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Defining Deference Down: Independent Agencies and *Chevron* Deference

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DEFINING DEFERENCE DOWN: INDEPENDENT AGENCIES AND *CHEVRON* DEFERENCE

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INTRODUCTION

The Supreme Court's decision in *National Cable & Telecommunications Association v. Brand X Internet Services*,[1] handed down at the very end of the 2004 term, is a communications law decision of major import. It is also a major administrative law decision with significant separation of powers implications because it impacts relationships among the three branches.

In *Brand X*, the Court relied on the now two-decade old *Chevron* deference doctrine[2] and affirmed a Federal Communications Commission

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1. 125 S. Ct. 2688 (2005).

2. The landmark decision in *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) held that, if a statutory provision is ambiguous and if the implementing agency's construction is reasonable, a federal court is required to accept the agency's statutory interpretation, even if the agency's construction differs from one the court deems better. Often, the doctrine announced in *Chevron* is expressed as a familiar two-step test.

(FCC or the Commission) ruling,[3] which held that a cable operator's broadband Internet service offering is properly classified under the Communications Act as an "information service"[4] and not a "telecommunications service."[5] The practical effect of the Court's decision is to sanction the agency's policy preference that, at least for now, broadband services should remain free from the common carrier-type rate and nondiscrimination regulation that attaches to services classified as telecommunications. Indeed, although *Brand X* itself involved only the broadband Internet services of cable operators, the FCC subsequently employed its rationale to reclassify telephone companies' broadband Internet services as information services.[6] In short, the *Brand X* decision removed the immediate threat that common carrier regulations would be extended to the more competitive broadband world. Although *Brand X* did not resolve all issues concerning the FCC's regulation of broadband services, it solved a critical issue: It allowed the FCC to determine the meaning of information services. Thus, the Commission retained the discretion to implement its policy determination that broadband services should exist in a "minimal regulatory environment" that promotes investment and innovation.[7] So, from a communications policy perspective, *Brand X* is a very consequential decision.

See Note, *"How Clear Is Clear" in* Chevron*'s Step One?*, 118 HARV. L. REV. 1687, 1687 (2005) ("At Step One, the court must determine whether the statutory language is clear. If it is, then the court must reject an alternative agency interpretation. If, however, the statute is ambiguous, Step Two requires the court to accept any reasonable agency interpretation.").

3. *See* Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rule Making, 17 F.C.C.R. 4798, 4802 (2002) [hereinafter FCC Ruling] ("[C]able modem service, as it is currently offered, is an interstate information service."), *vacated in part and remanded sub nom.* Brand X Internet Servs. v. FCC, 345 F.3d 1120 (9th Cir. 2003), *rev'd and remanded*, Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 125 S. Ct. 2688 (2005).

4. An information service is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing." Communications Act, 47 U.S.C. § 153(20) (2000).

5. Telecommunications is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(43). Telecommunications service means "the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used." *Id.* § 153(46).

6. *See* Appropriate Framework for Broadband Access to Internet Over Wireline Facilities, 70 Fed. Reg. 60,222, 60,223-24 (Oct. 17, 2005) (codified at 47 C.F.R. pts. 51, 63, 64) (concluding that, since wireline broadband provides a similar service to that provided by cable, it should receive the same legal classification).

7. *See* FCC Ruling, *supra* note 3, at 4802 ("[B]roadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market.") (citations omitted).

Brand X is also a very significant administrative law decision. It clarifies that, when in conflict, the doctrine of *Chevron* deference trumps the doctrine of stare decisis.[8] This determination, like the *Chevron* doctrine itself, has major separation of powers implications regarding interbranch governmental relationships. Before *Brand X*, it was unclear whether an agency remained free to reach a different interpretation once a court has construed a concededly ambiguous statutory provision.[9] In fact, in the appellate decision in *Brand X*, the Ninth Circuit held that, once a court has construed a statute, the provision's meaning becomes fixed, even if the provision might be susceptible to more than one reasonable interpretation, leaving the agency no further interpretative discretion.[10]

Given the prominent role the *Chevron* doctrine plays in affecting the distribution of decisionmaking authority in the administrative state, there is no doubt as to *Brand X*'s standing as a major administrative law case. Justice Scalia's dissent characterized the majority holding as "another breathtaking novelty: judicial decisions subject to reversal by Executive officers."[11] For good measure, he called the decision "bizarre," mocking the "wonderful new world that the Court creates, one full of promise for administrative law professors in need of tenure articles and of course, litigators."[12]

To be sure, long before the agency ruling contested in *Brand X* was a gleam in any FCC Commissioner's eye, *Chevron* already had generated many more than its fair share of would-be tenure articles. This is not surprising. Six years after it was decided, Cass Sunstein dubbed *Chevron* "one of the very few defining cases in the last twenty years of American public law."[13] In the domain of the administrative lawyer, it is often said,

8. Stare decisis, "to stand by things decided," refers to the principle that precedent decisions are to be followed by the courts. *See* BLACK'S LAW DICTIONARY 1414 (7th ed. 1999).

9. After explaining that the Court of Appeals held that stare decisis trumped *Chevron* deference, Justice Thomas, writing for the *Brand X* majority, stated, "We granted certiorari to settle important questions of federal law." 125 S. Ct. at 2699. *See* Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1273-74 (2002) (noting the dichotomy between the Court's stated goal of allowing agencies to interpret ambiguous statutes and the reality wherein courts generally hear cases regarding statutory ambiguity before the agency actually has a chance to interpret ambiguous statutes).

10. *See* Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1130-32 (9th Cir. 2003) (finding that the Ninth Circuit's decision in *Mesa Verde Construction Co. v. N. Cal. Dist. Council of Laborers*, 861 F.2d 1124 (9th Cir. 1988) (en banc), and the Supreme Court's holding in *Neal v. United States*, 516 U.S. 284 (1996), required adherence to statutory construction rather than the agency's interpretation); *see also* discussion *infra* Part III.

11. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 125 S. Ct. 2688, 2719 (2005) (Scalia, J., dissenting).

12. *Id.* at 2720-721.

13. Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2075 (1990).

in words more or less to this effect, "[t]here is no more familiar doctrine . . . than the two-step standard of review announced in *Chevron*."[14] So Justice Scalia is surely correct that *Brand X* promises a fresh supply of tenure articles for administrative law professors. The Court's holding that *Chevron* deference trumps stare decisis certainly, and quite properly, will prove a rich vein to mine. I will use the high-profile *Brand X* case as, in effect, a jumping off point to begin examining a doctrinal question implicated, but not addressed, by *Chevron*: 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?

