INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
ICDR CASE NO. 01-21-0004-1048

GCCIX, W.L.L.

And

INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS

INDEX OF EXHIBITS SUBMITTED WITH ICANN'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

EXHIBIT	DESCRIPTION
LA-1	*United States v. Mead Corp*., 533 U.S. 218 (2001)
LA-2	*Encino Motorcars, LLC v. Navarro*, 579 U.S. 211 (2016)
LA-3	*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)
LA-4	11 USCA § 323, Role and Capacity of Trustee (1978)
LA-5	Daniel A. Austin, *The Bankruptcy Clause and the Eleventh Amendment: An Uncertain Boundary Between Federalism and State Sovereignty*, 42 U.S.F. L. Rev. 383, University of San Francisco Law Review (2007)

Ex. LA-1

RESPONDENT'S EXHIBIT

121 S.Ct. 2164
Supreme Court of the United States

UNITED STATES, Petitioner,
v.
MEAD CORPORATION.

No. 99–1434.
|
Argued Nov. 8, 2000.
|
Decided June 18, 2001.

Synopsis
Importer filed suit challenging tariff classification of its day planners. The Court of International Trade, 17 F.Supp.2d 1004, granted summary judgment to the government. The Court of Appeals for the Federal Circuit, 185 F.3d 1304,reversed, holding that tariff classification ruling was not entitled to *Chevron* deference or any lesser degree of deference. Importer petitioned for certiorari. The United States Supreme Court, Justice Souter, held that: (1) tariff classification ruling was not entitled to *Chevron* deference, and (2) ruling was entitled to respect according to degree of its persuasiveness.

Vacated and remanded.

Justice Scalia filed dissenting opinion.

West Headnotes (10)

[1] Administrative Law and Procedure Deference to Agency in General

Administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.

1070 Cases that cite this headnote

[2] Administrative Law and Procedure Statutory basis
Constitutional Law Rule making

Congressional delegation to administrative agency of authority generally to make rules carrying force of law may be shown in variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.

573 Cases that cite this headnote

[3] Administrative Law and Procedure Statutory basis
Administrative Law and Procedure Erroneous or unreasonable construction; conflict with statute

When Congress has explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific

provision of the statute by regulation, and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.

287 Cases that cite this headnote

[4] Administrative Law and Procedure Relationship of agency with statute in general

Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.

46 Cases that cite this headnote

[5] Administrative Law and Procedure Permissible or reasonable construction

When circumstances imply that Congress would expect an agency to be able to speak with the force of law, even though Congress may not have expressly delegated authority or responsibility to implement particular provision, a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise, but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable.

417 Cases that cite this headnote

[6] Administrative Law and Procedure Deference to Agency in General

Generally, Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force; however, *Chevron*deference may be appropriate even when no such administrative formality is required and none is afforded.

131 Cases that cite this headnote

[7] Administrative Law and Procedure Import and export duties; tariffs

Customs Duties Construction as to Classification of Goods

Customs Duties Scope of inquiry or review

Statutory change requiring United States Customs Service to provide notice-and-comment procedures on tariff classification rulings when changing practices to produce a tariff increase, or when imposing a restriction or prohibition, did not reveal Congressional objective to treat decisions as rulemaking with force of law or to create

patchwork of classification rulings, with some rulings entitled to *Chevron* deference. Tariff Act of 1930, § 625(c), as amended, 19 U.S.C.A. § 1625(c); 19 C.F.R. §§ 177.8, 177.9(a).

125 Cases that cite this headnote

[8] Administrative Law and Procedure Import and export duties; tariffs

Customs Duties Scope of inquiry or review

Tariff classification rulings of United States Customs Service are not entitled to *Chevron* deference, but are best treated like interpretations contained in policy statements, agency manuals, and enforcement guidelines; statute on its face does not suggest that Congress intended to delegate authority to issue classification rulings with force of law, statute's direction to disseminate information necessary to "secure" uniformity is counterbalanced by provision for independent review by Court of International Trade, and letter's binding character as a ruling stops short of third parties, who are warned against assuming any right of detrimental reliance. Tariff Act of 1930, § 502(a), as amended, 19 U.S.C.A. § 1502(a); 19 C.F.R. §§ 177.8, 177.9(a).

468 Cases that cite this headnote

[9] Administrative Law and Procedure Competence, expertise, and knowledge of agency

An agency's interpretation may merit some deference whatever its form, even though interpretation is not entitled to *Chevron* deference, given the specialized experience and broader investigations and information available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires.

566 Cases that cite this headnote

[10] Administrative Law and Procedure Import and export duties; tariffs

Customs Duties Scope of inquiry or review

Tariff classification rulings of United States Customs Service, which are not entitled to *Chevron* deference, are entitled to some respect according to degree of their persuasiveness. Tariff Act of 1930, § 502(a), as amended, 19 U.S.C.A. § 1502(a); 19 C.F.R. §§ 177.8, 177.9(a).

179 Cases that cite this headnote

****2166** *Syllabus* *

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

***218** The Harmonized Tariff Schedule of the United States authorizes the United States Customs Service to classify and fix the rate of duty on imports, under rules and regulations issued by the Secretary of the Treasury. As relevant here, the Secretary provides for tariff rulings before the entry of goods by regulations authorizing "ruling letters" setting tariff classifications for particular imports. Any of the 46 port-of-entry Customs offices and the Customs Headquarters Office may issue such letters. Respondent imports "day planners," three-ring binders with pages for daily schedules, phone numbers and addresses, a calendar, and suchlike. After classifying the planners as duty free for several years, Customs Headquarters issued a ruling letter classifying them as bound diaries subject to tariff. Mead filed suit in the Court of International Trade, which granted the Government summary judgment. In reversing, the Federal Circuit found that ruling letters should not be treated like Customs regulations, which receive the highest level of deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694, because they are not preceded by notice and comment as under the Administrative Procedure Act (APA), do not carry the force of law, and are not intended to clarify importers's rights and obligations beyond the specific case. The court gave no deference at all to the ruling letter at issue.

Held: Administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of such authority. Such delegation may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of comparable congressional intent. A Customs ruling letter has no claim to *Chevron* deference, but, under *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124, it is eligible to claim respect according to its persuasiveness. Pp. 2171–2177.

(a) When Congress has explicitly left a gap for an agency to fill, there has been an express delegation of authority to the agency to elucidate a ***219** specific statutory provision by regulation, and any ensuing regulation is binding unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute. Even in the absence of an express delegation of authority on a particular question, agencies charged with applying a statute necessarily make all sorts of interpretive choices, and while not all of those ****2167** choices bind judges to follow them, they may influence courts facing questions the agencies have already answered. The weight accorded to an administrative judgment "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and

later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore, supra,* at 140, 65 S.Ct. 161. In *Chevron,* this Court identified a category of interpretive choices distinguished by an additional reason for judicial deference, recognizing that Congress engages not only in express, but also in implicit, delegation of specific interpretive authority. It can be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when addressing ambiguity in the statute or fills in a space in the enacted law, even one about which Congress did not have intent as to a particular result. When circumstances implying such an expectation exist, a reviewing court must accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable. A very good indicator of delegation meriting *Chevron* treatment is express congressional authorizations to engage in the rulemaking or adjudication process that produces the regulations or rulings for which deference is claimed. Thus, the overwhelming number of cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication. Although the fact that the tariff classification at issue was not a product of such formal process does not alone bar *Chevron* 's application, cf., *e.g., NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.,* 513 U.S. 251, 256–257, 263, 115 S.Ct. 810, 130 L.Ed.2d 740, there are ample reasons to deny *Chevron* deference here. Pp. 2171–2173.

(b) There is no indication on the statute's face that Congress meant to delegate authority to Customs to issue classification rulings with the force of law. Also, it is difficult to see in agency practice any indication that Customs set out with a lawmaking pretense in mind, for it does not generally engage in notice-and-comment practice and a letter's binding character as a ruling stops short of third parties. Indeed, any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at 46 offices is self-refuting. Nor ***220** do statutory amendments effective after this case arose reveal a new congressional objective of treating classification decisions generally as rulemaking with force of law or suggest any intent to create a *Chevron* patchwork of classification rules, some with force of law, some without. In sum, classification rulings are best treated like "interpretations contained in policy statements, agency manuals, and enforcement guidelines," *Christensen v. Harris County,* 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621, and thus beyond the *Chevron* pale. Pp. 2173–2175.

(c) This does not mean, however, that the letters are due no deference. *Chevron* did not eliminate *Skidmore* 's holding that an agency's interpretation may merit some deference whatever its form, given the "specialized experience and broader investigations and information" available to the agency, 323 U.S., at 139, 65 S.Ct. 161, and given the value of uniformity in its administrative and judicial understandings of what a national law requires, *id.,* at 140, 65 S.Ct. 161. There is room at least to raise a *Skidmore* claim here, where the regulatory scheme is highly

detailed, and Customs can bring the benefit of specialized experience to bear on this case's questions. The classification ruling may at least seek a respect proportional to its "power to persuade," *ibid.,* and may claim the merit of its writer's thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight. Underlying this Court's position is a choice about the best way to deal with the great variety ****2168** of ways in which the laws invest the Government's administrative arms with discretion, and with procedures for exercising it, in giving meaning to Acts of Congress. The Court said nothing in *Chevron* to eliminate *Skidmore* 's recognition of various justifications for deference depending on statutory circumstances and agency action. Judicial responses to such action must continue to differentiate between the two cases. Any *Skidmore* assessment here ought to be made in the first instance by the lower courts. Pp. 2175–2177.

185 F.3d 1304, vacated and remanded.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, THOMAS, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, *post,* p. 2177.

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***221** J. Peter Coll, Jr., New York City, for respondent.

Opinion

Justice SOUTER delivered the opinion of the Court.

The question is whether a tariff classification ruling by the United States Customs Service deserves judicial deference. The Federal Circuit rejected Customs's invocation of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), in support of such a ruling, to which it gave no deference. We agree that a tariff classification has no claim to judicial deference under *Chevron,* there being no indication that Congress intended such a ruling to carry the force of law, but we hold that under *Skidmore v. Swift & Co.,* 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944), the ruling is eligible to claim respect according to its persuasiveness.

I

A

Imports are taxed under the Harmonized Tariff Schedule of the United States (HTSUS), 19 U.S.C. § 1202. Title 19 U.S.C. § 1500(b) provides that Customs "shall, under rules ***222** and regulations prescribed by the Secretary [of the Treasury,] ... fix the final classification and rate of duty applicable to ... merchandise" under the HTSUS. Section 1502(a) provides that

> "[t]he Secretary of the Treasury shall establish and promulgate such rules and

> regulations not inconsistent with the law (including regulations establishing procedures for the issuance of binding rulings prior to the entry of the merchandise concerned), and may disseminate such information as may be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon at the various ports of entry." [1]

1 The statutory term "ruling" is defined by regulation as "a written statement ... that interprets and applies the provisions of the Customs and related laws to a specific set of facts." 19 CFR § 177.1(d)(1) (2000).

See also § 1624 (general delegation to Secretary to issue rules and regulations for the admission of goods).

The Secretary provides for tariff rulings before the entry of goods by regulations authorizing "ruling letters" setting tariff classifications for particular imports. 19 CFR § 177.8 (2000). A ruling letter

> "represents the official position of the Customs Service with respect to the particular transaction or issue described therein and is binding on all Customs Service personnel in accordance with the provisions of this section until modified or revoked. In the absence of a change ****2169** of practice or other modification or revocation which affects the principle of the ruling set forth in the ruling letter, that principle may be cited as authority in the disposition of transactions involving the same circumstances." § 177.9(a).

