Deference and Democracy

Lisa Schultz Bressman*

Abstract

In Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., *467 U.S. 837, 865–66 (1984), the Supreme Court famously held that judicial deference to agency interpretations of ambiguous statutes is appropriate largely because the executive branch is politically accountable for those policy choices. In recent cases, the Court has not displayed unwavering commitment to this decision or its principle of political accountability. This Article explores two cases,* FDA v. Brown & Williamson Tobacco Corp., *529 U.S. 120 (2000), and* Gonzales v. Oregon, *126 S. Ct. 904 (2006), in which the administrations possessed strong claims of accountability yet the Court did not defer to the agency determinations. In both, the Court justified its refusal of deference by contending that the questions were too extraordinary for Congress implicitly to have delegated. This Article argues that these cases might be better understood to reflect a judgment not about whether Congress had delegated interpretive authority, but about how each administration had exercised its authority. Both administrations, though accountable in a general sense, acted undemocratically when viewed in the particular context of these cases. The agencies used broad delegations in ways potentially insensitive to congressional or popular interests on controversial issues and inconsistent with the obligations of the executive branch within the government. The Court determined that the conditions for judicial deference were not met. Thus, these cases reflect an approach that, while inconsistent with conventional notions of political accountability, is nevertheless principled and defensible. The Article shows that this approach is reflected in other cases, although not many. This infrequency does not diminish the importance of the message that the cases send to the executive branch. It does, however, illuminate important limits: ordinarily, administrations do not raise alarms, and political accountability is sufficient for judicial deference. An examination of the cases demonstrates that the Court is aware of the danger that it might invalidate agency interpretations based simply on the Justices' own ideology or politics and that the Court has taken steps to curb such judicial overreaching.*

---

* Professor, Vanderbilt Law School. I would like to thank Michael Bressman, Rebecca Brown, Nita Farahany, John Goldberg, Richard Nagareda, Nick Rosenkranz, Suzanna Sherry, Kevin Stack, and Michael Vandenbergh for helpful comments. I would like to thank Leah Bressack and Smith Podris for excellent research assistance. Finally, I would like to thank John Duffy and Jon Molot for inviting me to participate in this inaugural administrative law issue of *The George Washington Law Review*.

June 2007 Vol. 75 No. 4

Introduction

Administrative law scholars often have assumed that judicial deference to agency determinations rests on the political accountability of the executive branch.[1] Recent Supreme Court cases have suggested that the relationship between deference and democracy is more complicated than we have thought. The conventional view of deference is reflected in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[2] Famously, *Chevron* established a two-step test for determining whether (and when) judicial deference to agency statutory interpretations is appropriate.[3] Step One considers whether Congress has spoken to the precise issue; Step Two takes statutory ambiguity as an implicit delegation of interpretive authority to the agency, commanding judicial deference to agency interpretations as long as they are "reasonable."[4] The second step premises judicial deference not only on the intent of Congress in allocating interpretive authority, but also on the relative expertise and political accountability of agencies in exercising such authority.[5] Scholars have widely endorsed *Chevron*[6] and especially the principle of political accountability on which it rests: "While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of government to make such policy choices."[7]

In recent cases, however, the Court has not displayed unwavering commitment to the *Chevron* decision or its principle. For example, in *United States v. Mead Corp.*,[8] the Court carved out an exception to *Chevron*'s scheme, which Cass Sunstein has dubbed *Chevron* Step Zero.[9] Specifically, the Court held that an agency is not entitled to judicial deference when interpreting statutory ambiguities unless there

---

1 *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2373–74 (2001); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 102–03 (1994); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 91–99 (1985); Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1256 (1989); Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2583 (2006).

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

3 *Id.* at 842–43.

4 *Id.* (articulating the test); *id.* at 844 (using the word "reasonable").

5 *Id.* at 865.

6 *See* sources at *supra* note 1.

7 *Chevron*, 467 U.S. at 865–66.

8 United States v. Mead Corp., 533 U.S. 218, 231 (2001).

9 Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006) (describing Step Zero as "the initial inquiry into whether the *Chevron* framework applies at all").

is evidence that Congress has delegated, and the agency has exercised, authority to act with the force of law, as evidenced by procedures like notice-and-comment rulemaking or formal adjudication.[10] Justice Scalia argued in dissent that deference was appropriate as long as the interpretation was the authoritative view of the agency, regardless of whether it was the product of any particular procedure, because the executive branch is accountable for such interpretations.[11] But, based on the majority's view, the electoral accountability of the President and his administration was not a sufficient basis for judicial deference.

The Court has carved another exception out of *Chevron*'s scheme, further evidencing its view that executive branch accountability is insufficient to justify judicial deference to agency interpretations in some circumstances. In *FDA v. Brown & Williamson Tobacco Corp.*,[12] the Court held that the Food and Drug Administration ("FDA") was not entitled to judicial deference with respect to its interpretation extending the reach of the Food, Drug, and Cosmetics Act ("FDCA") to tobacco products.[13] The Court refused to presume that Congress would have delegated "a decision of such economic and political significance . . . in so cryptic a fashion."[14] Recently, in *Gonzales v. Oregon*,[15] the Court similarly held that the Attorney General was not entitled to judicial deference regarding an interpretation extending the reach of the Controlled Substances Act ("CSA") to physician-assisted suicide.[16] The Court refused to presume that Congress would have implicitly authorized the Attorney General to reach an issue as "extraordinary" as the restriction of physician-assisted sui-

---

10 *Mead*, 533 U.S. at 230–31.

11 *Id.* (Scalia, J., dissenting) ("There is no necessary connection between the formality of procedure and the power of the entity administering the procedure to resolve authoritatively questions of law."); *see also* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 234 ("The Court's approach, when measured against the values of accountability and discipline, denies deference to actions that have earned it and gives deference to actions that do not deserve it.").

12 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

13 *Id.* at 161.

14 *Id.* at 160. The Court decided *Brown & Williamson* during the same Term as *Christensen v. Harris County*, in which the Court anticipated *Mead*. *See* Christensen v. Harris County, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.").

15 Gonzales v. Oregon, 126 S. Ct. 904 (2006).

16 *Id.* at 925.

cide.[17] Congress, the Court said, does not "hide elephants in mouseholes."[18]

This Article seeks to reconcile the *Chevron* framework with *Brown & Williamson* and *Gonzales*. It argues that the Court withheld deference because the respective administrations—agency heads, key White House officials, or even the President himself—although electorally accountable, had interpreted broad delegations in ways that were undemocratic when viewed in the larger legal and social contexts. In *Brown & Williamson*, the administration had used the FDCA to take an action that the current Congress likely opposed.[19] In *Gonzales*, the administration had used the CSA to take a position on an issue that the people actively were debating, without involving or ascertaining the views of the public.[20] Under these circumstances, the Court was not prepared to conclude that the executive branch had met the conditions for judicial deference. Political accountability was not functioning as an adequate check on the administrations' conduct.[21] Counterintuitively, the Court needed to intervene to ensure accountability, or at least the promise of representative and responsive government for which accountability stands.[22]

---

17 *See id.* at 918.

18 *Id.* at 921 (quotation omitted).

19 *See Brown & Williamson*, 529 U.S. at 159–60.

20 *See Gonzales*, 126 S. Ct. at 921.

21 This Article shares the sympathies of two short pieces that appeared as this Article was in its final stages. *See generally* William N. Eskridge, Jr. & Kevin S. Schwartz, Chevron *and Agency Norm-Entrepreneurship*, 115 YALE L.J. 2623 (2006); Peter L. Strauss, *Within* Marbury*: The Importance of Judicial Limits on the Executive's Power to Say What the Law Is*, 116 YALE L.J. POCKET PART 59 (2006). Professors Eskridge and Schwartz defend the result in *Gonzales*, arguing that administrations may not take positions that prevent decision making by "more qualified agencies and even by the democratic process itself." Eskridge & Schwartz, *supra*, at 2628, 2632. The authors view this case against a particular normative backdrop: agencies should undertake debate on social issues, and administrations should not disrupt debate or shift debate from its proper forum. *See id.* at 2625–27.

Professor Strauss argues that *Gonzales* is correct because it ensures that "someone other than the executive tend[s] the fence around executive authority and take[s] care that the authority is exercised in a manner subject to public participation and control." Strauss, *supra*, at 62. He argues that *Brown & Williamson* is correct because it preserves a role for judicial review and "the restraint it can offer against shorter-term political departures from our culture of legality." *Id.* at 67. Professor Strauss contends that Congress was unlikely to have delegated the power that the agency asserted, and that the case functions as a "nondelegation canon[ ]," requiring "fresh congressional authority" for cigarette restrictions. *Id.* at 62, 67.

22 The Court has examined so-called extraordinary questions in other cases that do not involve the particular political problem that, this Article argues, *Brown & Williamson* and *Gonzales* present. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) ("[W]e find it implausible that Congress would give to EPA through these modest words the power to determine whether implementation costs should moderate national air quality standards."); MCI

The heart of my explanation is that these cases are best understood to tell administrations that they may not disregard larger governmental or public interests and still expect to command judicial deference. The cases do not suggest that an administration may act only after aggregating congressional or popular preferences. Rather, an administration may not issue a rule knowing that Congress opposes its substance and would need supermajority support to reverse it, assuming a presidential veto. Moreover, an administration may not resolve a politically charged issue essentially by fiat, knowing that the people presently are engaged in active debate.

A difficult question that arises from this framework is determining how to relate this complicated and aggressive judicial stance to notions of congressional intent. We might adopt the Court's approach—Congress does not lightly delegate extraordinary questions—once we understand precisely what makes those questions extraordinary. Or we might look for a different explanation; perhaps Congress intends agencies either to interpret some statutes in light of current congressional preferences or even to refrain from taking positions on issues that are the subject of current debate. That way, Congress itself may participate in any federal resolution or prevent sudden changes on important issues.

My preference is simply to acknowledge that *Chevron* is based on a fiction about congressional intent in the service of broader democratic values, perhaps more than we previously may have thought. Furthermore, if we accept this position, we might begin to see that it matters little whether we classify the cases as *Chevron* Step Zero or Step One or Step Two. We might understand both *Brown & Williamson* and *Gonzales* not only to impose as a condition of deference that an agency possesses delegated authority, but also that the agency exercises such authority in a democratically reasonable fashion. In this regard, the cases may contain important lessons about the meaning of *Chevron* itself.

Although this story of the relationship between deference and democracy is different from the ones that others have told, I contend that it better explains the cases. Furthermore, this analysis ties *Brown*

Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994) ("It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle devise as permission to 'modify' rate-filing requirements."). This Article does not purport to address all extraordinary or jurisdictional question cases. Importantly, the Article suggests that such cases, despite common language, might yield different explanations for their holdings that are consistent with a multitextured view of the *Chevron* framework.