Surprisingly, although the rationale articulated in *Chevron* supporting the deference doctrine might suggest that independent agencies should receive less deference, the question has not been examined in the courts and has received very little attention in the academic literature.[15] I propose at least to begin that examination here, hoping to spur further commentary. In Part I below, this Article recounts *Chevron* and its rationale grounding the deference doctrine primarily (but not exclusively) in notions of political accountability inherent in constitutional separation of powers principles. Part II of this Article briefly examines the *Brand X* case to show how in that particular factual situation, involving a ruling of the FCC, a so-called independent agency, *Chevron* deference trumped stare decisis. In effect, this allowed the agency to alter the interpretation of a statutory provision that previously had been construed differently by an appellate court. Part III sketches the skimpy scholarly literature that hints, in light of *Chevron*'s political accountability rationale, that the decisions of independent regulatory agencies should receive less deference than those of executive branch agencies. Part IV argues that there is considerable law and logic to support these heretofore under-explored, sparse, suggestive comments. Since independent agencies such as the FCC are, as a matter of our current understanding of the law and of historical practice, mostly free from executive branch political control, *Chevron*'s political accountability rationale should imply that statutory interpretations of independent agencies receive less judicial deference. In light of the peculiar constitutional status of the independent agencies, which often are referred

14. Note, *supra* note 2, at 1687.

15. *See* David M. Gossett, Chevron, *Take Two: Deference to Revised Agency Interpretations of Statutes*, 64 U. CHI. L. REV. 681, 689 n.40 (1997) (noting that *Chevron*'s separation of powers rationale based on political accountability "would imply that that independent agencies might not deserve *Chevron* deference, though no commentary seems to have explored this idea").

to as the "headless fourth branch," this Article concludes with an explanation as to why a reconception of the *Chevron* doctrine that would accord less judicial deference towards the decisions of these agencies is more consistent with our constitutional tradition than is the current conception.

I. *CHEVRON*'S DOMAIN: A RATIONALE GROUNDED IN POLITICAL ACCOUNTABILITY

The basic facts of *Chevron*[16] are familiar. In 1981, the Environmental Protection Agency (EPA) reversed its earlier interpretation of the meaning of the term "stationary source" found in the Clean Air Act Amendments of 1977.[17] Under the statute, the EPA could require states to establish a permit program to regulate new or modified stationary sources of air pollution.[18] The EPA interpreted the statutory term "stationary source" to refer to each individual pollution-emitting device within a plant.[19] But in a rulemaking proceeding conducted after Ronald Reagan succeeded Jimmy Carter as President, the agency revised its interpretation of "stationary source" to refer to the entire plant.[20] The effect was to allow a plant to increase emissions from one device without triggering EPA intervention if, due to a corresponding decrease in emissions from other devices in the facility, there was no net increase in emissions for the plant as a whole. The D.C. Circuit found there was no clear-cut meaning of "stationary source" in either the text of the statute or its legislative history.[21] While acknowledging the EPA's views, the appeals court engaged in its own independent evaluation to determine that the new statutory interpretation was inconsistent with the Clean Air Act's objectives.[22]

In reversing the D.C. Circuit, the Supreme Court in *Chevron* established a new regime that significantly altered the existing understanding of the judiciary's role in reviewing agency statutory interpretations. The Court held that:

16. 467 U.S. 837 (1984).
17. *See* 42 U.S.C. § 7502(c)(5) (2000).
18. *See id.*
19. *See id.*
20. 467 U.S. at 857-59.
21. *See* Natural Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 720 (D.C. Cir. 1982) (noting that congressional debates regarding the Clean Air Act did not directly address the meaning of the word "source," but focused on the purpose of the Act to enhance air quality). The court further observed that the Environmental Protection Agency's (EPA) changed interpretation of the word "source" was intended to "cut back substantially the coverage of nonattainment area new source review" and thus, was impermissible in the face of Congress's intent that the Act serve "specifically to promote the cleanup of nonattainment areas." *Id.*
22. *See id.*

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of the Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statue 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.[23]

The Court said that, when Congress has left a gap in the statute for the agency to fill, the agency's interpretation embodied in regulations is to be given "controlling weight."[24]

The idea that the judiciary should provide authoritative interpretations of statutory texts is longstanding and deeply embedded in our legal culture. In *Federalist No. 78*, Alexander Hamilton said, "The interpretation of the laws is the proper and peculiar province of the courts."[25] Of course, in *Marbury v. Madison*, Chief Justice Marshall, famously proclaimed, "It is emphatically the province and duty of the judicial department to say what the law is."[26] Additionally, the Administrative Procedure Act (APA), called the "constitution"[27] or the "bill of rights"[28] of the modern regulatory state, provides that a reviewing court "shall decide all relevant questions of law, interpret . . . statutory provisions, and determine the meaning and applicability of the terms of agency action."[29] The APA also provides that

23. *Chevron*, 467 U.S. at 842-43. Relevant to the discussion of the *Brand X* case, the Court added in a footnote: "The court need not conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11. *See* discussion *infra* Part II.

24. 467 U.S. at 844.

25. THE FEDERALIST NO. 78, at 93-94 (Alexander Hamilton) (Hackett Pub. Co., 2005).

26. 5 U.S. (1 Cranch) 137, 177 (1803).

27. *See, e.g.*, Steven P. Croley, *The Administrative Procedure Act and Regulatory Reform: A Reconciliation*, 10 ADMIN. L.J. AM. U. 35 (1996) ("Like a constitution, the APA establishes a set of fundamental ground rules . . . according to which many particularized governmental decisions are made. In addition, the APA is comparable to some constitutions with respect both to its longevity and to the specific form that changes to the Act have taken."); Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253 (1986) ("My thesis is a simple one: the APA [Administrative Procedure Act] is more like a constitution than a statute.").

28. *See* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1558 (1996) (calling the APA "the bill of rights for the new regulatory state" because it "established the fundamental relationship between regulatory agencies and those whom they regulate—between government, on the one hand, and private citizens, business, and the economy, on the other hand").

29. APA, 5 U.S.C. § 706 (2000).

the reviewing court shall hold unlawful agency action found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[30] Given the judiciary's traditionally acknowledged law-interpreting function, along with the text of the APA that seemingly leaves questions of statutory interpretation to the reviewing court, what was the doctrinal basis for a decision giving administrative agencies, rather than the courts, the primary authority to interpret ambiguous statutory provisions? *Chevron*, contrary to jurisprudential tradition and the literal language of the APA, held that ambiguity in a statute, in effect, constitutes a delegation of authority by Congress to the agency to fill in the gap in meaning created by the ambiguity.[31]

Absent ascertainment of unambiguous congressional intent at *Chevron* Step One, the rationale for judicial deference to reasonable agency interpretations at Step Two is grounded principally in the separation of powers principles at the core of our Constitution. While the Court at least implicitly acknowledged agency expertise as a supporting rationale,[32] the justification for the deference requirement was mostly based on the idea that, in our tripartite constitutional system, the political branches, not the judiciary, should make policy. The Court explained that:

> 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

30. *Id.* § 706(2)(C). Taking these two provisions of § 706 at face value, it would be rather easy to conclude that the APA's framers intended for the courts to have the responsibility for determining the lawfulness of an agency interpretation of a statute, even an ambiguous one.

31. *See Chevron*, 467 U.S. 837, 844 (1984) (holding that the court's role was to determine whether the agency's interpretation was reasonable, not whether the interpretation was appropriate). As the Court later put this point very directly in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), *Chevron* deference "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *Id.* at 159. A year later, in *United States v. Mead*, 533 U.S. 218 (2001), the Court elaborated somewhat more fully on the implicit delegation point:

> Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which 'Congress did not actually have an intent' as to a particular result.