***223** After the transaction that gives it birth, a ruling letter is to "be applied only with respect to transactions involving articles identical to the sample submitted with the ruling request or to articles whose description is identical to the description set forth in the ruling letter." § 177.9(b)(2). As a general matter, such a letter is "subject to modification or revocation without notice to any person, except the person to whom the letter was addressed," § 177.9(c), and the regulations consequently provide that "no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter," *ibid.* Since ruling letters respond to transactions of the moment, they are not subject to notice and comment before being issued, may be published but need only be made "available for public inspection," 19 U.S.C. § 1625(a), and, at the time this action arose, could be modified without notice and comment under most circumstances, 19 CFR § 177.10(c) (2000). [2] A broader notice-and-comment requirement for modification of prior rulings was added by statute in 1993, Pub.L. 103–182, § 623, 107 Stat. 2186, codified at 19 U.S.C. § 1625(c), and took effect after this case arose. [3]

2 The opinion of the Federal Circuit in this case noted that § 177.10(c) provides some notice-and-comment procedures for rulings that have the " 'effect of changing a practice.' " 185 F.3d 1304, 1307, n. 1 (1999). The appeals court noted that this case does not involve such a ruling, and

specifically excluded such rulings from the reach of its holding. *Ibid.*

3 As amended by legislation effective after Customs modified its classification ruling in this case, 19 U.S.C. § 1625(c) provides that a ruling or decision that would "modify ... or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days" or would "have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions" shall be "published in the Customs Bulletin. The Secretary shall give interested parties an opportunity to submit, during not less than the 30–day period after the date of such publication, comments on the correctness of the proposed ruling or decision. After consideration of any comments received, the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after the closing of the comment period. The final ruling or decision shall become effective 60 days after the date of its publication."

***224** Any of the 46 [4] port-of-entry [5] Customs offices may issue ruling letters, and so may the Customs Headquarters Office, in providing "[a]dvice or guidance as to the interpretation or proper application of the Customs and related laws with respect to a specific Customs transaction [which] may be requested by Customs Service field offices ... at any time, whether the transaction is prospective, current, or completed," 19 CFR § 177.11(a) (2000). Most ruling letters contain little or no reasoning, but simply describe goods and state the appropriate category and tariff. A few letters, like the Headquarters ruling at issue here, set out a rationale in some detail.

4 Brief for Customs and International Trade Bar Association as *Amicus Curiae* 5 (CITBA Brief).

5 *I.e.,* "a Customs location having a full range of cargo processing functions, including inspections, entry, collections, and verification." 19 CFR § 101.1 (2000).

B

Respondent, the Mead Corporation, imports "day planners," three-ring binders with pages having room for notes of daily schedules and phone numbers and addresses, together with a calendar and suchlike. The tariff schedule on point falls under the HTSUS heading for "[r]egisters, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles," HTSUS subheading 4820.10, which comprises two ****2170** subcategories. Items in the first, "[d]iaries, notebooks and address books, bound; memorandum pads, letter pads and similar articles," were subject to a tariff of 4.0% at the time in controversy. 185 F.3d 1304, 1305 (C.A.Fed.1999) (citing subheading 4820.10.20); see also App. to Pet. for Cert. 46a. Objects in the second, covering "[o]ther" items, were free ***225** of duty. HTSUS subheading 4820.10.40; see also App. to Pet. for Cert. 46a.

Between 1989 and 1993, Customs repeatedly treated day planners under the "other" HTSUS subheading. In January 1993, however, Customs changed its position, and issued a Headquarters ruling letter classifying Mead's day planners as "Diaries ..., bound" subject to tariff under subheading 4820.10.20. That letter was short on explanation, App. to Brief in Opposition 4a–6a, but after Mead's protest, Customs Headquarters issued a new letter, carefully reasoned but never published, reaching the same conclusion, App. to Pet. for Cert. 28a–47a. This letter considered two definitions of "diary" from the Oxford English Dictionary, the first covering a daily journal of the past day's events, the second a book including " 'printed dates for daily memoranda and jottings; also ... calendars ....' " *Id.,* at 33a–34a (quoting Oxford English Dictionary 321 (Compact ed.1982)). Customs concluded that "diary" was not confined to the first, in part because the broader definition reflects commercial usage and hence the "commercial identity of these items in the marketplace." App. to Pet. for Cert. 34a. As for the definition of "bound," Customs concluded that HTSUS was not referring to "bookbinding," but to a less exact sort of fastening described in the Harmonized Commodity Description and Coding System Explanatory Notes to Heading 4820, which spoke of binding by " 'reinforcements or fittings of metal, plastics, etc.' " *Id.,* at 45a.

Customs rejected Mead's further protest of the second Headquarters ruling letter, and Mead filed suit in the Court of International Trade (CIT). The CIT granted the Government's motion for summary judgment, adopting Customs's reasoning without saying anything about deference. 17 F.Supp.2d 1004 (1998).

Mead then went to the United States Court of Appeals for the Federal Circuit. While the case was pending there this Court decided ***226** *United States v. Haggar Apparel Co.,* 526 U.S. 380, 119 S.Ct. 1392, 143 L.Ed.2d 480 (1999), holding that Customs regulations receive the deference described in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The appeals court requested briefing on the impact of *Haggar,* and the Government argued that classification rulings, like Customs regulations, deserve *Chevron* deference.

The Federal Circuit, however, reversed the CIT and held that Customs classification rulings should not get *Chevron* deference, owing to differences from the regulations at issue in *Haggar.* Rulings are not preceded by notice and comment as under the Administrative Procedure Act (APA), 5 U.S.C. § 553, they "do not carry the force of law and are not, like regulations, intended to clarify the rights and obligations of importers beyond the specific case under review." 185 F.3d, at 1307. The appeals court thought classification rulings had a weaker *Chevron* claim even than Internal Revenue Service interpretive rulings, to which that court gives no deference; unlike rulings by the IRS, Customs rulings issue from many locations and need not be published. 185 F.3d, at 1307–1308.

The Court of Appeals accordingly gave no deference at all to the ruling classifying the Mead day planners and rejected the agency's reasoning as to both "diary" and "bound." It

thought that planners were not diaries because they had no space for "relatively extensive notations about events, observations, feelings, or thoughts" in the past. *Id.,* at 1310. And it concluded that diaries "bound" in subheading ****2171** 4810.10.20 presupposed "unbound" diaries, such that treating ring-fastened diaries as "bound" would leave the "unbound diary" an empty category. *Id.,* at 1311.

[1] **[2]** We granted certiorari, 530 U.S. 1202, 120 S.Ct. 2193, 147 L.Ed.2d 231 (2000), in order to consider the limits of *Chevron* deference owed to administrative practice in applying a statute. We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make ***227** rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent. The Customs ruling at issue here fails to qualify, although the possibility that it deserves some deference under *Skidmore* leads us to vacate and remand.

II

A

[3] **[4]** When Congress has "explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," *Chevron,* 467 U.S., at 843–844, 104 S.Ct. 2778, and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.[6] See *id.,* at 844, 104 S.Ct. 2778; *United States v. Morton,* 467 U.S. 822, 834, 104 S.Ct. 2769, 81 L.Ed.2d 680 (1984); APA, 5 U.S.C. §§ 706(2)(A), (D). But whether or not they enjoy any express delegation of authority on a particular question, agencies charged with applying a statute necessarily make all sorts of interpretive choices, and while not all of those choices bind judges to follow them, they certainly may influence courts facing questions the agencies have already answered. "[T]he well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,' " *Bragdon v. Abbott,* 524 U.S. 624, 642, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998) (quoting *Skidmore,* 323 U.S., at 139–140, 65 S.Ct. 161), and "[w]e have long recognized that considerable weight should be accorded to an executive department's ***228** construction of a statutory scheme it is entrusted to administer ...." *Chevron, supra,* at 844, 104 S.Ct. 2778 (footnote omitted); see also *Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555, 565, 100 S.Ct. 790, 63 L.Ed.2d 22 (1980); *Zenith Radio Corp. v. United States,* 437 U.S. 443, 450, 98 S.Ct. 2441, 57 L.Ed.2d 337 (1978). The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care,[7] its consistency,[8] formality,[9] and relative expertness,[10] and to

the persuasiveness of the agency's position, see ****2172** *Skidmore, supra,* at 139–140, 65 S.Ct. 161. The approach has produced a spectrum of judicial responses, from great respect at one end, see, *e.g., Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist.,* 467 U.S. 380, 389–390, 104 S.Ct. 2472, 81 L.Ed.2d 301 (1984) (" 'substantial deference' " to administrative construction), to near indifference at the other, see, *e.g., Bowen v. Georgetown Univ. Hospital,* 488 U.S. 204, 212–213, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988) (interpretation advanced for the first time in a litigation brief). Justice Jackson summed things up in *Skidmore v. Swift & Co.:*

> "The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S., at 140, [65 S.Ct. 161].

[5] ***229** Since 1984, we have identified a category of interpretive choices distinguished by an additional reason for judicial deference. This Court in *Chevron* recognized that Congress not only engages in express delegation of specific interpretive authority, but that "[s]ometimes the legislative delegation to an agency on a particular question is implicit." 467 U.S., at 844, 104 S.Ct. 2778. Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which "Congress did not actually have an intent" as to a particular result. *Id.,* at 845, 104

6 Assuming in each case, of course, that the agency's exercise of authority is constitutional, see 5 U.S.C. § 706(2)(B), and does not exceed its jurisdiction, see § 706(2)(C).

7 See, *e.g., General Elec. Co. v. Gilbert,* 429 U.S. 125, 142, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976) (courts consider the " 'thoroughness evident in [the agency's] consideration' " (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944))).

8 See, *e.g., Good Samaritan Hospital v. Shalala,* 508 U.S. 402, 417, 113 S.Ct. 2151, 124 L.Ed.2d 368 (1993) ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due").

9 See, *e.g., Reno v. Koray,* 515 U.S. 50, 61, 115 S.Ct. 2021, 132 L.Ed.2d 46 (1995) (internal agency guideline that is not "subject to the rigors of the [APA], including public notice and comment," is entitled only to "some deference" (internal quotation marks omitted)).

10 See, *e.g., Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist.,* 467 U.S. 380, 390, 104 S.Ct. 2472, 81 L.Ed.2d 301 (1984).

