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Defining Deference Down, Again: Independent Agencies, *Chevron* Deference, and *Fox*

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“Defining Deference Down, Again: Independent Agencies, *Chevron* Deference, and *Fox*”
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DEFINING DEFERENCE DOWN, AGAIN:
INDEPENDENT AGENCIES, *CHEVRON* DEFERENCE,
AND *FOX*

RANDOLPH J. MAY*

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INTRODUCTION

In 2006, I published an article in this law review entitled *Defining Deference Down: Independent Agencies and Chevron Deference*.¹ In that article, I posed the question, “Should the statutory interpretations of independent regulatory agencies, such as the FCC’s determination at issue in *Brand X*, be accorded a lesser degree of judicial deference than those accorded to executive branch agencies?”² In response, I suggested that “a reading of *Chevron* that accords less deference to independent

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1. Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429 (2006).

2. *Id.* at 432. *Brand X* refers to the Supreme Court’s decision in *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967 (2005). My previous article discusses the *Brand X* decision in considerable detail. For present purposes, it suffices to note that the Supreme Court, in reviewing a decision of the Federal Communications Commission (FCC) interpreting a provision of the Communications Act, held that, when in conflict, *Chevron* deference trumps the doctrine of stare decisis. *Chevron* deference refers to the standard of deference to be accorded actions of administrative agencies when they interpret ambiguous statutory provisions. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984).

agencies' decisions than to those of executive branch agencies would be more consistent with our constitutional system and its values."³

Chevron's central holding is that when a statutory provision is ambiguous,⁴ if the agency's interpretation is "based on a permissible construction of the statute,"⁵ the agency's interpretation is to be given "controlling weight."⁶ The literature on *Chevron* is vast, and my earlier article explains *Chevron's* basic principles and contains citations to many other sources which discuss the case, so I am not going to rehash *Chevron* here. Rather, in order to provide the context for my contention in *Defining Deference Down* that independent agencies should receive less deference than executive branch agencies, I wish only to quote here what I regard as the key passage setting forth the *Chevron* Court's rationale:

Judges are not experts in the field, and are not part of either political branch of the Government. . . . [A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.⁷

Relying heavily on the obvious import of this passage, I argued in *Defining Deference Down* that the *Chevron* doctrine is rooted in the Supreme Court's understanding of fundamental separation-of-powers principles, which dictate that

3. May, *supra* note 1, at 453.

4. Of course, "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." *Chevron*, 467 U.S. at 842–43. Determining whether the intent of Congress is clear is step one of *Chevron*.

5. *Id.* at 843. When the intent of Congress is not clear, what constitutes a "permissible" construction of a statute at the step two inquiry naturally may not be self-evident. For most scholars, permissibility equates with the same type of reasonableness analysis that courts undertake in deciding whether an agency decision is arbitrary or capricious under § 706(2)(A) of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A) (2006). See Ronald M. Levin, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 37–38 (2002) ("If the statutory meaning on the precise issue before the court is not clear, or if the statute is silent on that issue, the court is required to defer to the agency's interpretation of the statute if that interpretation is 'reasonable' or 'permissible' ('step two' of *Chevron*). . . . Courts may look, for example, to whether the interpretation is supported by a reasonable explanation and is logically coherent. In this regard, the step two inquiry tends to merge with review under the arbitrary and capricious standard . . .").

6. *Chevron*, 467 U.S. at 844. The key point here is that, apart from the vagaries of defining permissibility or reasonableness in any given case, when *Chevron* applies, it requires a highly deferential review that generally is outcome-determinative. As Jeffrey Lubbers points out in his authoritative text, "The Supreme Court has only rarely set aside an agency action under step two." JEFFREY S. LUBBERS, *A GUIDE TO FEDERAL AGENCY RULEMAKING* 499 (4th ed. 2006).

7. *Chevron*, 467 U.S. at 865–66. To reinforce the political accountability rationale, the Court added that "federal judges—who have no constituency—have a duty to respect the legitimate policy choices made by those who do." *Id.* at 866.

when Congress leaves gaps in a statute, it is for the politically accountable branches, not unelected judges, to make policy by doing the gap filling.⁸ That being so, because the independent agencies, such as the Federal Communications Commission (FCC), are less politically accountable than the executive branch agencies with respect to their policymaking actions, I suggested that it should follow that courts reviewing independent agencies' statutory interpretations should accord them less *Chevron* deference.⁹ For good measure, I added that "it is odd in a constitutional system with three defined branches for courts to give controlling deference to agencies that, not without reason, are commonly referred to as 'the headless fourth branch.'"¹⁰