Id. at 229.

32. The Court asserted that the regulatory scheme was "technical and complex" and suggested Congress may have consciously wanted the EPA Administrator, rather than itself, to strike the balance among the competing interests, "thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so." 467 U.S. at 865.

> 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.[33]

The Court put an unmistakable point on the matter, emphasizing that "federal judges—who have no constituency—have a duty to respect the legitimate policy choices made by those who do."[34]

In one of the early leading articles on the case, Cynthia Farina notes that, "recognizing that the choice of interpretative model is part of the large problem of reconciling agencies and regulatory power with the constitutional scheme, *Chevron* invoked the principles of separation of powers and legitimacy."[35] In effect, the *Chevron* doctrine provides a foundational construct for "the separation of powers explanation for the administrative state"[36] because the legitimacy of the administrative state would be called into question if the congressional delegation of policymaking authority, necessary to achieve gap-filling of ambiguous statutes, ended up in the hands of politically unaccountable judges rather than a politically accountable branch of government.

II. *BRAND X*'S DOMAIN: POLITICAL ACCOUNTABILITY TRUMPS STABILITY OF THE LAW

Brand X is only the most recent case in which the Supreme Court has invoked the *Chevron* doctrine in reviewing an FCC statutory interpretation that implements a significant communications policy direction.[37] In this respect then, it is not especially remarkable. But, in that particular instance, before the agency could enjoy the deference that ultimately sanctioned an important new deregulatory policy, *Chevron* had to overcome the doctrine of stare decisis. Before turning to the next Part to explore the basis for suggesting whether a less deferential review standard should apply to independent regulatory agencies such as the FCC, it is

33. *Id.* at 865-66.
34. *Id.* at 866.
35. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989).
36. Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1284 (2002). Capturing the essence of its separation of powers foundation, now-Professor Bamberger stated: "Specifically, *Chevron* premised deference by the judiciary, (established by Article III of the Constitution) to decisions by agencies (which are not mentioned explicitly anywhere in the Constitution) on the intent of Congress (established by Article I of the Constitution)." *Id.* at 1283. *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 994 (3d ed. 2000) (stating that, though the *Chevron* doctrine "is not a rule of constitutional law per se, . . . it is nonetheless premised on important separation of powers principles").
37. *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 125 S. Ct. 2688 (2005).

useful to recount briefly the *Brand X* decision, if only to fully appreciate *Chevron*'s sway.

Two years before the FCC reached its own determination in a notice-and-comment rulemaking as to the proper classification of cable broadband service,[38] the Ninth Circuit had already ruled in an earlier unrelated case, *AT&T Corp. v. Portland*,[39] that such service constituted "telecommunications" under the Telecommunications Act of 1996. Notably, the *Portland* court was not reviewing an FCC proceeding and the FCC was not a party to the litigation between AT&T and the city of Portland, Oregon.[40] When the Brand X company's appeal from the FCC's classification rulemaking arrived in the Ninth Circuit[41] one year after *Portland*, the appeals court refused to give any deference to the agency's ruling, declaring that it was bound by stare decisis to adhere to its earlier *Portland* precedent.[42]

Reviewing the Ninth Circuit decision, the Supreme Court in *Brand X* held that the appeals court had misunderstood the reach of *Chevron*. Writing for the majority, Justice Thomas stated, "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[43] The Court explained that this principle necessarily results from *Chevron*'s premise that "it is for agencies, not courts, to fill statutory gaps."[44] Therefore, "[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."[45] The Court determined that the *Portland* decision did not unambiguously foreclose the FCC's subsequent interpretation,[46] so the Ninth Circuit erred in refusing to accord *Chevron*

38. *See* FCC Ruling, *supra* note 3 (detailing the FCC's determination of the proper category for cable broadband service).

39. 216 F.3d 871, 878-79 (9th Cir. 2000).

40. Foreshadowing the legal issue in the subsequent *Brand X* decision, the Ninth Circuit pointedly observed that "the FCC has declined, both in its regulatory capacity and as amicus curiae, to address the issue before us. Thus, we are not presented with a case involving potential deference to an administrative agency's statutory construction pursuant to the *Chevron* doctrine." *Id.* at 876.

41. *See* Brand X Internet Servs. v. FCC, 345 F.3d 1120 (9th Cir. 2003), *rev'd*, *Brand X Internet Servs.*, 125 S. Ct. 2688.

42. *See id.* at 1130-31 (observing that under the Ninth Circuit's holding in *Mesa Verde Construction Co. v. N. Cal. District Council of Laborers*, 861 F.2d 1124 (9th Cir. 1988) (en banc), "precedent can be disregarded in favor of a subsequent agency interpretation only 'where the precedent constituted deferential review of [agency] decisionmaking'").

43. 125 S. Ct. at 2700.

44. *Id.*

45. *Id.*

46. *See id.* at 2701-02 (noting that, in reaching its judgment, the Ninth Circuit also failed to invoke the rule of lenity or any other rule of construction that would have required

deference to the agency's statutory construction.[47] Additionally, because the Court concluded that the definitions of "telecommunications" and "information services" contained in the Communications Act were, in fact, ambiguous, *Chevron* carried the day for the agency.[48]

In dissent, Justice Scalia argued that the FCC was attempting to establish "a whole new regime of *non*-regulation" through an "implausible" reading of the statutory terms.[49] He unequivocally believed that the agency had exceeded its statutory authority. But Scalia was even more riled with what he called the "breathtaking novelty" of an understanding of *Chevron* that allows "judicial decisions [to be] subject to reversal by Executive officers."[50] Justice Scalia posited a hypothetical case in which an agency is a party to a case in which the Supreme Court construes a statute, and "the agency will be able to disregard that construction and seek *Chevron* deference for its contrary construction the next time around."[51] Justice Scalia called this result "probably unconstitutional" because "Article III courts do not sit to render decisions that can be reversed or ignored by Executive officers."[52]

The purpose of this Article is not to address the merits of *Brand X*'s treatment of the relationship between *Chevron* and stare decisis on the particular facts of that case. Rather, the goal is to use the *Brand X* majority's powerful reaffirmation of the *Chevron* doctrine and Justice Scalia's dissent, each with its constitutional separation of powers underpinnings, to examine a question lurking in *Chevron*'s shadow:

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it to determine that the statute was unambiguous).

47. *See id.* (overruling the Ninth Circuit opinion).

48. It is not necessary here to address the Court's own examination of the meaning of the two statutory terms. Nevertheless, it is worth pointing out that the Court's discussion amply demonstrates the metaphysical nature of the distinction between the two services in today's digital broadband environment in which, as the saying goes, "a bit is a bit is a bit." I first called the distinction between "telecommunications" and "information services" metaphysical in a piece published in January 2004. *See* Randolph J. May, *The Metaphysics of VoIP*, CNET NEWS.COM, Jan. 5, 2004, http://news.com.com/The+metaphysics+of+VoIP/2010-7352_3-5134896.html. In addressing whether the statutory terms were ambiguous, the *Brand X* majority and dissent jousted over whether these services are more or less analogous to pizzas with or without delivery service or puppy dogs with or without leashes. *See Brand X Internet Servs.*, 125 S. Ct. at 2704-06, 2714-15. Suffice it to say, this discussion went a long way to proving the metaphysical nature of the statutory distinctions and, ipso facto, their ambiguity, at least as the word "ambiguous" is commonly understood. For an argument that the current communications law needs to be replaced with a new one that does not tie regulatory consequences to outdated service definitions based on metaphysical techno-functional distinctions, see Randolph J. May, *Why Stovepipe Regulation No Longer Works: An Essay on the Need for a New Market-Oriented Communications Policy*, 58 FED. COMM. L.J. 103 (2006).