S.Ct. 2778. When circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise, see *id.,* at 845–846, 104 S.Ct. 2778, but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable, see *id.,* at 842–845, 104 S.Ct. 2778; cf. 5 U.S.C. § 706(2) (a reviewing court shall set aside agency action, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

[6] We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed. See, *e.g., EEOC v. Arabian American Oil Co.,* 499 U.S. 244, 257, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) (no *Chevron* deference to agency guideline where congressional delegation did not include the power to " 'promulgate rules or regulations' " (quoting ***230** *General Elec. Co. v. Gilbert,* 429 U.S. 125, 141, 97 S.Ct. 401, 50 L.Ed.2d 343 1976))); see also *Christensen v. Harris County,* 529 U.S. 576, 596–597, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000) (BREYER, J., dissenting) (where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is "inapplicable"). It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.[11] Cf. *Smiley v.* ****2173** *Citibank (South Dakota), N. A.,* 517 U.S. 735, 741, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996) (APA notice and comment "designed to assure due deliberation"). Thus, the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.[12] That said, and as significant ***231** as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded, see, *e.g., NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.,* 513 U.S. 251, 256–257, 263, 115 S.Ct. 810, 130 L.Ed.2d 740 (1995).[13] The fact that the tariff classification here was not a product of such formal process does not alone, therefore, bar the application of *Chevron.*

11 See Merrill & Hickman, *Chevron's Domain,* 89 Geo. L.J. 833, 872 (2001) ("[I]f *Chevron* rests on a presumption about congressional intent, then *Chevron* should apply only where Congress would want *Chevron* to apply. In delineating the types of delegations of agency authority that trigger *Chevron* deference, it is therefore important to determine whether a plausible case can be made that Congress would want such a delegation to mean that agencies enjoy primary interpretational authority").

12 For rulemaking cases, see, *e.g.*, *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 20–21, 120 S.Ct. 1084, 146 L.Ed.2d 1 (2000); *United States v. Haggar Apparel Co.*, 526 U.S. 380, 119 S.Ct. 1392, 143 L.Ed.2d 480 (1999); *AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999); *Atlantic Mut. Ins. Co. v. Commissioner*, 523 U.S. 382, 118 S.Ct. 1413, 140 L.Ed.2d 542 (1998); *Regions Hospital v. Shalala*, 522 U.S. 448, 118 S.Ct. 909, 139 L.Ed.2d 895 (1998); *United States v. O'Hagan*, 521 U.S. 642, 117 S.Ct. 2199, 138 L.Ed.2d 724 (1997); *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996); *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995); *ICC v. Transcon Lines*, 513 U.S. 138, 115 S.Ct. 689, 130 L.Ed.2d 562 (1995); *PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology*, 511 U.S. 700, 114 S.Ct. 1900, 128 L.Ed.2d 716 (1994); *Good Samaritan Hospital v. Shalala, supra*; *American Hospital Assn. v. NLRB*, 499 U.S. 606, 111 S.Ct. 1539, 113 L.Ed.2d 675 (1991); *Sullivan v. Everhart*, 494 U.S. 83, 110 S.Ct. 960, 108 L.Ed.2d 72 (1990); *Sullivan v. Zebley*, 493 U.S. 521, 110 S.Ct. 885, 107 L.Ed.2d 967 (1990); *Massachusetts v. Morash*, 490 U.S. 107, 109 S.Ct. 1668, 104 L.Ed.2d 98 (1989); *K mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988); *Atkins v. Rivera*, 477 U.S. 154, 106 S.Ct. 2456, 91 L.Ed.2d 131 (1986); *United States v. Fulton*, 475 U.S. 657, 106 S.Ct. 1422, 89 L.Ed.2d 661 (1986); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985).

For adjudication cases, see, *e.g.*, *INS v. Aguirre–Aguirre*, 526 U.S. 415, 423–425, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999); *Federal Employees v. Department of Interior*, 526 U.S. 86, 98–99, 119 S.Ct. 1003, 143 L.Ed.2d 171 (1999); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 116 S.Ct. 1396, 134 L.Ed.2d 593 (1996); *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317, 324–325, 114 S.Ct. 835, 127 L.Ed.2d 152 (1994); *National Railroad Passenger Corporation v. Boston & Maine Corp.*, 503 U.S. 407, 417–418, 112 S.Ct. 1394, 118 L.Ed.2d 52 (1992); *Norfolk & Western R. Co. v. Train Dispatchers*, 499 U.S. 117, 128, 111 S.Ct. 1156, 113 L.Ed.2d 95 (1991); *Fort Stewart Schools v. FLRA*, 495 U.S. 641, 644–645, 110 S.Ct. 2043, 109 L.Ed.2d 659 (1990); *Department of Treasury, IRS v. FLRA*, 494 U.S. 922, 110 S.Ct. 1623, 108 L.Ed.2d 914 (1990).

13 In *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S., at 256–257, 115 S.Ct. 810 (internal quotation marks omitted), we quoted longstanding precedent concluding that "[t]he Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of [the rule of deference] with respect to

his deliberative conclusions as to the meaning of these laws." See also 1 M. Malloy, Banking Law and Regulation § 1.3.1, p. 1.41 (1996) (stating that the Comptroller is given "personal authority" under the National Bank Act).

There are, nonetheless, ample reasons to deny *Chevron* deference here. The authorization for classification rulings, and Customs's practice in making them, present a case far removed not only from notice-and-comment process, but from any other circumstances reasonably suggesting that Congress ever thought of classification rulings as deserving the deference claimed for them here.

B

No matter which angle we choose for viewing the Customs ruling letter in this case, it fails to qualify under *Chevron.* On ****2174** the face of the statute, to begin with, the terms of the congressional delegation give no indication that Congress meant to delegate authority to Customs to issue classification ***232** rulings with the force of law. We are not, of course, here making any global statement about Customs's authority, for it is true that the general rulemaking power conferred on Customs, see 19 U.S.C. § 1624, authorizes some regulation with the force of law, or "legal norms," as we put it in *Haggar,* 526 U.S., at 391, 119 S.Ct. 1392.[14] It is true as well that Congress had classification rulings in mind when it explicitly authorized, in a parenthetical, the issuance of "regulations establishing procedures for the issuance of binding rulings prior to the entry of the merchandise concerned," 19 U.S.C. § 1502(a).[15] The reference to binding classifications does not, however, bespeak the legislative type of activity that would naturally bind more than the parties to the ruling, once the goods classified are admitted into this country. And though the statute's direction to disseminate "information" necessary to "secure" uniformity, *ibid.,* seems to assume that a ruling may be precedent in later transactions, precedential value alone does not add up to *Chevron* entitlement; interpretive rules may sometimes function as precedents, see Strauss, The Rulemaking Continuum, 41 Duke L.J. 1463, 1472–1473 (1992), and they enjoy no *Chevron* status as a class. In any event, any precedential claim of a classification ruling is counterbalanced by the provision for independent review of Customs classifications by the CIT, see 28 U.S.C. §§ 2638–2640; the scheme for CIT review includes a provision that treats classification rulings on par with the Secretary's rulings on "valuation, rate of duty, marking, restricted merchandise, ***233** entry requirements, drawbacks, vessel repairs, or similar matters," § 1581(h); see § 2639(b). It is hard to imagine a congressional understanding more at odds with the *Chevron* regime.[16]

14 Cf. *Adams Fruit Co. v. Barrett,* 494 U.S. 638, 649–650, 110 S.Ct. 1384, 108 L.Ed.2d 585 (1990) (although Congress required the Secretary of Labor to promulgate standards implementing certain provisions of the Migrant and Seasonal Agricultural Worker Protection Act, and "agency determinations within the scope of delegated authority

are entitled to deference," the Secretary's interpretation of the Act's enforcement provisions is not entitled to *Chevron* deference because "[n]o such delegation regarding [those] provisions is evident in the statute").

15 The ruling in question here, however, does not fall within that category.

16 Although Customs's decision "is presumed to be correct" on review, 28 U.S.C. § 2639(a)(1), the CIT "may consider any new ground" even if not raised below, § 2638, and "shall make its determinations upon the basis of the record made before the court," rather than that developed by Customs, § 2640(a); see generally *Haggar Apparel,* 526 U.S., at 391, 119 S.Ct. 1392.

It is difficult, in fact, to see in the agency practice itself any indication that Customs ever set out with a lawmaking pretense in mind when it undertook to make classifications like these. Customs does not generally engage in notice-and-comment practice when issuing them, and their treatment by the agency makes it clear that a letter's binding character as a ruling stops short of third parties; Customs has regarded a classification as conclusive only as between itself and the importer to whom it was issued, 19 CFR § 177.9(c) (2000), and even then only until Customs has given advance notice of intended change, §§ 177.9(a), (c). Other importers are in fact warned against assuming any right of detrimental reliance. § 177.9(c).

[7] Indeed, to claim that classifications have legal force is to ignore the reality that 46 different Customs offices issue 10,000 to 15,000 of them each year, see Brief for Respondent 5; CITBA Brief 6 (citing Treasury Advisory Committee on the Commercial Operations of the United States Customs Service, Report of the COAC Subcommittee on OR & R, Exhs. 1, ****2175** 3 (Jan. 26, 2000) (reprinted in App. to CITBA Brief 20a–21a)). Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is simply self-refuting. Although the circumstances are less startling here, with a Headquarters letter in issue, none of the relevant statutes recognizes this category of rulings as separate or different from others; there is thus no indication that a ***234** more potent delegation might have been understood as going to Headquarters even when Headquarters provides developed reasoning, as it did in this instance.

Nor do the amendments to the statute made effective after this case arose disturb our conclusion. The new law requires Customs to provide notice-and-comment procedures only when modifying or revoking a prior classification ruling or modifying the treatment accorded to substantially identical transactions, 19 U.S.C. § 1625(c); and under its regulations, Customs sees itself obliged to provide notice-and-comment procedures only when "changing a practice" so as to produce a tariff increase, or in the imposition of a restriction or prohibition, or when Customs Headquarters determines that "the matter is of sufficient importance to involve the interests of domestic industry," 19 CFR §§ 177.10(c)(1), (2) (2000). The

statutory changes reveal no new congressional objective of treating classification decisions generally as rulemaking with force of law, nor do they suggest any intent to create a *Chevron* patchwork of classification rulings, some with force of law, some without.

[8] In sum, classification rulings are best treated like "interpretations contained in policy statements, agency manuals, and enforcement guidelines." *Christensen,* 529 U.S., at 587, 120 S.Ct. 1655. They are beyond the *Chevron* pale.

C

[9] To agree with the Court of Appeals that Customs ruling letters do not fall within *Chevron* is not, however, to place them outside the pale of any deference whatever. *Chevron* did nothing to eliminate *Skidmore* 's holding that an agency's interpretation may merit some deference whatever its form, given the "specialized experience and broader investigations and information" available to the agency, 323 U.S., at 139, 65 S.Ct. 161, and given the value of uniformity in its administrative and judicial understandings of what a national law requires, *id.,* at 140, 65 S.Ct. 161. See generally *Metropolitan Stevedore Co. v.* ***235** *Rambo,* 521 U.S. 121, 136, 117 S.Ct. 1953, 138 L.Ed.2d 327 (1997) (reasonable agency interpretations carry "at least some added persuasive force" where *Chevron* is inapplicable); *Reno v. Koray,* 515 U.S. 50, 61, 115 S.Ct. 2021, 132 L.Ed.2d 46 (1995) (according "some deference" to an interpretive rule that "do[es] not require notice and comment"); *Martin v. Occupational Safety and Health Review Comm'n,* 499 U.S. 144, 157, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991) ("some weight" is due to informal interpretations though not "the same deference as norms that derive from the exercise of ... delegated lawmaking powers").