In *Defining Deference Down*, I observed that the question whether independent agencies should receive a lesser degree of *Chevron* deference had been subjected to little examination. I could find no court opinion addressing the question and only sparse commentary in the academic literature. To this same point, David Gossett commented in 1997 that *Chevron's* political accountability rationale "would imply that independent agencies might not deserve *Chevron* deference, though no [commentary] seems to have explored this idea."¹¹

8. See SECTION OF ADMIN. LAW & REGULATORY PRACTICE, AM. BAR ASS'N, A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 56 (John F. Duffy & Michael Herz eds., 2005) ("Thus, *Chevron* has significant institutional implications, shaping the relationship among the branches of government and serving as a kind of 'counter-*Marbury*' for the regulatory state."). The reference to *Chevron* as a kind of counter-*Marbury* is from Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2075 (1990) ("*Chevron* promises to be a pillar in administrative law for many years to come. It has become a kind of *Marbury*, or counter-*Marbury*, for the administrative state."). By counter-*Marbury*, Professor Sunstein meant to contrast *Marbury's* oft-repeated dictate that it is for the judges to "say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), with the highly deferential *Chevron* review standard that tilts toward allowing the agencies to say what the law is.

9. See May, *supra* note 1, at 442–45, where I discussed the nature of the independent regulatory agencies, describing the features, such as staggered fixed terms and bipartisanship requirements, which are intended to make them independent. A significant feature is the provision, found in several of the independent agency statutes, that prevents the President from removing commissioners except upon "good cause." Such a removal limitation was upheld against constitutional attack in *Humphrey's Executor v. United States*, 295 U.S. 602, 631–32 (1935). The Supreme Court said that, in light of the removal limitation and other features discussed in my *Defining Deference Down* article, Federal Trade Commission (FTC) commissioners were intended to be "free from executive control." *Id.* at 628. The FCC and FTC share many of the same institutional features that lead them to be considered "independent" agencies, including having a bipartisan mix of commissioners that serve for staggered fixed terms. The Securities and Exchange Commission (SEC) and the Commodities Futures Trading Commission (CFTC) also share these features and are considered independent agencies. I discuss the nature of independent regulatory agencies, and especially the FCC, in more detail in Randolph J. May, *The FCC's Tumultuous Year 2003: An Essay on an Opportunity for Institutional Agency Reform*, 56 ADMIN. L. REV. 1307, 1310–12 (2004). For a very useful comprehensive study of independent agencies, see Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1112–14 (2000).

10. May, *supra* note 1, at 451.

11. David M. Gossett, *Chevron, Take Two: Deference to Revised Agency Interpretations of Statutes*, 64

While the commentary was very sparse, there nevertheless had been some hints here and there that others might share my view that independent agencies should receive less deference. Notably, Elena Kagan—now Solicitor General of the United States—suggested linking “deference in some way to presidential involvement” in her magisterial article, *Presidential Administration*.¹² She proposed a “more refined version” of *Chevron*, one in which deference for an agency interpretation would be tied to the level of presidential involvement in the decisionmaking process.¹³ Solicitor General Kagan suggested this refined *Chevron* doctrine “would begin by distinguishing between actions taken by executive branch agencies and those taken by independent commissions.”¹⁴ After discussing the factors that give independent agencies considerably greater freedom from presidential control than executive agencies, including especially the lack of presidential removal power with respect to independent agencies,¹⁵ she explicitly suggested that a revised *Chevron* doctrine “attuned to the role of the President would respond to this disparity by giving greater deference to executive than to independent agencies.”¹⁶

In the Supreme Court’s *Brand X* decision, where *Chevron* deference played a determinative role in affirming an FCC order interpreting a statutory provision, neither the majority nor concurring or dissenting opinions questioned whether the independent agency should receive a lesser degree of deference than executive agencies. The Court assumed no difference in treatment between executive departments and independent agencies. Indeed, there was no discussion even intimating the question ought to be examined. This past Term, however, in *FCC v. Fox Television Stations, Inc.*,¹⁷ the beginnings of such a discussion did emerge, albeit not directly in the context of the application of *Chevron*. The Supreme Court’s opinions in the *Fox* case are well worth examining not only for what they say more broadly about judicial review of changes in agency policy, an important

U. CHI. L. REV. 681, 689 n.40 (1997).

12. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2376 (2001). At the time she wrote *Presidential Administration*, Kagan was a Visiting Professor at Harvard Law School. Later she served as Dean of the law school before becoming Solicitor General of the United States. In the Clinton Administration, she served as Deputy Assistant to the President for Domestic Policy and Deputy Director of the Domestic Policy Council.