& Williamson and *Gonzales* to previous decisions in which the Court exhibited similar attention to how the administration acted in interpreting a broad statute. But such cases are few, which reveals that the Court will not take this approach lightly. Thus, interpreting the cases together helps us understand the approach and its limits. Ordinarily, administrations do not act in a fashion that raises cause for concern. Only rarely will the Court find that political accountability is insufficient for judicial deference. That does not diminish the importance of the message to the executive branch that the cases convey. Rather, it shows that the Court is not out of control in telling agencies that in this particular context they have gone too far. Indeed, if we believe that agencies generally should control regulatory policy unless Congress has spoken to the precise issue, then any model of statutory construction must contain constraints on judicial maneuvering.[23]

In addition to applying in relatively few cases, the approach is limited in a more specific sense. An examination of the cases demonstrates that the Court is concerned not to invalidate agency interpretations simply on the basis of the Justices' own ideology or politics. The alignment of the Justices, however, seems to suggest otherwise. The conservatives voted to invalidate the Clinton administration's policy, and the liberals voted to invalidate the Bush administration's policy, with only Justices O'Connor and Kennedy voting with the majority in both cases.[24] But, as the cases themselves show, the Court—prompted perhaps by the concerns of the median Justices—actually has taken steps that allay the fear that it might be unprincipled in the application of this particular exception to *Chevron*'s framework: the Court has demanded a concrete indication that the administration has acted essentially by fiat, either by disregarding known congressional preferences or acting without public process on a matter of public debate. Now that Justice O'Connor has left the Court, it is important to take seriously these limits if the Court cares to immunize itself against charges of ideology in future cases.

---

23 Of course, *Chevron* itself always has provided courts with latitude to invalidate interpretations with which the judges disagree, and not only through the recently announced exceptions. Justice Scalia conceded long ago that he may find clarity in almost any ambiguous language. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 ("One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt.").

24 *See Gonzales*, 126 S. Ct. at 910; *Brown & Williamson*, 529 U.S. at 123.

This Article proceeds in four parts. Part I describes *Brown & Williamson* and *Gonzales*. Part II argues that those cases reflect a certain model of statutory construction, which is best understood as related to the administration's failure to exercise its authority in a democratic fashion. Part III identifies the theory in other cases. Finally, Part IV describes limitations that cabin this model of statutory construction and inhibit courts from depriving administrations of interpretive control on an ad hoc basis.

I. The Cases

This Part describes *Brown & Williamson* and *Gonzales* in some detail to set the stage for a discussion of the model of statutory construction that the cases reflect. It begins by describing the case from which they apparently depart: *Chevron*.

A. Chevron

In *Chevron*, the Court accorded deference to an agency interpretation in large part because the agency had relied on the administration's views.[25] The Environmental Protection Agency ("EPA") had switched its interpretation of "stationary source" in the Clean Air Act from an individual smokestack to a plant-wide or "bubble" concept at the behest of the newly elected Reagan administration.[26] Under the new definition, a firm could modify or add individual smokestacks within a plant and not trigger the stringent permitting requirements of the statute as long as the additional smokestacks did not increase emissions from that plant as a whole.[27] Thus, the definition introduced an "emissions trading" system, under which firms could determine the lowest-cost method to meet established pollution limits.[28] The new interpretation thereby provided pollution-reduction incentives for existing sources rather than pollution-reduction mandates for new ones.

The Court deferred to EPA's change, articulating the now famous two-step test for evaluating an agency's statutory interpretation.[29] Finding the statute ambiguous in the relevant respect, the Court de-

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

26 *Id. at* 857–59.

27 *Id.*

28 *See* Robert W. Hahn & Gordon L. Hester, *Where Did All the Markets Go? An Analysis of EPA's Emissions Trading Program*, 6 YALE J. ON REG. 109, 109 (1989); R. Liroff, *Reforming Air Pollution Regulation: The Toil and Trouble of EPA's Bubble*, *in* ENVIRONMENTAL LAW AND POLICY 388, 388 (Peter S. Menell & Richard Stewart eds., 1994).

29 *Chevron*, 467 U.S. at 842–43.

ferred to the agency's new definition.[30] The Court stated that reliance on the administration's views was a principal factor supporting judicial deference:

> [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.[31]

Chevron, of course, sets the gold standard for judicial deference to all agency interpretations, not just those that clearly rely on the administration's views. But *Chevron* makes clear that such interpretations deserve special solicitude because, in addition to satisfying the general conditions for judicial deference, they promote political accountability.[32]

B. Brown & Williamson

The Court has not always followed *Chevron* and deferred to agency interpretations that rely on the administration's views. In *FDA v. Brown & Williamson Tobacco Corp.*, the Court invalidated such an interpretation.[33] At the behest of the Clinton administration, the FDA had interpreted the FDCA to confer jurisdiction over tobacco products.[34] The FDA argued that tobacco is a "drug" within the meaning of the FDCA because it "affect[s] the structure or [a] function of the body," and that cigarettes are "combination products" for the delivery of those effects.[35] Specifically, the nicotine in cigarettes "exerts psychoactive, or mood-altering, effects on the brain that cause and sustain addiction, have both tranquilizing and stimulating effects,

---

30 *Id.* at 845.

31 *Id.* at 865–66.

32 *Id.* at 865.

33 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000). Justice O'Connor wrote the opinion, joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas. *Id.* at 123.

34 *Id.* at 127.

35 *Id.* (citation and internal quotation marks omitted).

and control weight."[36] Furthermore, the FDA found that such effects were "intended," as the statute requires, because the effects "are so widely known and foreseeable that [they] may be deemed to have been intended by the manufacturers," and the "actions of manufacturers revealed that they have 'designed' cigarettes to provide pharmacologically active doses of nicotine to consumers."[37] Thus, the FDA claimed that it had authority under the FDCA to regulate tobacco products.[38]

After deciding that it had jurisdiction over tobacco products, the FDA then defended its policy decision to restrict the sale and distribution of cigarettes to children and adolescents.[39] Because most people start smoking and become addicted at a young age, the FDA argued that the best way to prevent the adverse health effects associated with tobacco products was to prevent children and adolescents from ever using them.[40] Thus, the FDA promulgated regulations that, for example, prohibited "the sale of cigarettes in quantities smaller than 20," "sales through self-service displays and vending machines except in adult-only locations," "outdoor advertising within 1,000 feet of any public playground or school," and "the distribution of promotional items, such as T-shirts or hats, bearing the manufacturer's brand name."[41]

The Court invalidated the regulations, finding that the statute was clear and precluded FDA jurisdiction over tobacco products.[42] The majority began its analysis by noting that the FDCA envisions the ban of unsafe products from the market.[43] Although the FDA produced evidence that cigarettes were unsafe, a statute enacted after the FDCA protected the continued marketing of tobacco and therefore precluded the FDA from fully banning cigarettes.[44] Moreover, Congress had enacted six additional specific statutes since the FDCA, none of which authorized a ban on cigarettes or FDA jurisdiction over such products.[45] Rather, the statutes authorized other agencies to

36 *Id.* (quotation omitted).

37 *Id.* (citations and internal quotation marks omitted).

38 *Id.*

39 *Id.* at 127–28.

40 *Id.*

41 *Id.* (quotation omitted).

42 *Id.* at 160–61.

43 *Id.* at 137.

44 *Id.* (citing 7 U.S.C. § 1311(a) (2000)).

45 *Id.* at 137–38 (collecting statutes).

take more modest steps, regulating the labeling and advertising of tobacco products.[46]

The Court then considered in detail the tobacco-specific legislation that Congress had enacted since the FDCA, recognizing that a statute "may have a range of plausible meanings" that will take shape over time through subsequent statutes.[47] Congress had adopted the subsequent statutes "against the backdrop of the FDA's consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco absent claims of therapeutic benefit by the manufacturer."[48] Furthermore, during this time and "after the health consequences of tobacco use and nicotine's pharmacological effect had become well known," Congress had "considered and rejected bills that would have granted the FDA such jurisdiction."[49] This was not an instance of "simple inaction by Congress that purportedly represents its acquiescence in an agency's position."[50] Rather, the Court found that "Congress's tobacco-specific legislation has effectively ratified the FDA's previous position that it lacks jurisdiction to regulate tobacco products"[51] and "created a distinct regulatory scheme addressing the subject of tobacco and health"[52] that plainly excludes "*any* administrative agency in making policy on the subject of tobacco and health."[53] The Court concluded that "[i]t is therefore clear, based on the FDCA's overall regulatory scheme and the subsequent tobacco legislation, that Congress has directly spoken to the question at issue and precluded the FDA from regulating tobacco products."[54]

Finally, the Court noted that this was the sort of case in which it should hesitate before concluding that Congress implicitly delegated authority to the agency.[55] Specifically, "the FDA has now asserted jurisdiction to regulate an industry constituting a significant portion of

---

46 *Id.* at 137–39. The Court found that the FDA could not argue in the alternative that tobacco products are "safe" and fit to remain on the market. *Id.* at 139–40. The FDA had argued that a ban would be "dangerous" for those who already were addicted and who therefore would suffer extreme withdrawal. *Id.* at 139. But, the Court said, the statute requires a particular determination of "safety"—namely, that therapeutic benefits of cigarettes outweigh the health risks. *Id.* at 140. The FDA did not and could not make this determination precisely because it had determined that cigarettes have no therapeutic benefits. *Id.*

47 *Id.* at 143.

48 *Id.* at 144.

49 *Id.*

50 *Id.* at 155.

51 *Id.* at 157.

52 *Id.* at 156.

53 *Id.*

54 *Id.* at 160–61.

55 *See id.* at 159.

the American economy."[56] Tobacco "has its own unique place in political history."[57] Given this fact, the Court was confident that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[58] Thus, the Court concluded that "no matter how important, conspicuous, and controversial the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."[59]

Justice Breyer dissented, essentially on the same political accountability grounds that underpinned Justice Scalia's dissent in *Mead*.[60] After taking issue with the majority's technical points,[61] he contended that that the Court had no reason to withhold deference based on the "magnitude" of the question: "Insofar as the decision to regulate tobacco reflects the policy of an administration, it is a decision for which that administration, and those politically elected officials who support it, must (and will) take responsibility."[62] Indeed, "the very importance of the decision taken here, as well as its attendant publicity" facilitates political accountability.[63] Therefore, Justice Breyer believed that such accountability was sufficient for judicial deference to the FDA's interpretation here.[64]

C. Gonzales

In *Gonzales v. Oregon*,[65] the Court also rejected an agency interpretation even though the agency had relied on the administration's

---

56 *Id.*

57 *Id.*

58 *Id.* at 160.

59 *Id.* at 161 (quotation omitted).

60 *Id.* (Breyer, J., dissenting). Justice Breyer was joined by Justices Stevens, Souter, and Ginsburg. *Id.*; *see also* United States v. Mead Corp., 533 U.S. 218, 239 (2001) (Scalia, J., dissenting).

61 Justice Breyer argued that cigarettes fit within the FDCA. *Brown & Williamson*, 529 U.S. at 161 (Breyer, J., dissenting). First, he contended that cigarettes have pharmacological effects that manufacturers "intend." *Id.* at 162. Second, Justice Breyer noted that the regulation of cigarettes advances the basic purpose of the statute: to protect public health. *Id.* Finally, he argued that subsequently enacted statutes could not impeach this interpretation because the statutes are neither inconsistent with FDA jurisdiction nor a reliable indication of what Congress may have intended when passing the FDCA. *See id.* at 182.

62 *Id.* at 190.

63 *Id.*

64 *See id.* at 190–91.

