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# FIFTY YEARS WITH THE ADMINISTRATIVE PROCEDURE ACT AND JUDICIAL REVIEW REMAINS AN ENIGMA

James C. Thomas†

## I. INTRODUCTION

Today, some fifty years after Congress charted a procedural course with its adoption of the Administrative Procedure Act (APA),<sup>1</sup> scholars and students are still following a twisted, perhaps even tortured, path in the area of judicial review, where the *Chevron* doctrine now dominates the legal landscape.<sup>2</sup> This doctrine of judicial deference to administrative agencies was first pronounced by the Supreme Court on June 25, 1984. Since then, the case has been cited and followed by the Court on numerous occasions.<sup>3</sup> It, therefore, seems appropriate that *Chevron* be viewed once again as part of the fifty-year anniversary of the Administrative Procedure Act.

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, the Court adopted a two-step approach in the process of judicial review of an agency's construction of the statute it administers.<sup>4</sup> First, the reviewing court must deter-

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1. See Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.). The measure proceeded through the Senate as S.7 to "improve the administration of justice by prescribing fair administrative procedure," 92 CONG. REC. 2148 (1946), and was passed by voice vote on March 12, 1946, 92 CONG. REC. 2167 (1946). Then S.7 advanced through the House of Representatives and was adopted on May 24, 1946, 92 CONG. REC. 5668 (1946). The enrolled bill was signed by the Senate President pro tempore and by the Speaker of the House on May 29, 1946, 92 CONG. REC. 5881, 5954 (1946), and presented to the President on May 31, 1946, 92 CONG. REC. 6073 (1946). It was signed by President Harry S Truman on June 11, 1946, 92 CONG. REC. 6706 (1946).

2. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

3. During just the last two court terms of the Supreme Court, *Chevron* was cited at least ten times: *Lawrence ex rel. Lawrence v. Chater*, 116 S. Ct. 604, 608 (1996); *Holly Farms Corp. v. NLRB*, 116 S. Ct. 1396, 1401 (1996); *Smiley v. Citibank (South Dakota), N.A.*, 116 S. Ct. 1730, 1733 (1996); *NLRB v. Town & Country Elec., Inc.*, 116 S. Ct. 450, 453 (1995); *ICC v. Transcon Lines*, 115 S. Ct. 689, 696 (1995); *Director, Office of Workers' Comp. v. Newport News*, 115 S. Ct. 1278, 1287 (1995); *Stone v. INS*, 115 S. Ct. 1537, 1555 (1995) (Breyer, J., dissenting); *Reno v. Koray*, 115 S. Ct. 2021, 2027 (1995); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2411 (1995); *Brown v. Gardner*, 115 S. Ct. 552, 556 (1994).

4. See *Chevron*, 467 U.S. at 842-43.

mine whether the statute falls under the clear and unambiguous rule in which case the agency interpretation is given no deference. Specifically the Court stated, "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."<sup>5</sup> While the Court adheres to the clear and unambiguous rule, in a footnote to its exposition of the first part of the *Chevron* rule, the Court held tightly to its clearly defined exclusive area of authority in the process of interpreting statutes. "The judiciary is the final authority on issues of statutory construction," the Court said, "and must reject administrative constructions which are contrary to clear congressional intent."<sup>6</sup>

It is with the second step of the *Chevron* approach that so much commentary has been generated, unfortunately, without creating any greater level of clarity.<sup>7</sup> Therefore, commentators and courts have to keep trying the best they can to make sense of the Supreme Court's *Chevron* analysis. This second step of *Chevron* is triggered when "the court determines Congress has not directly addressed the precise question at issue."<sup>8</sup> Therefore, "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."<sup>9</sup> The scope of review then is whether the agency interpretation is "arbitrary, capricious, or manifestly contrary to the statute."<sup>10</sup> With this limited review given to the agency's interpretation, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."<sup>11</sup>

Does *Chevron* mean that the Court has surrendered to administrative agencies a degree of its Constitutional authority? A note on *Chevron*, published in the American Bar Journal shortly after the opinion was released, described it as a "spectacular administrative law decision."<sup>12</sup> *Chevron* was described as "the Court's most complete statement to date about the deference owed to an agency's interpretation of the statute it is charged with administering."<sup>13</sup> This landmark decision, according to the note, substantially increased the interpretative powers of the agency involved. The author concluded by stating, "[I]f Congress has expressed only a general intent about the ends of the statute, the court must defer to the agency's evaluation about what interpretation best fur-

5. *Id.* at 843.

6. *Id.* at 843 n.9. Cases cited by the Court in *Chevron* for the proposition of its exclusive authority included: *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981); *SEC v. Sloan*, 436 U.S. 103, 117-18 (1978); *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-46 (1973); *Volkswagenwerk v. FMC*, 390 U.S. 261, 272 (1968); *NLRB v. Brown*, 380 U.S. 278, 291 (1965); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965).

7. As of December 19, 1996, a WESTLAW search among law review articles of the term "Chevron U.S.A." generated 2471 entries. Search of WESTLAW, JLR database (Dec. 19, 1996).

8. *Chevron*, 467 U.S. at 843.

9. *Id.*

10. *Id.* at 844.

11. *Id.*

12. Geoffrey P. Miller, *Supreme Court Report: Six Cases Shape Business Law*, A.B.A. J., Jan. 1985, at 124, 130.

13. *Id.*

thers these ends. The court should reject the agency's interpretation only if it is plainly outside the bounds of reason."<sup>14</sup>

Professor Cass R. Sunstein, of the University of Chicago, lifted *Chevron* to the lofty level of *Marbury v. Madison*,<sup>15</sup> upon which the sanctity of judicial review of statutes is founded.<sup>16</sup> "[T]he decision," wrote Professor Sunstein, "has established itself as one of the very few defining cases in the last twenty years of American public law [that] . . . has altered the distribution of national powers among courts, Congress, and administrative agencies."<sup>17</sup> He added: "If *Chevron* allows agency interpretations to defeat well-established interpretative principles, it will indeed have worked a revolution in the law."<sup>18</sup> Kenneth Starr, of "Whitewater" fame, further described *Chevron* as a "watershed decision" that "strengthened the deference principle."<sup>19</sup> Associate Justice Antonin Scalia, appearing at a symposium on Administrative Law at Duke University, agreed with Professor Sunstein about the importance of that "watershed decision."<sup>20</sup> "*Chevron*," he said, "has proven a highly important decision — perhaps the most important in the field of administrative law since *Vermont Yankee Nuclear Power Corp. v. NRDC*."<sup>21</sup>

Not all scholars have been equally impressed. Professor Bernard Schwartz has expressed criticism of *Chevron*.<sup>22</sup> He has written, "The *Chevron* doctrine presents the danger of undue deference to self-expansion of an agency's jurisdiction . . . particularly . . . when an agency's power to act may be dependent

14. *Id.* at 132.

15. 5 U.S. (1 Cranch) 137 (1803).

16. See Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2074 (1990). Professor Sunstein had this to say about *Chevron's* linkage to *Marbury v. Madison*: "This principle [*Chevron*] is quite jarring to those who recall the suggestion, found in *Marbury v. Madison* and repeated time and again in American public law, that it is for judges, and no one else, to 'say what the law is.'" *Id.* (footnote omitted).

17. *Id.* at 2075.

18. *Id.* at 2077.

19. Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 294 (1986). Starr, as did Professor Sunstein, saw a linkage between *Chevron* and *Marbury v. Madison*: "Affording deference to an agency's legal analysis, however, seems facially contrary to the fundamental principle, incorporated in Chief Justice John Marshall's broad dictum in *Marbury v. Madison*, that '[i]t is emphatically the duty of the judicial department to say what the law is.'" *Id.* at 283 (footnotes omitted).

20. See Antonin Scalia, *Judicial Deference To Administrative Interpretations of Law*, 1989 DUKE L.J. 511. Scalia, speaking at Duke University School of Law on January 24, 1989, told his audience, in jest no doubt, that he had intended to talk about Bork's Senate confirmation hearings, "the proposed federal salary increase, capital punishment, *Roe v. Wade*, and Law and Astrology." *Id.* at 511. That would have been a ponderous task even for Justice Scalia. The audience was spared such an arduous experience when Scalia was reminded that his visit to Duke was to take part in a symposium on administrative law. But then he told the audience: "Administrative law is not for sissies — so you should lean back, clutch the sides of your chairs, and steel yourselves for a pretty dull lecture." *Id.*

21. *Id.* at 512. In *Vermont Yankee*, 435 U.S. 519 (1978), the Court of Appeals for the District of Columbia issued an order requiring the Atomic Energy Commission, engaged in rulemaking, to conform to the stricter procedural standard required for adjudication. See *id.* at 535-37. That court was faced with an argument from the environmental group that the agency preclusion of "discovery or cross-examination" denied them a meaningful opportunity to participate in the proceedings as guaranteed by due process." *Id.* at 541. From this argument, the Court of Appeals framed the issue: "Thus we are called upon to decide whether the procedures provided by the agency were sufficient to ventilate the issues." *Id.* The Supreme Court rejected this as "Monday morning quarterbacking." *Id.* at 547.

22. See Bernard Schwartz, *Some Crucial Issues in Administrative Law*, 28 TULSA L.J. 793, 804-11 (1993).

on findings involving statutory interpretation.”<sup>23</sup> Now, with a little more than a decade of *Chevron* behind us, it seems appropriate, during this fiftieth anniversary of the APA, to reexamine that doctrine of expansive deference to administrative agencies.

## II. CONTEXT OF ADMINISTRATIVE LAW

Prior to Congress providing more definite statutory guidelines for all federal agencies to follow with the passage of the Administrative Procedure Act, courts had already made procedure an integral part to the very integrity of the emerging field of administrative law. In fact, judicially created procedural innovations actually helped lead the courts away from the use of fiction to a more enlightened foundation in response to delegation issues. To help understand the meaning of *Chevron*, it is important to establish the context under which all administrative law principles must be examined.

### A. Constitutional Separation of Powers

The starting place in discussing this context is, of course, the constitutional model that divides the power of government into three branches.<sup>24</sup> Separation of powers is a structural manifestation in our federal Constitution: (1) “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives;”<sup>25</sup> (2) “The executive Power shall be vested in a President of the United States of America;”<sup>26</sup> and (3) “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>27</sup> The constitutional drafters decided early during the Federal Convention on this tripartition for the new government. Assembled in a Committee of the Whole House, it was “[r]esolved that a national government ought to be established consisting of a supreme legislative, judiciary, and executive.”<sup>28</sup> Such structural separation, which will be shown served a functional purpose, was founded upon the political philosophy of such critical thinkers as Montesquieu<sup>29</sup> and John Locke.<sup>30</sup>

23. *Id.* at 807. Professor Schwartz cites *Rust v. Sullivan*, 500 U.S. 173, 184-87 (1991), as an example of “how *Chevron* may skew the result in what would have once been a simple administrative-law case.” Schwartz, *supra* note 22, at 809.

24. See, e.g., Theodore Y. Blumoff, *Separation of Powers and the Origins of the Appointment Clause*, 37 SYRACUSE L. REV. 1037 (1987); Morris D. Forkosch, *The Separation of Powers*, 41 U. COLO. L. REV. 529 (1969); Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371 (1976); Malcolm P. Sharp, *The Classical American Doctrine of “The Separation of Powers,”* 2 U. CHI. L. REV. 385 (1935).

25. U. S. CONST. art. I, § 1.

26. U.S. CONST. art. II, § 1, cl. 1.

27. U.S. CONST. art. III, § 1.

28. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 30-31 (Max Farrand ed., Yale Univ. Press 1937).

29. See MONTESQUIEU, *THE SPIRIT OF LAWS* (T. Nugent transl. 1900), cited in Forkosch, *supra* note 25, at 529. See also ANNE M. COHLER, *MONTESQUIEU’S COMPARATIVE POLITICS AND THE SPIRIT OF AMERICAN CONSTITUTIONALISM* (1988); THOMAS L. PANGLE, *MONTESQUIEU’S PHILOSOPHY OF LIBERALISM: A COMMENTARY* (1975).

Montesquieu's work stood as a model for James Madison, who stoutly defended a separation of powers as the "sacred maxim of free government."<sup>31</sup> In fact, Madison, in *The Federalist No. 47*, cited Montesquieu in defense of the division of powers in the new constitution. Madison wrote, "The accumulation of all powers, legislative, executive, and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."<sup>32</sup> Madison further echoed Montesquieu's celebrated admonition that "[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates, or 'if the power of judging be not separated from the legislative and executive powers.'"<sup>33</sup>

The Supreme Court has anchored this separation of powers political philosophy, expressed in *The Federalist No. 47*, through a series of invariable reported decisions. In *United States v. Klein*,<sup>34</sup> decided in 1871, the Court stated, "It is the intention of the Constitution that each of the great co-ordinate departments of the government — the Legislative, the Executive, and the Judicial — shall be, in its sphere, independent of the others."<sup>35</sup> In 1879, the Court then added the admonition, "One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."<sup>36</sup>

Contemporary cases have also shown the Court's consistency in recognizing the constitutional structural division of the powers of government into three branches. In *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>37</sup> the Court was confronted with President Harry S Truman's executive order directing the Secretary of Commerce to take possession of and operate certain of the nation's steel mills.<sup>38</sup> Affirming the lower court's granting of plaintiffs' motion for tempo-

TARY ON THE SPIRIT OF THE LAWS (1973).