13. *Id.* at 2377.

14. *Id.* at 2376.

15. Significantly, Kagan refers to the lack of presidential removal power with respect to the commissioners of independent agencies as “the core legal difference between these entities.” *Id.*

16. *Id.* at 2377. Another of the few isolated references to the question of *Chevron* deference to independent agency deference came from John Duffy. He stated that “[i]f the courts really followed the common law logic of *Chevron*, they should have balked at extending *Chevron* to [independent] agencies, which have less democratic accountability than agencies like the EPA, whose heads serve at the pleasure of the President.” John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 203 n.456 (1998).

17. 129 S. Ct. 1800 (2009), *rev’g and remanding* 489 F.3d 444 (2d Cir. 2007).

administrative law issue which will be discussed here only briefly, but also for what the opinions may portend concerning the question of a differential standard of review for executive branch and independent agencies. That question, first examined in *Defining Deference Down*, remains my project here.

I. *FCC v. FOX TELEVISION STATIONS, INC.*: THE FCC CHANGES ITS BROADCAST INDECENCY ENFORCEMENT POLICY

In *Fox*, the Supreme Court, reversing the Second Circuit, affirmed a change of FCC policy to the effect that even isolated, nonrepetitive incidents of indecent speech could be sanctioned.¹⁸ The FCC had gradually expanded its enforcement of the statutory indecency prohibition since the Supreme Court, in the 1978 landmark *Pacifica* case,¹⁹ sustained the agency's initial indecency enforcement activity against statutory and constitutional attack. In the FCC enforcement actions ultimately reviewed in the *Fox* case, the agency articulated a new policy to the effect that it could sanction a "non-literal (expletive) use of the 'F- and 'S-Words' even when the word was used only once."²⁰ The court of appeals held the FCC's actions unlawful on the basis that the agency's new "fleeting expletives" policy was inadequately explained and, therefore, arbitrary and capricious under the Administrative Procedure Act's (APA's) review standard.²¹

I do not want to focus much of my attention on the aspect of the Supreme Court's decision that addresses an important general administrative law issue which is likely to spawn much commentary among administrative law professors and practitioners—that is, the Court's holding that there is no basis in the APA for subjecting an agency *change* of policy to a "more searching standard of review" than that applied to the adoption of the *existing* policy.²² As Justice Scalia put it for the *Fox* majority, the agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better."²³ According to Justice Scalia, the APA makes no distinction "between initial agency action and subsequent agency action

18. A federal statute prohibits broadcasting of "any . . . indecent . . . language." 18 U.S.C. § 1464 (2006).

19. See *FCC v. Pacifica Found.*, 438 U.S. 726, 729, 750–51 (1978) (affirming that the FCC's determination that a radio station's daytime broadcast of George Carlin's "Filthy Words" monologue was sanctionable under the indecency prohibition).

20. 129 S. Ct. at 1807.

21. See 5 U.S.C. § 706(2)(A) (2006) ("The reviewing court shall . . . hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .").

22. *Fox*, 129 S. Ct. at 1810.

23. *Id.* at 1811.

undoing or revising that action.”²⁴ In short, contrary to the practical import of the Second Circuit’s decision, the Court held that when adopting a new policy “the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.”²⁵

Another aspect of the *Fox* case that I will not address in-depth warrants at least brief mention. *Fox* and other broadcast networks claimed before the agency and in court that the FCC’s new “fleeting expletives” policy violates their First Amendment rights because the vagueness of the agency’s new policy chilled free speech.²⁶ Because the Second Circuit held the FCC’s “fleeting expletives” policy unlawful as arbitrary and capricious, it did not decide the First Amendment question.²⁷ Nevertheless, in dicta, it proceeded to question whether the FCC’s new policy “can survive First Amendment scrutiny.”²⁸ Based on its examination of the relevant First Amendment jurisprudence, the court of appeals majority concluded, “[W]e are sympathetic to the Networks’ contention that the FCC’s indecency test is undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague.”²⁹ After holding that the Second Circuit erred in finding the agency’s action unlawful under the APA’s arbitrary and capricious standard, the Supreme Court’s *Fox* majority observed that “[i]t is conceivable that the Commission’s orders may cause some broadcasters to avoid certain language that is beyond the Commission’s reach under the Constitution.”³⁰ But it too declined to address the constitutional issue, with Justice Scalia declaring, “Whether that is so, and, if so, whether it is unconstitutional, will be determined soon enough, perhaps in this very case.”³¹

II. DIFFERENT REVIEW STANDARDS FOR INDEPENDENT AND EXECUTIVE BRANCH AGENCIES: A DEBATE EMERGES IN THE *FOX* CASE

In the context of deciding whether the FCC’s change of policy regarding the

24. *Id.*

25. *Id.*

26. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 463 (2d Cir. 2007), *rev’d*, 129 S. Ct. 1800 (2009).