[10] There is room at least to raise a *Skidmore* claim here, where the regulatory scheme is highly detailed, and Customs can bring the benefit of specialized experience to bear on the subtle questions in this case: whether the daily planner with room for brief daily entries falls under "diaries," when diaries are grouped with "notebooks and address books, bound; memorandum pads, letter pads and similar articles," HTSUS subheading 4820.10.20; and whether a planner with a ring binding should qualify as "bound," when a binding may be typified by a book, but also may have "reinforcements or fittings of metal, plastics, etc.," Harmonized Commodity Description and Coding System Explanatory Notes to Heading 4820, p. 687 (cited in Customs Headquarters letter, App. to Pet. for Cert. 45a). A classification ruling in this situation may therefore at least seek a ****2176** respect proportional to its "power to persuade," *Skidmore, supra,* at 140, 65 S.Ct. 161; see also *Christensen,* 529 U.S., at 587, 120 S.Ct. 1655; *id.,* at 595, 120 S.Ct. 1655 (STEVENS, J., dissenting); *id.,* at 596–597, 120 S.Ct. 1655 (BREYER, J., dissenting). Such a ruling may surely claim the merit of its writer's thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight.

D

Underlying the position we take here, like the position expressed by Justice SCALIA in dissent, is a choice about the best way to deal with an inescapable feature of the ***236** body of congressional legislation authorizing administrative action. That feature is the great variety of ways in which the laws invest the Government's administrative arms with discretion, and with procedures for exercising it, in giving meaning to Acts of Congress. Implementation of a statute may occur in formal adjudication or the choice to defend against judicial challenge; it may occur in a central board or office or in dozens of enforcement agencies dotted across the country; its institutional lawmaking may be confined to the resolution of minute detail or extend to legislative rulemaking on matters intentionally left by Congress to be worked out at the agency level.

Although we all accept the position that the Judiciary should defer to at least some of this multifarious administrative action, we have to decide how to take account of the great range of its variety. If the primary objective is to simplify the judicial process of giving or withholding deference, then the diversity of statutes authorizing discretionary administrative action must be declared irrelevant or minimized. If, on the other hand, it is simply implausible that Congress intended such a broad range of statutory authority to produce only two varieties of administrative action, demanding either *Chevron* deference or none at all, then the breadth of the spectrum of possible agency action must be taken into account. Justice SCALIA's first priority over the years has been to limit and simplify. The Court's choice has been to tailor deference to variety.[17] This acceptance ***237** of the range of statutory variation has led the Court to recognize more than one variety of judicial deference, just as the Court has recognized a variety of indicators that Congress would expect *Chevron* deference.[18]

17 Compare *Christensen v. Harris County,* 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (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"), and *EEOC v. Arabian American Oil Co.,* 499 U.S. 244, 257–258, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) (applying *Skidmore* analysis where Congress did not confer upon the agency authority to promulgate rules or regulations), with *Christensen, supra,* at 589–591, 120 S.Ct. 1655 (SCALIA, J., concurring in part and concurring in judgment) (urging *Chevron* treatment); *EEOC v. Arabian American Oil Co., supra,* at 259–260, 111 S.Ct. 1227 (SCALIA, J., concurring in part and concurring in judgment) (urging *Chevron* treatment); see also *INS v. Cardoza—Fonseca,* 480 U.S. 421, 453–455, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987) (SCALIA, J., concurring in judgment) (urging broader application of *Chevron*).

18 It is, of course, true that the limit of *Chevron* deference is not marked by a hard-edged rule. But *Chevron* itself is a

> good example showing when *Chevron* deference is warranted, while this is a good case showing when it is not. Judges in other, perhaps harder, cases will make reasoned choices between the two examples, the way courts have always done.

Our respective choices are repeated today. Justice SCALIA would pose the question of deference as an either-or choice. On his view that *Chevron* rendered *Skidmore* anachronistic, when courts owe any deference it is *Chevron* deference that they owe, *post,* at 2183. Whether courts do owe deference in a given case turns, for him, on whether the agency action (if reasonable) is "authoritative," *post,* at 2187. The character of the ****2177** authoritative derives, in turn, not from breadth of delegation or the agency's procedure in implementing it, but is defined as the "official" position of an agency, *ibid.,* and may ultimately be a function of administrative persistence alone, *ibid.*

The Court, on the other hand, said nothing in *Chevron* to eliminate *Skidmore*'s recognition of various justifications for deference depending on statutory circumstances and agency action; *Chevron* was simply a case recognizing that even without express authority to fill a specific statutory gap, circumstances pointing to implicit congressional delegation present a particularly insistent call for deference. Indeed, in holding here that *Chevron* left *Skidmore* intact and applicable where statutory circumstances indicate no intent to delegate general authority to make rules with force of law, or where such authority was not invoked, we hold nothing more than we said last Term in response to the particular ***238** statutory circumstances in *Christensen,* to which Justice SCALIA then took exception, see 529 U.S., at 589, 120 S.Ct. 1655, just as he does again today.

We think, in sum, that Justice SCALIA's efforts to simplify ultimately run afoul of Congress's indications that different statutes present different reasons for considering respect for the exercise of administrative authority or deference to it. Without being at odds with congressional intent much of the time, we believe that judicial responses to administrative action must continue to differentiate between *Chevron* and *Skidmore,* and that continued recognition of *Skidmore* is necessary for just the reasons Justice Jackson gave when that case was decided. [19]

19 Surely Justice Jackson's practical criteria, along with *Chevron*'s concern with congressional understanding, provide more reliable guideposts than conclusory references to the "authoritative" or "official." Even if those terms provided a true criterion, there would have to be something wrong with a standard that accorded the status of substantive law to every one of 10,000 "official" customs classifications rulings turned out each year from over 46 offices placed around the country at the Nation's entryways. Justice SCALIA tries to avoid that result by limiting what is "authoritative" or "official" to a pronouncement that expresses the "judgment of central agency management, approved at the highest levels," as distinct from the pronouncements of "underlings," *post,* at 2188, n. 6. But that analysis

would not entitle a Headquarters ruling to *Chevron* deference; the "highest level" at Customs is the source of the regulation at issue in *Haggar,* the Commissioner of Customs with the approval of the Secretary of the Treasury. 526 U.S., at 386, 119 S.Ct. 1392. The Commissioner did not issue the Headquarters ruling. What Justice SCALIA has in mind here is that because the Secretary approved the Government's position in its brief to this Court, *Chevron* deference is due. But if that is so, *Chevron* deference was not called for until sometime after the litigation began, when central management at the highest level decided to defend the ruling, and the deference is not to the classification ruling as such but to the brief. This explains why the Court has not accepted Justice SCALIA's position.

* * *

Since the *Skidmore* assessment called for here ought to be made in the first instance by the Court of Appeals for the ***239** Federal Circuit or the CIT, we go no further than to vacate the judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, dissenting.

Today's opinion makes an avulsive change in judicial review of federal administrative action. Whereas previously a reasonable agency application of an ambiguous statutory provision had to be sustained so long as it represented the agency's authoritative interpretation, henceforth such an application can be set aside unless "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law," as by giving an agency "power to engage in adjudication or notice-and-comment rulemaking, or ... some other [procedure] indicati[ng] comparable congressional ****2178** intent," and "the agency interpretation claiming deference was promulgated in the exercise of that authority." *Ante,* at 2171. [1] What was previously a general presumption of authority in agencies to resolve ambiguity in the statutes they have been authorized to enforce has been changed to a presumption of no such authority, which must be overcome by affirmative legislative intent to the contrary. And whereas previously, when agency authority to resolve ambiguity did not exist the court was free to give the statute what it considered the best interpretation, henceforth the court must supposedly give the agency view some indeterminate amount of so-called *Skidmore* deference. *Skidmore v. Swift & Co.,* 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944). We will be sorting out the consequences of the *Mead* doctrine, which has today replaced the *Chevron* doctrine, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), for years to come. I would adhere to our established jurisprudence, ***240** defer to the reasonable interpretation the Customs Service has given to the statute it is charged with enforcing, and reverse the judgment of the Court of Appeals.

1 It is not entirely clear whether the formulation newly minted by the Court today extends to both formal and informal adjudication, or simply the former. Cf., *e.g., ante,* at 2172–2173.

I

Only five years ago, the Court described the *Chevron* doctrine as follows: "We accord deference to agencies under *Chevron* ... because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows," *Smiley v. Citibank (South Dakota), N. A.,* 517 U.S. 735, 740–741, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996) (citing *Chevron, supra,* at 843–844, 104 S.Ct. 2778). Today the Court collapses this doctrine, announcing instead a presumption that agency discretion does not exist unless the statute, expressly or impliedly, says so. While the Court disclaims any hard-and-fast rule for determining the existence of discretion-conferring intent, it asserts that "a very good indicator [is] express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed," *ante,* at 2172. Only when agencies act through "adjudication[,] notice-and-comment rulemaking, or ... some other [procedure] indicati[ng] comparable congressional intent [whatever that means]" is *Chevron* deference applicable—because these "relatively formal administrative procedure[s] [designed] to foster ... fairness and deliberation" bespeak (according to the Court) congressional willingness to have the agency, rather than the courts, resolve statutory ambiguities. *Ante,* at 2171, 2172. Once it is determined that *Chevron* deference is not in order, the uncertainty is not at an end—and indeed is just beginning. Litigants cannot then assume that the statutory question is one for the courts to determine, according ***241** to traditional interpretive principles and by their own judicial lights. No, the Court now resurrects, in full force, the pre-*Chevron* doctrine of *Skidmore* deference, see *Skidmore, supra,* whereby "[t]he fair measure of deference to an agency administering its own statute ... var[ies] with circumstances," including "the degree of the agency's care, its consistency, formality, and relative expertness, and ... the persuasiveness of the agency's position," *ante,* at 2171 (footnotes omitted). The Court has largely replaced *Chevron,* in other words, with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th'ol' "totality of the circumstances" test.

The Court's new doctrine is neither sound in principle nor sustainable in practice.

****2179** A

As to principle: The doctrine of *Chevron*—that all *authoritative* agency interpretations of statutes they are charged with administering deserve deference—was rooted in a legal presumption of congressional intent, important

to the division of powers between the Second and Third Branches. When, *Chevron* said, Congress leaves an ambiguity in a statute that is to be administered by an executive agency, it is presumed that Congress meant to give the agency discretion, within the limits of reasonable interpretation, as to how the ambiguity is to be resolved. By committing enforcement of the statute to an agency rather than the courts, Congress committed its initial and primary interpretation to that branch as well.

There is some question whether *Chevron* was faithful to the text of the Administrative Procedure Act (APA), which it did not even bother to cite.[2] But it was in accord with the ***242** origins of federal-court judicial review. Judicial control of federal executive officers was principally exercised through the prerogative writ of mandamus. See L. Jaffe, Judicial Control of Administrative Action 166, 176–177 (1965). That writ generally would not issue unless the executive officer was acting plainly beyond the scope of his authority.

2 Title 5 U.S.C. § 706 provides that, in reviewing agency action, the court shall "decide all relevant questions of law"—which would seem to mean that all statutory ambiguities are to be resolved judicially. See Anthony, The Supreme Court and the APA: Sometimes They Just Don't Get It, 10 Am. U. Admin. L.J. 1, 9–11 (1996). It could be argued, however, that the legal presumption identified by *Chevron* left as the only "questio[n] of law" whether the agency's interpretation had gone beyond the scope of discretion that the statutory ambiguity conferred. Today's opinion, of course, is no more observant of the APA's text than *Chevron* was—and indeed is even more difficult to reconcile with it. Since the opinion relies upon actual congressional intent to suspend § 706, rather than upon a legal presumption against which § 706 was presumably enacted, it runs head-on into the provision of the APA which specifies that the Act's requirements (including the requirement that judges shall "decide all relevant questions of law") cannot be amended except expressly. See § 559.