30. See JOHN LOCKE, AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT (1698), cited in Forkosch, *supra* note 24, at 529. See also Thomas P. Peardon, *Introduction to J. LOCKE, THE SECOND TREATISE OF GOVERNMENT* (Thomas P. Peardon ed., 1952).

31. THE FEDERALIST NO. 47, at 331 (James Madison) (Cooke ed., 1961). See Sharp, *supra* note 24, at 385-93.

32. THE FEDERALIST NO. 47, at 324 (James Madison) (Cooke ed., 1961). THE FEDERALIST included eighty-five essays written by John Jay, Alexander Hamilton, and James Madison between October, 1787 and May, 1788 to convince the people of New York State to ratify the proposed Constitution. See GEORGE W. CAREY, THE FEDERALIST: DESIGN FOR A CONSTITUTIONAL REPUBLIC at xi (1989). Thomas Jefferson described THE FEDERALIST as "the best commentary on the principles of government, which ever was written." DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST I (1984). Gottfried Dietze described the value of THE FEDERALIST as follows: "The Federalist is a treatise on free government in peace and security. It is the outstanding American contribution to the literature on constitutional democracy and federalism, a classic of Western political thought." GOTTFRIED DIETZE, THE FEDERALIST: A CLASSIC ON FEDERALISM AND FREE GOVERNMENT 3 (1960).

33. THE FEDERALIST NO. 47, at 325 (James Madison) (Cooke ed., 1961).

34. 80 U.S. (13 Wall.) 128 (1871).

35. *Id.* at 147.

36. Union Pac. R.R. Co. v. United States, 99 U.S. 700, 718 (1878).

37. 343 U.S. 579 (1952).

38. See *id.* at 583. President Truman issued Executive Order 10340, seizing the steel mills, on April 8, 1952, after determining that a threatened work stoppage due to a labor dispute endangered "American fighting men . . . now engaged in deadly combat with the forces of aggression in Korea." *Id.* at 590. His executive order was appended to the Court's *Youngstown* decision. See *id.* at 589-92.

rary injunction, the Supreme Court held the President had impermissibly encroached upon the exclusive constitutional domain of Congress.<sup>39</sup> Specifically, the Court stated, "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."<sup>40</sup> Justice William O. Douglas, in his concurring opinion, added:

There can be no doubt that the emergency which caused the President to seize these steel plants was one that bore heavily on the country. But the emergency did not create power; it merely marked an occasion when power should be exercised. And the fact that it was necessary that measures be taken to keep steel in production does not mean that the President, rather than the Congress, had the constitutional authority to act.<sup>41</sup>

If exceptions could be made in times of emergency, the scheme sought by the framers of the Constitution, to protect the liberty of people, would surely be defeated. As Justice Brandeis, dissenting in *Myers v. United States*,<sup>42</sup> said, "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power."<sup>43</sup> He further added, "The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."<sup>44</sup>

Protecting the people from autocracy points to the more functional side of the structural division of powers among the legislature, executive and judiciary. In its division of these powers, the constitutional convention envisioned the legislature as the superior branch with the court being the weakest.<sup>45</sup> In *The Federalist No. 78*, Alexander Hamilton stated:

Whoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them.<sup>46</sup>

Hamilton believed that "the general liberty of the people can never be endangered from that quarter . . . so long as the judiciary remains truly distinct from both the legislative and executive."<sup>47</sup>

It was with the judiciary's limited role in this constitutional sphere of government, that the Framers considered it essential to give this department a

39. *See id.* at 585-86.

40. *Id.* at 589.

41. *Id.* at 629 (Douglas, J., concurring).

42. 272 U.S. 52 (1926).

43. *Id.* at 293 (Brandeis, J., dissenting).

44. *Id.* (Brandeis, J., dissenting).

45. In THE FEDERALIST NO. 78, Alexander Hamilton, comparing the relative power and authority of the three division of government, concluded "that the judiciary is beyond comparison the weakest of the three departments of power . . ." THE FEDERALIST NO. 78 at 523 (Alexander Hamilton) (Cooke ed., 1961). Alexander Hamilton, in this essay, called upon the "celebrated Montesquieu" on this point: "Of the three powers above mentioned, the JUDICIARY is next to nothing." *See id.*

46. *Id.* at 522.

47. *Id.* at 523.

level of independence not otherwise shared by the legislative or executive departments. Alexander Hamilton stated, "The complete independence of the courts of justice is peculiarly essential in a limited constitution."<sup>48</sup> Judicial independence was accomplished by the Framers, first by language that judges "hold their Offices during good Behaviour"<sup>49</sup> and that the judges will receive compensation "which shall not be diminished during their Continuance in Office."<sup>50</sup>

While the federal judiciary was given no constituency, the Congress, the political body of government, was made clearly "dependent on the people alone."<sup>51</sup> James Madison defended this dependency that was structurally built into the constitutional requirement that members of the House go before the people every two years. "Frequent elections," Madison reasoned, "are unquestionably the only policy by which this dependence and sympathy can be effectually secured."<sup>52</sup> In *The Federalist No. 39*, Madison further explained the dependency of members of Congress. He noted, "The House of Representatives . . . is elected immediately by the great body of the people. The Senate . . . derives its appointment indirectly from the people."<sup>53</sup> This inherent dependence of Congress on the great body of people must also be read in the context of the constitutional framers' decision that there be a republican form of government instead of a direct democracy.<sup>54</sup>

There was apprehension among the constitutional drafters that a government by direct democracy would be dominated by factions fueled by human passion and inflamed with mutual animosity, "more disposed to vex and oppress each other, than to co-operate for their common good."<sup>55</sup> James Madison, in *The Federalist No. 10*, spoke against a direct democracy and in favor of the republican form of government. "[I]t may be concluded," Madison said, "that a

48. *Id.* at 524.

49. U.S. CONST. art. III, § 1. In *THE FEDERALIST NO. 78*, Hamilton explained:

That inflexible and uniform adherence to the rights of the constitution and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would in some way or other be fatal to their necessary independence.

*THE FEDERALIST NO. 78*, at 529 (Alexander Hamilton) (Cooke ed., 1961).

50. U.S. CONST. art. III, § 1. In *THE FEDERALIST NO. 79*, Alexander Hamilton stated, "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support." *THE FEDERALIST NO. 79*, at 531 (Alexander Hamilton) (Cooke ed., 1961). He added: "This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the states, in regard to their own judges." *Id.* at 532. It was similarly provided in Article II, that "[t]he President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected." U.S. CONST. art. II, § 1, cl. 7. This was intended to provide to the President a level of independence from the Legislature. See *THE FEDERALIST NO. 73*, at 492-93 (Alexander Hamilton) (Cooke ed., 1961).

51. *THE FEDERALIST NO. 52*, at 354 (James Madison) (Cooke ed., 1961).

52. *Id.* at 355.

53. *THE FEDERALIST NO. 39*, at 252 (James Madison) (Cooke ed., 1961). After April 8, 1913, with ratification of the Seventeenth Amendment to the U.S. Constitution, the Senate was also elected directly by the people. See U.S. CONST. amend. XVII, § 1.

54. See U.S. CONST. art. IV, § 4. That section states: "The United States shall guarantee to every State in this Union a Republican Form of Government . . ." *Id.*

55. *THE FEDERALIST NO. 10*, at 59 (James Madison) (Cooke ed., 1961).



pure Democracy . . . can admit of no cure for the mischiefs of faction."<sup>56</sup> He elaborated on this fear of political disruption that would surely flow from a system of politics structured upon the axiom of direct democracy. Madison expounded:

A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of Government itself; and there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual. Hence it is, that such Democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have in general been as short in their lives, as they have been violent in their deaths. Theoretic politicians, who have patronized this species of Government, have erroneously supposed, that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.<sup>57</sup>

On the other hand, a republican form of government "opens a different prospect, and promises the cure for which we are seeking."<sup>58</sup> Government through elected representatives was expected to insure that the country would be run by "a small number of citizens . . . whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations."<sup>59</sup> Madison believed that "[u]nder such a regulation, it may well happen that the public voice pronounced by the representatives of the people, will be more consonant to the public good, than if pronounced by the people themselves convened for the purpose."<sup>60</sup>

Additionally, a direct democracy was considered impractical in the expanding territory of the United States. How could the great body of people assemble in one central place to conduct the business of government? In *The Federalist No. 14*, Madison described the enormity of the problem:

As the natural limit of a democracy is that distance from the central point, which will just permit the most remote citizens to assemble as often as their public functions demand; and will include no greater number than can join in those functions; so the natural limit of a republic is that distance from the center, which will barely allow the representatives of the people to meet as often as may be necessary for the administration of public affairs. Can it be said, that the limits of the United States exceed this distance?<sup>61</sup>

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56. *Id.* at 61.

57. *Id.* at 61-62.

58. *Id.* at 62.

59. *Id.*

60. *Id.*

61. THE FEDERALIST NO. 14, at 85 (James Madison) (Cooke ed., 1961).

Still another defense of the republican form of government was the limited power and function of a central government. Madison addressed this also in *The Federalist No. 14*:

In the first place it is to be remembered, that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any.<sup>62</sup>

Additionally, the tenure of office held by members of Congress was short. “[W]e may,” explained Madison, “define a republic to be . . . a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour.”<sup>63</sup>

Finally came the question: “Who are to be the electors of the Federal Representatives?”<sup>64</sup> The expansive answer was given by either James Madison or Alexander Hamilton, appearing in *The Federalist No. 57*:

Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States. They are to be the same who exercise the right in every State of electing the correspondent branch of the Legislature of the State.

Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession, is permitted to fetter the judgment or disappoint the inclination of the people.<sup>65</sup>

### B. *Supreme Court's Interpretation of the Separation of Powers*

The Supreme Court has, for the most part, acknowledged and honored the Constitutional structural division of power. Such acknowledgement is found in the Court's enrolled bill doctrine, announced in *Field v. Clark*.<sup>66</sup> “The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress.”<sup>67</sup> Once the bill has gone through this formal process, “its authentication as a bill that has passed Congress should be deemed complete and unimpeachable.”<sup>68</sup> This enrolled bill doctrine, the Court explained, was commanded out of “respect due to [a] co-

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62. *Id.* at 86.

63. THE FEDERALIST NO. 39, at 251 (James Madison) (Cooke ed., 1961).

64. THE FEDERALIST NO. 57, at 385 (Alexander Hamilton & James Madison) (Cooke ed., 1961).

65. *Id.*

66. 143 U.S. 649 (1892).

67. *Id.* at 672.

68. *Id.*

equal and independent department” of government, despite what evils might flow therefrom.<sup>69</sup> It is, explained the Court, “far better, that a provision should occasionally find its way into the statute through mistake, or even fraud, than that every act, state and national, should at any and all times be liable to be put in issue and impeached by the journals, loose papers of the legislature and parol evidence.”<sup>70</sup>

Moreover, the Court has frequently admitted, in the over-all scheme of our constitutionally divided government, its inability to provide relief. In *Colegrove v. Green*,<sup>71</sup> efforts to gain some fair reapportionment of the congressional districts in Illinois was rebuffed by the Supreme Court. The Court stated:

We are of opinion that the appellants ask of this Court what is beyond its competence to grant. . . . It has refused to [intervene in these legislative controversies] because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination.<sup>72</sup>

The Court in *Colegrove* took a bright line approach in defining the respective role for the legislative and judicial departments stating, “It is hostile to a democratic system to involve the judiciary in the politics of the people.”<sup>73</sup> The fact that the petitioners presented a strong argument “that the conditions of which they complain are grave evils and offend public morality,”<sup>74</sup> did not alter the Court’s strict position in favor of preserving the separation of powers.<sup>75</sup> “The short of it,” explained the Court, “is that the Constitution has conferred upon Congress exclusive authority to secure fair representation. . . .”<sup>76</sup> So what happens if Congress declines to take legislative measures to accomplish this reapportionment? The Court answered this question as follows: “If Congress failed in exercising its powers, whereby standards of fairness are offended, the remedy ultimately lies with the people.”<sup>77</sup>

*Baker v. Carr*,<sup>78</sup> another reapportionment case, decided sixteen years after *Colegrove*, did not weaken the strict adherence by the Court to the structural and functional division of governmental powers. Distinguishing *Colegrove*, a case involving congressional districts, the Court in *Baker* noted that “[w]e have no question decided, or to be decided, by a political branch of government coequal with this Court.”<sup>79</sup> Though reluctant to tread into the exclusive area of Congress, the Court in *Baker* willingly extended its judicial power over the

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69. *Id.*

70. *Id.* at 675 (citing *Sherman v. Story*, 30 Cal. 253, 275 (1866)).