27. *See* 489 F.3d at 462 (holding that the agency failed to provide a “reasoned analysis justifying its departure from the agency’s established practice”).

28. *Id.* at 463.

29. *Id.*

30. *Fox*, 129 S. Ct. at 1819.

31. *Id.* Justice Thomas wrote a concurring opinion “to note the questionable viability of the two precedents that support the FCC’s assertion of constitutional authority to regulate the programming at issue in this case.” *Id.* at 1819–20 (Thomas, J., concurring). He asserted that *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) “were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity.” *Id.* at 1820. I have been a proponent of this view. In support of his assertion, Justice Thomas, *id.* at 1822, cited my recent article, Randolph J. May, *Charting a New Constitutional Jurisprudence for the Digital Age*, 3 CHARLESTON L. REV. 373 (2009).

indecenty prohibition was lawful, a debate emerged in the *Fox* case, albeit not altogether sharply, as to whether the actions of the independent agencies such as the FCC should be subject to a heightened standard of judicial review.³² Apparently because the FCC's change of policy was not based on an interpretation of a statutory term as was the case in *Chevron* itself,³³ the discussion in *Fox* concerning whether more or less deference is due independent agencies did not refer directly to *Chevron*. Nevertheless, as will be seen, there were certainly *Chevron*-like echoes as the Justices debated the relevance of the FCC's political accountability (or lack thereof) to determine whether the proper standard of review should be more or less searching. It would not be at all surprising to see these echoes reverberate in a way that leads, sooner or later, to a more robust dialogue concerning the differential review issue I raised in *Defining Deference Down*.

Before offering my own thoughts concerning the Justices' statements in *Fox*, it is useful to set forth their statements relating to the question of a differential deference standard. It is best to begin with the dissents to which Justice Scalia, this time in a plurality opinion, is so clearly responding. Justice Breyer began his dissent by pointing to the characteristics of the FCC, such as fixed terms of office for commissioners and the fact that they are not directly responsible to the voters, that he says give the agency its independence.³⁴ He declared that despite the fact that the law grants those in charge of independent agencies broad authority to determine policy, "it does not permit them to make policy choices for purely political reasons nor to rest them primarily upon unexplained policy preferences."³⁵ According to Justice Breyer, an independent agency's "comparative freedom from ballot-box control makes it all the more important that courts review its decisionmaking to assure compliance with applicable provisions of law—including law requiring that major policy decisions be based on articulable reasons."³⁶ He emphasized the important role agency expertise plays in producing reasoned decisions.³⁷ Suffice it to say, with no purpose served by detailing all his points here,³⁸ Justice Breyer

32. I should note here that I understand Justice Breyer objected to Justice Scalia's characterization of his position as advocating a "heightened standard" of review. *Fox*, 129 S. Ct. at 1831 (Breyer, J., dissenting). Apart from the semantics, for my purposes the point, to employ *Chevron*-speak, is that it is clear that Justice Breyer advocated a less deferential standard of review than did Justice Scalia, and the difference is in some material way related to the status of the FCC as an independent regulatory agency.

33. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984).

34. *Fox*, 129 S. Ct. at 1829 (Breyer, J., dissenting).

35. *Id.*

36. *Id.* at 1830.

37. *Id.*

38. *See id.* at 1832–41. Justice Breyer discussed the FCC's failure, in his view, to sufficiently address the First Amendment implications of the change in its "fleeting expletives" policy and also the adverse financial impact on local broadcasters stemming from the requirements imposed by the new policy, such as the need to purchase time delay equipment. *Id.*

found the FCC's change of policy to be inadequately explained. In his view, it was not reasoned decisionmaking but rather was arbitrary and capricious decisionmaking. Notably, although he distinguished at the outset between policy choices made for purely political reasons and policy choices based on reasoned decisionmaking, Justice Breyer did not explicitly identify the source of any claimed "purely political" reasons for the FCC's policy change. He just identified what he saw as the defects in the agency's reasoning.