65 Gonzales v. Oregon, 126 S. Ct. 904 (2006). Justice Kennedy wrote the opinion, joined by Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer. *Id.* at 910.

views. Under President George W. Bush's administration, Attorney General John Ashcroft interpreted the CSA to confer jurisdiction over physician-assisted suicide in the wake of an Oregon law that legalized physician-assisted suicide under certain conditions.[66] Without opportunity for public notice or comment—indeed "without consulting Oregon or apparently anyone outside his Department"[67]—the Attorney General determined that physician-assisted suicide was "not a 'legitimate medical purpose'" for which physicians might dispense and prescribe controlled substances under the CSA and accompanying Attorney General regulations.[68] As a result, physicians would violate the CSA and its regulations by dispensing and prescribing controlled substances to assist a person to commit suicide, jeopardizing doctors' federal registrations to prescribe controlled substances for other purposes.[69] Furthermore, physicians would be vulnerable to these consequences "regardless of whether state law authorizes or permits such conduct."[70]

The Court invalidated the Attorney General's interpretation of the CSA.[71] The majority first considered whether the Interpretive Ruling construed a separate regulation rather than the statute itself and therefore came within the deference test of *Auer v. Robbins*.[72] The Court found that the Attorney General's Interpretive Ruling construed a regulation that merely parroted the statute, thus effectively construing the statute itself.[73] As a result, the Court stated that *Chevron* provided the proper starting place.[74]

Turning to a *Chevron* analysis, the Court acknowledged that the language of the CSA was ambiguous.[75] Nevertheless, the Court refused to presume that Congress implicitly would authorize the executive branch to resolve such an "extraordinary" question by

---

66 *Id.* at 913; *see* Oregon Death with Dignity Act, OR. REV. STAT. §§ 127.800–.897 (2005).

67 *Gonzales*, 126 S. Ct. at 913 (quotation omitted).

68 *Id.* at 913–14 (interpreting 21 U.S.C. § 824(a)(4) (2000 & Supp. 2005)).

69 *Id.*

70 *Id.* at 914.

71 *Id.* at 922.

72 *Id.*; Auer v. Robbins, 519 U.S. 452, 461–63 (1997) (holding that the Court must defer to a Secretary's interpretation of an agency's own regulations unless the interpretation is "plainly erroneous or inconsistent with the regulation").

73 *Gonzales*, 126 S. Ct. at 915–16.

74 *Id.* at 916; *see* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

75 *Gonzales*, 126 S. Ct. at 916 ("All would agree, we should think, that the statutory phrase 'legitimate medical purpose' is a generality, susceptible to more precise definition and open to varying constructions, and thus ambiguous in the relevant sense.").

criminalizing an act that is legal under state law.[76] Indeed, the Attorney General did not have broad rulemaking power to enforce all the provisions of the statute.[77] Nor did the Attorney General assert authority that related to his limited powers concerning "the registration and control of the manufacture, distribution, and dispensing of controlled substances."[78] Rather, the Attorney General unilaterally claimed authority to determine what constitutes a legitimate medical practice, which is an issue generally outside his area of expertise.[79] The Court noted that granting an agency's interpretation *Chevron* deference reflects a presumption that Congress tends to delegate in accordance with a determination that a particular agency possesses "historical familiarity and policymaking expertise."[80]

Moreover, the Court cited *Brown & Williamson* to support its decision and observed that Congress does not tend to "'hide elephants in mouseholes.'"[81] The Court then considered subsequent legislative history, bolstering its conclusion against congressional delegation in much the same way as it had in *Brown & Williamson*.[82] The Court stated that "[p]ost enactment congressional commentary on the CSA's regulation of medical practice is also at odds with the Attorney General's claimed authority."[83] As the Court noted, "'Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide.'"[84] The Court reasoned that "[t]he importance of the issue of physician-assisted suicide, which has been the subject of an earnest and profound debate across the country, makes the oblique form of the claimed delegation all the more suspect."[85] The logical result of a decision upholding the new regulation on the ground of deference, the Court reasoned, would be a conferral to the Attorney General of carte blanche power to prohibit any controversial treatment.[86]

The Court refused to decide whether the Attorney General could ever use an Interpretive Ruling and expect to command judicial defer-

---

76 *Id.* at 916, 918.

77 *Id.* at 917.

78 21 U.S.C. § 821 (2000 & Supp. 2005).

79 *Gonzales*, 126 S. Ct. at 921.

80 *Id.* (quotation omitted).

81 *Id.* (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).

82 *Id.* at 920–21.

83 *Id.* at 920.

84 *Id.* at 911 (quoting Washington v. Glucksberg, 521 U.S. 702, 735 (1997)).

85 *Id.* at 921 (quotation omitted).

86 *Id.* at 921–22.

ence under *Chevron*.[87] Thus, the Court did not reach the *Mead* issue: whether an Interpretative Ruling might carry "the force of law" in other contexts, such as the Attorney General's resolution of a less important question.[88] Instead, the Court held that this particular question simply was too significant for the Attorney General to resolve through an Interpretive Ruling.[89] In this way, the Court linked the magnitude of the question with the force-of-law determination, suggesting that significant questions may only be resolved in formats that more clearly carry the force of law.

The Court also considered whether the Attorney General's reading of the statute nevertheless was "persuasive" under the standard for judicial deference outlined in *Skidmore v. Swift & Co.*,[90] concluding that it was not.[91] The Court noted that the CSA "presupposed" statutes just like Oregon's.[92] At the same time, the CSA directs any medical judgments to the Secretary of Health and Human Services, not the Attorney General.[93] In light of these facts, the Court refused to presume that "the prescription requirement delegates to a single Executive officer the power to effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality."[94]

Justice Scalia dissented.[95] Although his argument did not reference political accountability, that was the effect: the interpretation was valid because the executive branch authoritatively chose it. Justice Scalia argued that the Attorney General plainly has the authority to regulate prescriptions,[96] and therefore also has the power to determine that "the dispensation of a Schedule II substance for the purpose of assisting a suicide is not a 'prescription' within the meaning of [the statute]"[97] because the act of assisting suicide is not a "legitimate med-

87 *Id.* at 922.

88 *Id.*

89 *Id.* at 921–22.

90 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (holding that a Court should follow an agency's rule if the agency can persuade the Court that it is the best interpretation).

91 *Gonzales*, 126 S. Ct. at 922–25.

92 *Id.* at 923.

93 *Id.* at 924.

94 *Id.* at 925.

95 *Id.* at 926–39 (Scalia, J., dissenting). Justice Scalia was joined by Chief Justice Roberts and Justice Thomas. *Id.* Justice Thomas also filed a separate dissent, arguing that the Court was bound by its decision in *Gonzales v. Raich*, 545 U.S. 1 (2005), to conclude that the CSA sweeps broadly into areas of traditional state control. *Gonzales*, 126 S. Ct. at 939–41 (Thomas, J., dissenting).

96 *Gonzales*, 126 S. Ct. at 930 (Scalia, J., dissenting).

97 *Id.* at 931.

ical practice" or otherwise within the public interest.[98] Justice Scalia noted that the Attorney General may further determine that any physician who writes illegitimate prescriptions "*may* 'render his registration . . . inconsistent with the public interest' and therefore subject to *possible* suspension [under the statute]."[99] This conclusion follows, Justice Scalia believed, whether the Interpretive Ruling is entitled to any deference or no deference, because it is "the most reasonable" reading of the statute.[100] Thus, Justice Scalia took the view that as long as the interpretation is not precluded by the statute, the Attorney General is entitled to adopt it, even without any outside consultations or formal process.[101]

II. A Principled Approach

Scholars have argued that the opinion in *Brown & Williamson* is incorrect because it reflects an approach to statutory construction that deprives the executive branch of control over regulatory policy without countervailing justification, and these scholars might also reject the decision in *Gonzales* for the same reason.[102] The argument would be that the cases fail to remit certain interpretive questions—indeed, a potentially boundless category of questions—to agencies, even though the agencies are more accountable than courts. These scholars would assert that political accountability is a sufficient basis for judicial deference.[103]

---

98 *Id.* at 931–33.

99 *Id.* at 931 (first alteration in original, emphasis added) (quoting Dispensing of Controlled Substances to Assist Suicide, 66 Fed. Reg. 56,608 (Nov. 9, 2001)).

100 *Id.* Justice Scalia contended that the notion that Congress does not "hide elephants in mouseholes" has no relevance here because it applies only to interpretations that undermine the central features of the regulatory scheme, whereas this interpretation enhances the Attorney General's ability to address drug abuse. *Id.* He also underscored that the Court's decision did not render *Chevron* inapplicable due to the format of the ruling or the absence of notice-and-comment procedures. *Id.* at 929.

101 *Id.*

102 *See, e.g.*, Sunstein, Chevron *Step Zero*, *supra* note 9, at 193–94 (arguing that *Brown & Williamson* increases "uncertainty and judicial policymaking without promoting important countervailing values" and that it should yield to a rule that gives "policymaking authority to institutions that are likely to have the virtues of specialized competence and political accountability").

103 This Article brackets wholesale objections to *Chevron* premised either on separation of powers or institutional considerations. *See* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989) (expressing separation of powers concerns); Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676, 679 (2006) (arguing that *Chevron* should operate as a voting rule, requiring a majority of justices or judges to uphold an interpretation, rather than one that requires courts to assess the reasonableness of agency interpretations).

The cases, of course, suggest otherwise. This Part offers an explanation for the Court's rejection of deference in these cases. It first considers the Court's stated reason uniting the cases—that some questions are too extraordinary to presume that Congress intended the agency to resolve them.[104] This Part then argues that further information is necessary to understand what made the particular questions so extraordinary. That information, this Part continues, leads to a particular understanding of why the Court withheld deference. The administrations used broad statutes in an undemocratic fashion to take an action on a controversial issue that disregarded the likely preferences of Congress or to take a position on an issue subject to public debate without conducting any public process of its own.

A. The Problem of "Extraordinary" Questions

Brown & Williamson and *Gonzales* are very different cases. In the former, the Court held that Congress had directly spoken to the issue;[105] in the latter, the Court found that the statute was ambiguous.[106] In the former, the agency had used notice-and-comment rulemaking procedures;[107] in the latter, the agency had used an essentially procedure-less Interpretive Ruling.[108] Nevertheless, the cases have a common thread: in both, the Court rejected the interpretations because the questions were too important to support an implicit delegation of interpretive authority.[109] The Court thus prevented the administrations from asserting authority over significant issues absent an express delegation.[110]

Some scholars have described the Court's approach in *Brown & Williamson* as reinforcing a nondelegation principle.[111] Specifically,

---

104 *See Gonzales*, 126 S. Ct. at 921–22; FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2001).

105 *See Brown & Williamson*, 529 U.S. at 133.

106 *See Gonzales*, 126 S. Ct. at 916.

107 *See Brown & Williamson*, 529 U.S. at 126–27.

108 *See Gonzales*, 126 S. Ct. at 913–14.

109 *See id.* at 921–22; *Brown & Williamson*, 529 U.S. at 160.

110 *See* Thomas W. Merrill & Kristen E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 845 (2001) (stating that *Brown & Williamson* reflects "a reverse presumption about congressional silence"); *see also* Michael Herz, *Reading the Clean Air Act After* Brown & Williamson, 31 ENVTL. L. REP. 10,151, 10,155 (2001) ("*Chevron* deference hinges on a policymaking delegation, and while the requisite delegation can sometimes be found simply through Congress' use of vague language, such an implicit delegation will be found only for minor, interstitial questions.").