49. *See Brand X Internet Servs.*, 125 S. Ct. at 2713.

50. *Id.* at 2719.

51. *Id.* at 2720. The majority opinion responded that, when the court's construction of the statute in the first case was the *best* but not the *only* permissible interpretation, then the court's earlier interpretation is not to be deemed authoritative. *See id.* at 2701-02.

52. *Id.* at 2720.

whether, consistent with separation of powers principles, an independent agency like the FCC should be accorded less deference than an executive branch agency. Certainly the Supreme Court in *Brand X* [53] and in other decisions involving the FCC[54] seems, thus far, to have assumed no difference in the degree of deference due.

III. INDEPENDENT AGENCIES AND DEMOCRATIC ACCOUNTABILITY UNDER *CHEVRON*

A good place to begin examining whether *Chevron* should apply with less force to decisions of the independent regulatory agencies is with Dean Elena Kagan's informative and insightful article, *Presidential Administration*.[55] In her study, Kagan claims that, beginning with President Reagan, but most especially under President Clinton, the relationship between the President and the administrative state has undergone a dramatic transformation, "making the regulatory activities of the executive branch agencies more and more an extension of the President's own policy and political agenda."[56] In large part, President Clinton accomplished this expansion of presidential control over policymaking through the issuance of "formal directives to the heads of executive agencies to set the terms of administrative action and prevent deviation from his proposed course."[57] By the close of his second term, "President Clinton's articulation and use of directive authority over regulatory agencies, as well as his assertion of personal ownership over regulatory product, pervaded crucial areas of administration."[58] With her

53. *Id.* at 2699 ("The *Chevron* framework governs our review of the Commission's construction.").

54. *See* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 397 (1999) (reinstating the FCC's "pick and choose" rule governing the terms of agreements between local exchange carriers and competing carriers, noting that the "matter [is] eminently within the expertise of the Commission and eminently beyond our ken"); Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co., 534 U.S. 327, 333-39 (2002) (finding that the FCC's interpretation of the Pole Attachments Act as applying to providers of commingled cable television and Internet service was reasonable, and so must be accepted); Verizon Comm. Inc. v. FCC, 535 U.S. 467, 501-02 (2002) (determining that the FCC was authorized to regulate the method for setting the lease rates charged by incumbent carriers to entrant carriers for local-exchange networks elements in order to foster competition). In addition, the Court noted that interpreting what constituted "just and reasonable" rates, for which the agency is responsible under the Telecommunications Act of 1996, was within the agency's discretionary power. *See id.*

55. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001). Kagan, now the Dean of Harvard Law School, served as Deputy Assistant to the President for Domestic Policy and Deputy Director of the Domestic Policy Council during the Clinton Administration. *Id.* at 2246 n.*.

56. *Id.* at 2248.

57. *Id.* at 2249.

58. *Id.* at 2250.

firsthand experience as a key member of the Clinton White House,[59] Kagan's article provides a rich history documenting how President Clinton's presidential directives ordained the outcome of regulatory actions, including regulations issued in notice-and-comment rulemaking proceedings.[60]

Kagan is not especially troubled by the increase in presidential control over agency actions that she chronicles, even directives purporting to dictate the outcome of rulemaking proceedings. Rather, she says, if this strong form of presidential administration "represents a salutary development in administrative process, then courts should attempt, through their articulation of administrative law, to recognize and promote this kind of control over agency policymaking."[61] Given the typically broad delegations of authority to agencies, courts should "encourage this mechanism of control as mitigating the potential threat that administrative discretion poses."[62] This, quite naturally, brings Kagan to consider *Chevron*'s role. She proposes to "link deference in some way to presidential involvement."[63] Under this "more refined version" of *Chevron*, deference might be accorded an agency's interpretation only when "presidential involvement rises to a certain level of substantiality, as manifested by executive orders and directives, rulemaking records, and other objective indicia of decisionmaking processes."[64] In other words, Dean Kagan proposes that the degree of deference should vary depending on evidence concerning the extent of presidential involvement: More involvement means more deference; less involvement means less deference. She states that this focus on presidential involvement "would reverse in many cases the courts' current suspicion of change in regulatory policy."[65] And, it follows that, "if courts should give increased deference to agency actions linked to the President, then new administrative interpretations following new presidential elections should provide a reason to think deference appropriate rather than the opposite."[66]

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59. *See id.* at 2246 n.* (discussing the author's service during the Clinton Administration).

60. *See* Kagan, *supra* note 55, at 2281-303 (observing that President Clinton played an active role in supervising and overseeing administrative actions during his presidency, despite a popular expectation that the change to a Democratic presidency would result in a reduction in presidential oversight of administrative agencies).

61. *Id.* at 2363.

62. *Id.* at 2369.

63. *Id.* at 2376.

64. *Id.* at 2377.

65. *See* Kagan, *supra* note 55, at 2378.

66. *Id.* A change in statutory interpretation following a presidential election was precisely the situation in *Chevron*, of course. Thus, in *Brand X*, Justice Thomas pointed out that, "in *Chevron* itself, this Court deferred to an agency interpretation that was a recent reversal of agency policy." Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 125 S. Ct. 2688, 2700 (2005).

Now recall *Chevron*'s separation of powers rationale in which the Court referred to both an agency's reliance on "the incumbent administration's views" to inform its policy judgments and the President's accountability to the people as justification for judicial deference to "this political branch of Government."[67] Kagan explicitly suggests that the proposed variable *Chevron* doctrine "would begin by distinguishing between actions taken by executive branch agencies and those taken by independent commissions."[68] Accordingly, after delineating factors that give independent agencies greater freedom from presidential control than executive branch agencies,[69] she concludes, without elaboration, that the *Chevron* doctrine "attuned to the role of the President would respond to this disparity by giving greater deference to executive than to independent agencies."[70]

Also with little elaboration, other commentators have suggested that the decisions of independent agencies should perhaps receive less deference than those of executive branch agencies in light of *Chevron*'s political accountability rationale. For example, Barry Friedman has stated:

> Deference under the *Chevron* principle is justified in part by courts based upon the greater accountability of administrative agencies. Especially with regard to independent agencies, under control of officials appointed much like Supreme Court Justices, this claim is more than a little difficult to support, yet has received insufficient attention in the literature.[71]

Similarly, John Duffy has declared 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

67. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

68. Kagan, *supra* note 55, at 2376.

69. Kagan targets the lack of presidential removal power with respect to the independent agencies as "the core legal difference between these entities." *Id.* at 2376. For the landmark decision upholding congressional limitations on the power of the President to remove, without cause, an FTC Commissioner, see Humphrey's Ex'r v. United States, 295 U.S. 602 (1935). Kagan notes other attributes that are commonly cited, along with insulation from presidential removal power, to distinguish independent agencies from executive branch agencies: "an organizational structure featuring multiple agency heads of diverse parties serving staggered terms" and "longstanding (even if psychological) norms of independence, widely held within both the bureaucracy and Congress." Kagan, *supra* note 55, at 2376.