"The questions mooted before the Secretary and decided by him were whether the fund is a tribal fund, whether the tribe is still existing and whether the distribution of the annuities is to be confined to members of the tribe .... These are all questions of law the solution of which requires a construction of the act of 1889 and other related acts. A reading of these acts shows that they fall short of plainly requiring that any of the questions be answered in the negative and that in some aspects they give color to the affirmative answers of the Secretary. That the construction of the acts insofar as they have a bearing on the first and third questions is sufficiently uncertain to involve the exercise of judgment and discretion is rather plain...."

. . . . .

"From what has been said it follows that the case is not one in which mandamus will lie." *Wilbur v. United States ex rel. Kadrie,* 281

U.S. 206, 221–222, 50 S.Ct. 320, 74 L.Ed. 809 (1930).

***243** Statutory ambiguities, in other words, were left to reasonable resolution by the Executive.

The basis in principle for today's new doctrine can be described as follows: The background rule is that ambiguity in legislative instructions to agencies is to be resolved not by the agencies but by the judges. Specific congressional intent to depart from this rule must be found—and while there is no single touchstone for such intent it can generally be found when Congress has authorized the agency to act through (what the Court says is) relatively formal procedures such as informal rulemaking and formal (and informal?) adjudication, and when the agency in fact employs such procedures. The Court's background rule is contradicted by the ****2180** origins of judicial review of administrative action. But in addition, the Court's principal criterion of congressional intent to supplant its background rule seems to me quite implausible. 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. The most formal of the procedures the Court refers to —formal adjudication—is modeled after the process used in trial courts, which of course are not generally accorded deference on questions of law. The purpose of such a procedure is to produce a closed record for determination and review of the facts—which implies nothing about the power of the agency subjected to the procedure to resolve authoritatively questions of law.

As for informal rulemaking: While formal adjudication procedures are *prescribed* (either by statute or by the Constitution), see 5 U.S.C. §§ 554, 556; *Wong Yang Sung v. McGrath,* 339 U.S. 33, 50, 70 S.Ct. 445, 94 L.Ed. 616 (1950), informal rulemaking is more typically *authorized* but not required. Agencies with such authority are free to give guidance through rulemaking, but they may proceed to administer their statute case-by-case, "making law" as they implement their program (not necessarily through formal adjudication). See *NLRB v. Bell* ***244** *Aerospace Co.,* 416 U.S. 267, 290–295, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974); *SEC v. Chenery Corp.,* 332 U.S. 194, 202–203 (1947). Is it likely—or indeed even plausible—that Congress meant, when such an agency chooses rulemaking, to accord the administrators of that agency, *and their successors,* the flexibility of interpreting the ambiguous statute now one way, and later another; but, when such an agency chooses case-by-case administration, to eliminate all future agency discretion by having that same ambiguity resolved authoritatively (and forever) by the courts?[3] Surely that makes no sense. It is also the case that certain significant categories of rules—those involving grant and benefit programs, for example, are exempt from the requirements of informal rulemaking. See 5 U.S.C. § 553(a)(2). Under the Court's novel theory, when an agency takes advantage of that exemption its rules will be deprived of *Chevron* deference, *i.e.,* authoritative effect. Was this either the plausible intent of the APA rulemaking exemption, or the plausible intent of the Congress that established the grant or benefit program?

3 See *infra,* at 2181–2183.

Some decisions that are neither informal rulemaking nor formal adjudication are required to be made personally by a Cabinet Secretary, without any prescribed procedures. See, *e.g., United States v. Giordano,* 416 U.S. 505, 508, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974) (involving application of 18 U.S.C. § 2516 (1970 ed.), requiring wiretap applications to be authorized by "[t]he Attorney General, or any Assistant Attorney General specially designated by the Attorney General"); *D.C. Federation of Civic Assns. v. Volpe,* 459 F.2d 1231, 1248–1249 (C.A.D.C.1971) (involving application of 23 U.S.C. § 138 (1970 ed.) requiring the Secretary of Transportation to determine that there is "no feasible and prudent alternative to the use of" publicly owned parkland for a federally funded highway), cert. denied, 405 U.S. 1030, 92 S.Ct. 1290, 31 L.Ed.2d 489 (1972). Is it conceivable that decisions ***245** specifically committed to these high-level officers are meant to be accorded no deference, while decisions by an administrative law judge left in place without further discretionary agency review, see 5 U.S.C. § 557(b), are authoritative? This seems to me quite absurd, and not at all in accord with any plausible actual intent of Congress.

B

As for the practical effects of the new rule:

****2181** 1

The principal effect will be protracted confusion. As noted above, the one test for *Chevron* deference that the Court enunciates is wonderfully imprecise: whether "Congress delegated authority to the agency generally to make rules carrying the force of law, ... as by ... adjudication[,] notice-and-comment rulemaking, or ... some other [procedure] indicati[ng] comparable congressional intent." But even this description does not do justice to the utter flabbiness of the Court's criterion, since, in order to maintain the fiction that the new test is really just the old one, applied consistently throughout our case law, the Court must make a virtually open-ended exception to its already imprecise guidance: In the present case, it tells us, the absence of notice-and-comment rulemaking (and "[who knows?] [of] some other [procedure] indicati[ng] comparable congressional intent") is not enough to decide the question of *Chevron* deference, "for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded." *Ante,* at 2171, 2173. The opinion then goes on to consider a grab bag of other factors—including the factor that used to be the sole criterion for *Chevron* deference: whether the interpretation represented the *authoritative* position of the agency, see ***246** *ante,* at 2173–2175. It is hard to know what the lower courts are to make of today's guidance.

2

Another practical effect of today's opinion will be an artificially induced increase in informal rulemaking. Buy stock in the GPO. Since informal rulemaking and formal adjudication

are the only more-or-less safe harbors from the storm that the Court has unleashed; and since formal adjudication is not an option but must be mandated by statute or constitutional command; informal rulemaking —which the Court was once careful to make voluntary unless required by statute, see *Bell Aerospace, supra,* and *Chenery, supra*—will now become a virtual necessity. As I have described, the Court's safe harbor requires not merely that the agency have been given rulemaking authority, but also that the agency have *employed* rulemaking as the means of resolving the statutory ambiguity. (It is hard to understand why that should be so. Surely the mere *conferral* of rulemaking authority demonstrates—if one accepts the Court's logic—a congressional intent to allow the agency to resolve ambiguities. And given that intent, what difference does it make that the agency chooses instead to use another perfectly permissible means for that purpose?) Moreover, the majority's approach will have a perverse effect on the rules that do emerge, given the principle (which the Court leaves untouched today) that judges must defer to reasonable agency interpretations of their own regulations. See, *e.g., United States v. Cleveland Indians Baseball Co.,* 532 U.S. 200, 220, 121 S.Ct. 1433, 149 L.Ed.2d 401 (2001) ("We need not decide whether the [informal] Revenue Rulings themselves are entitled to deference [, ... because] the Rulings simply reflect the agency's longstanding interpretation of its own regulations"). Agencies will now have high incentive to rush out barebones, ambiguous rules construing statutory ambiguities, which they can then in turn further clarify through informal rulings entitled to judicial respect.

***247** 3

Worst of all, the majority's approach will lead to the ossification of large portions of our statutory law. Where *Chevron* applies, statutory ambiguities remain ambiguities subject to the agency's ongoing clarification. They create a space, so to speak, for the exercise of continuing agency discretion. As *Chevron* itself held, the Environmental Protection Agency can interpret "stationary source" to mean a single smokestack, can later replace that interpretation with the "bubble concept" embracing an entire plant, and if that proves undesirable can return again ****2182** to the original interpretation. 467 U.S., at 853–859, 865–866, 104 S.Ct. 2778. For the indeterminately large number of statutes taken out of *Chevron* by today's decision, however, ambiguity (and hence flexibility) will cease with the first judicial resolution. *Skidmore* deference gives the agency's current position some vague and uncertain amount of respect, but it does not, like *Chevron, leave* the matter within the control of the Executive Branch for the future. Once the court has spoken, it becomes *unlawful* for the agency to take a contradictory position; the statute now *says* what the court has prescribed. See *Neal v. United States,* 516 U.S. 284, 295, 116 S.Ct. 763, 133 L.Ed.2d 709 (1996); *Lechmere, Inc. v. NLRB,* 502 U.S. 527, 536–537, 112 S.Ct. 841, 117 L.Ed.2d 79 (1992); *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.,* 497 U.S. 116, 131, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990). It will be bad enough when this ossification occurs as a result of judicial determination (under today's new principles) that there is no affirmative indication of

congressional intent to "delegate"; but it will be positively bizarre when it occurs simply because of an agency's failure to act by rulemaking (rather than informal adjudication) before the issue is presented to the courts.

One might respond that such ossification would not result if the agency were simply to readopt its interpretation, after a court reviewing it under *Skidmore* had rejected it, by repromulgating it through one of the *Chevron*-eligible procedural formats approved by the Court today. Approving this ***248** procedure would be a landmark abdication of judicial power. It is worlds apart from *Chevron* proper, where the court does not *purport* to give the statute a judicial interpretation—except in identifying the scope of the statutory ambiguity, as to which the court's judgment is final and irreversible. (Under *Chevron* proper, when the agency's authoritative interpretation comes within the scope of that ambiguity—and the court therefore approves it—the agency will not be "overruling" the court's decision when it later decides that a different interpretation (still within the scope of the ambiguity) is preferable.) By contrast, under this view, the reviewing court will not be holding the agency's authoritative interpretation within the scope of the ambiguity; but will be holding that the agency has not used the "delegation-conferring" procedures, and that the court must therefore *interpret the statute on its own*—but subject to reversal if and when the agency uses the proper procedures.

One is reminded of Justice Jackson's words in *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.,* 333 U.S. 103, 113, 68 S.Ct. 431, 92 L.Ed. 568 (1948):

> "The court below considered that after it reviewed the Board's order its judgment would be submitted to the President, that his power to disapprove would apply after as well as before the court acts, and hence that there would be no chance of a deadlock and no conflict of function. But if the President may completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render. Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government."

I know of no case, in the entire history of the federal courts, in which we have allowed a judicial interpretation of a statute to be set aside by an agency—or have allowed a ***249** lower court to render an interpretation of a statute subject to correction by an agency. As recently as 1996, we rejected an attempt to do *precisely* that. In *Chapman v. United States,* 500 U.S. 453, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991), we had held that the weight of the blotter paper bearing the lysergic acid diethylamide (LSD)

must be counted for purposes of determining whether the quantity crossed the 10–gram threshold of 21 U.S.C. § 841(b)(1)(A)(v) imposing a ****2183** minimum sentence of 10 years. At that time the United States Sentencing Commission applied a similar approach under the Sentencing Guidelines, but had taken no position regarding the meaning of the statutory provision. The Commission later changed its Guidelines approach, and, according to the petitioner in *Neal v. United States,* 516 U.S. 284, 116 S.Ct. 763, 133 L.Ed.2d 709 (1996), made clear its view that the statute bore that meaning as well. The petitioner argued that we should defer to that new approach. We would have none of it.

> "Were we, for argument's sake, to adopt petitioner's view that the Commission intended the commentary as an interpretation of § 841(b)(1), and that the last sentence of the commentary states the Commission's view that the dose-based method is consistent with the term 'mixture or substance' in the statute, he still would not prevail. The Commission's dose-based method cannot be squared with *Chapman*.... In these circumstances, we need not decide what, if any, deference is owed the Commission in order to reject its alleged contrary interpretation. Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis,* and we assess an agency's later interpretation of the statute against that settled law." *Id.,* at 294–295, [116 S.Ct. 763] (citations omitted).