111 *See* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 224 (2000) (arguing that the Court's approach in *Brown & Williamson* can be understood as narrowing the statute to avoid a nondelegation problem); Sunstein, Chevron *Step Zero*, *supra* note 9, at 245 ("For those who are enthusiastic about the nondelegation doctrine,

the Court might have sought to prevent Congress from relinquishing power too easily, through mere statutory ambiguity.[112] Similarly, some have contended that the Court might be understood to pursue an anti-aggrandizement principle.[113] It might have sought to prevent agencies from assuming power too easily, exploiting mere statutory ambiguity.[114] Agencies, inclined to pursue their missions overzealously, might interpret their authority without regard to the limits that Congress intended to set.[115]

But these explanations are at once plausible and unhelpful. Even if the "extraordinary" question approach serves nondelegation or anti-aggrandizement purposes, those purposes do not explain why the Court singled out these particular questions. Thus, the nondelegation or anti-aggrandizement explanations are really defenses for the results in the cases—ones with which scholars have both agreed and disagreed.[116] But they leave unexplained what about the particular interpretations made them so "extraordinary." We must infer a more complete justification from the specific facts of the cases.

The facts reveal two potentially distinctive features. First, both cases involved social rather than purely technical matters.[117] Though important, this feature is not enough to distinguish the questions from other cases where the Court has provided *Chevron* deference to agency interpretations. Any policy might involve a social matter. The issue of regulating carbon dioxide emissions and climate change, for example, is largely a technical issue with profound social, economic,

---

this background principle [from *Brown & Williamson*] will have considerable appeal, above all because it requires Congress, rather than agencies, to decide critical questions of policy . . . ."); *see also* Jonathan T. Molot, *Reexamining* Marbury *in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1244 (2002) (arguing that the Court's approach in *Brown & Williamson* can be understood as reasserting the judiciary's role in statutory construction, *Chevron* notwithstanding).

112 *See* Manning, *The Nondelegation Doctrine*, *supra* note 111, at 271.

113 *See, e.g.*, Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 250–62 (2004) (arguing that the Court's approach in *Brown & Williamson* can be understood as invalidating an interpretation that would have expanded the statute to advance the agency's self-interest).

114 *See id.* at 261.

115 *See id.*

116 *See, e.g.*, Manning, *The Nondelegation Doctrine*, *supra* note 111, at 261–67 (arguing that the nondelegation principle evident in *Brown & Williamson* does not best serve congressional intent); Sunstein, Chevron *Step Zero*, *supra* note 9, at 246 (arguing that a principle that seeks to prevent agencies from expanding their own authority would introduce "an unhealthy status quo bias into administrative law").

117 *See* Gonzales v. Oregon, 126 S. Ct. 904, 921–22 (2006); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2001).

and political consequences.[118] The same might be said for auto safety regulation: the public often cares deeply about the choice of safety standards that the Department of Transportation mandates, and certainly the regulations that affect the domestic auto industry affect the national economy.[119] We need more information to know why the Court distinguishes certain social policies from others for purposes of judicial deference.

Second, the questions extended the reach of the agency's authority.[120] Yet even this refinement, if necessary, still does not provide a sufficient explanation. Many questions that arise under regulatory statutes have some bearing on an agency's jurisdiction. As Justice Scalia has remarked, there is "no discernable line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority," and "[v]irtually any administrative action can be characterized as either the one or the other, depending upon how generally one wishes to describe the 'authority.'"[121] The jurisdictional nature of the questions, standing alone, does not distinguish the cases. Rather, understanding the Court's approach requires additional analysis into the underlying reasons for calling some, but not all, of these borderline questions "extraordinary."

To determine what made these questions more significant than others, we might fold in additional considerations from the cases. In *Brown & Williamson*, the Court said that later-enacted statutes concerning tobacco cut against the delegation of authority to the FDA.[122] In *Gonzales*, the Court said that the importance of the question, as indicated by the "earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide,"[123] made the delegation "all the more suspect."[124] Thus, the questions were significant based on the current legal or social context. Without knowing this background information, the questions look rather ordinary.

---

118 *See* Massachusetts v. EPA, 415 F.3d 50, 58 (D.C. Cir. 2005), *rev'd*, 127 S. Ct. 1438 (2007).

119 *See* Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 39 (1983).

120 *See* Merrill & Hickman, Chevron*'s Domain*, *supra* note 110, at 845 (stating that "*Brown & Williamson* adopted the functional equivalent of an exception to *Chevron* deference in cases that involve ambiguities about the scope of an agency's jurisdiction").

121 Miss. Power & Light Co. v. Mississippi, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in the judgment).

122 *Brown & Williamson*, 529 U.S. at 160–61.

123 Gonzales v. Oregon, 126 S. Ct. 904, 921 (2006) (quotation omitted).

124 *Id.*

This information is not merely useful in identifying the questions that the Court has removed from *Chevron*'s domain. It also points to a particular understanding of the Court's decisions. More specifically, the legal and social contexts show with greater precision the reason that the Court rejected the agency interpretations, despite strong arguments that the executive branch was accountable for the agency actions.

B. The Relevance of the Legal and Social Contexts

Examination of the current legal and social contexts in each case reveals that the administrations were acting against a certain backdrop and in a certain way. In *Brown & Williamson*, the administration, though visibly assuming responsibility for tobacco policy, disregarded the likely preferences of Congress on the issue.[125] Congress acquiesced in the FDA's prior refusal to assert jurisdiction and conferred on other agencies only limited power to regulate the advertising or marketing of tobacco products.[126] Congress, however, never went as far as the administration did to regulate the sale and distribution of those products.[127] Nevertheless, the administration argued that facts had changed sufficiently to bring tobacco products within the ambit of the statute.[128] Specifically, information had come to light that manufacturers manipulated the nicotine content of cigarettes such that they intended cigarettes to have their physiological affects.[129] But the bigger problem simply was that the *political* facts had not changed: despite factual developments in understanding the effects of nicotine, Congress had not retreated from its likely preference against FDA jurisdiction that it had revealed through later statutes.[130]

In *Gonzales*, the administration took a position on an issue subject to public debate essentially by fiat.[131] The Attorney General picked sides for the public without involving or even ascertaining the views of the public.[132] But this was exactly the sort of controversial issue on which the people themselves might have registered their preferences at the federal level, if given the opportunity. For example, the FDA undertook notice and comment for its interpretation in *Brown &*

125 *See Brown & Williamson*, 529 U.S. at 159–61.

126 *See id.* at 137–39.

127 *See id.*

128 *See id.* at 127.

129 *See id.*

130 *See id.* at 137–39.

131 Gonzales v. Oregon, 126 S. Ct. 904, 921 (2006).

132 *See id.* at 911 (discussing the issuance of the Interpretive Rule).

Williamson, and it received over 700,000 submissions on its proposed rule—more than it ever had on any previous issue.[133] Furthermore, in *Gonzales*, the Attorney General claimed power that inhibited further discussion in the states. Oregon had legalized physician-assisted suicide, providing a source of learning not only for its own citizens but also for the entire country. The Bush administration took a position that hindered the operation of this law without consulting Oregon or even anyone outside the Department of Justice.[134] Finally, the administration asserted authority that, if vested in any federal agency, belonged to the Secretary of Health and Human Services.[135] The administration thus demonstrated disregard for the distribution of authority within the executive branch, a distribution that could be traced back to Congress itself.

Both cigarettes and assisted suicide, then, were the subjects of continuing public debate and evolving popular views. The difference between *Brown & Williamson* and *Gonzales* lies in the extent of the evidence supporting popular (or congressional) preferences on these controversial topics. But the cases are united by a similar perception that strong popular preferences existed that were at odds with the administration's decision—or at least that the administration had made no effort to determine those preferences and acted in a way that was insensitive to the legal and social contexts of the issues.

C. The Concern for Accountability

In both cases, the administrations were not entitled to deference although they had taken responsibility for the policies. One way to explain why is that the agency's conduct was arbitrary, making electoral accountability insufficient and uncertain to deter or remedy it. The conduct was not arbitrary in the sense that it necessarily was irrational from a strategic standpoint. Indeed, the administrations may have taken such actions to further their agendas or please their party loyalists. But the Court's decisions demonstrate that no administration is entitled to disregard Congress's likely preferences or fence out popular consideration of contested issues, no matter the reason. Rather, the Court imposed upon the administration a broader obligation: it must function as part of the larger government and must serve the public, especially when addressing significant social issues.[136]

---

133 *See Brown & Williamson*, 529 U.S. at 126–27.

134 *See Gonzales*, 126 S. Ct. at 913–14.

135 *See id.*

136 Einer Elhauge has defended the result in *Brown & Williamson*, arguing that the Court

Few would dispute that the President should act in a representative and responsive fashion. In the administrative state, a condition of delegating regulatory authority is that agencies will ensure that such regulatory authority is exercised in a manner that serves the interests of all and not just some.[137] This is why presidential control of regulatory policy has such strong appeal to politicians and scholars.[138] The President offers the administrative state the legitimacy it long has lacked. If presidents rather than unelected bureaucrats or judges assume responsibility for regulatory policy, there is less worry about broad delegation.[139] More specifically, presidential control means that there will be less worry about whether or to what extent regulatory policy actually reflects the will of the people or the preferences of their chosen representatives.

Although many people may assume that the President faithfully discharges his obligation to the public, this may not always be true. Some scholars assume that the President *is* representative of and re-

---

was giving effect to current enactable congressional preferences, as it should when reviewing agency interpretations of ambiguous provisions. Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2148 (2002) (arguing that the "requirement that the agency make a 'reasonable policy choice' given competing political interests . . . suggests courts should deny deference if, even though not openly admitted by the agency, its interpretations plainly conflict with current enactable policy preferences"). This Article's argument is not grounded on a theory of statutory construction that directs courts to interpret ambiguous statutes so as to implement current enactable congressional preferences. Instead, the goal is to recognize that courts should prevent administrations from issuing interpretations in an arbitrary or undemocratic manner on the basis of the administration's own preferences without regard to broader popular (including congressional) interests. The argument is closer to one calling on courts to balance executive and legislative branch preferences. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 46 (1994) (noting that the Court "can be expected to fragment (often contentiously) if Congress and the President take opposing sides on a separation-of-powers issue"); Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1266 (2006) (describing *Brown & Williamson* as consistent with the view that "the president's mandate is essentially on par with that of Congress").

137 *See* JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 152 (1997); Kagan, *supra* note 1, at 2331; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 477 (1989).

138 *See, e.g.*, Stephen G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 58–70 (1995) (endorsing presidential control of agency decision making because it promotes accountability); Kagan, *supra* note 1, at 2331–46 (same); Lessig & Sunstein, *supra* note 1, at 105–06 (arguing that presidential control of agency decision making increases political accountability); Mashaw, *supra* note 1, at 95 (same); Pierce, *supra* note 1, at 1239, 1251–54 (arguing that the Constitution is premised on the belief that government should act as an agent for the people).

139 *See* Sunstein, *Interpreting Statutes*, *supra* note 137, at 477 (arguing that "[c]ourts should construe statutes so that those who are politically accountable and highly visible will make regulatory decisions").

sponsive to popular preferences by virtue of the same general features that make the President accountable: the President is the one official elected by and beholden to a national constituency.[140] Because of these attributes, many people assume that the President will ensure that the executive branch fills statutory gaps and make regulatory policy in a public-regarding fashion.[141] This assumption is sufficient to legitimate regulatory policy and support judicial deference in the large run of cases. That is, political accountability is ordinarily sufficient for judicial deference.