70. Kagan, *supra* note 55, at 2377 (footnote omitted). This conclusion concerning the applicability of *Chevron* is consistent with Kagan's view that "most statutes granting discretion to the executive branch *but not independent* agency officials should be read as leaving ultimate decisionmaking authority in the hands of the President." *Id.* (emphasis added). A recent commentator correctly observed that Dean Kagan's proposal "is best read as applying Chevron deference only to executive agencies and some lower level of deference to independent ones." Note, *supra* note 2, at 1701 (footnote omitted).

71. Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 164 n.31 (2002) (citation omitted).

pleasure of the President."[72] Referring to *Chevron*'s political accountability rationale, David Gossett has written that this "would imply that independent agencies might not deserve *Chevron* deference, though no commentary seems to have explored this idea."[73] Similarly, invoking *Chevron*'s accountability rationale, Christopher Sprigman has concluded, "Admittedly, the separation of powers element of this analysis does not fit well with independent agencies."[74]

Thus, two things are clear from this survey. First, whether independent agencies, by virtue of their independent status, should ordinarily receive a lesser degree of deference than executive branch agencies is an under-explored question. Second, to the extent that commentators have considered, however fleetingly, the question, they have recognized that *Chevron*'s political accountability rationale suggests that perhaps a less deferential standard should be adopted for independent agencies.

IV. INDEPENDENT AGENCIES SHOULD RECEIVE LESS JUDICIAL DEFERENCE THAN EXECUTIVE BRANCH AGENCIES

Just as it did in *Brand X*, the Supreme Court has previously applied the *Chevron* doctrine to independent agencies without any suggestion that they are due any less deference than executive agencies. This is true whether the Court invoked *Chevron* in affirming an agency interpretation[75] or, instead, acknowledged *Chevron* but nevertheless found that the agency clearly erred in interpreting the statute.[76] So, despite *Chevron*'s language

72. John Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 203 n.456 (1998).

73. Gossett, *supra* note 15, at 689 n.40.

74. Christopher Sprigman, *Standing on Firmer Ground: Separation of Powers and Deference to Congressional Findings in Standing Analysis*, 59 U. CHI. L. REV. 1645, 1668 n.145 (1992). A recent student Note also addressed this question, stating: "Dean Kagan proposes that courts should afford a higher level of deference to agencies within the executive branch, which are under the direct control of the President, and a lower level of deference to 'independent' agencies." Note, *supra* note 2, at 1701.

75. *See* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 397 (1999) (affirming most of the FCC's interpretations implementing the local competition provisions of the Telecommunications Act of 1996). The Court stated, "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *Id.* (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984)).

76. *See* MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 226 (1994) (invalidating the FCC's interpretation of its authority to implement permissive detariffing under the Communications Act of 1934, citing *Chevron*, but rejecting the contention that a difference in the dictionary definition of the word "modify . . . establishes sufficient ambiguity to entitle the Commission to deference in its acceptance of the broader meaning") (citation omitted). Justice Scalia, writing for the majority, emphasized that interpreting the Commission's statutory authority to "modify" the requirements of the tariff filing regime to encompass permissive elimination of the tariff filing requirement worked "fundamental changes" of "enormous importance" into the regulatory regime. *Id.* at 228, 231. Thus, despite the different dictionary definitions of the disputed statutory term, this perception that the FCC's action would fundamentally alter the regulatory regime appeared to play a

referring to political accountability of "the incumbent administration" and "the Chief Executive" and "this political branch"[77] and scholarly suggestions for differential treatment of independent and executive agencies, neither the Supreme Court nor any lower federal court has explicitly considered whether independent agencies, such as the FCC, the Securities and Exchange Commission, or the Federal Trade Commission (FTC), should receive less *Chevron* deference than executive branch agencies. For some, perhaps the Court's continued application of *Chevron* to independent agencies, including in *Brand X* when the Court so directly confronted the doctrine's application, is enough in and of itself to end the matter. But in the remainder of this Article, I want to begin to explore whether such a differential standard should be adopted by the courts.[78]

I agree with Kagan's basic principle that the disparity in presidential control should lead to "giving greater deference to executive than to independent agencies."[79] Ever since the Supreme Court held in *Humphrey's Executor v. United States* that at least certain "good cause" statutory limitations on the President's power to remove a member of the FTC were constitutional, agencies such as the FTC and the FCC have been considered in at least some good measure, as a matter of law and established practice, "free from executive control."[80] In distinguishing the FTC from executive branch agencies,[81] the Court first referred to the FTC's performance of predominantly quasi-legislative and quasi-judicial duties under the Federal Trade Act. The Court then looked to the fact that, pursuant to the statute, its members served fixed, staggered terms, subject to removal only for "inefficiency, neglect of duty, or malfeasance in

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significant role in the Court's conclusion, regarding its own interpretation that the Court had "not the slightest doubt that is the meaning the statute intended." *Id.* at 228. The Supreme Court's decision in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000), bears a strong resemblance to the *MCI* decision in that the Court refused to grant *Chevron* deference on the basis that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so a cryptic a fashion." The Court stated that in "extraordinary cases" courts should "hesitate before concluding that Congress has intended such an implicit delegation." *Id.* at 159; *see* Note, *supra* note 2, at 1703-05.

77. *See supra* note 25 and accompanying text.

78. Like the question of whether C*hevron* deference trumps stare decisis, there ought to be several good tenure articles ready to be harvested in a more complete exploration of this subject. My hope is to spur such further commentary.

79. *See* Kagan, *supra* note 55, at 2377 ("A more refined version of this doctrine might take into account as well actual evidence of presidential involvement in a given administrative decision.").

80. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935).

81. The Court especially had to distinguish its earlier decision in *Myers v. United States*, 272 U.S. 52 (1926), in which it had held that the President had the power to remove a postmaster without the advice and consent of the Senate, as provided by statute. In *Humphrey's Executor*, the Court stated that "[t]he office of a postmaster is so essentially unlike the office now involved that the decision in the *Myers* case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions." 295 U.S. at 627.

office."[82] And, finally, the Court considered the requirement that no more than three of the agency's five commissioners may be from the same political party.[83] According to the Court, as a predominantly quasi-legislative and quasi-judicial body, the FTC "is charged with the enforcement of no policy except the policy of the law,"[84] and "[i]ts duties are neither political nor executive."[85] As such, the agency "cannot in any proper sense be characterized as an arm or an eye of the executive."[86] Rather, Congress intended "to create a body of experts who shall gain experience by length of service—a body which shall be independent of executive authority, *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government."[87]

82. 295 U.S. at 623.