There is, in short, no way to avoid the ossification of federal law that today's opinion sets in motion. What a court says is the law after according *Skidmore* deference will be the ***250** law forever, beyond the power of the agency to change even through rulemaking.

4

And finally, the majority's approach compounds the confusion it creates by breathing new life into the anachronism of *Skidmore,* which sets forth a sliding scale of deference owed an agency's interpretation of a statute that is dependent "upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control"; in this way, the appropriate measure of deference will be accorded the "body of experience and informed judgment" that such interpretations often embody, 323 U.S., at 140, 65 S.Ct. 161. Justice Jackson's eloquence notwithstanding, the rule of *Skidmore* deference is an empty truism and a trifling statement of the obvious: A judge should take into account the well-considered views of expert observers.

It was possible to live with the indeterminacy of *Skidmore* deference in earlier times. But in an era when federal statutory law administered by federal agencies is pervasive, and when the ambiguities (intended or unintended) that those statutes contain are innumerable, totality-of-the-circumstances *Skidmore* deference is a recipe for uncertainty, unpredictability, and endless litigation. To condemn a vast body of agency action to that regime (all except rulemaking, formal (and informal?)

adjudication, and whatever else might now and then be included within today's intentionally vague formulation of affirmative congressional intent to "delegate") is irresponsible.

II

The Court's pretense that today's opinion is nothing more than application of our prior case law does not withstand analysis. It is, to be sure, impossible to demonstrate that any of our cases contradicts the rule of decision that the ***251** Court prescribes, because the Court prescribes none. More precisely, it at one and the same time (1) renders meaningless its newly announced requirement that there be an affirmative congressional intent to have ambiguities resolved by the administering agency, and (2) ensures that no prior decision can possibly be cited which contradicts that requirement, by simply announcing that all ****2184** prior decisions according *Chevron* deference exemplify the multifarious ways in which that congressional intent can be manifested: "[A]s significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded," *ante,* at 2173. [4]

4 As a sole, teasing example of those "sometimes" the Court cites *NationsBank of N. C., N.A. v. Variable Annuity Life Ins. Co.,* 513 U.S. 251, 115 S.Ct. 810, 130 L.Ed.2d 740 (1995), explaining in a footnote that our "longstanding precedent" evinced a tradition of great deference to the " 'deliberative conclusions' " of the Comptroller of the Currency as to the meaning of the banking laws the Comptroller is charged with enforcing. *Ante,* at 2173, n. 13. How it is that a tradition of great judicial deference to the agency head provides affirmative indication of congressional intent to delegate authority to resolve statutory ambiguities challenges the intellect and the imagination. If the point is that Congress must have been aware of that tradition of great deference when it enacted the law at issue, the same could be said of the Customs Service, and indeed of *all* agencies. See, *e.g.,* 4 K. Davis, Administrative Law Treatise § 30.08, pp. 237–238 (1958) (describing the "great weight" accorded the "determination[s]" of the Federal Trade Commission) (quoting *FTC v. Cement Institute,* 333 U.S. 683, 720, 68 S.Ct. 793, 92 L.Ed. 1010 (1948)); Report of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 8, 77th Cong., 1st Sess., 90–91 (1941). Indeed, since our opinion in *Chevron* Congress must have been aware that we would defer to *all* authoritative agency resolutions of statutory ambiguities. Needless to say, *NationsBank* itself makes no mention of any such affirmative indication, because it was never the law. The many other cases that contradict the Court's new rule will presumably be explained, like *NationsBank,* as other "modes" of displaying affirmative

> congressional intent. If a tradition of judicial deference can be called that with a straight face, what cannot be?

***252** The principles central to today's opinion have no antecedent in our jurisprudence. *Chevron,* the case that the opinion purportedly explicates, made no mention of the "relatively formal administrative procedure[s]," *ante,* at 2172, that the Court today finds the best indication of an affirmative intent by Congress to have ambiguities resolved by the administering agency. Which is not so remarkable, since *Chevron* made no mention of any *need* to find such an affirmative intent; it said that in the event of statutory ambiguity agency authority to clarify was to be *presumed.* And our cases have followed that prescription.

Six years ago, we unanimously accorded *Chevron* deference to an interpretation of the National Bank Act, 12 U.S.C. § 24 Seventh (1988 ed. and Supp. V), contained in a letter to a private party from a Senior Deputy Comptroller of the Currency. See *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.,* 513 U.S. 251, 255, 257, 115 S.Ct. 810, 130 L.Ed.2d 740 (1995). We did so because the letter represented (and no one contested) that it set forth the official position of the Comptroller of the Currency, see *id.,* at 263, 115 S.Ct. 810.

Several cases decided virtually in the wake of *Chevron,* which the Court conveniently ignores, demonstrate that Congress could not (if it was reading our opinions) have acted in reliance on a background assumption that *Chevron* deference would generally be accorded only to agency interpretations arrived at through formal adjudication, notice-and-comment rulemaking, or other procedures assuring "fairness and deliberation," *ante,* at 2172. In *FDIC v. Philadelphia Gear Corp.,* 476 U.S. 426, 438–439, 106 S.Ct. 1931, 90 L.Ed.2d 428 (1986), we accorded *Chevron* deference to the Federal Deposit Insurance Corporation's interpretation of the statutory term "deposit" reflected in a course of unstructured administrative actions, and gave particular weight to the agency's "contemporaneous understanding" reflected in the response given by an FDIC official to a question asked at a meeting of FDIC and bank officials. It was clear that the position reflected ***253** the official position of the agency, and that ****2185** was enough to command *Chevron* deference. In *Young v. Community Nutrition Institute,* 476 U.S. 974, 106 S.Ct. 2360, 90 L.Ed.2d 959 (1986), the statutory ambiguity at issue pertained to a provision that "the Secretary [of Health and Human Services] shall promulgate regulations limiting the quantity [of any poisonous or deleterious substance added to any food] to such extent as he finds necessary for the protection of public health." The Secretary had regularly interpreted the phrase "to such extent as he finds necessary" as conferring discretion not to issue a rule, rather than merely discretion regarding the quantity that the rule would permit. This interpretation was not, of course, reflected in any formal adjudication, and had not been the subject of any informal rulemaking—it was the Secretary's *understanding* consistently applied in the course of the Department's practice. We accorded it *Chevron* deference, as unquestionably we should have. And in *Mead Corp. v. Tilley,* 490 U.S. 714, 109 S.Ct. 2156, 104 L.Ed.2d 796 (1989), a private suit by retirees against their former employer under the Employee Retirement Income Security Act of

1974 (ERISA), we accorded *Chevron* deference to the Pension Benefit Guaranty Corporation's interpretation of § 4044(a) of ERISA, 29 U.S.C. § 1344(a) (1982 ed. and Supp. V), that was reflected only in an *amicus* brief to this Court and in several opinion letters issued without benefit of any prescribed procedures. See 490 U.S., at 722, 109 S.Ct. 2156.

I could continue to enumerate cases according *Chevron* deference to agency interpretations not arrived at through formal proceedings —for example, *Pension Benefit Guaranty Corporation v. LTV Corp.,* 496 U.S. 633, 642–643, 647–648, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990) (according *Chevron* deference to the PBGC's interpretation of the requirements for its restoring a terminated plan under § 4047 of ERISA, 29 U.S.C. § 1347 (1988 ed.), which interpretation was reflected in nothing more than the agency's act of issuing a notice of restoration). Suffice it to say that many cases flatly contradict the theory of *Chevron* set forth in today's opinion, and *with one exception* ***254** not a single case can be found with language that supports the theory. That exception, a very recent one, deserves extended discussion.

In *Christensen v. Harris County,* 529 U.S. 576, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000), the Court said the following:

> "[W]e confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. 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." *Id.,* at 587, [120 S.Ct. 1655].

This statement was dictum, unnecessary to the Court's holding. Since the Court went on to find that the Secretary of Labor's position "ma[de] little sense" given the text and structure of the statute, *id.,* at 585–586, 120 S.Ct. 1655, *Chevron* deference could not have been accorded *no matter what* the conditions for its application. See 529 U.S., at 591, 120 S.Ct. 1655 (SCALIA, J., concurring in part and concurring in judgment). It was, moreover, dictum unsupported by the precedent that the Court cited.

The *Christensen* majority followed its above-quoted dictum with a string citation of three cases, none of which sustains its point. In *Reno v. Koray,* 515 U.S. 50, 115 S.Ct. 2021, 132 L.Ed.2d 46 (1995), we had no occasion to consider what level of deference was owed the Bureau of Prisons' interpretation of 18 U.S.C. § 3585(b) set forth in an internal agency guideline, because our opinion made clear that we would have independently arrived at the same interpretation on our own, see 515 U.S., at 57–60, 115 S.Ct. 2021. And although part of one sentence in *Koray* ****2186** might be read to suggest that the Bureau's "Program Statemen[t]" should be accorded a measure of deference less than that mandated by *Chevron,* this aside is ultimately inconclusive, ***255** since the sentence ends by observing that the statement was "a 'permissible construction of the statute' " under Chevron. 515 U.S., at 61, 115 S.Ct. 2021 (quoting *Chevron,* 467 U.S., at 843, 104 S.Ct. 2778). In the second case cited, *EEOC v. Arabian American Oil Co.,* 499 U.S. 244, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991), it was again unnecessary to our

holding whether the agency's interpretation of the statute warranted *Chevron* deference, since the "longstanding ... 'canon of [statutory] construction' " disfavoring extraterritoriality, 499 U.S., at 248, 111 S.Ct. 1227, would have required the same result even if *Chevron* applied. See 499 U.S., at 260, 111 S.Ct. 1227 (SCALIA, J., concurring in part and concurring in judgment). While the opinion did purport to accord the Equal Employment Opportunity Commission's informally promulgated interpretation only *Skidmore* deference, it did so because the Court thought itself bound by its pre-*Chevron,* EEOC-specific decision in *General Elec. Co. v. Gilbert,* 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), which noted that " 'Congress, in enacting Title VII, did not' " intend to give the EEOC substantive authority to resolve statutory ambiguities, *Arabian American Oil, supra,* at 257, 111 S.Ct. 1227 (quoting *Gilbert, supra,* at 141, 97 S.Ct. 401). Lastly, in *Martin v. Occupational Safety and Health Review Comm'n,* 499 U.S. 144, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991), the question of the level of deference owed the Secretary of Labor's interpretation of the Occupational Safety and Health Act of 1970, 84 Stat. 1590, as amended, 29 U.S.C. § 651 *et seq.,* was neither presented by the case nor considered in our opinion. The only question before the Court was which of two competing interpretations of 29 CFR § 1910.1029 (1990)—the Secretary's or the Occupational Safety and Health Review Commission's—should have been deferred to by the court below. See 499 U.S., at 150, 111 S.Ct. 1171. The dicta the *Christensen* Court cited, 529 U.S., at 587, 120 S.Ct. 1655 (citing 499 U.S., at 157, 111 S.Ct. 1171), opined on the measure of deference owed the Secretary's interpretation, not of the statute, but of his own regulations, see generally Manning, ***256** Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L.Rev. 612 (1996).