But if political accountability is to carry the weight of the administrative state on its shoulders, then scholars should be prepared to recognize that accountability must entail more than the requirement that the President periodically stand for election. Electoral accountability is an important but often thin check when viewed in connection with particular regulatory policies, because voters usually elect officials based on particularly salient policy issues, such as war or terrorism, as well as the general ideology of the candidates.[142] Thus, there is no guarantee that the incumbent President will reflect the will of the people on particular policies simply by virtue of an electoral mandate, or respond to the will of the people for fear of an electoral check. Political accountability, to constitute a meaningful and effective constraint on executive branch action, must entail a more continuous commitment to the principles of good government. Put differently, political accountability must contain a functional component as well as a formal one.

Cases like *Brown & Williamson* and *Gonzales* demonstrate that the Court sometimes encounters accountability danger signals—signals that the administration has acted without regard to its continuous commitment of accountable government. First, the Court may gather evidence from the legal and social contexts that Congress or the public disfavors the administration's resolution, either in terms of substance

---

140 *See* MASHAW, *supra* note 137, at 152.

141 *See, e.g.*, Kagan, *supra* note 1, at 2336 ("Take the President out of the equation and what remains are individuals and entities with a far more tenuous connection to national majoritarian preferences and interests: administrative officials selected by the President himself; staff of the permanent bureaucracy; leaders of interest groups, which whether labeled 'special' or 'public' represent select and often small constituencies; and members of congressional committees and subcommittees almost guarantees by their composition and associated incentive structure to be *un*representative of national interests.").

142 *See* Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 617–19 (2003) (describing reasons why election does not ensure that the President will reflect popular preferences on specific issues).

or procedure. One inference when the administration ignores congressional or popular preferences is that it is serving the interests of favored constituencies. Serving narrow groups at public expense is the hallmark of arbitrary government. But, even if we grant that serving narrow groups is a reality of our government, then it is unclear why the President's favored groups ought to have a systematic advantage over others, or why we ought to call such favoritism "accountability" just because the President is involved.

Second, the Court may gather evidence from the statute, whether as enacted or as elaborated through subsequent legislation, that other agencies within the executive branch are the proper repository of the regulatory authority at issue. For example, if any entity was to regulate tobacco products, it was not the FDA.[143] Rather, other agencies had jurisdiction.[144] Those agencies possessed substantially more limited powers than the FDA to regulate the advertising and labeling of tobacco products rather than to restrict (or even ban) the sale and marketing of such products.[145] Similarly, if any agency was to regulate medical practices such as physician-assisted suicide, it was the Department of Health and Human Services ("HHS"), not the Attorney General.[146] Although the statutes on their faces arguably were vague enough to permit a contrary interpretation, allowing the FDA and the Attorney General to assert jurisdiction over the issues, the very assertion of authority suggested that the executive branch was insensitive to its own internal separation of powers. Such separation of powers might inhibit arbitrary action by preventing narrow groups (or the President himself) from turning to agencies with strong powers or lax procedures, particularly with respect to controversial social issues.

Finally, the very visibility of a policy and the assumption of responsibility may, counterintuitively, suggest to the Court that the administration acted for opportunistic rather than public-regarding reasons. The Bush administration's physician-assisted suicide policy raised this concern because the practice, like abortion, has strong moral and religious dimensions.[147] Perhaps the President wanted to claim credit for the policy to solidify a voter base that has disproportionate political power, knowing that those who oppose the policy have limited recourse. The losers then would have to obtain the sup-

143 *See* FDA v. Brown & Williamson Tobacco, Corp., 529 U.S. 120, 137–39 (2000).

144 *See id.*

145 *See id.*

146 *See* Gonzales v. Oregon, 126 S. Ct. 904, 924 (2006).

147 *See id.* at 921–22.

port of a supermajority of Congress to repeal the policy, assuming a presidential veto. Or the opponents of the administration's policy must await electoral recourse, at which time the electorate might prefer to vote on a basis other than that individual policy. It is possible to think that these are simply the risks and costs of democracy; but to trumpet this result as an exalted form of accountability seems problematic. If accountability is to serve as the key to agency legitimacy then it is not unreasonable to expect representation and responsiveness, not just credit-claiming and blame-shifting.

Of course, these accountability danger signals are not always accurate; they are proxies for problematic executive branch motives. An administration may have perfectly valid motives for departing from popular preferences in a particularly visible way.[148] For example, an administration may believe that the policy is the most effective or efficient means of solving a social problem. It may believe that the policy breaks the hold of narrow groups on Congress, or that the policy overcomes cognitive biases or generally reduces harmful public behavior. The administration may also believe that the policy is morally superior or required. Indeed, the Clinton administration's tobacco policy possessed many of these qualities. Tobacco manufacturers may have great influence on members of Congress, and citizens have suffered health effects from which they may be unable to protect themselves.[149] Children and adolescents, in particular, are vulnerable to the pressures of smoking, and thereafter become addicted to these cancer-causing products.[150]

This analysis might suggest that any exception to *Chevron* deference ought to be nuanced, triggered by executive branch motives rather than proxies such as contrary congressional or popular preferences. But, we might recognize, this cure is worse than the disease. For one thing, requiring judges to read an administrator's (and the President's) mind would erode separation of powers principles.[151] For another, the approach would impose practical difficulties. Any ad-

148 *See* Kagan, *supra* note 1, at 2340–41 (arguing that presidential involvement in agency decision making may energize the administrative state).

149 *See* Robert A. Kagan & William P. Nelson, *The Politics of Tobacco Regulation in the United States*, *in* REGULATING TOBACCO 13 (Robert L. Rabin & Stephen D. Sugarman eds., 2001) ("The tobacco industry is large, extremely profitable, and politically well organized. It can and does contribute lavishly to the political campaigns of individual legislators and parties.").

150 *See Brown & Williamson*, 529 U.S. at 128.

151 *See, e.g.*, Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) (stating that "inquiry into the mental processes of administrative decision makers is usually to be avoided").

ministration can claim that it is aiming to achieve public goals, and the facts required to substantiate or refute that claim are difficult to obtain. The Court cannot ensure that a particular policy actually reflects leadership in a way that might negate the concern that the administration is operating only in consideration of its own interests. Thus, any rule will be under- or overinclusive. Perhaps, therefore, the Court simply chose the overinclusive rule.

If so, this rule is no different from many other rules in our democratic structure. The Constitution often demands broad assurances against arbitrary action or of broadly majoritarian action. For example, the requirements of bicameralism and presentment may be understood to serve this function, requiring narrow interest groups to secure broader agreement before they may procure a law.[152] Against this backdrop, a one-house legislative veto could not stand due to the fear that it could provide interest groups with an easy method of reversing agency action and therefore might facilitate government by faction, even though this may not be the result in every case.[153] Indeed, a one-house veto might even inhibit government tyranny in certain cases, preventing the executive branch from accumulating too much authority.[154] Nevertheless, the Court, lacking a practical way to distinguish between harmful and beneficial uses of a one-house veto, chose overprotection rather than underprotection.[155] This is a legitimate and justifiable choice, even if not the only one.

The exception to *Chevron* deference in cases like *Brown & Williamson* and *Gonzales* may be judged in this light. The Court's decisions might do more than necessary to prevent factional influences from dictating policy, and it may thereby frustrate White House leadership in particular cases. But it does so in pursuit of assurances that transcend particular policies or particular presidents. This approach

---

152 U.S. CONST. art. I, § 7; *see* Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 1017–18 (1997) (arguing that the requirements of bicameralism and presentment ensure that any law enacted receives a high degree of political support).

153 *See* INS v. Chadha, 462 U.S. 919, 948–49, 958–59 (1983); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 519–23 (2003) (arguing that the legislative veto may facilitate faction).

154 *See* William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 542–43 (1992) (arguing that the legislative veto restores the balance of power between Congress and the President); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 187–90 (1994) (contending that given the increase in presidential power, the legislative veto restores checks and balances).

155 *See Chadha*, 462 U.S. at 946–51, 956 (invalidating the legislative veto as a violation of the requirements of bicameralism and presentment).

recognizes that the President and his senior officials, in attending to the details of regulatory statutes, must honor the power of the Oval Office and not simply disregard the views of the other political branch or the people themselves.

D. The Relationship to Congressional Intent

How might we relate this approach, which is based on general democratic values, to congressional intent? After all, the Court is interpreting statutes.[156] In answering, we might resist the question, acknowledging that when Congress creates broad statutes, it may have *no* intent on certain issues—neither on the substance of particular policies nor on the allocation of interpretive authority. Indeed, many scholars believe that presumptions of congressional intent are simply judicially created proxies or fictions.[157] That is, *Chevron* is simply a rule premised on the Court's judgment concerning the best allocation of interpretive authority in the face of statutory ambiguity.[158] This explanation seems to fit here because the problem in cases like *Brown & Williamson* and *Gonzales* was not whether Congress had delegated authority but how the administration had exercised authority thereafter.

If so, these cases might tell us something significant about the meaning of *Chevron* itself. First, *Chevron* might be premised on substantive values rather than congressional intent. In the wake of *Mead*, scholars have begun to claim with increased confidence that *Chevron* turns on congressional intent or delegation.[159] But *Brown & Williamson* and *Gonzales* might suggest otherwise. Although *Chevron* might

---

156 *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 5 (2001) ("In our constitutional system, it is widely assumed that federal judges must act as Congress's faithful agents."); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1313 (1990) ("Traditional democratic theory suggests that the court interpreting a statute must act as the faithful agent of the legislature's intent.").

157 *See* Barron & Kagan, *supra* note 11, at 234 (arguing that the presumptions of congressional intent are "proxies"); Gersen & Vermeule, *supra* note 103, at 689 (agreeing with the view of some Justices and commentators who have recognized that the presumption of congressional intent underlying *Chevron* is a "fiction"); Merrill & Hickman, *supra* note 110, at 871–72 (noting that the presumption of congressional intent underlying *Chevron* deference "has been described by even its strongest defender [Justice Scalia] as 'fictional'").

158 *See* Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637, 2638–39 (2003) (arguing that *Chevron* is premised on judicially determined values).

159 *See* Merrill & Hickman, *supra* note 110, at 836 (arguing that *Chevron* is premised on congressional intent); Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 587 (2005) (same); *cf.* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 470 (2002) (arguing that Congress once under-

be premised on judicially recognized values, including formal accountability and expertise, it may not be limited to those values. Rather, *Chevron* might also include both procedural regularity, as in *Mead*,[160] and functional accountability, as in *Brown & Williamson* and *Gonzales*. To the extent that these judicially recognized values make any use of congressional intent, it is the intent or preferences of the prevailing Congress, not the enacting one.

Second, *Chevron*'s various steps have begun to blur together with increasing frequency, making little practical difference.[161] *Brown & Williamson* and *Gonzales* might be read together to suggest that the Court imposes as a condition of deference that an agency not only possess delegated authority, but also that the agency exercise such authority in a democratically "reasonable" fashion. In *Brown & Williamson*, the Court attended to the agency action at Step One, in part based on an assessment of current events,[162] even though the FDCA may have been ambiguous—notwithstanding the Court's interpretive gymnastics.[163] In *Gonzales*, the Court attended to the agency action at so-called Step Zero, based on an assessment of current events.[164] Furthermore, the Court likely could have addressed the agency actions in both cases under Step Two, which incorporates notions of reasonableness, at least technocratic reasonableness.[165] There is an analogy here. No court would uphold an agency interpretation that considers only half of the technical facts;[166] why should the result be any different when an agency interpretation considers only half of the *political* facts,

---

stood statutory grants of lawmaking authority to confer on agencies authority to act with the force of law, but recognizing that this convention is now lost).