83. *Id.* at 623-24. The FCC, the Securities and Exchange Commission (SEC), the Commodities Future Trading Commission, and the now-defunct Interstate Commerce Commission and Civil Aeronautics Board, share very similar organizational and structural indicia upon which the *Humphrey's Executor* Court relied in determining that such agencies are "independent" and free from executive control. This is not the place to explore in any detail the rich literature concerning the usual hallmarks of independent agencies and all of the variations in the form and functions of agencies that are generally characterized as falling within the independent universe. For an excellent scholarly study containing such information, including basic descriptions of almost all such agencies, see Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111 (2000). Regarding the FCC as an independent regulatory agency, see 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) and John F. Duffy, *Symposium Overview: Part III: A New Role for the FCC and State Agencies in a Competitive Environment?*, 71 U. COLO. L. REV. 1071 (2000). It is interesting to note that with respect to some of the agencies universally classified as independent agencies, such as the FCC and SEC, their respective statutes do not contain express provisions limiting the President's authority to remove a commissioner. They do, however, contain the fixed, staggered terms and political balance requirements that are hallmarks of independence. *See* 47 U.S.C § 154(b)(5) (2000); 15 U.S.C § 78d(a) (2000). As far as I am aware, since *Humphrey's Executor*, there are no cases involving attempts by the President to remove an FCC or SEC commissioner during a fixed term. *See* SEC v. Blinder, Robinson & Co., 855 F.2d 677, 681 (10th Cir. 1988) (accepting the "common" understanding that an SEC commissioner may only be removed for good cause, even though the statute does not contain an explicit limitation on removal); *see also* Wiener v. United States, 357 U.S. 349 (1958) (holding that President Eisenhower lacked power to remove a member of the War Claims Commission, an agency charged with adjudicating war claims, even though the statute did not contain a "for cause" limitation).

84. *Humphrey's Ex'r*, 295 U.S. at 624. In *Morrison v. Olson*, 487 U.S. 654 (1988), the Supreme Court cast doubt on *Humphrey's Executor*'s reliance on the characterization of the quasi-legislative and quasi-judicial nature of the FTC as a basis for supporting the agency's freedom from executive control, in upholding the constitutionality of the independent counsel provisions of the Ethics in Government Act. Nevertheless, the Court's decision did not weaken the notion that, consistent with the Constitution, Congress can create officials performing executive duties who are subject to limitations or removal by the executive branch. *Id.* at 688-90

85. *Humphrey's Ex'r*, 295 U.S. at 624.

86. *Id.* at 628.

87. *Id.* at 625-26 (emphasis in original).

The Court's opinion in *Humphrey's Executor* reminds us just how much, as a matter of Progressive Era theory, Congress purportedly expected agencies like the FTC, the FCC, and the former Civil Aeronautics Board and Interstate Commerce Commission, to be insulated from politics.[88] The dominant idea was that the expertise of the commissioners would primarily guide these essentially nonpolitical agencies. The *Humphrey's Executor* opinion amply documents this aspiration, quoting at length the legislative history of the act creating the FTC. For example, the FTC was not to be "subject to anybody in the government but . . . only to the people of the United States," free from "political domination or control," and "separate and apart from any existing department of the government—not subject to orders of the President."[89]

When the FCC was created, Congress characterized it in a similar vein. The Senate Report from the Committee on Interstate and Foreign Commerce accompanying the legislation stated that radio regulation "is fraught with such great possibilities that it should not be entrusted to any one man or to any administrative department of the Government."[90] Instead, the committee proclaimed that regulatory authority should reside in "an entirely independent body."[91] A leading scholar in the early 1930s disclaimed that the Interstate Commerce Commission could no more be characterized as "a part of the national administration—in the sense of being an instrument for furthering the particular political ends of the party in power—than is the Supreme Court, and executive influence is as manifestly out of place in the one case as it would be in the other."[92] From these statements, the ideal of independence and freedom from political control of the President certainly comes through loud and clear.

It is questionable whether the Progressive Era theoretical ideal ever came close to matching the reality of governance in the rising administrative state.[93] More importantly, there is certainly a sharp divergence between the

88. *See* Randolph J. May, *Solving the Mystery of 'Who Is the Plaintiff?' and the Nature of Independent Regulatory Agencies*, 32 ADMIN. L. REV. 749, 755 (1980) ("The court recognized that in our scheme of government based on the constitutional doctrine of separation of powers, the independence of the regulatory commissions from Executive control must be maintained.").

89. *Humphrey's Ex'r*, 295 U.S. at 625 (internal quotations omitted).

90. S. REP. NO. 69-772, at 2 (1926).

91. *Id.*

92. 2 I. L. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE 454 (1931).

93. Regarding my own views as to the gap between the Progressive Era nonpolitical "body of experts" ideal and the governance reality, see May, *supra* note 83, at 1322 ("[T]he unusual tumult and decisional delay surrounding 2003's two most prominent FCC proceedings undercuts the idea of an independent agency simply applying its expertise, largely insulated from political forces."). *See, e.g.*, Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 99-103 (1994) (containing a good discussion concerning the extent to which the Progressive Era nonpolitical expertise

Progressive Era vision of the independent regulatory agencies, such as the FTC and FCC,[94] as bodies of experts free from politics, and *Chevron*'s vision of political accountability grounded in the President's supervision of the EPA's activities. In light of this stark gap in vision, it is somewhat surprising that the Court in *Chevron* did not then, nor has it since, said anything explicit about *Chevron*'s applicability to independent agencies.

In *Chevron*, the Court also declared that the Clean Air Act's regulatory scheme was "technical and complex."[95] The Court conjectured that perhaps Congress had intended the EPA resolve the conflicting policy choices that inhere in the statute, "thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position" than Congress to do so.[96] Certainly, an agency's expertise, however acquired, provides a logical basis for courts to afford some degree of judicial deference to agency decisions. Agency expertise is the rationale underpinning the *Skidmore* doctrine. In *Skidmore*, a case involving an interpretation of the Fair Labor Standards Act's overtime payment provisions, the Court declared:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. 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.[97]

Thus, the agency's "body of experience" and "informed judgment"—in other words, key aspects of an agency's expertise—entitled it to some

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vision does not match the present day reality of government administration, in the context of addressing the extent to which, as a constitutional matter and otherwise, the President may control the actions of agencies). The authors conclude:

> It is not as obvious today as it seemed in the 1930s that there can be such things as genuinely 'independent' regulatory agencies, bodies of impartial experts whose independence from the President does not entail correspondingly greater dependence upon the committees of Congress to which they are then immediately accountable; or indeed, that the decisions of such agencies so clearly involve scientific judgment rather than political choice that it is even theoretically desirable to insulate them from the democratic process.

Id. at 100.

94. As explained earlier, the FCC is modeled along the same lines as the FTC, with members, no more of whom a majority may be from the same political party, serving fixed and staggered terms. *See supra* note 83; 47 U.S.C. § 154 (2000).

95. *See* 467 U.S. 837, 865 (1984) ("[T]he agency considered the matter in a detailed and reasoned fashion.").