In his dissent, Justice Stevens suggested that independent agencies like the FCC should be considered much more as arms of Congress than of the Executive Branch. He observed that in *Humphrey's Executor*,³⁹ the Supreme Court "made clear, however, [that] when Congress grants rulemaking and adjudicative authority to an expert agency composed of commissioners selected through a bipartisan procedure and appointed for fixed terms, it substantially insulates the agency from executive control."⁴⁰ Having in mind these institutional agency characteristics, Justice Stevens declared that independent agencies are better viewed as agents of Congress, quoting *Humphrey's Executor* to the effect that these agencies are established "to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative . . . aid."⁴¹

The upshot for purposes of reviewing agency action, according to Justice Stevens, is that "[t]here should be a strong presumption that the FCC's initial views, reflecting the informed judgment of independent commissioners with expertise in the regulated area, also reflect the views of the Congress that delegated the Commission authority to flesh out details not fully defined in the enacting statute."⁴² In this instance, this strong presumption that the FCC's initial views properly reflected congressional intent meant that it "makes eminent sense to require the Commission to justify why its prior policy is no longer sound before allowing it to change course."⁴³ Of course, Justice Stevens probably did not mean to imply that the FCC did not offer any justification, just not one that, in his view, was sufficient.

In the face of these dissents, Justice Scalia, in the portion of his opinion commanding only a plurality,⁴⁴ characteristically gave no ground. According to

39. *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

40. *Fox*, 129 S. Ct. at 1825 (Stevens, J., dissenting). In *Humphrey's Executor*, the Court had said that Congress intended to create "a body which shall be independent of executive authority, *except in its selection*, and free to exercise its judgment without leave or hindrance of any other official or any department of the government." 295 U.S. at 625–26.

41. *Fox*, 129 S. Ct. at 1825 (quoting *Humphrey's Executor*, 295 U.S. at 628).

42. *Id.* at 1826.

43. *Id.* Justice Stevens also suggested that the Communications Act, 47 U.S.C. §§ 151–614 (2006), the APA's judicial review provision, 5 U.S.C. § 706(2)(A) (2006), and the rule of law "all favor stability over administrative whim." *Id.*

44. Chief Justice Roberts and Justices Thomas and Alito joined this portion of Justice Scalia's

Justice Scalia, “the independent agencies are sheltered not from politics but from the President, and it has often been observed that their freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction.”⁴⁵ Justice Scalia asserted that the change in policy at issue in *Fox* “was spurred by significant political pressure from Congress.”⁴⁶ He characterized Justice Stevens’s view of the relationship between Congress and the FCC as a “principal–agency relationship,”⁴⁷ which he suggested might be unconstitutional on separation-of-powers grounds if one were to take this principal–agency relationship seriously.⁴⁸ Despite such intimation of unconstitutionality, Justice Scalia, referring merely to statements made by representatives at two congressional committee hearings,⁴⁹ concluded, “If the FCC is indeed an agent of Congress, it would seem an adequate explanation of its change of position that Congress made clear its wishes for stricter enforcement.”⁵⁰

In any event, apart from the degree of congressional (or presidential) control exerted, Justice Scalia found no “applicable law” in the APA, or otherwise, requiring that rulemaking by independent agencies be subject to “heightened scrutiny.”⁵¹ Curiously, Justice Scalia stated that “it is hard to imagine any closer scrutiny than that we have given to the Environmental Protection Agency, which is not an independent agency.”⁵² And, just as curiously, Justice Scalia concluded this portion of his opinion by stating, “There is no reason to magnify the separation-of-powers dilemma posed by the Headless Fourth Branch by letting Article III judges—like jackals stealing the lion’s kill—expropriate some of the power that Congress has wrested from the unitary Executive.”⁵³

opinion. *See id.* at 1815–19 (plurality opinion).

45. *Id.* at 1815.

46. *Id.* at 1815–16.

47. *Id.* at 1816.

48. The intimation came in the form of Justice Scalia’s throwaway line, “Leaving aside the unconstitutionality of a scheme giving the power to enforce laws to agents of Congress . . .” *Id.* The line was followed immediately by Justice Scalia’s statement that “[i]f the FCC is indeed an agent of Congress,” then the fact that Congress made clear its wishes for stricter indecency enforcement should suffice for an adequate reason for changing the agency’s policy. *Id.* (emphasis added).

49. *See id.* at 1816 n.4.

50. *Id.* at 1816.

51. *Id.* at 1817.

52. *Id.* This is a curious statement because *Chevron* itself involved a statutory interpretation by the Environmental Protection Agency (EPA). The whole point of *Chevron* is that in light of the political accountability of executive branch agencies such as EPA, their rulings are owed deference as long as they are reasonable. It is somewhat jarring, then, to see Justice Scalia declaring that it is difficult to imagine any closer scrutiny than the Court has given EPA actions.