160 *See* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1485 (2005) (arguing that under *Mead*, "courts frequently must infer congressional delegation from agency practice").

161 *Cf.* Gersen & Vermeule, *supra* note 103, at 697–98 (noting that it may be cognitively difficult for judges to separate these steps).

162 *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).

163 Scholars have argued that the FDCA was ambiguous, and that the Court went to great lengths to conclude otherwise. *See* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1257 (2001); Mark Seidenfeld, *An Apology for Administrative Law in the Contracting State*, 28 FLA. ST. U. L. REV. 215, 223–24 (2000).

164 *See* Gonzales v. Oregon, 126 S. Ct. 904, 921 (2006).

165 *See* Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 1005–07 (2007) (demonstrating that *Chevron* Step Two incorporates the requirement of reasoned decision making).

166 *See, e.g.*, Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 51 (1983) (remanding agency rule rescission for dismissing too quickly the data concerning the safety benefits of automatic seatbelts).

that is, the executive side but not the congressional or public side?[167] These cases might prompt us to recognize that *Chevron* is not as compartmentalized as the Court or commentators may assume. *Chevron* often does not provide a mechanical framework as much as a set of factors for considering interpretive problems in the regulatory state.

For those who prefer a link to congressional intent, there are explanations for the decisions in *Brown & Williamson* and *Gonzales* that are no less plausible than the explanations relating other decisions to congressional intent. For example, we might rely on the "extraordinary" question rationale, as the Court did.[168] Of course, this is admittedly awkward, as it relies on imputing back to Congress information that it could not envision when enacting the statutes.[169] Thus, we are forced to say that Congress sometimes intends to delegate authority and sometimes it does not, depending on a set of future facts that make a question extraordinary. We nevertheless might embrace such a contextual or dynamic approach to statutory construction.[170]

Indeed, we might attribute to Congress the intent that agencies interpret statutes in light of current congressional preferences.[171] Perhaps Congress even intends agencies to refrain from taking positions on issues that are the subject of public debate so that Congress itself may participate in any federal resolution. Or perhaps Congress seeks

---

167 A possible difference is that the Court in both *Brown & Williamson* and *Gonzales* invalidated the agency interpretations, *see supra* Part I, rather than remanding those interpretations to the agency for reconsideration, as Step Two envisions. *See, e.g.*, AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 392, 397 (1999) (remanding an unreasonable rule to the agency for reconsideration). Some interpretations are not susceptible to agency repair on remand, such as those that extend the reach of the statute to a particular product or conduct. Either the interpretation is permissible or it is not.

168 *See Gonzales*, 126 S. Ct. at 921; FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).

169 *See* William W. Buzbee, *The One-Congress Fiction in Statutory Construction*, 149 U. PA. L. REV. 171, 194–98 (2000) (arguing that the Court in *Brown & Williamson*, when consulting later-enacted statutes to interpret an earlier one, presumed that a single Congress produces legislation).

170 *See Brown & Williamson*, 529 U.S. at 132 ("The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context."). On dynamic statutory construction, see generally T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 56–61 (1988), articulating a theory under which courts update statutes based on current legal and social context, and William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1480–81, 1484 (1987), articulating the same theory.

171 *See* Elhauge, *supra* note 136, at 2039 (arguing that members of Congress, past and present, would prefer judicial interpretations of statutes in a manner that tracks the current Congress's preferences); Peter L. Strauss, *Statutes That Are Not Static—The Case of the APA*, 14 J. CONTEMP. LEGAL ISSUES 767, 801 (2005) (arguing that later-enacted statutes sometimes indicate the current preferences of Congress).

to prevent shifts on such issues to avert sudden changes triggered by the election of a new administration.[172]

It is beyond the scope of this Article to defend any particular theory. However we explain what the Court is doing as a matter of statutory construction, the Court's approach is still coherent, though inconsistent with the notion of political accountability as commonly understood.[173] More specifically, the Court is determining that administrations do not meet the general conditions for judicial deference when they pursue their own agendas in disregard of broader governmental or public interests.

III. Other Examples

If the Court really is following a coherent approach in distinguishing instances of agency action warranting less deference from those warranting more, we might expect to see it elsewhere. Of course, we might not expect to see it very often if the trigger for nondeferential review is the presence of circumstances that are truly extraordinary. We might think that administrations do not often use broad statutes to reach issues removed from their core responsibilities, intruding into matters of public concern when doing so goes against likely congressional preferences or dampens public deliberation. Thus, the Court rarely should find that an administration has acted undemocratically. This infrequency does not diminish the importance of the message that the cases convey to the executive branch or suggest that there is no trend afoot. But it does suggest that the approach is limited in an important respect. That is, the Court has not run amok, invalidating executive branch policies without cause. Al-

172 *See* Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1049–57, 1065–66 (2006) (constructing a model to demonstrate that courts are more likely to produce decisions in conformity with the notion of stare decisis, and that Congress might seek this approach where consistency matters, such as with issues concerning the scope of agency authority); *see also* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 941–56 (1992) (arguing that courts should promote continuity and that agencies themselves have an obligation to observe continuity); Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 Nw. U. L. REV. 1389, 1430 (2005) (arguing that courts should interpret statutes so at to promote stability and that *Chevron* runs counter to this goal).

173 *Cf.* Armstrong, *supra* note 113, at 262 (speculating whether the approach in *Brown & Williamson* reflected the emergence of new principle or "a ticket good for this train, and this train only") (internal citation omitted); Molot, *supra* note 111, at 1325 (arguing that the Court in *Brown & Williamson* "focused so much on finding the right answer in the case at hand that it overlooked its responsibility for maintaining a coherent doctrine of judicial review across cases").

though both *Brown & Williamson* and *Gonzales* are susceptible to a political critique—that the conservative Justices voted to invalidate the policy of a liberal administration, and the liberal Justices voted to invalidate the policy of a conservative administration—we simply do not see extreme cases often enough to suggest that the Court is driven by agenda or ideology.

Nevertheless, we might expect to see some other cases beyond those already discussed. This Part considers two such cases. The cases are not identical to *Brown & Williamson* or *Gonzales* any more than those cases are identical to each other. This Part merely claims that all of the cases reflect a similar sentiment and makes clear why *Chevron* does not reflect that sentiment.

A. Bob Jones

The focus on democratically unreasonable action connects *Brown & Williamson* and *Gonzales* to an earlier case, *Bob Jones University v. United States*,[174] in which the Court held that the administration had disregarded likely congressional preferences—indeed, likely preferences of the entire federal government—on a matter of great social and political concern.[175] In response to a court order, the Internal Revenue Service ("IRS") determined that a racially discriminatory educational institution was not a "charitable" institution entitled to tax exempt status under the Internal Revenue Code.[176] The Reagan administration resisted this interpretation of the statute.[177] But the executive branch was the only part of the federal government to do so; judicial decisions, previous executive orders, and congressional actions all reflected consensus against race discrimination in education.[178] Under the circumstances, the Court stated that "it would be anomalous for the Executive, Legislative, and Judicial Branches to reach conclusions that add up to a firm public policy on racial discrimination, and at the same time have the IRS blissfully ignore what all three branches of the Federal Government had declared."[179] That is, the administration chose a position opposite to the one on which other institutions of the federal government had reached consensus.

---

174 Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

175 *Id.* at 585, 595–96, 598.

176 *Id.* at 578–79 (citing 26 U.S.C. § 501(c)(3) (2000)).

177 *Id.* at 585 n.9.

178 *Id.* at 598–99.

179 *Id.* at 598.

Bob Jones is different from *Brown & Williamson* and *Gonzales* in a material respect. In *Bob Jones*, the Court merely told the administration that it could not be the lone holdout. Such conduct was the epitome of unreasonable or arbitrary action because it seemed to lack any public-regarding explanation. But this difference only underscores the broad nature of the principle gleaned from *Brown & Williamson* and *Gonzales*. In those cases, the Court suggested that even pioneering conduct may be problematic. The administrations in those cases may have been attempting to move the country forward by using broad mandates to solve what they perceived to be social problems, restricting tobacco products and physician-assisted suicide.[180] The Court nevertheless withheld deference,[181] suggesting that the direction of the change is irrelevant or simply too subjective a basis on which to ground a distinction. Whether regressive or progressive, the administrations were not functioning as part of the broader government or as a representative of the popular will, which was enough to suggest that judicial deference was inappropriate.

B. Rust v. Sullivan

The focus on democratically unreasonable action also provides an explanation for the decision in *Rust v. Sullivan*.[182] There, the approach actually worked in favor of the agency.

The Secretary of HHS under the George H.W. Bush administration had issued abortion-related speech restrictions.[183] Title X of the Public Health Services Act authorizes grants to public and nonprofit private entities that offer family planning services, provided that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning."[184] HHS interpreted "family planning" to require a ban on abortion counseling, referral, or advocacy.[185] In this way, it extended its jurisdiction from administering funds to regulating speech on a matter of profound public concern, much as the agencies had done in *Brown & Williamson* and *Gonzales*.

---

180 *See* Gonzales v. Oregon, 126 S. Ct. 904, 921 (2006); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).

181 *See Gonzales*, 126 S. Ct. at 921; *Brown & Williamson*, 529 U.S. at 159.

182 Rust v. Sullivan, 500 U.S. 173 (1991).

183 *Id.* at 177–78.

184 *Id.* at 178.

185 *Id.* at 179.

The Court found that the statute was ambiguous and that the regulations were worthy of deference.[186] The Court noted that HHS justified the regulations as necessary to provide guidance on the distinction between eligible and ineligible Title X programs.[187] Furthermore, the Court stated that HHS had determined that the regulations were "supported by a shift in attitude against the elimination of unborn children by abortion."[188] That shift, of course, was reflected in many state statutes regulating access to abortion.[189] Accordingly, the Court held that "we must defer to the Secretary's permissible construction of the statute."[190] Specifically, the Court held that the agency was entitled to judicial deference for using a statute to reach new conduct in an area of great social and political concern, in part because the interpretation, which was the product of notice-and-comment rulemaking, *was* in line with public attitudes.[191] Thus, the administration did not fence out the public but relied on its preferences in interpreting the statute. Indeed, the Court made offensive rather than defensive use of public sentiments in evaluating the interpretation.[192]

Justice Stevens dissented, contending that the Secretary lacked authority under the statute to regulate abortion-related speech because of the constitutional questions the issue raised.[193] Thus, he stated that "[i]n a society that abhors censorship and in which policymakers have traditionally placed the highest value on the freedom to communicate, it is unrealistic to conclude that statutory authority to regulate conduct implicitly authorized the Executive to regulate

---

186 *Id.* at 184–88.

187 *See id.* at 188.

188 *Id.* at 187 (internal quotation marks omitted).

189 *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-2152 (2003) (requiring informed consent for a minor to have an abortion); *see also* COLO. CONST. art. 5, § 50 (banning public funding for abortion).

190 *See Rust*, 500 U.S. at 187.

191 *See id.*

192 *Id.* The Court rejected the argument that the regulations were not entitled to deference because they raised a constitutional question. *Id.* at 190–91. Indeed, the Court sustained the regulation against a First Amendment attack, holding that government had the right to control the speech it chooses to fund. *Id.* at 196–200. The Court also rejected a Fifth Amendment challenge. *Id.* at 201–03. Justice Blackmun dissented, arguing that the Court should have invoked the constitutional avoidance canon and that the speech restrictions violated the Constitution on First and Fifth Amendment grounds. *Id.* at 204–20 (Blackmun, J., dissenting). Justice Stevens also dissented, as described in the text accompanying notes 193–96. Finally, Justice O'Connor dissented, stating that she would interpret the statute to avoid serious constitutional questions. *Id.* at 223 (O'Connor, J., dissenting).