To make matters worse, the arguments marshaled by *Christensen* in support of its dictum—its observation that "interpretations contained in policy statements, agency manuals, and enforcement guidelines, all ... lack the force of law," and its citation of 1 K. Davis & R. Pierce, Administrative Law Treatise § 3.5 (3d ed.1994), 529 U.S., at 587, 120 S.Ct. 1655—are not only unpersuasive but bear scant resemblance to the reasoning of today's opinion. Davis and Pierce, and Professor Robert Anthony upon whom they rely, see Anthony, Which Agency Interpretations Should Bind Citizens and the Courts?, 7 Yale J. on Reg. 1 (1990), do indeed set forth the argument I have criticized above, that congressional authorization of informal rulemaking or formal (and perhaps even informal) adjudication somehow bespeaks a congressional intent to "delegate" power to resolve statutory ambiguities. But their analysis does not permit the broad add-ons that the Court's opinion contains—"some other [procedure] indicati[ng] comparable congressional intent," *ante,* at 2171, and "we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded," *ante,* at 2173.

III

To decide the present case, I would adhere to the original formulation of *Chevron.* " ' The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, ****2187** by Congress,' " 467 U.S., at 843, 104 S.Ct. 2778 (quoting *Morton v. Ruiz,* 415 U.S. 199, 231, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974)). We accordingly presume—and our precedents have made clear to Congress that we presume—that, absent some clear textual indication to the contrary, "Congress, when it left ambiguity in a statute meant for implementation ***257** by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows," *Smiley,* 517 U.S., at 740–741, 116 S.Ct. 1730 (citing *Chevron, supra,* at 843–844, 104 S.Ct. 2778). *Chevron* sets forth an across-the-board presumption, which operates as a background rule of law against which Congress legislates: Ambiguity means Congress intended agency discretion. Any resolution of the ambiguity by the administering agency that is authoritative—that represents the official position of the agency—must be accepted by the courts if it is reasonable.

Nothing in the statute at issue here displays an intent to modify the background presumption on which *Chevron* deference is based. The Court points, *ante,* at 2174, n. 16, to 28 U.S.C. § 2640(a), which provides that, in reviewing the ruling by the Customs Service, the Court of International Trade (CIT) "shall make its determinations upon the basis of the record made before the court." But records are made to determine the facts, not the law. All this provision means is that new evidence may be introduced at the CIT stage; it says nothing about whether the CIT must respect the Customs Service's authoritative interpretation of the law. More significant than § 2640(a), insofar as the CIT's obligation to defer to the Customs Service's legal interpretations is concerned, is § 2639(a)(1), which requires the CIT to accord a "presum[ption of] correct[ness]" to the Customs Service's decision. Another provision cited by the Court, *ante,* at 2174, n. 16, is § 2638, which provides that the CIT, "by rule, may consider any new ground in support" of the challenge to the Customs Service's ruling. Once again, it is impossible to see how this has any connection to the degree of deference the CIT must accord the Customs Service's interpretation of its statute. Such "new ground[s]" may be intervening or newly discovered facts, or some intervening ***258** law or regulation that might render the Customs Service's ruling unsound. [5]

5 The Court also states that "[i]t is hard to imagine" that Congress would have intended courts to defer to classification rulings since "the scheme for CIT review includes a provision that treats classification rulings on par with the Secretary's rulings on 'valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters,' " *ante,* at 2174 (quoting 28 U.S.C. § 1581(h), and citing § 2639(b)). I fail to see why this is hard to imagine at all.

> If anything, the fact that "the scheme for CIT review ... treats classification rulings on par with the Secretary's rulings on" such important matters as " 'valuation, rate of duty, ... restricted merchandise [and] entry requirements,' " *ante,* at 2174, which often require interpretation of the Nation's customs and tariff statutes, only strengthens the case for according *Chevron* deference to whatever statutory interpretations (as opposed to factual determinations) such rulings embody. In other words, the Court's point is wrong—indeed, the Court's point cuts deeply into its own case—unless the Court believes that the Secretary's *personal* rulings on the legal criteria for imposing particular rates of duty, or for determining restricted merchandise, are entitled to no deference.

There is no doubt that the Customs Service's interpretation represents the authoritative view of the agency. Although the actual ruling letter was signed by only the Director of the Commercial Rulings Branch of Customs Headquarters' Office of Regulations and Rulings, see Pet. for Cert. 47a, the Solicitor General of the United States has filed a brief, cosigned by the General Counsel of the Department of the Treasury, that represents the position set forth in the ruling letter to be the official position of the Customs Service. Cf. ****2188** *Christensen,* 529 U.S., at 591, 120 S.Ct. 1655 (SCALIA, J., concurring in part and concurring in judgment). No one contends that it is merely a "*post hoc* rationalizatio[n]" or an "agency litigating positio[n] wholly unsupported by regulations, rulings, or administrative practice," *Bowen v. Georgetown Univ. Hospital,* 488 U.S. 204, 212, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988). [6]

6 The Court's parting shot, that "there would have to be something wrong with a standard that accorded the status of substantive law to every one of 10,000 'official' customs classifications rulings turned out each year from over 46 offices placed around the country at the Nation's entryways," *ante,* at 2177, n. 19, misses the mark. I do not disagree. The "authoritativeness" of an agency interpretation does not turn upon whether it has been enunciated by someone who is actually employed by the agency. It must represent the judgment of central agency management, approved at the highest levels. I would find that condition to have been satisfied when, a ruling having been attacked in court, the general counsel of the agency has determined that it should be defended. If one thinks that that does not impart sufficient authoritativeness, then surely the line has been crossed when, as here, the General Counsel of the agency and the Solicitor General of the United States have assured this Court that the position represents the agency's authoritative view. (Contrary to the Court's suggestion, there would be nothing bizarre about the fact that this latter approach would entitle the ruling to deference here, though it would not have been entitled to deference in the lower courts. Affirmation of the official agency position before this

court—if that is thought necessary —is no different from the agency's issuing a new rule after the Court of Appeals determination. It establishes a new legal basis for the decision, which this Court must take into account (or remand for that purpose), even though the Court of Appeals could not. See *Thorpe v. Housing Authority of Durham,* 393 U.S. 268, 282, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969); see also *United States v. Schooner Peggy,* 1 Cranch 103, 2 L.Ed. 49 (1801).)

The *authoritativeness* of the agency ruling may not be a bright-line standard —but it is infinitely brighter than the line the Court asks us to draw today, between a statute such as the one at issue in *NationsBank* that (according to the Court) *does* display an "affirmative intent" to "delegate" interpretive authority, and innumerable indistinguishable statutes that (according to the Court) do *not.* And, most important of all, it is a line that focuses attention on the right question: not whether Congress "affirmatively intended" to delegate interpretive authority (if it entrusted administration of the statute to an agency, it did, because that is how our system works); but whether it is truly the agency's considered view, or just the opinions of some underlings, that are at issue.

***259** There is also no doubt that the Customs Service's interpretation is a reasonable one, whether or not judges would consider it the best. I will not belabor this point, since the Court evidently agrees: An interpretation that was unreasonable would not merit the remand that the Court decrees for consideration of *Skidmore* deference.

IV

Finally, and least importantly, even were I to accept the Court's revised version of *Chevron* as a correct statement ***260** of the law, I would still accord deference to the tariff classification ruling at issue in this case. For the case is indistinguishable, in that regard, from *NationsBank of N. C., N.A. v. Variable Annuity Life Ins. Co.,* 513 U.S. 251, 115 S.Ct. 810, 130 L.Ed.2d 740 (1995), which the Court acknowledges as an instance in which *Chevron* deference is warranted notwithstanding the absence of formal adjudication, notice-and-comment rulemaking, or comparable "administrative formality," *ante,* at 2173. Here, as in *NationsBank,* there is a tradition of great deference to the opinions of the agency head, *ante,* at 2173, n. 13. Just two Terms ago, we observed:

> "As early as 1809, Chief Justice Marshall noted in a customs case that '[i]f the question had been doubtful, the court would have respected the uniform construction which it is understood has been given by the treasury department of the United States upon similar questions.' *United States v. Vowell,* 5 Cranch 368, 372, [3 L.Ed. 128]. See also P. Reed, The Role of Federal Courts in U.S. Customs & International Trade Law 289 (1997) ('Consistent with the *Chevron* methodology, and as has long ****2189** been the rule in customs

> cases, customs regulations are sustained if they represent reasonable interpretations of the statute'); cf. *Zenith Radio Corp. v. United States,* 437 U.S. 443, 450, [98 S.Ct. 2441, 57 L.Ed.2d 337] (1978) (deferring to the Treasury Department's 'longstanding and consistent administrative interpretation' of the countervailing duty provision of the Tariff Act.)" *United States v. Haggar Apparel Co.,* 526 U.S. 380, 393, [119 S.Ct. 1392, 143 L.Ed.2d 480] (1999).

And here, as in *NationsBank,* the agency interpretation in question is officially that of the agency head. Consequently, even on the Court's own terms, the Customs ruling at issue in this case should be given *Chevron* deference.

* * *

***261** For the reasons stated, I respectfully dissent from the Court's judgment. I would uphold the Customs Service's construction of Subheading 4820.10.20 of the Harmonized Tariff Schedule of the United States, 19 U.S.C. § 1202, and would reverse the contrary decision of the Court of Appeals. I dissent even more vigorously from the reasoning that produces the Court's judgment, and that makes today's decision one of the most significant opinions ever rendered by the Court dealing with the judicial review of administrative action. Its consequences will be enormous, and almost uniformly bad.

All Citations

533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292, 23 ITRD 1129, 69 USLW 4488, 01 Cal. Daily Op. Serv. 5004, 2001 Daily Journal D.A.R. 6144, 14 Fla. L. Weekly Fed. S 372, 3 A.L.R. Fed. 2d 651

Footnotes

Ex. LA-2

RESPONDENT'S EXHIBIT

136 S.Ct. 2117
Supreme Court of the United States

ENCINO MOTORCARS, LLC, Petitioner
v.
Hector NAVARRO, et al.

No. 15–415
|
Argued April 20, 2016.
|
Decided June 20, 2016.

Synopsis

Background: Employees, who were service advisors for automobile dealership, brought action against dealership, alleging that it violated Fair Labor Standards Act (FLSA) by failing to pay them overtime compensation. The United States District Court for the Central District of California, R. Gary Klausner, J., 2013 WL 518577, dismissed action. Employees appealed. The United States Court of Appeals for the Ninth Circuit, Graber, Circuit Judge, 780 F.3d 1267, affirmed in part and reversed in part, holding that service advisors were entitled to overtime compensation. Certiorari was granted.

[Holding:] The Supreme Court, Justice Kennedy, held that *Chevron* deference would not be applied to Department of Labor (DOL) regulation, interpreting term "salesman," in FLSA provision exempting salesmen engaged in selling or servicing automobiles from overtime pay requirements, as excluding service advisors.

Vacated and remanded.

Justice Ginsburg filed concurring opinion in which Justice Sotomayor joined.

Justice Thomas filed dissenting opinion in which Justice Alito joined.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (17)

[1] Labor and Employment 🔑 Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) was enacted to protect all covered workers from substandard wages and oppressive working hours. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

29 Cases that cite this headnote

[2] Administrative Law and Procedure 🔑 Plain, literal, or clear meaning; ambiguity or silence

Administrative Law and Procedure 🔑 Permissible or reasonable construction

In the usual course, when an agency is authorized by Congress to issue regulations and promulgates a regulation interpreting a statute it enforces, the interpretation receives deference if the statute is ambiguous

and if the agency's interpretation is reasonable, and this principle is implemented by the two-step analysis set forth in *Chevron*.