71. 328 U.S. 549 (1946).

72. *Id.* at 552.

73. *Id.* at 553-54.

74. *Id.* at 554.

75. *See id.*

76. *Id.*

77. *Id.*

78. 369 U.S. 186 (1962).

79. *Id.* at 226.

Tennessee legislature, determined by the Court not to be a coequal branch of government.<sup>80</sup>

Still, the Court continues to recognize the constitutional precepts that divide the power of governing into three branches — the Legislative, Executive and Judicial. The Court also acknowledges that the judiciary cannot possibly fashion a remedy for every wrong that might occur to some person or group of people.<sup>81</sup> One of the classic cases on this issue is *Bi-Metallic Inv. Co. v. State Board of Equalization of Colorado*,<sup>82</sup> decided by the Supreme Court in 1915. In *Bi-Metallic*, the Court offered the following guideline: “Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption.”<sup>83</sup> A legislature has the constitutional power to enact laws “that affect the person or property of individuals, sometime to the point of ruin, without giving them a chance to be heard.”<sup>84</sup> In such cases, the rights of people affected by such legislative action “are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.”<sup>85</sup>

However, in *Missouri v. Jenkins*,<sup>86</sup> the Court was willing to permit the judiciary to enter the realm of taxation,<sup>87</sup> ordinarily considered a subject belonging exclusively to Congress — the branch that is dependent on the people. It is not insignificant that the framers of the Constitution required that “[a]ll Bills for raising Revenue shall originate in the House of Representatives.”<sup>88</sup>

80. See *id.* But then two years later, the Court extended *Baker* to the reapportionment of Congressional Districts in *Westberry v. Sanders*, 376 U.S. 1 (1964). In reaching this decision, the Court relied heavily upon THE FEDERALIST essays by Madison. See *Westberry*, 376 U.S. at 7-18. Justice Harlan, in a strong dissenting opinion, stated, “I had not expected to witness the day when the Supreme Court of the United States would render a decision which casts grave doubt on the constitutionality of the composition of the House of Representatives. It is not an exaggeration to say that such is the effect of today’s decision.” *Id.* at 20 (Harlan, J., dissenting). Since *Baker*, the Supreme Court has freely expanded its judicial arm around both Congress and the state legislatures. See *Roudebush v. Hartke*, 405 U.S. 15 (1972); *Powell v. McCormack*, 395 U.S. 486 (1969); *Bond v. Floyd*, 385 U.S. 116 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964). The latest reapportionment cases indicate that the Court is in firm control of what at one time was considered a political question. See *Bush v. Vera*, 116 S. Ct. 1941 (1996); *Miller v. Johnson*, 115 S. Ct. 2475 (1995); *United States Dept. of Commerce v. Montana*, 503 U.S. 442 (1992).

81. In *Lewis v. Casey*, 116 S. Ct. 2174, 2179 (1996), the Court reiterated the constitutional principal that “that prevents courts of law from undertaking tasks assigned to the political branches.” Considering a claim filed by twenty-two prison inmates that the State prison was depriving them of their rights of access to the courts and counsel, the Court stated, “[I]t is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.” *Id.* In the setting of prisons, the Court added, “[I]t is for the political branches of the State and Federal Governments to manage prisons in such fashion that official interference with the presentation of claims will not occur.” *Id.* See also *Nixon v. U.S.*, 113 S. Ct. 732 (1993). In *INS v. Chadha*, 462 U.S. 919, 951 (1983), the Court stated, “The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility.” *But see also* *U.S. v. Munoz-Flores*, 495 U.S. 385 (1990); *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221 (1986).

82. 239 U.S. 441 (1915).

83. *Id.* at 445.

84. *Id.*

85. *Id.*

86. 495 U.S. 33 (1990).

87. See *id.* at 55.

88. U. S. CONST. art. I, § 7, cl. 1. In *U.S. v. Munoz-Flores*, 495 U.S. 385, 397-98 (1990), the Court explained that the Origination Clause is limited to “a statute that raises revenue to support Government gener-

“[I]mposing Taxes on us without our Consent” was one of the grievances listed against the King of Great Britain that led to the historic Declaration of Independence.<sup>89</sup> Under the new government by and for the People of the United States, the Framers believed this grievance would never again occur. Requiring that all revenue measures originate in the House of Representatives, the drafters of the Constitution sought to insure that there would never again be an unconsented tax on the people. In the context of the republican form of government, the People give their consent through their representatives elected to the House.

This left the question of whether the Court’s decision in *Missouri v. Jenkins* ran counter to the Constitutional history and to the drafters’ structural division of powers? Four members of the Court<sup>90</sup> thought it might. Justice Kennedy in a concurring opinion stated that the description of judicial power incorporated in Article III does not include “the word ‘tax’ or anything that resembles it.”<sup>91</sup> A judicial claim to the power of taxation without consent would resurrect the same grievance that the people filed against the King of Great Britain. Clearly, the Framers had no understanding that taxation would ever be considered “a proper area for judicial involvement.”<sup>92</sup> In *The Federalist No. 78*, Alexander Hamilton compared the respective power of the legislative branch to the judicial branch:

The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.<sup>93</sup>

Considering the exclusive legislative power assigned to Congress in the context of the constitutional framers’ conscious choice of a republican form of

ally.” See also *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897).

89. THE DECLARATION OF INDEPENDENCE para. 19 (U.S. 1776). The unanimous Declaration of Independence of the thirteen United States of America was adopted on July 4, 1776.

90. Justice Kennedy wrote a concurrence and was joined by Chief Justice Rehnquist, Justice O’Connor and Justice Scalia. See *Jenkins*, 495 U.S. at 58.

91. *Id.* at 65 (Kennedy, J., concurring).

92. *Id.* (Kennedy, J., concurring).

93. THE FEDERALIST NO. 78, at 522-23 (Alexander Hamilton) (Cooke ed., 1961). A portion of this passage was quoted in Justice Kennedy’s concurring opinion in *Jenkins*. See *Jenkins*, 495 U.S. at 65 (Kennedy, J., concurring). Justice Frankfurter, in his dissenting opinion in *Baker*, also drew on the wisdom expressed by Hamilton. He wrote:

Disregard of inherent limits in the effective exercise of the Court’s “judicial Power” not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. It may well impair the Court’s position as the ultimate organ of “the supreme Law of the Land”. . . . The Court’s authority — possessed of neither the purse nor the sword — ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court’s complete detachment, in fact and in appearance, from political entanglements . . . .

*Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (emphasis added).

government, it becomes somewhat more critical when Congress delegates that power to an administrative agency, beyond the immediate political reach of the people. Yet how could government otherwise protect the people? Delegation of legislative authority grew out of a clear necessity of government, particularly with the establishment of a national character for corporations as legal entities.<sup>94</sup> In the late 1800s, the farmers, workers and other people came under the tight domination of the national corporation.

Justice John Marshall Harlan, in a concurring and dissenting opinion filed in *Standard Oil Co. of New Jersey v. United States*,<sup>95</sup> described the conditions in the business world in 1890 that alerted Congress of the need for strong legislation to check growing monopolistic practices.<sup>96</sup> Dissenting to the Court's "rule of reason" interpretation of the Sherman Antitrust Act,<sup>97</sup> Justice Harlan wrote:

All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The Nation had been rid of human slavery . . . but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people, namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country . . . .<sup>98</sup>

Such danger from the great aggregations of capital, explained Justice Harlan, had to "be met firmly and by such statutory regulations as would adequately protect the people against oppression and wrong."<sup>99</sup> Congress had already responded with the Interstate Commerce Act in 1887<sup>100</sup> and the Sherman Antitrust Act in 1890.<sup>101</sup> Senator James Z. George of Mississippi, though questioning the authority of Congress to adopt such strong economic legislation as that offered by the Sherman Act, still recognized the terrible need for regulating the growing power of national corporations.<sup>102</sup> Taking the floor of Congress, Senator George remarked:

94. See *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839).

95. 221 U.S. 1 (1911).

96. See *id.* at 82-105 (Harlan, J., concurring and dissenting). Though the Court found *Standard Oil* to be a monopoly, the Court established the "rule of reason," which led Justice Harlan to dissent. See *id.*

97. Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-36 (1994)).

98. *Standard Oil*, 221 U.S. at 83 (Harlan, J., concurring and dissenting).

99. *Id.* at 84 (Harlan, J., concurring and dissenting).

100. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (1887) (repealed 1995). The Interstate Commerce Commission created by Congress in 1887, was given "authority to inquire into management of the business of all common carriers subject to the provisions of [the] act," and was mandated to "keep itself informed as to the manner and method in which the same is conducted." *Id.* at 383. Then after operating with expanding power for almost one hundred and ten years, the Interstate Commerce Commission was abolished by Congress. The Interstate Commerce Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 804 (1995), simply read: "The Interstate Commerce Commission is abolished."

101. Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-36 (1994)).

102. 21 CONG. REC. 2598 (1890) (remarks of Senator George).

Certainly there is no subject likely to engage the attention of the present Congress in which the people of this country are more deeply interested than in the subject of trusts and combinations. These evils have grown within the last few years to an enormous magnitude; enormous also in their numbers. They cover nearly all the great branches of trade and of production in which our country is interested. They grow out of the present tendency of economic affairs throughout the world. It is a sad thought to the philanthropist that the present system of production and of exchange is having that tendency which is sure at some not very distant day to crush out all small men, all small capitalists, all small enterprises. This is being done now. We find everywhere over our land the wrecks of small independent enterprises thrown in our pathway.<sup>103</sup>

This federal legislation came only after it had become apparent that the individual states lacked the power and authority to regulate the growing interstate giants. In *Wabash, St. Louis & Pac. Ry. v. Illinois*,<sup>104</sup> decided in 1886, the Court struck down an Illinois statute intended to prevent unjust discrimination in freight rates by railroads.<sup>105</sup> One year later, Congress responded with a relatively timid effort to regulate the railroads through power delegated to the Interstate Commerce Commission.<sup>106</sup> Although weak in terms of power, this Congressional delegation of authority to the ICC was still a major step toward the evolution of a government of administrative agencies. Then in 1914, Congress created a major and powerful agency, the Federal Trade Commission, in response to the perceived uncertainty of antitrust enforcement policy created by the Supreme Court's "rule of reason."<sup>107</sup> Justice Frankfurter, in his dissenting opinion filed in *FTC v. Motion Picture Advertising Co.*,<sup>108</sup> noted the enormity of the power delegated to the Federal Trade Commission compared to an agency like the Interstate Commerce Commission.<sup>109</sup> He compared the two agencies to demonstrate the need for strict judicial review: "[T]he Interstate Commerce Act dealt with governmental regulation not only of a limited sector of the economy but of economic enterprises that had long been singled out for public control."<sup>110</sup> Justice Frankfurter continued, "On the other hand, the Federal Trade Commission Act gave an administrative agency authority over economic controls of a different sort that began with the Sherman Law — restrictions upon the whole domain of economic enterprise engaged in interstate com-

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103. *Id.*

104. 118 U.S. 557 (1886).

105. *See id.* at 562. Until this decision by the Court, Congress had declined to take action against the abuses of the railroads. *See* JOHN F. STOVER, AMERICAN RAILROADS 126 (1961).

106. *See* Justice Harlan's dissent in *ICC v. Alabama Midland Ry. Co.*, 168 U.S. 144, 176-77 (1897).

107. *See* Federal Trade Commission Act of 1914, Pub. L. No. 203, 38 Stat. 717 (1914). In 1914, Congress was responding to the ineffectiveness of the Sherman Antitrust Act of 1890, weakened by the Supreme Court in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), and its companion case, *United States v. American Tobacco Co.*, 221 U.S. 106 (1911). In those cases, the Court used harsh language but at the same time interpreted section 1 of the Sherman Act to prohibit only those restraints of trade considered by the courts to be unreasonable. *See* 51 CONG. REC. 9873, 9876 (1914) (remarks of Mr. Murdock). *See also* 51 CONG. REC. 1866, 8840 (1914); 51 CONG. REC. 11,081, 11,237 (1914).

108. 344 U.S. 392 (1952).

109. *See id.* at 404 (Frankfurter, J., dissenting).