193 *Id.* at 222 (Stevens, J., dissenting).

speech."[194] Interestingly, Justice Stevens did not question whether the country really had experienced "a shift in attitude against the elimination of unborn children by abortion."[195] Rather, he emphasized the overriding concern for speech.[196] Of course, the argument did not carry the day, perhaps because the executive branch had public attitudes and state laws on its side. But Justice Stevens's dissent is instructive for two reasons. First, it suggests that interpretations raising constitutional questions further complicate the deference analysis. There may be a conflict between two principles—one that counsels deference because the interpretation has public support and another that undercuts deference because the interpretation raises a constitutional question. Second, Justice Stevens's dissent signals a danger, addressed in detail below, that the Court may misconstrue popular (or congressional) preferences for a purpose broader than it should. The states that restricted access to abortion had not weighed in on the precise issue of abortion-related speech restrictions. As Justice Stevens recognized, it is unclear whether the concern for preventing abortion or the concern for protecting free speech would prevail when the two conflict. Thus, the Court may have erred in suggesting that the Secretary acted with the support of the public.

Nevertheless, the generic point still remains. Setting aside the constitutional complication, as the majority did, the case shows that deference is particularly appropriate when an agency acts with the support of the public. The administration not only has formal accountability on its side, but also has functional accountability as well.

D. Chevron *Distinguished*

Chevron itself involved an agency interpretation with none of the features that made the agency interpretations in *Brown & Williamson* and *Gonzales* problematic. The new interpretation, from smokestack to bubble, was not "extraordinary" in the sense that it reached a new social problem.[197] Rather, it offered a new solution to a statutorily recognized social problem: air pollution.[198] Moreover, the new definition reconciled interests that the statute itself made relevant.[199] This is true even if, as the lower court found, an emissions trading system was

194 *Id.* Justice Stevens also argued that even if the language was ambiguous, he would have joined Justice O'Connor in construing it to avoid serious constitutional questions. *Id.* at 223.

195 *Id.* at 187 (majority opinion) (internal quotation marks omitted).

196 *Id.* at 222 (Stevens, J., dissenting).

197 *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 857–59 (1984).

198 *See id.*

199 *See id.* at 865 ("Congress intended to accommodate both interests [pollution reduction

not the best way to reduce air pollution and therefore was at odds with the broad purposes of the statute.[200] Thus, the best method to reduce air pollution, whatever it was, undoubtedly was at the heart of the statute.

Furthermore, the new definition was not extraordinary when viewed in the larger political context. First, there was no evidence that the administration precluded public consideration. Indeed, the administration issued the interpretation through notice-and-comment rulemaking, not by executive-branch fiat.[201] Although such a procedure was not sufficient for judicial deference in *Brown & Williamson* because Congress still likely opposed the interpretation (and perhaps is not necessary for judicial deference in other circumstances), a public procedure may show that the administration has engaged the public, as it arguably did in *Rust v. Sullivan*.

Second, there was no evidence that the administration issued the new definition despite likely congressional resistance. If anything, Congress supported the shift, as the interpretation was part of a broader movement in regulatory law.[202] Other agencies, both executive branch and independent, began using economic or incentive-based strategies to solve existing problems.[203] For example, the FDA and the Occupational Safety & Health Administration started employing information disclosure requirements rather than restrictions to deter risky behavior.[204] Furthermore, Congress also started pursuing incentive-based approaches. It too began requiring information disclosure and amended the Clean Air Act in 1990 explicitly to include an emissions trading system for acid deposition.[205] Thus, the policy change, when viewed in context, was restricted neither to EPA nor to the Reagan administration. It was widespread and collaborative, involving other agencies and Congress in an experiment that already had substantial support in economic circles.

---

and reasonable economic growth], but did not do so itself on the level of specificity presented by these cases.").

200 *See id.* at 859 (noting that the lower court "interpreted the policies of the statute, however, to mandate the plantwide definition in programs designed to maintain clean air and to forbid it in programs designed to improve air quality").

201 *See id.* at 858–59.

202 For accounts of air pollution regulation, see generally BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR (1981); A. DENNY ELLERMAN ET AL., MARKETS FOR CLEAN AIR (2000).

203 *See* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 295–98 (5th ed. 2002) (collecting examples).

204 *See id.* at 297.

205 *See id.* at 296.

IV. The Limits

These cases together reveal that the approach reflected in *Brown & Williamson* and *Gonzales* is limited. The Court invokes the approach only rarely, suggesting that, for the most part, it will not find that administrations have acted undemocratically. Furthermore, when the Court does invoke the approach, it does so in a way that recognizes the danger of judicial overreaching. Scholars criticize the exceptions to *Chevron* on many grounds, but one of the most concerning is that courts may use the room to invalidate agency interpretations on the basis of their own ideology or politics.[206] Under the approach reflected in *Brown & Williamson* and *Gonzales*, courts have leeway to deprive the executive branch of interpretive authority by manipulating or mistaking the subsequent legislative history. For example, a court might invalidate an agency interpretation for disregarding likely congressional preferences, yet have read congressional silence for more than it is worth. Or a court might invalidate an agency interpretation for taking a position that stems from public debate, yet might overestimate the extent of the division in the country. It also might refuse to give an administration credit where credit is due by refusing to recognize that congressional acquiescence or public consensus supports the interpretation. But an examination of the cases suggests that the Court demands a degree of substantiation that minimizes judicial judgment.

It is important to note, however, that no set of limits can convert a nuanced model of statutory construction into a bright line rule of judicial deference against which Congress may legislate. Some have argued that this purpose is the only way to justify *Chevron* and its fiction about congressional intent.[207] Adherents of this view will find little comfort in this Part because it only makes the exception more restrained and predictable.

---

206 *See* Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 825–27 (2006); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeal*, 107 YALE L.J. 2155, 2162–76 (1998); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1717–19 (1997).

207 *See* Scalia, *supra* note 23, at 517 ("Congress now knows that the ambiguities it creates . . . will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known.").

A. Likely Congressional Preferences

The limit that the Court imposes when consulting congressional preferences is one of substantiation.[208] Thus, the Court does not rely on congressional silence alone. For example, in *Brown & Williamson*, the Court noted that Congress had taken specific steps consistent with the agency's prior position, having enacted six federal statutes.[209] In *Bob Jones*, the Court identified even more overwhelming evidence from every branch of the federal government, undermining the agency's prior position.[210]

By contrast, the Court would have been on shaky ground if it had relied on sources that are not considered to be reliable evidence of governmental preferences. For example, the Court would have encountered trouble if it had attempted to verify Congress's refusal to overturn the prior agency interpretation in *Brown & Williamson* with letters from individual members of Congress, statements from individual members in connection with later-enacted statutes, or general presumptions about congressional preferences in a period of divided government. Similarly, the Court in *Bob Jones* would have been less sure if it had relied only on memos from the President or presidential signing statements attached to other laws. But the Court relied on none of these sources.

Could the Court in another case rely on less evidence, or must it rely on overwhelming evidence to determine congressional preferences under this approach? One might imagine that quantity is largely dependent on the context. Perhaps even a single concrete legislative action might be sufficient to corroborate congressional preferences if Congress would not be expected to manifest its preferences through multiple sources, as it did in *Brown & Williamson* and *Bob Jones*.[211]

---

208 *See* Strauss, *Statutes That Are Not Static*, *supra* note 171, at 768–69 (arguing that examining subsequent statutes to gain perspective on an earlier-enacted statute may assist courts in distinguishing their preferences from those of Congress).

209 *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 137–38 (2000) (collecting statutes).

210 *See* Bob Jones Univ. v. United States, 461 U.S. 574, 598 (1983).

211 *Cf.* Rapanos v. United States, 126 S. Ct. 2208, 2231 (2006) (stating that "[a]bsent such *overwhelming evidence* of acquiescence [as was present in *Bob Jones*], we are loath to replace the plain text and original understanding of a statute with an amended agency interpretation" (first alteration and emphasis in original) (citation and internal quotation marks omitted)).

B. Division or Consensus in the Country

The Court also looks for substantiation of general public attitudes toward a particular issue, whether those attitudes reflect division or consensus. In *Gonzales*, Congress presumably knew that the public was not settled on the issue of physician-assisted suicide when it acquiesced in the prior policy—indeed, anyone living in this country probably knows that the issue is a live controversy. In any event, the Court did not rely on this presumption. Congress had not taken further steps to substantiate such awareness, nor would we have expected it to. It is fair to say that legislative silence, under these circumstances, could not be distinguished from "Congress's failure to express any opinion."[212]

Instead, the Court relied on Oregon's action.[213] Oregon's law demonstrated that the administration was moving in a direction opposite to a concrete constituency. Perhaps Oregon was an outlier, and no state would follow. That certainly would be problematic if the Court had found that the administration acted undemocratically by ignoring popular consensus on physician-assisted suicide. But there likely was no consensus among the people or the states on physician-assisted suicide, as there was among members of Congress regarding tobacco products. Indeed, the Court did not rely on popular consensus. Rather, it found that the administration was insensitive to public engagement on the issue, taking a position in the debate essentially by fiat.[214] Oregon's law was a concrete manifestation of such public engagement. Furthermore, the administration's action inhibited other states from enacting similar laws.

In *Rust*, the Court invoked public consensus rather than engagement.[215] Many states had enacted statutes restricting access to abortion services, and the Court might have pointed to these statutes as evidence of consensus supporting the administration's speech restrictions. But the case was more complicated, and actually contains a cautionary note about the use of subsequent legislative history. The states had not considered the precise issue of abortion gag rules in enacting various other restrictions, and that issue raised free speech concerns.[216]

---

212 *Id.*

213 *See* Gonzales v. Oregon, 126 S. Ct. 904, 912–13 (2006).

214 *See id.* at 921.

215 *See* Rust v. Sullivan, 500 U.S. 173, 187 (1991).

216 *See supra* Part III.B.

Moreover, Congress ultimately opposed the speech restrictions, passing a bill to repeal them after the case was decided.[217] The Bush administration, insistent on the speech restrictions, predictably vetoed the bill.[218] The rules remained in place until the Clinton administration took office.[219] Although this evidence was not available during the litigation, it suggests that the Court and the administration may have taken too broad a view of any shift in public attitude regarding the precise issue of abortion-related speech restrictions. Perhaps the public opposed such speech restrictions, and, in any event, perhaps Congress, which ultimately determines the content of federal law, opposed them. At the same time, the case has a positive side, as it shows that the Court was not overzealous in recognizing congressional resistance based on hearings or other expressions of interest short of an enacted law.

Conclusion

The Supreme Court may be driving at a rule of statutory construction that pursues a goal different from and counter to traditional notions of political accountability. That rule asks whether the administration has acted undemocratically either by disregarding likely congressional preferences or public engagement on an issue of social concern. We might understand this rule as an effort by the Court (or at least the median Justices) to see the realization of congressional intent. Or perhaps we might acknowledge that the rules in this area, both *Chevron* and its exceptions, recognize judicially determined values more than we have previously acknowledged.

