variations in citation patterns among the judges in these early years, but they appear to have more to do with age and openness to new precedent than with politics. Thus, Judge Spottswood Robinson, the most senior Democratic appointee, made relatively little use of *Chevron*, citing it only once the first two years. He tended to stick to the traditional factors, and even after *Chevron* became established referred to it mostly in string citations. Similarly, Judge Mikva never showed much affinity for *Chevron*. Judges Wald and Harry Edwards, in contrast, who were younger and arguably more open to change, made greater use of *Chevron*. On the Republican side, Judge Starr, who was the youngest judge on the Circuit, was the most frequent user of *Chevron*. In contrast, Judge Robert Bork, who was more senior, made little reference to *Chevron* until the third year after it came down (he cited it in only two opinions the first two years). Interestingly, Judge Antonin Scalia, who was to become identified as *Chevron's* champion after he was named to the Supreme Court, cited *Chevron* in only three opinions while he sat on the D.C. Circuit.

93. For evidence that Democratic and Republican judges on the D.C. Circuit respond differently to cases in ways that match their party affiliation, see Richard L. Revesz, *Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit*, 76 N.Y.U. L. REV. 1100, 1106–09 (2001) (summarizing studies). Interestingly, one study finds less political influence in *Chevron* cases than in cases presenting procedural challenges to agency decisions. Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997).

In the third year of *Chevron's* existence, the picture begins to change slightly, although this may be due to the fact that the Republican appointees, with their increasing numbers, were getting more of the opinion-writing assignments in major regulatory decisions. Republican appointees in 1986–87 used *Chevron* slightly more than Democratic appointees (32 to 25 citations in majority opinions). Judge Starr became the leading user of *Chevron* that year (11 citations), slightly eclipsing Judge Wald (9 citations). Judge Bork discovered *Chevron* (8 citations), as did Judge Laurence Silberman (6 citations). On the other side of the aisle, after *Cardozo-Fonseca* was decided late in the year, Judge Edwards mounted a short-lived campaign to limit *Chevron* to cases involving “law application.”⁹⁴ So there is some evidence that *Chevron* was becoming more of a Republican-favored doctrine, and the Democrats were having second thoughts. But the evidence is at most suggestive on this point.⁹⁵

I should add that there is little evidence, from these three years, that *Chevron* caused the judges of the D.C. Circuit to become more deferential toward administrative agencies.⁹⁶ In terms of cases citing *Chevron* in which there was a clear disposition affirming or reversing the agency, affirmances barely outnumbered reversals (64 to 52). If we look only at those cases that expressly frame the inquiry in terms of *Chevron's* two-step formula, the ratio of affirmances to reversals improves slightly (30 to 20). Of course, all this could be due to selection effects: judges are more likely to select a deference-promoting framework when they have decided to affirm (and

94. See *Int'l Union v. Brock*, 816 F.2d 761, 764 (D.C. Cir. 1987) (Edwards, J.); *Regular Common Carrier Conference v. United States*, 820 F.2d 1323 (D.C. Cir. 1987) (Edwards, J.). Early the next term, Justice Scalia announced in another concurring opinion that *Cardozo-Fonseca's* “law application” interpretation of *Chevron* had been abandoned by the Court (properly enough in his view). *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 133–34 (1987) (Scalia, J., concurring). The pure question of law/law application distinction quickly disappeared. See Merrill, *supra* note 14, at 986 n.74.

95. About this time, a number of Republican-appointed judges took to writing about *Chevron* in the law reviews. See Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 *YALE J. ON REG.* 283 (1986); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 *DUKE L. J.* 511 (1989); Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 *GEO. WASH. L. REV.* 821 (1990). Although this confirms that the D.C. Circuit judges attributed great significance to *Chevron*, it would be difficult to characterize these efforts as advocacy pieces. Judge Starr's article presented a carefully balanced view of *Chevron*, and Justice Scalia's article took pains to point out that the *Chevron* standard did not necessarily mean more deference to agencies.

96. In a widely cited study, Peter Schuck and Donald Elliott claimed that *Chevron* caused an increase in deference to agency policy decisions in the lower courts. See Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 *DUKE L. J.* 984 (1990). But their methodology did not single out for study cases that actually cited or relied on *Chevron*.

need to justify this result) than when they have decided to reverse. Still, the D.C. Circuit took virtually no time at all to learn how to reverse agency interpretations at step one or step two of the *Chevron* framework.⁹⁷ The much-debated question whether *Chevron* has had any impact on the degree of deference judges actually give to agencies remains unresolved.