110. *Id.* (Frankfurter, J., dissenting).

merce.”<sup>111</sup> Based on this comparison, Justice Frankfurter concluded that the interpretation of Section 5 of the FTC Act, the prohibition of “unfair methods of competition . . . was not entrusted to the Commission for *ad hoc* determination within the interstices of individual records but was left for ascertainment by this Court.”<sup>112</sup>

Without doubt, “[t]he power granted [to the FTC] is far-reaching in its results, and of a most salutary character.”<sup>113</sup> Not surprisingly, with such an accolade from the court, the power delegated to the Commission withstood the nondelegation challenge. Ruling against the delegation challenge, the Court in *T.C. Hurst & Son v. FTC*, stated that “it is manifestly within the power of Congress to legislate generally in respect to the burdens that may or may not be imposed upon foreign and interstate commerce.”<sup>114</sup> In another FTC case, *Sears, Roebuck & Co. v. FTC*,<sup>115</sup> the court linked the delegation of authority to the Commission to a necessity of government. “With the increasing complexity of human activities,” explained the court, “many situations arise where governmental control can be secured only by the ‘board’ or ‘commission’ form of legislation.”<sup>116</sup> In *Sears*, the court acknowledged that the power delegated to the Commission “may be deemed to be quasi legislative,” however, the court also explained, “it is so only in the sense that it converts the actual legislation from a static into a dynamic condition. But the converter is not the electricity.”<sup>117</sup>

As long as Congress did not surrender the “electricity” itself, the court in *Sears* manifested a willingness to allow the Commission to exercise “quasi legislative” powers that had been delegated by Congress. Up until 1928, the Supreme Court, in its review of the nondelegation issue, had verbalized the constitutional constraints embedded in Article I, that all legislative power is vested in a Congress. Yet, through the use of fiction, the Court allowed the delegation to stand with the finding that the authority delegated was not in fact “legislative” power.<sup>118</sup> In *United States v. Grimaud*,<sup>119</sup> decided in 1911, the Court recognized an element of government necessity when considering the delegation issue. “In the nature of things,” the Court stated, “it was impracticable for Congress to provide general regulations for these various and varying details of management [and preservation of public forests].”<sup>120</sup> The govern-

111. *Id.* at 405 (Frankfurter, J., dissenting).

112. *Id.* (Frankfurter, J., dissenting). As enacted in 1914, the prohibiting language in section 5 of the Federal Trade Commission Act, read: “That unfair methods of competition in commerce are hereby declared unlawful.” Federal Trade Commission Act of 1914, § 5, 38 Stat. at 719.

113. *T. C. Hurst & Son v. FTC*, 268 F. 874, 877 (E.D. Va. 1920).

114. *Id.* at 877.

115. 258 F. 307 (7th. Cir. 1919).

116. *Id.* at 312. *See also* National Harness Mfrs. Ass’n v. FTC, 268 F. 705, 707 (6th Cir. 1920).

117. *Sears*, 258 F. at 312.

118. *See* ICC v. Goodrich Transit Co., 224 U.S. 194, 214-15 (1912); *United States v. Grimaud*, 220 U.S. 506, 516 (1911); *Field v. Clark*, 143 U.S. 649, 680-85 (1892); *Cargo of Brig Aurora Burn Side v. United States*, 11 U.S. (7 Cranch) 382 (1813).

119. 220 U.S. 506 (1911).

120. *Id.* at 516. In *Grimaud*, the defendant was charged with the criminal act of grazing sheep on the Sierra Forest Reserve in violation of the rules promulgated by the Secretary of Agriculture. *See id.* at 509.



ment had asked the Court to relax the "general theory of government that there should be no union between the several departments" so that the government could more efficiently protect its public lands.<sup>121</sup>

Justice Lamar, writing for the Court, agreed that the general theory of separation of powers should not be so strictly followed.<sup>122</sup> Though he did acknowledge the difficulty in defining "the line which separates legislative power to make laws, from administrative authority to make regulations."<sup>123</sup> Ultimately, the Court determined that the rule making authority delegated to the Secretary of Agriculture was not legislative power. Specifically, the Court held, "Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power."<sup>124</sup> In *Wayman v Southard*,<sup>125</sup> Chief Justice Marshall acknowledged that the line separating the divisions of government had not "been exactly drawn."<sup>126</sup> In fact, the framers of our Constitution never intended that there be an absolute separation of powers.

### C. No Absolute Separation

James Madison, in *The Federalist No. 47*, made it clear: "On the slightest view of the British constitution we must perceive, that the legislative, executive and judiciary departments are by no means totally separate and distinct from each other."<sup>127</sup> So if not absolute, when is the constitutional structural division of governmental powers violated? Madison addressed this question in *The Federalist No. 48*. Madison wrote, "It was shewn in the last paper, that the political apothegm there examined, does not require that the legislative, executive and judiciary departments should be wholly unconnected with each other."<sup>128</sup> Certainly, "a mere demarkation on parchment of the constitutional limits of the several departments," Madison cautioned, "is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."<sup>129</sup>

121. *Id.* at 512.

122. *See id.* at 517.

123. *Id.* The Court stated, "This difficulty has often been recognized . . ." *Id.* In *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825), relied upon by the Court in *Grimaud*, Chief Justice Marshall, considering Congressional authority delegated to the courts to make rules, stated, "It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative." However, the Chief Justice upheld the validity of the delegation, stating, "Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself." *Id.* at 43. *See also* *Union Bridge Co. v. United States*, 204 U.S. 364, 378-88 (1907).

124. *Grimaud*, 220 U.S. at 516.

125. 23 U.S. (10 Wheat.) 1 (1825).

126. *Id.* at 43.

127. THE FEDERALIST NO. 47, at 325 (James Madison) (Cooke ed., 1961). *See also* DIETZE, *supra* note 32, at 127; EPSTEIN, *supra* note 32, at 130; Sharp, *supra* note 24, at 407.

128. THE FEDERALIST NO. 48, at 332 (James Madison) (Cooke ed., 1961).

129. *Id.* at 338. Professor Malcolm Sharp wrote: "Madison . . . observed that a paper separation, such as had been relied on by some of the states, was useless. This amounted to no more than putting faith in the faithless legislature." Sharp, *supra* note 24, at 409. Madison wrote:

As the legislative department alone has access to the pockets of the people, and has in some Constitutions full discretion, and in all, a prevailing influence over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to

Then in 1928, the Supreme Court took what it referred to, in *J.W. Hampton, Jr. & Co. v. United States*,<sup>130</sup> as a “common sense” approach to the delegation issue.<sup>131</sup> Specifically, the Court stated, “If Congress were to be required to fix every rate, it would be impossible to exercise the power at all. Therefore, common sense requires that in the fixing of such rates, Congress may provide a Commission . . . to fix those rates . . . .”<sup>132</sup> The Court then established the delegation principle that “[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”<sup>133</sup>

*Hampton* set the stage for a more aggressive move by Congress to create in reality a new and higher realm administered by administrative agencies. As expected, Congress quickly accepted the judicial license to delegate a greater and more diverse authority to the President and to newly created administrative agencies. Government necessity reached new heights as Congress sought ways to help pull the country from the grips of the great depression. In 1930, Congress established the Federal Power Commission.<sup>134</sup> Three years later, Congress enacted the National Industrial Recovery Act,<sup>135</sup> and created the Securities Exchange Commission,<sup>136</sup> and the Federal Communications Commission.<sup>137</sup> Then in 1938, Congress enacted the Civil Aeronautics Act.<sup>138</sup>

Of all these enactments, it was the National Industrial Recovery Act that provided the major impetus in what configuration administrative procedure and judicial review would take. The preamble to that Act read: “To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works.”<sup>139</sup> Title I of the Act began with a Congressional declaration of a “national emergency productive of widespread unemployment and disorganization of industry, which . . . undermines the standard of living of the American people.”<sup>140</sup> Addressing this national emergency, Congress delegated to the President authority to approve “a code or codes of fair competition” drafted and presented to him by private “trade or industrial

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encroachments of the former.

THE FEDERALIST NO. 48, at 334 (James Madison) (Cooke ed., 1961).

130. 276 U.S. 394 (1928).

131. *See id.* at 407.

132. *Id.* at 407-08.

133. *Id.* at 409. *See also* *ICC v. Goodrich Transit Co.*, 224 U.S. 194, 214 (1912).

134. *See* Pub. L. No. 412, 46 Stat. 797 (1930). Congress extended the scope of authority for the act by adding electricity in the Federal Water Powers Act, Pub. L. No. 333, 49 Stat. 838 (1935), and natural gas in Pub. L. No. 688, 52 Stat. 821 (1938).

135. Pub. L. No. 67, 48 Stat. 195 (1933).

136. Pub. L. No. 291, 48 Stat. 881 (1934).

137. Pub. L. No. 416, 48 Stat. 1064 (1934).

138. Pub. L. No. 706, 52 Stat. 973 (1938).

139. 48 Stat. at 195.

140. *Id.*

organization, associations, or groups."<sup>141</sup> Additionally, Congress authorized the President

to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State.<sup>142</sup>

Considering the petroleum industry's economic problems which had national consequences, it was not surprising that Congress intended to delegate broad powers to the President. With the East Texas oil field commanding so much attention, such expansive delegation might easily be defended on the ground of governmental necessity. It all started with the Daisy Bradford Three gusher that opened the East Texas oil field.<sup>143</sup> By the end of May 1931, the oil market had become turbulently depressed from the uncontrolled production that sent the price of crude oil spiraling downward to a low of six cents a barrel.<sup>144</sup> Violence and economic waste marked the need for drastic action.<sup>145</sup> On August 16, 1931, Ross S. Sterling, Governor of the State of Texas, issued a proclamation, declaring "a state of insurrection, tumult, riot, and a breach of the peace."<sup>146</sup> Governor Sterling then declared martial law and ordered Jacob F. Wolters, brigadier general of the Texas National Guard, to take control of the oil fields and to enforce Sterling's executive order drastically limiting the level of production.<sup>147</sup>

But on October 13, 1931, the district court had issued a temporary order restraining the Governor from enforcing his seizure of the oil field.<sup>148</sup> Attracting national attention, Congress addressed this same problem in section 9 of the National Industrial Recovery Act. But then, in *Panama Refining Co. v. Ryan*,<sup>149</sup> the Supreme Court invalidated this Congressional effort to solve the problems stemming from inadequately controlled oil production. Section 9 of the NIRA was held to be an unconstitutional delegation of legislative powers.<sup>150</sup> One needs to look at section 9 of the NIRA in terms of the total lack of procedural protection for oil men caught in the vice of transporting across state

141. *Id.* § 3(a), 48 Stat. at 196. In *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Court struck down this portion of the NIRA as being an unlawful delegation of legislative powers.

142. National Industrial Recovery Act, § 9(c), 48 Stat. at 200.

143. See Kent Biffle, *Boom Turned E. Texas Into a Free-For-All*, THE DALLAS MORNING NEWS, Sept. 9, 1990, at 43A.

144. See *id.*

145. See *id.*

146. *Sterling v. Constantin*, 287 U.S. 378, 387 (1932).

147. See *id.*

148. See *id.* at 387-88. On December 12, 1932, the Supreme Court affirmed the decision of the lower court that the seizure of the East Texas oil field was unconstitutional. *Id.* For another related case dealing with the East Texas oil field, see *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (an antitrust case that arose after the independent oil companies got together and worked out the problems that caused the depressed oil market caused by over production).

149. 293 U.S. 388 (1935).

150. See *id.* at 430.

lines the overproduction of crude oil from the East Texas oil field and other major producing areas. Such conduct, it must be remembered, had not been made illegal by Congress.

Whether the act of transporting in interstate commerce of this "hot oil" was to be made a criminal act, was a decision delegated by Congress solely to the President. Under the Act, the President was authorized to prohibit the transportation of this "hot oil" in interstate commerce.<sup>151</sup> On July 11, 1933, under authority delegated to him by Congress, President Franklin Roosevelt signed an Executive Order prohibiting the transportation of "hot oil" in interstate commerce.<sup>152</sup> An executive decision was issued without any notice or participation by the persons affected. In October 1933, Panama Refining Company, owner of a refining plant in Texas, challenged the constitutionality of Section 9 of the NIRA on the ground that Congress had unlawfully delegated legislative power to the President. The Supreme Court agreed. In *Panama Refining*, the Court held section 9 of the Act unconstitutional:

If § 9(c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function. . . . Instead of performing its law-making function, the Congress could at will and as to such subjects as it chooses transfer that function to the President or other officer or to an administrative body.<sup>153</sup>

What the Court was saying in *Panama Refining* was even more clearly brought out in *A.L.A. Schechter Poultry Corp. v. United States*.<sup>154</sup> This was the second case in which the Court invalidated a portion of the National Industrial Recovery Act under the nondelegation doctrine.<sup>155</sup>

*Schechter* involved section 3(a) of the Act which in effect delegated broad authority to private trade or industrial associations or groups. Section 3 authorized the President, upon the application of private trade associations, to approve "a code or codes of fair competition for the trade or industry."<sup>156</sup> Considered collectively, the numerous "codes of fair competition" put into effect after the NIRA went into effect substantially altered the private economic sector from one of free competition to a managed economy. Section 3(a) of the Act authorized private industrial associations to draft codes of *fair competition* which, after their approval, legally controlled all members of the particular

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151. *See id.* at 406-07.