53. *Id.* (citation omitted). Justice Scalia supposes that subjecting decisions of independent agencies to closer scrutiny than those of executive branch agencies magnifies separation-of-powers problems, perhaps by calling further attention to these constitutional anomalies in which executive, legislative, and judicial functions are exercised by the same entity. As I made clear in *Defining Deference Down*, May, *supra* note 1, at 451, my view is that by giving less deference to independent agencies’

As I will explain in the next section, I believe Justice Scalia's view—that for purposes of applying deference independent and executive branch agencies should be treated alike—not only magnifies the separation-of-powers dilemmas inherent in the nature of independent regulatory agencies but is inconsistent with the principal political accountability rationale of *Chevron*.

III. “THE HEADLESS FOURTH BRANCH” WARRANTS LESS JUDICIAL DEFERENCE

Before addressing the way in which Justice Scalia dealt in *Fox* with the separation-of-powers concerns that he acknowledged existed and which, after all, are central to the political accountability rationale upon which *Chevron* principally rests, I will acknowledge that Justice Scalia is correct that, on its face, the APA does not distinguish between executive and independent regulatory agencies for purposes of review of agency action.⁵⁴ But, of course, it does not preclude such differentiation either. *Chevron* itself did not even refer to the APA review provision, even as the Court established a new deference requirement relating to judicial review that governs large amounts of agency action.

While this omission in *Chevron* may seem somewhat odd, it is not illogical to the extent the question whether an agency action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,”⁵⁵ is not necessarily coincident with the question of how much deference should be given the agency in deciding whether the action complies with the § 706 standard.

Thus, when the *Chevron* Court said that “controlling weight” should be given to the agency's statutory interpretation when Congress has left a gap to be filled,⁵⁶ it was not necessarily purporting to change the substantive meaning of the arbitrary and capricious test. Rather, its action can be viewed as an effort to tip the scale decidedly in the agency's direction by the weight accorded to the agency's interpretation. Formulating different degrees of deference in reviewing agency actions—such as according “controlling weight” or not—is not unlike the Supreme Court formulating different degrees of scrutiny—“strict,” “intermediate,” or “rational basis”—in assessing the constitutionality of laws, or common law courts or legislatures devising different evidentiary standards, such as “preponderance of the evidence” or “substantial evidence.” In short, I do not see the APA as a bar to applying a less deferential standard of review to the actions of independent agencies.

While Justice Scalia did not make much of the point, it is also true that the

decisions, courts might at least mitigate to some extent separation-of-powers concerns. Thus, I stated, “[I]t is odd in a constitutional system with three defined branches for courts to give controlling deference to agencies that, not without reason, are commonly referred to as ‘the headless fourth branch.’” *Id.*

54. *Fox*, 129 S. Ct. at 1817.

55. 5 U.S.C. § 706(2)(A) (2006).

56. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

Chevron Court referred to Environmental Protection Agency's (EPA's) "expertise" in implementing a regulatory regime that is "technical and complex" as a basis for giving deference to EPA's determination.⁵⁷ And the Court observed that EPA "considered the matter in a detailed and reasoned fashion."⁵⁸ No doubt recognition of agency expertise is a factor supporting deference to an agency's determination, all the more so in areas that are especially technical and complex. Both executive branch agencies, such as EPA, and independent agencies, such as FCC, possess such institutional expertise, and they are both often called on to make decisions on technical and complex matters. Nevertheless, the fact remains that *Chevron* deference was not premised principally upon agency expertise, but rather upon the notion that there should be political accountability for policy choices that Congress did not make itself.⁵⁹ As the Court put it, "federal judges—who have no constituency—have a duty to respect the legitimate policy choices made by those who do."⁶⁰ Because executive and independent agencies are not politically accountable for making policy in the same way, agency expertise, while not irrelevant, is not a reason in and of itself to require that both types of agencies be treated alike for purposes of fashioning a deference standard.

In response to the dissents, Justice Scalia does not argue that the APA by its terms requires that independent and executive branch agencies be treated alike for purposes of judicial review. Nor does he argue that the fact that both types of agencies possess expertise relevant to their institutional tasks requires like treatment. Rather, he ultimately places the most weight upon the notion that not subjecting the independent agencies to more searching judicial scrutiny avoids magnifying the separation-of-powers dilemmas posed by the "Headless Fourth Branch."⁶¹ Justice Scalia's approach not so much avoids magnifying separation-of-powers problems as, with some sleight of hand, it downplays them. He accomplishes this by exaggerating the extent to which the independent agencies are politically accountable to Congress, while at the same time fully acknowledging that they are not accountable to the President. Specifically, Justice Scalia states, "The independent agencies are sheltered not from politics but from the President, and it has often been observed that their freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional

57. *Id.* at 865.