This Article's core contention is that *Brown & Williamson* and *Gonzales* are best explained by reference to the obligations of the executive branch in our democratic structure. The administration is not always entitled to deference when interpreting broad delegations to achieve certain political goals, subject only to periodic electoral check. Specifically, it is not entitled to deference when taking positions that, though politically expedient, disregard Congress's views and the engagement of the people. To do so raises an inference that the administration is interested in representing only some of the people, not all of the people.

---

217 *See* PETER L. STRAUSS ET AL., GELHORN AND BYSE'S ADMINISTRATIVE LAW 1048 (10th ed. 2003).

218 *See id.*

219 *See id.*

This Article does not contend that we necessarily should embrace the approach from *Brown & Williamson* and *Gonzales*. It has a more modest goal. We ought to understand the circumstances in which the Court has determined that political accountability is insufficient to support judicial deference. Scholars, focused on remitting interpretive authority to elected officials, may have rejected cases like *Brown & Williamson* and *Gonzales* without appreciating fully the values that they reflect. Once we understand why the Court may have intervened in these cases, we must better articulate why abstractions about political accountability or concerns about judicial overreaching nevertheless should carry the day.

***

Postscript

On April 2, 2007, the Court decided *Massachusetts v. EPA*,[220] and its reasoning closely tracks the theory that I have articulated in this Article. The case involved the question of whether EPA has authority under the Clean Air Act to regulate greenhouse gas emissions from new motor vehicles, and if so, whether the agency could decline to regulate greenhouse gases simply based on its own policy considerations and its claim of "scientific uncertainty."[221] The case is another example in which the Court found political accountability insufficient for judicial deference. The Court withheld deference from an administration policy that disregarded obvious congressional preferences, parallel to *Brown & Williamson*.[222] Interestingly, the Bush administration understood the importance of *Brown & Williamson* and the relevance of subsequent congressional action to a finding of agency authority, but it analyzed the direction of that action and authority exactly backwards.

The question in *Massachusetts v. EPA* was different from the ones in *Brown & Williamson* and *Gonzales v. Oregon*[223] because here the agency had *declined* to assert jurisdiction under a statute that arguably encompassed the regulatory subject, rather than asserting jurisdiction

220 Massachusetts v. EPA, 127 S. Ct. 1438 (2007).

221 *Id.* at 1451; 42 U.S.C. § 7521(a)(1) (2000) (requiring that EPA "shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class . . . of new motor vehicles . . . which [in EPA Administrator's] judgment cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare").

222 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60. In *Massachusetts v. EPA*, the Court did not invalidate the policy but remanded to the agency. *See* Massachusetts v. EPA, 127 S. Ct. at 1463.

223 Gonzales v. Oregon, 126 S. Ct. 904 (2006).

under a statute that arguably did not.[224] For this reason, the Court did not treat the question as an "extraordinary" statutory extension, as it had in the prior cases. But it did note, at the very outset of the opinion, that the question was extraordinary in the sense that it concerned "the most pressing environmental challenge of our time"—namely, global warming.[225] The Court went on to conclude that EPA may not decline to regulate greenhouse gas emissions in accordance with presidential priorities if doing so contravenes the "congressional design" of the statute.[226]

By "congressional design," the Court had in mind the same sorts of considerations as in *Brown & Williamson*: not only the language of the Clean Air Act[227] but also the "postenactment congressional actions and deliberations" surrounding that statute.[228] When Congress enacted the Clean Air Act, "the study of climate change was in its infancy."[229] But, the Court noted, as that study progressed, Congress took concrete steps consistent with EPA authority to regulate greenhouse gases.[230] In particular, Congress enacted statutes to promote "research to better understand climate change" and interagency coordination on the issue.[231] The Court thus rejected EPA's argument that the subsequent legislative context undercut its authority to regulate greenhouse gas emissions.[232] Although Congress had considered but failed to confer express authority on EPA, the Court found that such congressional inaction "tells us nothing about what Congress meant" when providing for climate change research and collaboration.[233] In-

224 *See* Massachusetts v. EPA, 127 S. Ct. at 1450.

225 *Id.* at 1446 (citation and internal quotation marks omitted).

226 *Id.* at 1462. The Court first determined that the plaintiffs—a group of states, local governments, and private organizations—had standing to bring the challenge. *See id.* at 1452–58. The standing determination is significant for administrative law purposes and will no doubt generate considerable scholarly discussion.

227 *Id.* at 1460 (finding that the statute "[o]n its face . . . embraces all airborne compounds of whatever stripe" and further stating on this point that "[t]he statutory text forecloses EPA's reading" and "[t]he statute is unambiguous").

228 *Id.*

229 *Id.* at 1447.

230 *Id.* at 1447–48.

231 *Id.* at 1460–61; *see also id.* at 1448 (describing the National Climate Program Act of 1978, Pub. L. No. 95-367, § 3, 92 Stat. 601, 601, "which required the President to establish a program to 'assist the Nation and the world to understand and respond to natural and man-induced climate processes and their implications,'" and the Global Climate Protection Act of 1987, Pub. L. No. 100-204, § 1103(b), 101 Stat. 1407, 1408 (codified at 15 U.S.C. § 2901 note (2000)), which "directed EPA to propose to Congress a 'coordinated national policy on global climate change.'").

232 *Id.* at 1460–61.

233 *Id* at 1460.

deed, it found nothing in the subsequent context of the Clear Air Act "remotely suggesting that Congress meant to curtail [EPA's] power to treat greenhouse gases as air pollutants."[234]

Furthermore, the Court noted that Congress had not parceled lesser or exclusive authority in this area to other agencies, a factor especially relevant in *Gonzales*.[235] The Court rejected EPA's argument that the Department of Transportation was the right agency to regulate carbon dioxide emissions from motor vehicles, finding "no reason to think that the two agencies cannot both administer their obligations and yet avoid inconsistency."[236] Later in the opinion, the Court noted that another agency, the State Department, also had interest in this issue, but that agency was relevant in a way that freed EPA to regulate greenhouses gases, not the opposite.[237] The Court stated that "Congress authorized the State Department—not EPA—to formulate United States foreign policy with reference to environmental matters relating to climate."[238] The Bush administration argued that EPA was prevented by foreign policy concerns from regulating greenhouse gas emissions from new vehicles.[239] The Court disagreed, and noted, moreover, that EPA had not even consulted with the State Department in declining to take action on climate change.[240]

In line with this reasoning, the Court rejected EPA's contention that *Brown & Williamson* foreclosed EPA jurisdiction.[241] First, the Court stated that the FDA's statutory construction in *Brown & Williamson* would have required a ban on tobacco products, a result that "clashed with the common sense intuition that Congress never meant to remove those products from circulation."[242] An interpretation of the relevant portion of the Clean Air Act to include greenhouse gases would not result in a ban of greenhouse gas emissions but only regula-

234 *Id.*

235 *Id.* at 1461–62; *see* Gonzales v. Oregon, 126 S. Ct. 904, 924 (2006) (noting that the CSA directs any medical judgments to the Secretary of Health and Human Services, not the Attorney General).

236 Massachusetts v. EPA, 127 S. Ct. at 1462.

237 *Id.* at 1463.

238 *Id.*

239 *Id.* at 1451 (noting EPA argument that "unilateral EPA regulation of motor-vehicle greenhouse gas emissions might also hamper the President's ability to persuade key developing countries to reduce greenhouse gas emissions").

240 *Id.* at 1463.

241 *Id.* at 1461.

242 *Id.* (citation and internal quotation marks omitted).

tion of such emissions, which is not "counterintuitive."[243] Second, the Court observed that *Brown & Williamson* involved congressional enactments that implicitly accepted the FDA's repeated determination that it lacked authority to regulate tobacco products, Whereas this case involved no comparable congressional action that conflicts with EPA authority.[244] If anything, Congress operated against the reverse backdrop of EPA's consistent determination that it had authority to regulate greenhouse gases.[245]

Finding jurisdiction, the Court then determined that EPA had not offered a sufficient basis for declining to regulate carbon dioxide emissions from new vehicles.[246] It rejected the "laundry list" of factors that EPA supplied, all of which concerned the President's desire to manage climate issues as he saw fit.[247] According to the Court, the statutory language calls for an endangerment judgment—a determination whether carbon dioxide "cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare."[248] None of the reasons that EPA offered, including a preference to adopt voluntary programs, negotiate with foreign nations, or generally eschew any "inefficient, piecemeal approach," amounted "to a reasoned justification for declining to form a scientific judgment."[249]

As for whether greenhouse gases contribute to climate change, the Court stated that EPA was not entitled simply to claim scientific uncertainty.[250] Rather, the agency must show that scientific uncertainty "is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming."[251] The Court found that EPA had failed to undertake such analysis.[252] The Court might have gone further, frankly expressing its doubt that EPA could show profound scientific uncertainty; in its standing analysis, the Court noted the virtual consensus in the scientific community, as well as in the world community, that greenhouse gases contribute to global warming.[253] Thus, EPA's determination not

243 *Id.*

244 *Id.*

245 *Id.*

246 *Id.* at 1462.

247 *Id.*

248 42 U.S.C. § 7521(a)(1) (2000).

249 Massachusetts v. EPA, 127 S. Ct. at 1463.

250 *Id.*

251 *Id.*

252 *Id.*

253 *Id.* at 1455–56.

to regulate defied both congressional preferences for EPA regulatory authority and larger scientific and global consensus on climate change. As a result, the determination not to regulate based on scientific analysis may be more difficult to sustain on remand than the Court acknowledged,[254] a point that Justice Scalia suggested in his dissent.[255]

The dissenters contested both the standing and merits holdings. Chief Justice Roberts's dissent focused on standing, arguing for various reasons that "redress of grievances of the sort at issue here is the function of Congress and the Chief Executive, not the federal courts."[256] Justice Scalia's dissent discussed the merits. He argued that EPA's reasons for refusing to regulate were not proscribed by the statute and therefore were entitled to *Chevron* deference.[257] He also found that EPA's conclusions as to scientific uncertainty were sufficiently explained.[258] Finally, he argued that the statute itself was ambiguous as to whether carbon dioxide emissions were covered, and therefore EPA was owed *Chevron* deference in making that judgment.[259]

The lineup—with the liberals in the majority and the conservatives in the dissent—is relevant because it makes the case susceptible to the same critique as *Brown & Williamson* and *Gonzales*: that the result turned on judicial ideology and not legal principle.[260] But that critique overlooks the critical and consistent position of Justice Kennedy. He was in the majority of each case, which makes the principle of withholding deference when an agency acts undemocratically fragile but nonetheless robust for as long as the Court's personnel remains consistent. The point is not to emphasize the vulnerability of the principle, however. It is rather to see that a principle exists among the politics and to think about whether this principle ought to be defended, not merely explained, as I have done in this Article. We should consider, in connection with the proper relationship between deference and democracy in the administrative state, the appropriate rules of administrative law.

---

254 *Id.* at 1463 (stating that EPA must do more than show "some residual uncertainty" as to climate change).

255 *Id.* at 1474–75 (Scalia, J., dissenting) (laying out the scientific findings of EPA and stating that is difficult to know "what else the Court would like EPA to say").

256 *Id.* at 1464 (Roberts, C.J., dissenting) (internal quotation marks and citation omitted).

257 *Id.* at 1472 (Scalia, J., dissenting).

258 *Id.* at 1474–75.

259 *Id.* at 1472–77.

260 *See supra* text accompanying notes 23–24.