152. *See id.* Roosevelt's order prohibiting the transportation of the "hot oil" was Executive Order 6199, issued on July 11, 1933. This was then followed by Executive Order 6204, issued on July 14, delegating to the Secretary of Interior all powers vested in the President to enforce the prohibition.

153. *Panama Refining*, 293 U.S. at 430.

154. 295 U.S. 495 (1935).

155. *See supra* note 141.

156. *See* National Industrial Recovery Act, Pub. L. No. 67, § 3(a), 48 Stat 195, 196 (1933).

industry groups.<sup>157</sup> Of course, the private codes did not legally go into effect, unless and until the President gave his approval.<sup>158</sup>

What level of review the President actually gave to the codes of fair competition is not known and is beyond the scope of this article. Yet, a review of the *Congressional Information Service Index to Presidential Executive Orders & Proclamations* yields some idea of the expanse of the private regulations imposed on the economy.<sup>159</sup> During the six-month period after the NIRA went into effect, hundreds of Presidential executive orders were issued on various codes of fair competition presented for approval. A general scrutiny of the *CIS Index* offers a glimpse of the nature and composition of the U.S. economy in 1933. The first ten entries of the fair competition executive orders offers a reminder of the early presence in this country of textiles: Silk Association of America, Cotton Thread Industry, Textile finishing industry, Underwear and allied products industry, Silk and rayon dyeing and printing industry, Ship building and ship repairing industry, Wool textile industry, Hosiery Manufactures, Association of Garment Manufactures, and National Council of Pajama Manufactures.<sup>160</sup>

Even before the Supreme Court decided the *Panama Refining* and *Schechter* cases, the Congress had under consideration H.R. 6323, an act "to provide for the custody of Federal proclamations, orders, regulations, notices, and other documents, and for the prompt and uniform printing and distribution thereof."<sup>161</sup> Congress was quite aware of the procedural deficiency in this new and exploding area of administrative law. During debates on this Federal Register proposal, Congressman Emanuel Celler made this observation:

In the first 15 months after March 4, 1933, the President alone issued 674 Executive orders, aggregating approximately 1,400 pages. This was a greater volume than that of the preceding 4 years, and nearly six times as great as that for the 39 years from 1862 through 1900. Moreover, in the first year of the National Recovery Administration 2,998 administrative orders were issued.<sup>162</sup>

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157. See *id.* Section 3(b) of the NIRA provides: "After the President shall have approved any such code, the provisions of such code shall be the standards of fair competition for such trade or industry or subdivision thereof." Provisions of the codes were enforceable in federal courts. Section 3(c) read: "The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of any code of fair competition approved under this title . . ." *Id.*

158. See *id.* That in this approval process, Section 3(a) includes this provision: "That where such code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes." *Id.* It is not known and it is beyond the scope of this paper to what extent there were such hearings prior to the President's approval.

159. See *CIS INDEX TO PRESIDENTIAL EXECUTIVE ORDERS & PROCLAMATIONS, PART II: MAR. 4, 1921 TO DEC. 31, 1983, WARREN HARDING TO RONALD REAGAN* 113-33 (1986).

160. See *id.* at 113-16. A sampling of the industries filing codes of fair competition during the first six months of the law provides a nostalgic journey through history. To name a few: saddlery manufacturing industry, umbrella manufacturing industry, handkerchief industry, lace curtain industry, soap and glycerine industry, ladder manufacturing, wood plug industry, and the mop stick industry. The list suggests a noticeable absence of the big conglomerates that we have today.

161. 79 CONG. REC. 2807 (1935).

162. 79 CONG. REC. 4788 (1935) (remarks of Cong. Celler). These statistics recited by Congressman

Congress was apparently influenced by Professor Erwin N. Griswold, of the Harvard Law School, who in 1934 wrote:

Administrative regulations “equivalent to law” have become important elements in the ordering of our lives today. . . . [T]he volume of these rulings has so increased that full, accurate, and prompt information of administrative activity is now quite as important to the citizen and to his legal advisor as is knowledge of the product of the Congressional mill.<sup>163</sup>

Professor Griswold drew upon the procedure followed with respect to the publication of statutes in recommending a similar procedure for the publication of administrative rules and orders. He noted, “Congressional enactments are readily available to the profession . . . [through] the Statutes at Large . . . .”<sup>164</sup>

Griswold suggested a solution that he considered “amazingly simple.”<sup>165</sup> On July 22, 1935, Congress adopted Professor Griswold’s suggestion by sending H.R. 6323 to the President.<sup>166</sup> Four days later, on July 26, 1935, the President approved and signed the bill. Now, just two months after *Schechter Poultry* was handed down by the Supreme Court, the Federal Register Act, the first step in opening the business of agencies to greater public light, was in place.<sup>167</sup> Shortly thereafter, Congress began working on a more comprehensive measure to control the growth and power of administrative agencies to “provide for the more expeditious settlement of disputes with the United States, and for other purposes.”<sup>168</sup>

This measure was the highly controversial Walter-Logan bill, named for its sponsors, Senator M. M. Logan of Kentucky, and Representative Francis E. Walter of Easton, Pennsylvania. Supported by the American Bar Association, the measure would, some believed, incapacitate the administrative process that had taken such a surge during the 1930s.<sup>169</sup> Representative Adolph J. Sabath of Chicago was one of the vocal opponents of the proposition. Attempting to hasten the debate and to silence Sabath, Representative E. E. Cox of Georgia inquired, “Has the gentleman completed his statement in opposition to the

Cells were drawn directly from Erwin N. Griswold, *Government In Ignorance of The Law — A Plea For Better Publication of Executive Legislation*, 48 HARV. L. REV. 198, 198-99 (1934).

163. Griswold, *supra* note 162, at 198.

164. *Id.* at 203.

165. *Id.* at 205.

166. See 79 CONG. REC. 11,607 (1935).

167. See Federal Register Act, Pub. L. No. 74, 49 Stat. 500 (1935). For a discussion of the Federal Register Act, see Urban A. Lavery, “*The Federal Register*” — *Official Publication For Administrative Regulations, Etc.*, 7 F.R.D. 625 (1947). See also John H. Wigmore, *The Federal Register and Code of Federal Regulations*, 29 A.B.A. J. 10 (1943); David C. Eberhart, Jr., Note, *Federal Register Documents: Effective Dates and Constructive Notice Before and After The Administrative Procedures Act*, 35 GEO. L.J. 354 (1947).

168. 86 CONG. REC. 4738 (1940). For a discussion of the Walter-Logan bill, see Marshall J. Breger, *Administrative Law After Forty Years*, 33 FED. B. NEWS & J. 297 (1986); Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 226 (1986); James M. Landis, *Crucial Issues In Administrative Law*, 53 HARV. L. REV. 1077 (1940); Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 271 (1978). See also President Franklin D. Roosevelt’s veto message, 86 CONG. REC. 13942 (1940), reprinted in 27 A.B.A. J. 52 (1941).

169. See Verkuil, *supra* note 168, at 272.

amendment offered by the gentleman from Illinois? If he has, let us vote."<sup>170</sup> Sabath responded, "I will let the gentleman from Georgia know when I am ready to conclude."<sup>171</sup>

He then addressed the bill's sponsor, by stating, "Knowing the gentleman from Pennsylvania [Mr. Walter] as I do, I fear that he has been imposed upon by the proponents of this bill, the gentlemen of the American Bar Association."<sup>172</sup> As part of his remarks in opposition to the Walter-Logan bill, Congressman Sabath inserted into the record the Brookings Institute report, opposing the legislation, in its entirety.<sup>173</sup> The bill placed the courts, specifically the Court of Appeals for the District of Columbia, squarely in the center of the administrative process with few limitations. Professor Verkuil observed, "The bill provided for judicial review that was particularly intrusive into the administrative process."<sup>174</sup> On this point, the Brookings Institute report read:

The ultimate consequence [of this bill] would be not only to swamp the Court of Appeals for the District of Columbia and the circuit courts of appeals with a flood of minor administrative matters that have never been regarded as justifiable cases or controversies, but to retard and hamper the work of the executive branch of the Government to an intolerable degree. The control of the executive branch would be transferred to the courts, and the performance of all executive duties would be subjected to the supervision and control of the judiciary. Theoretically, this is contrary to the basic ideas of our form of government, which makes a clear demarcation between executive and judicial duties.<sup>175</sup>

Still, with support from the American Bar, the bill passed. Then it was vetoed by President Franklin D. Roosevelt on December 18, 1940. "I am convinced," the President said in his veto message to Congress, "that in reality the effect of this bill would be to reverse and, to a large extent, cancel one of the most significant and useful trends of the twentieth century in legal administration."<sup>176</sup> Of course, the "useful trends of the twentieth century" were, in a large measure the creation of Roosevelt's New Deal policy, characterized by the transfer of enormous blocks of power over to administrative agencies. The Walter-Logan bill unduly challenged this New Deal social philosophy by increasing the role of the Court. Defending his program, Roosevelt continued his veto message:

That movement [had] its origin in the recognition even by courts themselves that the conventional processes of the courts are not adapted to handling controversies in the mass. Court procedure is adapted to the intensive investigation of individual controversies. But it is impossible to

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170. 86 CONG. REC. 4738 (1940) (remarks of E. E. Cox).

171. 86 CONG. REC. 4738 (1940) (remarks of Adolph J. Sabath).

172. *Id.*

173. See 86 CONG. REC. 4738-40 (1940). The Brookings report concluded: "It is urged, in view of all the foregoing considerations, that the legislation should not be enacted." *Id.*

174. Verkuil, *supra* note 168, at 271.

175. 86 CONG. REC. 4740 (1940).

176. *Id.* at 13,942.

subject the daily routine of fact-finding in many of our agencies to court procedure.<sup>177</sup>

The Walter-Logan debate had involved the critical question of the appropriate level of judicial involvement in the administrative process. In a report accompanying Roosevelt's veto message, Attorney General Robert H. Jackson, explained this level of judicial involvement. He wrote:

The bill provides that any party to an administrative proceeding who is aggrieved by the final decision of the agency may secure review in a circuit court of appeals or the Court of Appeals for the District of Columbia. Already under existing statutes specific decisions affecting the rights of individuals are made subject to judicial review. This act, however, does not confine review to the specific matters heretofore allowed but sweeps into the judicial hopper all manner of questions which have never before been considered appropriate for judicial review.

For example, such matters as the awarding of contracts, the acceptance or rejection of supplies, the granting or withholding of compensation or hospitalization from a veteran, fraud orders of the Post Office Department, the granting or withholding of a license for a vessel or of a master's or mate's ticket, the determination of claims for benefits under the Social Security Act are a few examples, taken at random, of governmental actions of an executive or administrative nature which may become subject to judicial review were this bill to become law, but which have never been regarded as so reviewable. The ultimate consequences would be not only to swamp the courts with a flood of minor administrative matters but to retard and hamper the work of the executive branch of the Government. The discretion which must be exercised in performance of executive duties would, to a considerable extent, be transferred to the courts.<sup>178</sup>

Roosevelt agreed with his Attorney General. In concluding his veto message to Congress, President Roosevelt expressed concern for the consequences of the proposed increased judicial scrutiny of administrative agencies. He further wrote:

I am convinced that it would produce the utmost chaos and paralysis in the administration of the Government at this critical time. I am convinced that it is an invitation to endless and innumerable controversies at a moment when we can least afford to spend either governmental or private effort in the luxury of litigation . . . . For these reasons I return the bill without my approval.<sup>179</sup>

Roscoe Pound severely criticized President Roosevelt's Walter-Logan veto message to Congress. "This message," Pound told the Judicial Section of the New York State Bar Association

is so thoroughly in keeping with the Marxian idea of the disappearance of law, now much in fashion, and so much in the spirit of the absolute ideas

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177. *Id.*

178. *Id.* at 13,945.