58. *Id.*

59. In contrast, in *Humphrey's Executor*, in the course of highlighting the FTC's freedom from executive control, the Court touted the agency's "body of experts who shall gain experience by length of service" as a distinguishing characteristic of the agency's independence. 295 U.S. 602, 625 (1935).

60. *Chevron*, 467 U.S. at 866.

61. The term *headless fourth branch* was used to describe the independent agencies by a presidential management commission in 1937 studying the organization and management of the federal government. PRESIDENT'S COMM. ON ADMIN. MGMT., REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT 40 (1937).

direction.”⁶² In my view, he magnifies congressional control too much.

In support of his assertion concerning subservience to Congress, Justice Scalia cites a footnote in Elena Kagan’s *Presidential Administration* article to the effect that “[a]s a practical matter, successful insulation of administration from the President—even if accomplished in the name of ‘independence’—will tend to enhance Congress’s own authority over the insulated activities.”⁶³ It may be that Solicitor General Kagan believes that successful insulation of independent agencies from presidential control has the effect of enhancing Congress’s own authority. But that is a far cry from concluding that congressional control is such that it puts independent agencies under Congress’s thumb (and certainly not under its thumb based on a few statements by representatives at congressional hearings, which was the factual context of the alleged congressional influence in *Fox*).⁶⁴ After all, the pertinent question for separation-of-powers purposes really is not whether Congress’s authority might be somewhat *enhanced* by the lack of presidential control, but rather whether the *extent* of congressional control rises to the level of ensuring the meaningful political accountability which separation of powers is designed to ensure.

Indeed, Solicitor General Kagan’s view appears to be distinctly different from that which Justice Scalia assumed when he cited her article for support. Further along in *Presidential Administration*, when she explicitly advocates giving less *Chevron* deference to the decisions of independent agencies than to those of executive agencies, Kagan makes quite clear that she views the independent agencies as not sufficiently accountable to *either* the President or Congress to justify according them the same deference accorded to the more politically accountable executive agencies. Apart from what she calls “the institutional characteristics that make Congress a less reliable overseer of agency action than the President,”⁶⁵ Kagan emphasizes that “the constitutional limits on Congress’s ability to establish a hierarchical relationship with the independent agencies (most notably, by retaining removal power over their heads) preclude equating the two kinds of control.”⁶⁶

In other words, as I asserted in *Defining Deference Down*,⁶⁷ the presidential removal power is the key to the executive agencies’ political accountability. Surely both the President and Congress each have various means of exercising influence over the independent agencies. But they are both alike in lacking the critical ability

62. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1815 (2009) (plurality opinion).

63. *See id.* (citing Kagan, *supra* note 12, at 2271 n.93).

64. *Id.* at 1816 n.4.

65. Kagan, *supra* note 12, at 2377 n.506.

66. *Id.* (citation omitted).

67. May, *supra* note 1, at 447–48; *see also* 1 KENNETH CULP DAVIS & RICHARD PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.5 (3d ed. 1994) (“The characteristic that most sharply distinguishes independent agencies is the existence of a statutory limit on the President’s power to remove the head (or members) of an agency.”).

to remove agency commissioners without cause. In *Humphrey's Executor*, the Supreme Court put the point plainly: "For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will."⁶⁸ This lack of removal power, what Kagan calls the "core legal difference" between independent and executive branch agencies, is what, combined with their unique organizational structure, gives the independent agencies their independence.⁶⁹

In his famous dissent in *Morrison v. Olson*,⁷⁰ Justice Scalia argued (persuasively in my opinion) that the then-existing "independent counsel" statute was unconstitutional as a violation of separation of powers because of limitations placed on the President's authority to remove the counsel except upon good cause. Referring to *Humphrey's Executor*, he pointed out, with respect to the independent counsel, that the limitation on the President's removal power constituted an effective impediment to presidential control.⁷¹ Indeed, Justice Scalia argued that the removal limitation constituted such an impediment to presidential control that this diminishment of executive authority violated the separation of powers that he described as so central to the preservation of our liberties.⁷²

The relevance of Justice Scalia's *Morrison* dissent to *Fox* is this: In *Morrison* he recognized, as had the Court years earlier in *Humphrey's Executor*, the centrality of the removal power to the independence vel non of government officials. After all, the effect of this "power to fire," or "coercive influence" as *Humphrey's Executor*⁷³ put it, is only common sense logic. But in *Fox*, Justice Scalia ignored the fact that Congress lacks the authority to remove independent agency commissioners, absent impeachment proceedings.⁷⁴ Thus, while no one doubts Congress has the means to influence agency actions through investigatory or oversight hearings, such as those to which Justice Scalia referred in his *Fox* opinion, or through other means such as the confirmation and appropriations processes,⁷⁵ these means, absent the removal power, do not give rise to the same degree of political accountability for policymaking upon which the *Chevron* rationale primarily rests. Once again, recall that in *Chevron* the Court pointed to the political accountability of EPA as part of the

68. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935).