The second plausible explanation for *Chevron*'s rise to fame is aggressive promotion by the Executive Branch lawyers. *Chevron* was regarded as a godsend by Executive Branch lawyers charged with writing briefs defending agency interpretations of law. Not only did the two-step standard provide an effective organizing principle for busy brief-writers, the opinion seemed to say that deference was the default rule in any case where Congress has not spoken to the precise issue in controversy. Since this describes (or can be made to seem to describe) virtually every case, *Chevron* seemed to say that the government should nearly always win. *Chevron* may have meant little to the justices when it was decided, and it may have taken time for courts other than the D.C. Circuit to accept it as orthodoxy. But it was quickly seized on as a kind of mantra by lawyers in the Justice Department, who pushed relentlessly to capitalize on the perceived advantages the decision presented.⁹⁸

Enthusiasm for *Chevron* among government lawyers is one thing; acceptance by courts is another. But here it is plausible to suppose that the Justice Department's role as the ultimate institutional litigant is relevant. The Department urged that *Chevron* serve as the relevant standard of review at nearly every turn, and the Department appeared in court much more frequently in cases raising questions about review of questions of law than any other category of litigant. It is not difficult to imagine that over time the Department's persistence would pay off, and courts would start to regard *Chevron* as the accepted standard.⁹⁹

These two explanations for *Chevron*'s delayed investiture as a landmark decision—migration from the D.C. Circuit and executive advocacy—are

97. See, e.g., *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133, 156 (D.C. Cir. 1984) (Wald, C.J.) (reversing agency interpretation as unreasonable at step two of *Chevron*); *FAIC Sec., Inc. v. United States*, 768 F.2d 352 (D.C. Cir. 1985) (Scalia, J.) (reversing agency interpretation as contrary to statute at step one of *Chevron*).

98. From 1987 to 1990, I served as Deputy Solicitor General in the Justice Department, overseeing appeal authorization and Supreme Court litigation in civil cases. After only a few months on the job, I joked to friends that I was the Deputy Solicitor General for *Chevron*, since it seemed that virtually every request from the Civil Division for appeal authorization or for Supreme Court participation was based on the need to expand or defend the *Chevron* doctrine.

99. The classic study of the advantages of being an institutional litigant is Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

by no means inconsistent. To the contrary, they are mutually supportive. The Justice Department's impact as an institutional litigant might well be the strongest in the D.C. Circuit, given the very high concentration of administrative law cases in that circuit. So executive advocacy may help explain why *Chevron* caught on first in the D.C. Circuit. Moreover, the Justice Department, through the Office of Solicitor General, is by far the most important institutional litigant in the Supreme Court. So executive advocacy may have played a reinforcing role in *Chevron's* migration back to the Supreme Court. Perhaps most importantly, vigorous advocacy of executive branch prerogatives served the interests of both D.C. Circuit judges seeking promotion to the Supreme Court—such promotions being controlled by the White House—and Justice Department lawyers seeking victories in court. Both sets of aspirants had a stake in supporting an expansion of executive power, making *Chevron's* rhetoric of implied delegations of executive authority congenial to both.

CONCLUSION

Chevron presents a striking instance of a case that became great not because of the inherent importance of the issue presented, but because the opinion happened to be written in such a way that key actors in the legal system later determined to make it a great case. *Chevron* became a landmark decision due to the cumulative effect of a series of fortuitous events, among them Justice White's assignment of the case to Justice Stevens, Justice Stevens' creative restatement of certain principles of judicial review of questions of law, the lack of scrutiny given the Stevens opinion by other justices, Judge Patricia Wald's quick embrace of the two-step formula in the D.C. Circuit, Justice Scalia's elevation to the Supreme Court from the D.C. Circuit two years later, and the Justice Department's unrelenting campaign to make *Chevron* the universal standard for judicial review of agency interpretations of law. Individually, each of these events is readily explicable; cumulatively, they would have to be described as an accident.

There is no evidence that *Chevron* has led to a greater rate of acceptance of agency interpretations of statutes by the Supreme Court.¹⁰⁰ The evidence of its effect on acceptance of agency views by lower courts is mixed.¹⁰¹ Nevertheless, *Chevron's* impact on the legal system has been

100. For the most recent and comprehensive review, see William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008).

101. In addition to Kerr, *supra* note 15, Revesz, *supra* note 93, and Schuck & Elliott, *supra* note 96, see also Linda R. Cohen & Matthew L. Spitzer, *Solving the Chevron Puzzle*, 57 L. &

profound. By separating out for judicial determination the question whether the statute has a clear or unambiguous meaning, and suppressing other contextual variables traditionally considered by courts in considering agency interpretations, the decision subtly but profoundly reinforced the movement toward textualism in statutory interpretation. By highlighting agency accountability to the president, and the judiciary's lack of democratic pedigree, the decision accelerated the movement toward "presidential administration."¹⁰² Perhaps most importantly, the decision has led to a sustained discussion among judges and academics about the proper role of courts in the administrative state, and has ignited an awareness of questions of institutional choice that have long remained submerged. It is not overstating the matter to say that *Chevron* has become one of a handful of decisions—along with *Marbury v. Madison*, *Brown v. Board of Education*, and *Roe v. Wade*—that are the material for a continuing collective meditation about the role of the courts and indeed of the law itself in the governance of our society.

The wonder of it all is that the Court that rendered this decision had utterly no intention of producing such an opinion. Indeed, the Court did not even realize it had produced such an opinion until others pointed this out. *Chevron* reminds us that sometimes in the pressure of events a remarkable document emerges that becomes the focus of collective deliberation about matters of great importance. The author of such a document is as much the times in which it is rendered as the individual who strings the words together and puts them on paper.

CONTEMP. PROBS., 65 (Spring 1994); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998); Jason J. Czarnecki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767 (2008); Thomas J. Miles and Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006).

102. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).