96. *Id.*

97. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (holding that the deference due to an agency's decision by a reviewing court depends on a variety of factors).

measure of deference, though not the controlling deference characterized by *Chevron*.[98] Thus, forty years after *Skidmore*, it is not surprising that the Court in *Chevron* justified the new deference rationale in part by referencing agency expertise.[99] Nevertheless, the agency expertise justification plays second fiddle to the primary political accountability rationale in *Chevron*.

A proponent of applying *Chevron* deference to independent agencies and executive agencies alike might argue that, notwithstanding *Humphrey's Executor*, independent agencies are more politically accountable than the courts, and therefore, it still makes sense to extend *Chevron* deference to their actions. This is undoubtedly true, despite the rhetorical flourishes of the New Deal acolytes, such as those that equate the independence of the Interstate Commerce Committee (ICC) with the Supreme Court's independence.[100] The President and Congress certainly subject independent agencies to some measures of political influence. Arguing for application of *Chevron* deference on this basis is not without reason. It might be what Justice Stevens had in mind when he penned *Chevron* or what Justice Thomas had in mind as he wrote the majority opinion in *Brand X*. But the ability of the President and Congress to influence the independent agencies in their own ways does not rise to the level of control that justifies ascribing political accountability in the sense that *Chevron* envisions.

As for the President, despite whatever modicum of influence he may exert through the appointment (and reappointment) process, budget submission process, or control over litigating authority,[101] the fact remains that the President cannot remove independent agency members without good cause. This ensures a large measure of freedom from executive branch control. Bernard Schwartz concluded that "[t]he resulting lack of accountability to the White House enables the ICC-type commissions to make their own decisions, which may be subject to judicial review, but are not subject to legal control by the President."[102] Likewise, a leading administrative law treatise stated that: "The characteristic that most

98. *See* 467 U.S. at 844 (referring to *Chevron*'s "controlling weight" deference).

99. For another leading case decided the same year as *Skidmore* that also grants deference to an agency's decision based on the agency expertise, *see* NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 130-31 (1944) (holding that an agency's determination should be accepted if it has "warrant in the record and a reasonable basis in law").

100. *See* SHARFMAN, *supra* note 92, at 454 (stating that executive control over independent agencies is as "manifestly out of place" as it would be over the Supreme Court).

101. I refer the reader to the excellent study of Professors Breger and Edles, which comprehensively discusses the ways in which these factors are applicable to the various independent agencies. *See* Breger & Edles, *supra* note 83, at 1236-94 (Appendix) (listing federal agencies that are considered "independent").

102. BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 1.10 (3d ed. 1991).

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."[103] Admittedly, *Humphrey's Executor* did not definitively resolve the constitutional limitations on the President's authority to remove commissioners from the FTC and similar multi-member agencies.[104] Justice Scalia was, for the most part, correct in 1985 when he stated that the Supreme Court's decision "continues to induce the Executive to leave the policy control of the independent agencies to congressional committees, and fastidiously to avoid any appearances of influence in those entities."[105] In any event, the absence of any more *Humphrey's Executor*-like attempted removal cases since the original in 1935, other than *Wiener v. United States*,[106] demonstrates its continuing impact. Although commissioners at the FTC, FCC, and similar agencies do not enjoy life tenure like federal judges, they do enjoy job security. They know that it would be difficult for the President to remove them from office. This knowledge gives these commissioners the independence that accompanies job security and the tenure protection that executive branch agency heads lack. Thus, for independent agencies, the political accountability link to the President emphasized in *Chevron* is absent.

As Justice Scalia suggested,[107] many generally assume that Congress, by virtue of various means at hand, exerts more policy control over the independent agencies than the President. The vehicles for congressional influence include control over appropriations, appropriation riders directing or restricting specific agency actions, oversight hearings and investigations, mechanisms for congressional review of regulations, enactment of legislation overturning or modifying agency actions—or just the threat to employ any of these devices.[108] Through these means, Congress, or just the committees responsible for agency oversight, influences the policy direction of the independent agencies. Indeed, it is reported that Sam Rayburn, then-Speaker of the U.S. House of Representatives, advised FCC Chairman Newton Minow: "Your agency is an arm of the Congress and you belong to us."[109]

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103. 1 KENNETH CULP DAVIS & RICHARD PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.5 (3d ed. 1994).

104. *See* Kagan, *supra* note 55, at 2324 n.311.

105. *See* Antonin Scalia, *Historical Anomalies in Administrative Law*, SUPREME COURT HISTORICAL SOCIETY YEARBOOK 110 (1985).

106. *See* 357 U.S. 349 (1958) (interpreting a statute creating the War Claim Commission so as to deny President Eisenhower power to remove a member of the Commission, despite the fact that the statute did not contain a "for cause" limitation).

107. *See* Scalia, *supra* note 105.

108. *See* Kagan, *supra* note 55, at 2255-60 (discussing congressional control mechanisms).

109. Neil Devins, *Congress, the FCC, and the Search for the Public Trustee*, 56 LAW & CONTEMP. PROBS. 145, 148-49 (1993) (quoting Speaker of the U.S. House of Representatives

As Professor Bruff reminded us, "Congress is quite jealous of its hegemony over the independent agencies, and can be expected to react strongly to any executive poaching."[110] This message concerning Congress's view of its prerogatives is usually not completely lost on agency commissioners. Thus, it is not surprising that when Deborah Tate recently appeared before the Senate Committee on Commerce, Science and Transportation for her confirmation hearing as an FCC Commissioner and pledged "to work closely with Congress."[111] She said nothing about working closely with the President.

Like the President, Congress is politically accountable to the people. The question that arises is why independent agencies are not afforded *Chevron* deference on the basis that they are at least somewhat accountable to Congress for their decisions, perhaps even more so than to the President. First, while Congress, like the President, has means to exercise influence over the actions of the independent agencies, Congress cannot (except through the extreme remedy of impeachment for "high crimes and misdemeanors")[112] remove the commissioners of independent agencies. Therefore, in this most important respect relating to the preservation of independence—the security of tenure protection—the independent agencies are insulated from congressional control in the very same way they are insulated from executive control. In rejecting the notion that Congress exercises tight control over the independents, Kagan quite rightly refers to "the constitutional limits on Congress's ability to establish a hierarchical relationship with the independent agencies (most notably, by retaining the removal power over their heads)."[113]

Thus, there is a fundamental sense in which Congress's ability to influence agency interpretations, whatever its extent, does not square with *Chevron*'s political accountability rationale. That rationale is premised on the assumption that Congress, itself politically accountable, intends to delegate authority to another politically accountable entity to make policy by having that delegate fill in the statutory gaps. The independent agencies simply do not fit the bill. In *Chevron*, the Court spoke of "*this* political branch of the Government"[114] in reference to the President as the delegate

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Sam Rayburn) (citation omitted).

110. Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 350 (1991).

111. *See Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 109th Cong. 3 (2005) (statement of Deborah Tate, Nominee, FCC), http://www.fcc.gov/commissioners/tate/dtt121305.pdf (thanking Senate Majority Leader Bill Frist for his remarks before thanking President Bush for the nomination).