179. *Id.* at 13,943.



which have been making headway all over the world in the past two decades, that it deserves to be made the text for a discussion of the place of the judiciary in our democracy.<sup>180</sup>

Walter Gellhorn could not understand the temper of Pound's criticism of Roosevelt's message to Congress. To this effect he wrote, "After reading this characterization of the veto message . . . [and] re-read[ing] the message twice, [I] . . . failed to identify what had set the alarm bells ringing in Dean Pound's mind."<sup>181</sup>

Forgotten during the Walter-Logan debate was the role that judicial review played in the evolution of the "intelligible principle" of delegation enunciated by the Supreme Court in the *Hampton* case.<sup>182</sup> In fact, it may have been the very presence of a protective level of judicial review, supplanting thereby the constitutionally structured political safety that the people had against legislative abuse, that served as the back-drop to the evolving justification for allowing vast measures of power to be transferred by Congress into the hands of administrative agencies. For example, in upholding the powers delegated to the Federal Trade Commission, the Sixth Circuit, in *National Harness Mfrs.' Ass'n v. FTC*,<sup>183</sup> observed that "[t]he commission's determination of these questions [unfair methods of competition] is not final."<sup>184</sup> The court stated:

Not only does the statute give a right of review thereon, upon application by an aggrieved trader, to a Circuit Court of Appeals of the United States, but the commission's order is not enforceable by the commission, but only by order of court. "It is for the courts, not the commission, ultimately to determine as matter of law" what the words "unfair methods of competition" include.<sup>185</sup>

In *National Harness*, the Sixth Circuit stressed the fact that "[t]hroughout the proceedings, not only before the commission, but before the court, the trader is given the right and opportunity to be heard. The act delegates to the commission no judicial powers, nor does it, in our opinion, confer invalid executive or administrative authority."<sup>186</sup> Even clearer perhaps was the court in *T.C. Hurst & Son v. FTC*, upholding the broad powers delegated to the Commission. In *Hurst* the court observed:

The commission is given full power and authority to investigate, make finding of fact, and render its judgment and order in relation thereto, *and before the same is carried into effect, the judgment of the Circuit Court of Appeals, the second highest court under the government, is to be sought by the commission, to enforce its order, and any party required by such order to cease and desist from using such method of competition may*

180. Roscoe Pound, *The Place of the Judiciary in a Democratic Polity*, 27 A.B.A. J. 133, 133 (1941).

181. Gellhorn, *supra* note 168, at 226 n.22.

182. See *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

183. 268 F. 705 (6th Cir. 1920).

184. *Id.* at 707.

185. *Id.* (quoting *FTC v. Gratz*, 253 U.S. 421, 427 (1920)).

186. *Id.*

obtain a review of such order in the Circuit Court of Appeals, by filing its written petition praying therefor.<sup>187</sup>

The Federal Trade Commission Act,<sup>188</sup> passed by Congress in 1914, during the fictional phase of the nondelegation doctrine, offers the best example of the linkage between judicial review and permissible delegation. In *Sears, Roebuck & Co. v. FTC*, the Seventh Circuit first noted the “government necessity” that underlies Congress’ delegation of authority to an agency. Specifically, the court held, “With the increasing complexity of human activities many situations arise where governmental control can be secured only by the ‘board’ or ‘commission’ form of legislation.”<sup>189</sup> Acknowledging that the power delegated to the FTC, to decide what conduct is an “unfair method of competition,” might be considered “quasi legislative,” the court, upholding the authority delegated, stated, “And though the action of the commission . . . may be counted quasi judicial on account of its form . . . it is not judicial, because a judicial determination is only that which is embodied in a judgment or decree of a court and enforceable by execution or other writ of the court.”<sup>190</sup>

This vital linkage between delegation and judicial review has likewise been recognized by the Supreme Court. First, in *FTC v. Gratz*,<sup>191</sup> the Court noted that the “words ‘unfair method of competition’ are not defined by the statute and their exact meaning is in dispute.”<sup>192</sup> But, “[i]t is for the courts, not the commission, ultimately to determine as matter of law what they include.”<sup>193</sup> Then, in *FTC v. Motion Picture Advertising Service Co.*,<sup>194</sup> the Court reaffirmed this constitutional role of the Court in stating, “The content of the prohibition of ‘unfair methods of competition,’ to be applied to widely diverse business practices, was not entrusted to the Commission for *ad hoc* determination within the interstices of individualized records *but was left for ascertainment by this Court.*”<sup>195</sup>

As the Framers structured the Constitution, the Court was assigned a specific role. In *The Federalist No. 78*, Alexander Hamilton described this function of judicial review.

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.<sup>196</sup>

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187. *T. C. Hurst & Son v. FTC*, 268 F. 874, 877 (E.D. Va. 1920) (emphasis added).

188. Federal Trade Commission Act, Pub. L. No. 203, § 5, 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. § 45 (1994)).

189. *Sears, Roebuck & Co. v. FTC*, 258 F. 307, 312 (7th Cir. 1919).

190. *Id.*

191. 253 U.S. 421 (1920).

192. *Id.* at 427 (emphasis added).

193. *Id.*

194. 344 U.S. 392 (1953).

195. *Id.* at 405 (emphasis added).

196. THE FEDERALIST NO. 78, at 525 (Alexander Hamilton) (Cooke ed., 1961).

Thus, Hamilton described the precursor to *Marbury v. Madison* in that “[i]t is emphatically the province and duty of the judicial department to say what the law is . . . . This is of the very essence of judicial duty.”<sup>197</sup>

#### D. *The Administrative Procedure Act*

Moreover, this fundamental constitutional principle of judicial review became firmly implanted in the 1946 Administrative Procedure Act. Section 10(e) defined the role of the court within the administrative process, stating, “So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action.”<sup>198</sup> This statutory language is quite in line with both *The Federalist No. 78* and *Marbury v. Madison*.

Judicial review was made a critical part of this Administrative Procedure Act. This precept was made clear in the House Report accompanying the measure. “Very rarely,” the Report read

do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.<sup>199</sup>

The role for the courts in the new Administrative Procedure Act was well defined in both the House and Senate Committee Reports. With respect to Congress’ intent for “scope of judicial review,” each report stated in identical language: “*Reviewing courts are required to decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of any agency action.*”<sup>200</sup> Further, the legislative explanation made it even clearer that the interpretation of statutory terms was strictly a judicial function, stating, “This section provides that questions of law are for courts rather than agencies to decide in the last analysis . . . .”<sup>201</sup>

Within the expanding administrative state, the people are left with no choice but to rely on the protection offered by a reviewing court. For with the delegation of legislative power to administrative agencies, the peoples’ political protection against legislative abuse is made less effective. Thus, we see the Court continuing to tie delegation to judicial review. In *Yakus v. United States*,<sup>202</sup> the Court again upheld the constitutional authority of Congress to

197. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803).

198. Administrative Procedure Act, ch. 324, § 10(e), 60 Stat. 237, 243 (1946) (codified as amended at 5 U.S.C. § 706 (1994)).

199. H.R. REP. NO. 1980, 79th Cong. 41 (1946).

200. *Id.* at 44. See also S. REP. NO. 752, 79th Cong. 27 (1945).

201. H.R. REP. NO. 1980, 79th Cong. at 44. See also S. REP. NO. 752, 79th Cong. at 28.

202. 321 U.S. 414 (1944).

delegate authority to an administrative agency.<sup>203</sup> The Court in *Yakus* specifically held, "Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers."<sup>204</sup> This delegation will be upheld by the Court as long as there are "standards . . . sufficiently definite and precise to enable Congress, *the courts* and the public *to ascertain whether the Administrator . . . has conformed to those standards.*"<sup>205</sup>

Again, the Court links its affirmation of the delegation of authority from Congress to the process of judicial review. Judge Leventhal, in a concurring opinion filed in *Ethyl Corp. v. EPA*,<sup>206</sup> explained the trade-off as follows: "Congress has been willing to delegate its legislative powers broadly — and courts have upheld such delegation — because there is court review to assure that the agency exercises the delegated power within statutory limits, and that it fleshes out objectives within those limits by an administration that is not irrational or discriminatory."<sup>207</sup> Under this trade-off, our security against abusive governmental authority essentially must come from the judiciary instead of the political process, upon which the legislative branch is dependent.

It is in this context that we have witnessed an apparent endless proliferation of administrative bodies that in different degrees exercise power over various aspects of life, all in the name of governmental necessity. Additionally, we have seen a growing acceptance of an observable increase in the level of deference given to these "independent" administrative bodies. An example of this is found in *Vermont Yankee*, in which the Supreme Court repelled efforts of the Court of Appeals for the District of Columbia to impose additional procedural requirements on the Atomic Energy Commission's rulemaking authority.<sup>208</sup> In an effort to protect the environmental interest involved, the Court of Appeals had ordered the agency to satisfy a procedural requirement greater than that required by the Administrative Procedure Act. Nevertheless, the Supreme Court concluded, the Court of Appeals had made a "serious departure from the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure."<sup>209</sup>

203. *See id.* at 425-26. *See also* *Lichter v. United States*, 334 U.S. 742, 778-83 (1948).

204. *Yakus*, 321 U.S. at 425-26.

205. *Id.* at 426 (emphasis added).

206. 541 F.2d 1 (D.C. Cir. 1976).

207. *Id.* at 68 (Leventhal, J., concurring) (footnote omitted).

208. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 544-49 (1978).

209. *Id.* at 544 (citing *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976)). In *Transcontinental*, the Court stated:

At least in the absence of substantial justification for doing otherwise, a reviewing court may not, after determining that additional evidence is requisite for adequate review, proceed by dictating to the agency the methods, procedures, and time dimension of the needed inquiry and ordering the results to be reported to the court without opportunity for further consideration on the basis of the new evidence by the agency. Such a procedure clearly runs the risk of "propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.

*Transcontinental*, 423 U.S. at 333 (citation omitted). *See also* *Heckler v. Lopez*, 463 U.S. 1328, 1332-33 (1983); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980).

For more than five decades, the Supreme Court has “emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments.”<sup>210</sup> In *FCC v. Pottsville Broadcasting Co.*,<sup>211</sup> reaffirmed in *FCC v. Schreiber*,<sup>212</sup> the Court said that “administrative agencies . . . should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.”<sup>213</sup> Though federal agencies have been given wide discretion in determining the level of procedure they will follow, the Supreme Court has kept a slight opening in the window of judicial inquiry. In *Vermont Yankee*, the Court created an important pressure valve, with this reservation: “Absent constitutional constraints or extremely compelling circumstances the ‘administrative agencies should be free to fashion their own rules of procedure . . . .’”<sup>214</sup>

Perhaps the most discerning statement of agency procedural discretion in their adoption of new policy is found in *SEC v. Chenery Corp.*<sup>215</sup> Agencies were given “the choice . . . between proceeding by general rule or by individual, *ad hoc* litigation.”<sup>216</sup> This choice, the Court explained, “is one that lies primarily in the informed discretion of the administrative agency.”<sup>217</sup> However, this discretion is not without limits.

In *Ford Motor Co. v. FTC*,<sup>218</sup> the Court of Appeals for the Ninth Circuit noted that with all grants of discretion, “there may be situations where the [agency’s] reliance on adjudication would amount to an abuse of discretion.”<sup>219</sup> What we seem to be left with is this: Subject of course to constitutional due process, administrative agencies are bound to follow the procedural model established by Congress in the enabling act and in the Administrative Procedure Act. Beyond this model, the agencies have discretion to impose a higher, though not lower, level of procedure.

However, it is one thing to allow an agency to exercise such discretion in formulating procedure. It is yet another thing for the administrative unit to be given almost unbounded discretion in the interpretation of the very statutory terms which Congress used in creating and in defining the agency’s delegated authority. It is with this interpretative discretion that brings us squarely to the *Chevron* doctrine. This *Chevron* doctrine of judicial deference to agency inter-

210. *Vermont Yankee*, 435 U.S. at 524.

211. 309 U.S. 134 (1941).

212. 381 U.S. 279 (1965).

213. *Pottsville*, 309 U.S. at 143.

214. *Vermont Yankee*, 435 U.S. at 543 (emphasis added) (citation omitted). See also *Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 606-07 (1st Cir. 1994); *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 303 (1981). In *Puerto Rico Aqueduct*, the First Circuit stated, “It is well established that agencies are free to announce and develop rules in an adjudicatory setting . . . . Of course, there are limits on this freedom.” *Puerto Rico Aqueduct*, 35 F.3d at 607.

215. 332 U.S. 194 (1947).

216. *Id.* at 203.

217. *Id.*

218. 673 F.2d 1008 (9th Cir. 1981).

219. *Id.* at 1009 (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974)).

pretation of statutory terms has certainly, since 1984, commanded the immense attention of the entire legal community — lawyers, judges and academicians. In reviewing this doctrine, we might just find that the interpretations given to the underlying decision are far more expansive than the decision itself.

### III. *CHEVRON U.S.A. INC. V. NATURAL RESOURCES DEFENSE COUNCIL*<sup>220</sup>

Decided on June 25, 1984, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, arose out of a dispute over the Environmental Protection Agency's definition of a statutory term in the Clean Air Act, as applied to "nonattainment" states. The question for the Court was "whether [the] EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble' is based on a reasonable construction of the statutory term 'stationary source.'"<sup>221</sup> This question was answered in the negative by the Court of Appeals based on established precedent.<sup>222</sup>

Judge Ginsburg, writing for a three judge panel, wrote that the Clean Air Act "does not explicitly define what Congress envisioned as a 'stationary source' to which the permit process and construction moratorium should apply."<sup>223</sup> Further, the court observed "[n]or is the issue squarely addressed in the legislative history."<sup>224</sup> This part of the Circuit Court opinion was accepted by the Supreme Court, against NRDC's arguments that the term "stationary source" had a definite meaning.<sup>225</sup> In its brief to the Supreme Court, the NRDC argued that the legislative history, the statutory provisions, and the congressional expressions of purpose are not ambiguous.<sup>226</sup> This same argument, also made below by the environmental group, had been rejected by the Circuit Court, though that court did agree that the agency rule was invalid.<sup>227</sup> But then, as the Supreme Court observed, the NRDC did "not defend the legal reasoning of the Court of Appeals."<sup>228</sup>

In fact, not only did the NRDC fail to mount a strong legal defense in support of the Circuit Court opinion, it acceded to the elements of what would become the *Chevron* doctrine. It attempted to convince the Supreme Court to establish a bright line test for determining the level of deference that a court should give to the findings and conclusions of administrative agencies. "While deference to an agency's interpretation of the law is common," the NRDC argued to the Court, "the courts 'are not obliged to stand aside and rubber-

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220. 467 U.S. 837 (1984).