69. Kagan, *supra* note 12, at 2376.

70. 487 U.S. 654, 706 (1988) (Scalia, J., dissenting).

71. *Id.* at 706.

72. *See id.* at 706–07.

73. 295 U.S. at 630.

74. *Cf. Bowsher v. Synar*, 478 U.S. 714, 726 (1986) ("[W]e conclude that Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment."). Impeachment proceedings rarely, if ever, have been instituted against independent agency officials. I am unaware of such a case.

75. There is a vast literature on the myriad ways that Congress can exercise influence on agency actions. For a good source, with citation to many authorities, see Jack M. Beerermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006).

“incumbent administration.”⁷⁶ By deliberate design, and by virtue of the Supreme Court’s decision in *Humphrey’s Executor*, the independent agencies are not considered part of the incumbent administration and they do not enjoy—or suffer, as the case may be—the same degree of political accountability.

CONCLUSION

Certainly, there is a respectable body of opinion that *Humphrey’s Executor*, in insulating the independent agencies from presidential control, is constitutionally suspect on separation-of-powers grounds.⁷⁷ Professors Lessig and Sunstein, for example, have stated “the case was a bizarre and unfounded exercise in constitutional innovation,”⁷⁸ an innovation that threatens “the core constitutional commitments to political accountability, expedition in office, and coordinated policymaking.”⁷⁹ However bizarre and unfounded *Humphrey’s Executor* may be, the constitutional sanction it gave to independent agencies like the FCC seems now embedded in our constitutional culture, despite nonfrivolous separation-of-powers concerns.

But the fact that the constitutional status of the independent regulatory agencies does not appear to be threatened per se does not mean that, in reviewing their actions, courts should not strive to act consistently with, or at least to not diminish, “the core constitutional commitments to political accountability.”⁸⁰ In the main, *Chevron* deference is primarily all about this constitutional commitment to political accountability. And the debate that emerged in *Fox* between Justices Scalia, Breyer, and Stevens concerning review of the FCC’s changed indecency policy, with the back-and-forth exchange concerning the extent to which the agency was subject to congressional control, revolves around the constitutional commitment to political accountability. Although the *Fox* opinions did not directly invoke *Chevron*, they definitely sounded in *Chevron* in their invocations of the relevance of political accountability to a more or less deferential standard of review of an independent agency’s actions.

At the end of the day in *Fox*, Justice Scalia’s view, embodied in his plurality opinion, prevailed—that is, the actions of independent agencies are not subject to any form of heightened scrutiny on review as a result of the agencies’ status. I think Justice Scalia’s view is based on an exaggerated notion of congressional control of the independent agencies’ actions that assumes a greater degree of agency political

76. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

77. For further analysis on this issue and additional sources, see May, *supra* note 1, at 450 nn.117–19.

78. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 101 (1994).

79. *Id.* at 114.

80. *Id.*

accountability than is warranted. He accepts, rather uncritically, the notion that the independent agencies are insulated from presidential control. But in *Fox* he does not confront the reality that it is the limitation on presidential removal power of agency heads which is at the heart of such insulation and that the absence of the removal power similarly limits congressional control of the independent agencies. While Justice Scalia professed a desire to avoid magnifying separation-of-powers problems, in my view his approach achieves just the opposite by, in effect, derogating the core commitment to political accountability that constitutional separation of powers embodies.

With *Defining Deference Down*, based on what I see as the principal political accountability rationale underpinning *Chevron*, my project was to begin a more robust dialogue concerning whether a less deferential judicial review standard of independent agency actions would be more consistent with core separation-of-powers values. While I expect that *Fox* will be seen first and foremost through the lens of a more conventional administrative law “change of agency policy” case, I have hopes that it will also be an impetus for the dialogue that I aim to further with this follow-on article. For regardless of the outcome, a discussion relating to the impact of judicial review doctrines on separation of powers and political accountability is never out of place in our democratic republic. Indeed, it is to be welcomed.

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