112. U.S. CONST., art. II, § 4.

113. Kagan, *supra* note 55, at 2377 n.506.

114. 467 U.S. 837, 865 (1984) (emphasis supplied) (highlighting that, while agencies are not directly accountable to the people, the President remains directly accountable to the electorate).

of congressional authority, a characterization distinctly at odds with the way one usually refers to the independent agencies.

In the 1930s, a presidential commission studying the organization and management of the federal government described the independent agencies as a "headless 'fourth branch' of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers."[115] The commission contended that this "headless fourth branch" does "violence to the basic theory of the American Constitution that there should be three major branches of the Government and only three."[116] There is a substantial body of scholarly literature that calls into question the legal status of the "fourth branch" independent agencies, characterizing them as constitutional anomalies in our tripartite system.[117] To the extent that *Humphrey's Executor* has truly served to insulate the independent agencies from presidential supervision, whether as a matter of law or as a matter of tradition, their special constitutional status is quite likely "unjustifiable."[118] In their comprehensive study, *The President and the Administration*, which evaluated institutional policy grounds in favor of a constitutional framework sanctioning a strong unitary executive, Professors Lessig and Sunstein concluded:

> On the question whether Congress can create genuinely independent administrators, there is precious little guidance. Probably the best answer is that as a general rule (and subject to important exceptions), Congress is without constitutional power to immunize administrative officers exercising important discretionary policymaking authority from presidential control. Congress is therefore without power to create a 'headless Fourth Branch' of government.[119]

115. THE PRESIDENT'S COMM. ON ADMIN. MGMT., REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT 40 (1937).

116. *Id.*

117. For a special volume of articles on the legal status of federal agencies, see *A Symposium on Administrative Law: The Uneasy Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 277 (1987). *See also* Breger & Edles, *supra* note 83, at 1155-60; Stephen L. Carter, *Constitutional Improprieties: Reflections on* Mistretta, Morrison, *and Administrative Government*, 57 U. CHI. L. REV. 357 (1990); Robert E. Cushman, *The Constitutional Status of the Independent Regulatory Commissions* (pts. 1 & 2), 24 CORNELL L.Q. 13, 163 (1938-39); Geoffery P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41; Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L.Q. 430, 460-64 (1987).

118. Harold H. Bruff, *On the Constitutional Status of Administrative Agencies*, 36 AM. U. L. REV. 491, 513 (1987) ("[I]f executive oversight can be controlled, I see no reason to exempt the independent agencies from its influence. Viewed in this light, the special constitutional status of the independent agencies is unjustifiable. The Supreme Court should repudiate the dicta in *Humphrey's Executor* that account for it.").

119. Lessig & Sunstein, *supra* note 93, at 113.

Referring to *Humphrey's Executor*, Lessig and Sunstein suggest that "the case was a bizarre and unfounded exercise in constitutional innovation"[120] that threatens "the core constitutional commitments to political accountability, expedition in office, and coordinated policymaking."[121]

CONCLUSION

It is odd for a doctrine of judicial deference to agency interpretations, especially deference that is strong enough to be characterized as controlling,[122] to rely on what is widely viewed as a constitutional innovation, perhaps even a bizarre one. It is odd to premise judicial deference to agency interpretations on separation of powers principles, as *Chevron* does, and not to question the soundness of the doctrine's applicability to agencies that by their very nature present constitutional difficulties on separation of powers grounds. And 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."

One obvious resolution of these oddities would be a constitutional jurisprudence looking toward the elimination of the insular features that give the independent agencies freedom from presidential control. That (perhaps unlikely) project would involve an overturning, or at least a reevaluation, of *Humphrey's Executor*. Something far short of that resolution (or revolution), however, is warranted. With respect to the independent agencies, the judicial branch should reassume a pre-*Chevron* posture of applying more exacting scrutiny to the statutory interpretations of independent agencies. Simply put, the judicial branch should reassert its authority, in Chief Justice Marshall's words, with respect to the independent agencies, to "say what the law is."[123] This revision in the current understanding of the *Chevron* doctrine would not mean that the courts would no longer accord any deference to the statutory interpretations of independent agencies. Rather, they would accord deference consistent with *Skidmore* principles.[124] This new understanding of *Chevron* would be more consistent with core constitutional values of the United States than the current understanding.[125]

120. *Id.* at 101.
121. *Id.* at 114.
122. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 844 (1984) ("Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.").
123. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
124. *See supra* note 97 and accompanying text.
125. *See* Lessig & Sunstein, *supra* note 93, at 101 ("Currently, a fundamental premise of administrative law is the lawmaking ingredient of practically every executive act, including, in *Chevron, U.S.A. v. NRDC*, the act of interpretation itself. In such a period, the whole

Ultimately, as the Court made clear in *United States v. Mead*, Congress can determine the degree of deference, if any, to be accorded agency decisions through its expressions of legislative intent.[126] If Congress wishes, it can enact legislation that prescribes that courts must give the same deference to both independent and executive branch agencies. Absent such legislation, however, it would be more consistent with our constitutional values if *Chevron*'s strong deference doctrine is not interpreted to extend to independent agencies.

There is one oddity that further supports this contention. It is more than a little strange that *Chevron*, the most significant administrative law decision of the last quarter-century, did not even refer to the APA, the fundamental charter of the administrative state. After all, the purpose of the APA was to impose a large measure of uniformity across the federal agencies. In addition, § 706 of the APA specifically addresses judicial review of agency action providing that "the reviewing court shall decide all relevant questions of law, . . . *interpret* . . . *statutory provisions*, and determine the meaning or applicability of the terms of agency action."[127] Interpreting statutory provisions is what *Chevron* is all about. This APA statutory directive is consistent with the separation of powers basis of *Marbury v. Madison*'s declaration that the province of the judiciary is to "say what the law is." While *Mead* teaches that congressional intent, absent any other more specific expression to the contrary, determines whether and how much deference is due agency interpretations of statutes, the APA itself provides a textual basis for concluding courts should not grant controlling weight to independent agencies' statutory interpretations.

Perhaps this reliance on *Marbury v. Madison*'s injunction and the literal terms of the APA's directive is not sufficient to call into question the application of the *Chevron* doctrine across the board to all federal agencies. In any event, that is not my purpose here. But at least with respect to the

notion of independent political bodies becomes highly problematic, especially in light of founding commitments.").

126. In *Mead*, the Court's citation to the following statement from Thomas Merrill and Kristin Hickman is instructive regarding the role of congressional intent in determining the deference due:

> If *Chevron* rests on a presumption about congressional intent, then *Chevron* should apply only where Congress would want *Chevron* to apply. In delineating the types of delegations of agency authority that trigger *Chevron* deference, it is therefore important to determine whether a plausible case can be made that Congress would want such a delegation to mean that agencies enjoy primary interpretational authority.

United States v. Mead, 533 U.S. 218, 230 n.11 (quoting Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 872 (2001)).

127. 5 U.S.C. § 706 (2000) (emphasis added).

independent agencies that are not politically accountable to the people in the same measure as the President and Congress, I suggest that a reading of *Chevron* that accords less deference to independent agencies' decisions than to those of executive branch agencies would be more consistent with our constitutional system and its values.

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