221. *Id.* at 840.

222. *See* *Natural Resources Defense Council, Inc. v. Gorsuch*, 685 F.2d 718, 728 (D.C. Cir. 1982).

223. *Id.* at 723.

224. *Id.*

225. *See Chevron*, 467 U.S. at 841.

226. *See* Brief for the Natural Resources Defense Council at 15-23, *Chevron* (No. 82-1005).

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

228. *Id.*

stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."<sup>229</sup> In fact, the Supreme Court did not disagree with this. Rather, it has been the legal commentary of *Chevron* that has taken the opinion to new heights, far beyond the Court's own analysis.

What did the Court say about the interpretation of statutory terms? First, the Court reaffirmed the long standing, constitutionally consistent, role of the judiciary that "[t]he judiciary is the final authority on issues of statutory construction . . . ."<sup>230</sup> This is, in fact, perhaps the most important characteristic of judicial power under our structural constitutional separation of powers as declared so imperatively by Chief Justice Marshall in *Marbury v. Madison*.<sup>231</sup> "It is emphatically the province and duty of the judicial department to say what the law is . . . ."<sup>232</sup> As mentioned previously, it has been the exercise of this judicial duty that has vindicated the Court's approval of the ever-expanding level of Congress' delegation of authority to independent and non-political administrative bodies. It is important to keep in mind the close linkage between this delegation and judicial review. The clear rationalization found in Judge Leventhal's concurring opinion filed in *Ethyl Corp. v. EPA* was shown above.<sup>233</sup> Judge Leventhal's thinking most certainly merits repeating as part of the beneficial context within which *Chevron* will further be reviewed. He stated, "In the case of agency decision-making the courts have an additional responsibility set by Congress. Congress has been willing to delegate its legislative powers broadly — and courts have upheld such delegation — because there is court review to assure that the agency exercises the delegated power within statutory limits . . . ."<sup>234</sup>

To remain true to the constitutional division of powers that relegates to the courts the duty to define the law, the Court must always remain "the final authority on issues of statutory construction."<sup>235</sup> Likewise, the Court must "decide all relevant questions of law, [and] interpret constitutional and statutory provisions" if it is to respect the coordinate branch of government.<sup>236</sup> Without going into the details of each case, no evidence has been found that the Supreme Court has ever sharply strayed from its most basic and critical function — interpreting of the law, that is, unless *Chevron* is interpreted to be the *Marbury v. Madison* of administrative law, allowing the administrative agency to declare what the law is. Did the Supreme Court say in *Chevron* that it was "emphatically the province and duty of the [administrative agency] to say what the law is"?<sup>237</sup>

229. Brief for the Natural Resources Defense Council at 9, *Chevron* (No. 82-1005) (quoting *NLRB v. Brown*, 380 U.S. 278, 291 (1965)).

230. *Chevron*, 467 U.S. at 843 n.9.

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

232. *Id.* (emphasis added).

233. See *supra* notes 206-07 and accompanying text.

234. *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir. 1976) (Leventhal, J., concurring).

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

236. 5 U.S.C. §706 (1994).

237. For a comparison of the *Chevron* doctrine to *Marbury v. Madison*, see Sunstein, *supra* note 16, at

A long and consistent line of cases clearly defines the Court's exclusive role of interpreting statutory terms and deciding all relevant questions of law. In *Adams Fruit Co, Inc. v. Barrett*,<sup>238</sup> the Court reaffirmed the principle that "agency determinations within the scope of delegated authority are entitled to deference," but in this recognition, the Court also continued to preserve its own judicial role.<sup>239</sup> Recognizing some level of deference, the Court in *Adams Fruit* offered this admonition: "[I]t is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'"<sup>240</sup> Additionally, the Court has cautioned: "Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrates the congressional policy underlying a statute."<sup>241</sup>

*Chevron* is not unique in giving deference to the expert administrative tribunals. In *FTC v. Colgate-Palmolive Co.*,<sup>242</sup> decided in 1965, the Court explained that the statutory scheme for protecting the economy from "unfair methods of competition,"<sup>243</sup> "necessarily gives the Commission an influential role in interpreting Section 5 [of the FTC Act] and in applying it to the facts of particular cases arising out of unprecedented situations."<sup>244</sup> The Court noted that it "has frequently stated that the Commission's judgment is to be given great weight by reviewing courts."<sup>245</sup> This then raised the following question: How much deference should the reviewing courts give to agency interpretation of statutory terms?

In fact, this was a question that the Court in *Skidmore v. Swift & Co.*<sup>246</sup> embellished upon, over fifty years ago, in 1944. The Court stated, "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."<sup>247</sup> *Skidmore* is considered by the Court

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238. 494 U.S. 638 (1990).

239. *Id.* at 650.

240. *Id.* (quoting *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)).

241. *NLRB v. Brown*, 380 U.S. 278, 291 (1965). *See also* *SEC v. Sloan*, 436 U.S. 103, 118 (1978); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Volkswagenwerk v. Federal Maritime Commission*, 390 U.S. 261, 272 (1968); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965).

242. 380 U.S. 374 (1965).

243. Federal Trade Commission Act, Pub. L. No. 203, § 5, 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. § 45(a)(1) (1958)). As first enacted in 1924, the substantive clause of Section 5 read: "That unfair methods of competition in commerce are hereby declared unlawful." *Id.* In 1938, the Wheeler-Lea Act, Pub. L. No. 447, § 5, 52 Stat. 111 (1938), expanded the scope of the FTC's jurisdiction with this amended language: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

244. *Colgate-Palmolive*, 380 U.S. at 385.

245. *Id.*

246. 323 U.S. 134 (1944).

247. *Id.* at 140. The *Skidmore* case involved the enforcement of a portion of the Fair Labor Standards Act, for which the "Congress did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act." *Id.* at 137. In deciding *de novo* whether waiting time was working time under the wage and hour laws, the question concerned the level of deference that the court should give the Administrator's Interpretative Bulletin. *Id.*



as its "most comprehensive statement" of the level of judicial deference that should be given to agency "interpretative rulings,"<sup>248</sup> and has been followed in a long line of cases that predate *Chevron*.<sup>249</sup>

Even after *Chevron*, the *Skidmore* standard for deference continues to be observed by the Court. In *Lowe v. Securities Exchange Commission*,<sup>250</sup> the Court, citing *Skidmore*, commented: "An agency's construction of legislation that it is charged with enforcing is entitled to substantial weight, particularly when the construction is contemporaneous with the enactment of the statute."<sup>251</sup> Furthermore, the Supreme Court, long before *Chevron*, had refined the doctrine of judicial deference to include a constitutionally imperative limitation to this level of deference.

In *Colgate-Palmolive*, the Court explained that "while informed judicial determination is dependent upon enlightenment gained from administrative experience . . . [statute terms] must get their final meaning from judicial construction."<sup>252</sup> An even clearer expression of the limitation on this deference was given by the Court in *American Ship Building Company v. NLRB*.<sup>253</sup> That Court offered this admonition: "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress."<sup>254</sup>

With the Court's long experience in measuring the limited deference that it would give to agency decisions, what was it that made *Chevron* such a celebrated case? What the Court did in that case was perhaps to offer a clearer explanation of what it had long been doing. It divided into two separate steps the approach that a reviewing court should follow in its analysis of an agency's interpretation of statutory terms. The first step, explained the Court, was to determine whether "Congress has directly spoken to the precise question at issue."<sup>255</sup> If it has spoken, and if "the intent of Congress is clear, that is the end of the matter."<sup>256</sup>

Clearly, there is nothing new in this first step of *Chevron*. This first step is nothing more than a recitation of one of the most basic rules of statutory interpretation. In fact, the Supreme Court announced in *Cary v. Curtis*,<sup>257</sup> decided in 1845, that the "positive language of the statute, it is true, must control every

248. *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976).

249. See *Steadman v. SEC*, 450 U.S. 91, 103-04 (1981); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 783 n.13 (1981); *SEC v. Sloan*, 436 U.S. 103, 117-18 (1978); *United States v. Consumer Life Ins. Co.*, 430 U.S. 725, 752 (1977); *Morton v. Ruiz*, 415 U.S. 199, 237 (1974); *United States v. Pennsylvania Industrial Chem. Corp.*, 411 U.S. 655, 674-75 (1973).

250. 472 U.S. 181 (1985).

251. *Lowe*, 472 U.S. at 216. See also *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257-58 (1991).

252. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965).

253. 380 U.S. 300 (1965).

254. *Id.* at 318. See also *NLRB v. Brown*, 380 U.S. 278, 292 (1965).

255. *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984).

256. *Id.*

257. 44 U.S. (3 How.) 236 (1845).

other rule of interpretation.<sup>258</sup> The Court stated: “To deny this position would be to elevate the judicial over the legislative branch of the government.”<sup>259</sup> Then, in *Barnes v. The Railroads*,<sup>260</sup> the Court recited the basic interpretation rule, that “where the language employed by the legislature is plain and free of all uncertainty . . . the statute speaks its own construction.”<sup>261</sup> With respect to the interpretation of statutory terms, “[n]othing is better settled than that in the construction of a law its meaning must first be sought in the language employed.” And, “[i]f that be plain, it is the duty of the courts to enforce the law as written, provided it be within the constitutional authority of the legislative body which passed it.”<sup>262</sup>

The rule requiring courts to give obedience to the language of the statute is a rule respecting the constitutional separation of powers. Furthermore, this fundamental canon of statutory construction was not altered in any way by the *Chevron* case. The starting place for interpreting statutes is still with the language chosen by Congress.<sup>263</sup> When the relevant statute “contains a phrase that is unambiguous — that has a clearly accepted meaning in both legislative and judicial practice — [the court will] not permit it to be expanded or contracted.”<sup>264</sup> Where the language is clear and unambiguous, the “sole function of the court is to enforce it according to its terms.”<sup>265</sup>

In *Chevron*, the first step in the review of agency action was extended by the Court beyond the reading of the literal language used by Congress. It explained that the reviewing court could employ the “traditional tools of statutory construction [to ascertain whether] Congress had an intention on the precise question at issue.”<sup>266</sup> This recognition of the “traditional tools of statutory construction” further reduces the perceived and exaggerated impact of *Chevron*. If administrative lawyers are to avoid the transfer of vast amounts of authority to the agency, they must arm themselves with these “traditional tools” for reading and understanding statutes.<sup>267</sup>

258. *Id.* at 239.

259. *Id.* at 245.

260. 84 U.S. (17 Wall) 294 (1872).

261. *Id.* at 302.

262. *United States v. Standard Brewery, Inc.*, 251 U.S. 210, 217 (1919).

263. *See Pennsylvania Dept. of Pub. Welfare v. Davenport*, 495 U.S. 552, 557-58 (1990); *Mallard v. United States Dist. Ct.*, 490 U.S. 296, 300 (1989).

264. *West Virginia Univ. Hosp. v. Casey*, 499 U.S. 83, 98 (1991).

265. *Id.* at 99 (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1917)). *See also* *Reves v. Ernst & Young*, 507 U.S. 170 (1993); *United States Nat'l Bank v. Independent Ins. Agents*, 508 U.S. 439 (1993); *Estate of Cowart v. Nicklos*, 505 U.S. 469 (1992).

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

267. Perhaps the most traditional tool of construction, maybe even the most reliable, is the standard dictionary. “Dictionary definitions appeared in twenty-eight percent of the 107 Supreme Court cases decided by published opinion in the 1992 Term — a fourteen-fold increase over the 1981 Term.” Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1438 (1994). *See also* 2A SUTHERLAND STAT CONST §§ 45.01-48.20 (Norman J. Singer ed., 5th ed. 1992); Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370 (1947); Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259 (1947); Felix Frankfurter, *Some Reflections On the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947); Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1898); Karl N. Llewellyn, *Remarks On The Theory of Appellate Decision and The Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950); Russell L.

Through a rational use of these traditional tools of statutory interpretation, courts should be able to fasten a settled meaning to the very statute from which the agency draws its power. In *NLRB v. Bell Aerospace Co.*,<sup>268</sup> the Supreme Court articulated a limit on the agency's discretion. The Court held that an agency is not free "to read a new and more restrictive meaning into the Act," after the statute has acquired a settled meaning through prior administrative and judicial interpretation.<sup>269</sup> In *Neal v. United States*,<sup>270</sup> the Court stated: "Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law."<sup>271</sup>

Step one of the *Chevron* doctrine did not materially depart from the basic traditions of statutory interpretation. Neither did step two which arises only when "the statute is silent or ambiguous with respect to the specific" question at issue.<sup>272</sup> *Chevron's* step two, giving deference to agency interpretation, was not a substantial shift from the past. Douglas W. Kmiec, then Assistant Attorney General, observed: "The result in *Chevron* was arguably foreshadowed forty years earlier in *NLRB v. Hearst Publications, Inc.*"<sup>273</sup> Kenneth W. Starr offered this additional view: "At first blush, *Chevron* appears to be little more than an application of long-standing Supreme Court precedent calling for courts to defer to administrative interpretations absent strong reasons for not doing so."<sup>274</sup>

Step two of the *Chevron* doctrine is considered only when it is concluded that "the statute is silent or ambiguous with respect to the specific issue."<sup>275</sup> But, of course, it must be remembered, the very determination of the presence or absence of ambiguity within the language of a statute is, in itself, an interpretation. *Sutherland Statutory Construction* explains, "It is . . . widely acknowledged that a statute is ambiguous only when it is capable of being understood by reasonably well-informed persons in either of two or more senses."<sup>276</sup> Further, as Professor Sunstein observed, "the resolution of ambiguities in statutes is sometimes a question of policy . . ."<sup>277</sup> It is in this instance that the

Weaver, *Judicial Interpretation of Administrative Regulations: An Overview*, 53 U. CIN. L. REV. 681, 717-21 (1984); James M. Landis, *A Note On "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930).

268. 416 U.S. 267 (1974).

269. *Id.* at 289.

270. 116 S. Ct. 763 (1996).

271. *Id.* at 768-69. See also *NLRB v. Town & Country Elec., Inc.*, 116 S. Ct. 450, 453-54 (1995); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-537 (1992) (involving the interpretation of the statutory term "employee" as used in the National Labor Relations Act).

272. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

273. Douglas W. Kmiec, *Judicial Deference To Executive Agencies And the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 279 (1988).

274. Starr, *supra* note 19, at 292.

275. *Chevron*, 467 U.S. at 843.

276. 2A SUTHERLAND STAT CONST § 45.02, at 6 (Norman J. Singer ed., 5th ed. 1992).

277. Sunstein, *supra* note 16, at 2086. See also, Eric M. Brown, Note, *Coring The Seedless Grape: A Reinterpretation of Chevron U.S.A. Inc v. NRDC*, 87 COLUM. L. REV. 986, 992 (1987).

Court looks to see “whether the agency’s answer is based on a permissible construction of the statute.”<sup>278</sup>

Elaborating on *Chevron*’s step two, the Court offered this explanation: “If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.”<sup>279</sup> Then, for that instance, the *Chevron* Court offered the prescription of what it considered to be the proper scope of review. “Such legislative regulations,” the Court explained, “are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”<sup>280</sup> Continuing, the Court added, “In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”<sup>281</sup>

As previously alluded to, *Chevron* did not break any truly meaningful new ground. In fact, long before all the hullabaloo was raised and encircled this “celebrated case,” the Court had already established limited review of an agency’s interpretation of a statutory term. In *Gray v. Powell*,<sup>282</sup> decided in 1941, the Court, upholding the agency’s interpretation of the statutory term “producer,” as used in the National Bituminous Coal Act,<sup>283</sup> stated:

Such a determination as is here involved belongs to the usual administrative routine. Congress, which could have legislated specifically as to the individual exemptions from the code, found it more efficient to delegate that function to those whose experience in a particular field gave promise of a better informed, more equitable, adjustment of the conflicting interests of price stabilization upon the one hand and producer consumption upon the other.<sup>284</sup>

The scope of judicial review in *Gray v. Powell* was just as limited as the scope in *Chevron*. Justice Reed, writing for the Court, offered this explanation of the proper level of review.

Unless we can say that a set of circumstances deemed by the Commission to bring them within the concept “producer” is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a *sensible exercise of judgment*, it is the Court’s duty to leave the Commission’s judgment undisturbed.<sup>285</sup>

Though similar in scope and substance to *Chevron*, *Gray* received little attention from legal scholars. Consequently, in tracing this 1941 decision of the

278. *Chevron*, 467 U.S. at 843.

279. *Id.* at 843-44.

280. *Id.* at 844.

281. *Id.*

282. 314 U.S. 402 (1941).

283. Pub. L. No. 48, 50 Stat. 72 (1937). The Act was intended to stabilize the price of coal at a time when coal was a primary fuel in this country. See Eric Stein, *Recent Decision*, 40 MICH. L. REV. 1093 (1942). An exemption from the price regulations was provided for coal consumed by the “producer.” See *Gray*, 314 U.S. at 403.

284. *Gray*, 314 U.S. at 411-12.

285. *Id.* at 413 (emphasis added).

Supreme Court through the Table of Cases in the Index To Legal Periodicals for the years 1940 through 1946, only one law review article was found.<sup>286</sup>

However, legal textbooks refer to this 1941 Supreme Court scope of review of statutory terms as “the doctrine of *Gray v. Powell*.”<sup>287</sup> It is not until more than forty years later, as *Chevron* approached, that one finds increased attention given the “*Gray v. Powell* doctrine” of judicial deference to administrative agencies.<sup>288</sup> In 1944, the Supreme Court, in *NLRB v. Hearst Publications*,<sup>289</sup> upholding the Board’s interpretation of the statutory term “employee,” had this to say: “It is not necessary in this case to make a completely definitive limitation around the term ‘employee.’ That task has been assigned primarily to the agency created by Congress to administer the Act.”<sup>290</sup>

The Court, following the *Gray v. Powell* rationale, continued with its explanation of the appropriate level of judicial review stating, “[W]here the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court’s function is limited.”<sup>291</sup> This, then, is the limitation upon the function of the Court: “[T]he Board’s determination that specified persons are ‘employees’ under this Act *is to be accepted if it has ‘warrant in the record’ and a reasonable basis in law.*”<sup>292</sup> This is what the Court said in *Chevron*. The Court stated that “[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”<sup>293</sup>

#### IV. CONCLUSION

So what does it all mean? If the *Chevron* doctrine means that the Court is surrendering its constitutional and statutory responsibility to “decide all relevant questions of law,” the Court should as a corollary revisit and increase its scrutiny of the delegation issue. For, as shown above, the Court’s review of agency decisions is the very thing that validates the Court’s approval of the delegation. It is worthwhile to once again think back to Judge Leventhal’s admonition in his concurring opinion in *Ethyl Corp.* that “Congress has been willing to dele-

286. See Stein, *supra* note 283.

287. See BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 10.32, at 696 (3rd ed. 1991); see also PETER L. STRAUSS ET AL., GELLHORN & BYSE’S ADMINISTRATIVE LAW: CASES AND COMMENTS (9th ed. 1995).

288. See Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT’L L. 193, 202 n.41 (1996); Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1082 (1984); Weaver, *supra* note 267, at 724; Angela R. Freeman, Note, *Health Care & Retirement Corp. of America: A Potential Broadening of the Test For Supervisory Status Under the NLRA*, 31 TULSA L.J. 323, 338 n.133 (1995); Note, *The Federal Communications Commission and Interactive Cable Technology: The Case For Minimal Regulation*, 97 HARV. L. REV. 565, 579 (1983).

289. 322 U.S. 111 (1944).

290. *Id.* at 130.

291. *Id.* at 131.

292. *Id.* (emphasis added). See also Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983).

293. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

gate its legislative powers broadly — and courts have upheld such delegation — *because there is court review.*<sup>294</sup>

The fact is that *Chevron* does not make any great departure from the judicial balance that the courts have made between the scope of judicial review and the level of delegation permitted. In *Chevron* itself, the Court made it clear that it was not surrendering its constitutional responsibility. It stated, albeit in a footnote, that “[t]he judiciary is the final authority on issues of statutory construction and must reject administrative construction which are contrary to clear congressional intent.”<sup>295</sup> In *Director, Office of Workers’ Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*,<sup>296</sup> the Court confirmed this; *Chevron* does not authorize an agency to extend its jurisdiction beyond that granted by statute.<sup>297</sup> The Court has made clear that “an agency’s interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear.”<sup>298</sup> Justice O’Connor, concurring in *Holly Farms Corp. v. NLRB*,<sup>299</sup> had this to say: “None of our precedents sanction blind adherence to the Board’s position when it is directly contrary to the plain language of the relevant statute.”<sup>300</sup>

The key to understanding the constitutional and statutory soundness of *Chevron*, *Hearst*, and *Gray v. Powell* lies in the identification of the parts of the opinions which are products of the Court’s independent judgment, where no deference was given to the administrative agencies. Look closely at the *Chevron* opinion. One quickly finds that the Supreme Court spent considerable time both in its independent analysis of the language of the relevant statutes and in its review of the legislative history.<sup>301</sup> The Court was establishing a “law record” which was essential before the Court could measure the “reasonableness” of the Agency’s interpretation. In establishing the “law records” the Court was making an independent determination, in complete compliance with the language of the Administrative Procedure Act, of “all relevant questions of law.”<sup>302</sup> This independent judgement of the Court is in fact the antecedent to the secondary determination of whether the agency decision is a “reasonable interpretation” — that the decision is not “arbitrary or capricious.” For without this predetermination of some “law record” against which the agency’s interpretation could be measured, it would be impossible for the reviewing court to determine if the agency decision was arbitrary or capricious.

294. *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D. C. Cir. 1976) (Leventhal, J., concurring) (emphasis added).

295. *Chevron*, 467 U.S. at 843 n.9.

296. 115 S. Ct. 1278 (1995).

297. *See id.* at 1287.

298. *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 114 S. Ct. 2223, 2231 (1994).

299. 116 S. Ct. 1396 (1996).

300. *Id.* at 1407 (O’Connor, J., concurring).

301. In Part III of the opinion, the Court began its review of the statutory scheme and the agency action. *See Chevron U.S.A. Inc. v. National Resources Defense Council*, 467 U.S. 837, 845-48 (1984). Then, in Part IV, the Court examined the language of the statute. *See id.* at 848-51. Finally, in Part V of the opinion, the Court examined the legislative history. *See id.* at 851-53.

302. 5 U.S.C. § 706 (1994).

These are not abstract terms which allow a reviewing court to apply subjective analysis to agency decisions. In fact, it was such subjectivity that the Court squarely rejected in *Vermont Yankee*, as “Monday morning quarterbacking.”<sup>303</sup> As previously mentioned, before a court is competent to decide whether an agency decision is unreasonable or arbitrary, it must first establish a “law record” against which the decision can be objectively measured.<sup>304</sup> After all “[a]mbiguity is a creature not of definitional possibilities but of statutory context.”<sup>305</sup> An agency decision is unreasonable or arbitrary only when it is without any rational basis in fact or in law. This is what the Court stated in *Hearst* when it explained that “the Board’s determination . . . is to be accepted if it has ‘warrant in the record’ and a reasonable basis in law.”<sup>306</sup>

Of course, whether the agency decision has “warrant in the record” requires a scope of review under the substantial evidence rule as explained in *Universal Camera*.<sup>307</sup> In *Universal Camera*, the Court recognized that Congress, with its enactment of the Administrative Procedure Act, “left no room for doubt as to the kind of scrutiny which a court of appeals must give the record before the Board to satisfy itself that the Board’s order rests on adequate proof.”<sup>308</sup> It explained that reviewing courts shall “hold unlawful and set aside agency action” only when it is unsupported by substantial evidence” reading the record as a whole.<sup>309</sup>

*Universal Camera*, in regard to questions of fact, offers a close analogy to *Chevron*, with respect to questions of law. As with *Universal Camera*, where the reviewing court examines an agency’s findings against a fact constructed record, *Chevron* examines the agency’s interpretation of statutory terms against the “law record” first constructed by the reviewing court. In *Chevron*, the Court admonished administrative lawyers to review agency action against a legal record, composed of statutory language and legislative history rather than against some subjective model created by special interest groups.

Though vast quantities of words have already been written on *Chevron*, there is still much more to do to elevate our understanding of what the Court actually did. Yes, without a doubt, judicial review under *Chevron* still remains an enigma.

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303. See *Vermont Yankee Nuclear Power v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 547 (1978).

304. See *Air Line Pilots Ass’n, Int’l v. O’Neill*, 499 U.S. 65, 67 (1991); *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971); *United States v. Carmack*, 329 U.S. 230, 243 (1946).

305. *Brown v. Gardner*, 115 S. Ct. 552, 555 (1994). In *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991), the Court stated: “[T]he meaning of statutory language, plain or not; depends on context.” See also *MCI Telecommunications Corp. v. American Tel. & Tel. Co.* 114 S. Ct. 2223 (1994).

306. *NLRB v. Hearst Publications*, 322 U.S. 111, 131 (1944).

307. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

308. *Id.* at 487.

309. *Id.* See also 5 U.S.C. § 706(2) (1994).