33 Cases that cite this headnote

[3] Administrative Law and Procedure Plain, literal, or clear meaning; ambiguity or silence

Administrative Law and Procedure Permissible or reasonable construction

At the first step of the *Chevron* analysis, a court must determine whether Congress has directly spoken to the precise question at issue, and, if so, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress, but if not, then at the second step the court must defer to the agency's interpretation if it is reasonable.

17 Cases that cite this headnote

[4] Administrative Law and Procedure Plain, literal, or clear meaning; ambiguity or silence

A premise of *Chevron* is that when Congress grants an agency the authority to administer a statute by issuing regulations with the force of law, it presumes the agency will use that authority to resolve ambiguities in the statutory scheme.

17 Cases that cite this headnote

[5] Administrative Law and Procedure Deference to Agency in General

When Congress authorizes an agency to proceed through notice-and-comment rulemaking, that relatively formal administrative procedure is a very good indicator that Congress intended the regulation to carry the force of law, so *Chevron* should apply.

10 Cases that cite this headnote

[6] Administrative Law and Procedure Circumstances or Time of Construction

Chevron deference is not warranted where the regulation is procedurally defective, that is, where the agency errs by failing to follow the correct procedures in issuing the regulation.

18 Cases that cite this headnote

[7] Administrative Law and Procedure Circumstances or Time of Construction

A party might be foreclosed in some instances from challenging the procedures used by an agency to promulgate a given rule, but where a proper challenge is raised to the agency procedures, and those procedures are defective, a court

should not accord *Chevron* deference to the agency interpretation.

19 Cases that cite this headnote

[8] **Administrative Law and Procedure** Findings; reason or explanation

One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions.

53 Cases that cite this headnote

[9] **Administrative Law and Procedure** Findings; reason or explanation

Administrative Law and Procedure Force of law in general

An agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made, and that requirement is satisfied when the agency's explanation is clear enough that its path may reasonably be discerned; but where the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law. 5 U.S.C.A. § 706(2)(A).

87 Cases that cite this headnote

[10] **Administrative Law and Procedure** Change of policy; reason or explanation

Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.

109 Cases that cite this headnote

[11] **Administrative Law and Procedure** Change of policy; reason or explanation

When an agency changes its existing position, it need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate, but the agency must at least display awareness that it is changing position and show that there are good reasons for the new policy.

107 Cases that cite this headnote

[12] **Administrative Law and Procedure** Change of policy; reason or explanation

In explaining its changed position, an agency must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account; in such cases it is not that further justification is demanded by the mere fact of policy change, but that a reasoned explanation is needed for disregarding facts and circumstances

that underlay or were engendered by the prior policy.

121 Cases that cite this headnote

[13] Administrative Law and Procedure Erroneous or unreasonable construction; conflict with statute

An unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice, and an arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference.

92 Cases that cite this headnote

[14] Administrative Law and Procedure Compensation; wages and hours

Labor and Employment Retail or service establishments

Chevron deference would not be applied to Department of Labor (DOL) regulation, interpreting term "salesman," in FLSA provision exempting salesmen engaged in selling or servicing automobiles, trucks, or farm implements from overtime pay requirements, as excluding service advisors, who sold repair and maintenance services, where DOL had previously taken the opposite position, automobile and truck dealership industry had relied on such prior position for approximately 33 years, and DOL offered barely any explanation for its reversal. Fair Labor Standards Act of 1938, § 13(b)(10)(A), 29 U.S.C.A. § 213(b)(10)(A); 29 C.F.R. § 779.372(c)(1).

13 Cases that cite this headnote

[15] Administrative Law and Procedure Findings; reason or explanation

An agency may justify its policy choice by explaining why that policy is more consistent with statutory language than alternative policies.

11 Cases that cite this headnote

[16] Administrative Law and Procedure Scope and Extent of Review in General

It is not the role of the courts to speculate on reasons that might have supported an agency's decision.

34 Cases that cite this headnote

[17] Administrative Law and Procedure Theory or grounds not provided or relied upon by agency

A court may not supply a reasoned basis for the agency's action that the agency itself has not given.

42 Cases that cite this headnote

West Codenotes

Validity Called into Doubt
29 C.F.R. § 779.372(c)(1)

****2119** *Syllabus* [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

***211** The Fair Labor Standards Act (FLSA) requires employers to pay overtime compensation to covered employees who work more than 40 hours in a given week. In 1966, Congress enacted an exemption from the overtime compensation requirement for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles" at a covered dealership. Fair Labor Standards Amendments of 1966, § 209, 80 Stat. 836, codified as amended at 29 U.S.C. § 213(b)(10)(A). Congress authorized the Department of Labor to promulgate necessary rules, regulations, or orders with respect to this new provision. The Department exercised that authority in 1970 and issued a regulation that defined "salesman" to mean "an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the vehicles ... which the establishment is primarily engaged in selling." 29 CFR § 779.372(c)(1) (1971). The regulation excluded service advisors, who sell repair and maintenance services but not vehicles, from the exemption. Several courts, however, rejected the Department's conclusion that service advisors are not covered by the statutory exemption. In 1978, the Department issued an opinion letter departing from its previous position and stating that service advisors could be exempt under 29 U.S.C. § 213(b)(10)(A). In 1987, the Department confirmed its new interpretation by amending its Field Operations Handbook to clarify that service advisors should be treated as exempt under the statute. In 2011, however, the Department issued a final rule that followed the original 1970 regulation and interpreted the statutory term "salesman" to mean only an employee who sells vehicles. 76 Fed.Reg. 18859. The Department gave little explanation for its decision to abandon its decades-old practice of treating ****2120** service advisors as exempt under § 213(b)(10)(A).

Petitioner is an automobile dealership. Respondents are or were employed by petitioner as service advisors. Respondents filed suit alleging that petitioner violated the FLSA by failing to pay them overtime compensation when they worked more than 40 hours in a week. Petitioner moved to dismiss, arguing that the FLSA overtime provisions do not apply to respondents because service advisors are covered by the § 213(b)(10)(A) exemption. The District Court granted the motion, but ***212** the Ninth Circuit reversed in relevant part. Deferring under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694, to the interpretation set forth in the 2011 regulation, the court held that service

advisors are not covered by the § 213(b)(10)(A) exemption.

Held : Section 213(b)(10)(A) must be construed without placing controlling weight on the Department's 2011 regulation. Pp. 2124 – 2127.

(a) When an agency is authorized by Congress to issue regulations and promulgates a regulation interpreting a statute it enforces, the interpretation receives deference if the statute is ambiguous and the agency's interpretation is reasonable. See *Chevron, supra,* at 842–844, 104 S.Ct. 2778. When Congress authorizes an agency to proceed through notice-and-comment rulemaking, that procedure is a "very good indicator" that Congress intended the regulation to carry the force of law, so *Chevron* should apply. *United States v. Mead Corp.,* 533 U.S. 218, 229–230, 121 S.Ct. 2164, 150 L.Ed.2d 292. But *Chevron* deference is not warranted where the regulation is "procedurally defective"—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation. 533 U.S., at 227, 121 S.Ct. 2164.

One basic procedural requirement of administrative rulemaking is that an agency must give adequate reasons for its decisions. Where the agency has failed to provide even a minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law. Agencies are free to change their existing policies, but in explaining its changed position, an agency must be cognizant that longstanding policies may have "engendered serious reliance interests that must be taken into account." *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515, 129 S.Ct. 1800, 173 L.Ed.2d 738. An "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice," *National Cable & Telecommunications Assn. v. Brand X Internet Services,* 545 U.S. 967, 981, 125 S.Ct. 2688, 162 L.Ed.2d 820, and an arbitrary and capricious regulation of this sort receives no *Chevron* deference. Pp. 2124 – 2126.

(b) Applying those principles, the 2011 regulation was issued without the reasoned explanation that was required in light of the Department's change in position and the significant reliance interests involved. The industry had relied since 1978 on the Department's position that service advisors are exempt from the FLSA's overtime pay requirements, and had negotiated and structured compensation plans against this background understanding. In light of this background, the Department needed a more reasoned explanation for its decision to depart from its existing enforcement policy. The Department instead said almost nothing. It did not analyze or explain why the statute should be interpreted ***213** to exempt dealership employees who sell vehicles but not dealership employees who sell services. This lack of reasoned explication for a regulation that is inconsistent with the Department's ****2121** longstanding earlier position results in a rule that cannot carry the force of law, and so the regulation does not receive *Chevron* deference. It is appropriate to remand for the Ninth Circuit to interpret § 213(b)(10)(A) in the first instance. Pp. 2126 – 2127.

780 F.3d 1267, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C.J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. GINSBURG, J., filed a concurring opinion, in which SOTOMAYOR, J., joined. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined.

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Opinion

***214** Justice KENNEDY delivered the opinion of the Court.

[1] This case addresses whether a federal statute requires payment of increased compensation to certain automobile dealership employees for overtime work. The federal statute in question is the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.,* enacted in 1938 to "protect all covered workers from substandard wages and oppressive working hours." *Barrentine v. Arkansas–Best Freight System, Inc.,* 450 U.S. 728, 739, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981). Among its other provisions, the FLSA requires employers to pay overtime compensation to covered employees who work more than 40 hours in a given week. The rate of overtime pay must be "not less than one and one-half times the regular rate" of the employee's pay. § 207(a).

Five current and former service advisors brought this suit alleging that the automobile dealership where they were employed was required by the FLSA to pay them overtime wages. The dealership contends that the position and duties of a service advisor bring these employees within § 213(b)(10)(A), which establishes an exemption from the FLSA overtime provisions for certain employees engaged in selling or servicing automobiles. The case turns on the interpretation of this exemption.

I

A

Automobile dealerships in many communities not only sell vehicles but also sell repair and maintenance services. Among the employees

involved in providing repair and maintenance services are service advisors, partsmen, and mechanics. Service advisors interact with customers and sell them services for their vehicles. A service ****2122** advisor's duties may include meeting customers; listening to their concerns about their cars; suggesting repair and maintenance services; selling new accessories or replacement parts; recording service orders; following up with customers as the services are ***215** performed (for instance, if new problems are discovered); and explaining the repair and maintenance work when customers return for their vehicles. See App. 40–41; see also *Brennan v. Deel Motors, Inc.,* 475 F.2d 1095, 1096 (C.A.5 1973); 29 CFR § 779.372(c)(4) (1971). Partsmen obtain the vehicle parts needed to perform repair and maintenance and provide those parts to the mechanics. See § 779.372(c)(2). Mechanics perform the actual repair and maintenance work. See § 779.372(c)(3).

In 1961, Congress enacted a blanket exemption from the FLSA's minimum wage and overtime provisions for all automobile dealership employees. Fair Labor Standards Amendments of 1961, § 9, 75 Stat. 73. In 1966, Congress repealed that broad exemption and replaced it with a narrower one. The revised statute did not exempt dealership employees from the minimum wage requirement. It also limited the exemption from the overtime compensation requirement to cover only certain employees —in particular, "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft" at a covered dealership. Fair Labor Standards Amendments of 1966, § 209, 80 Stat. 836. Congress authorized the Department of Labor to "promulgate necessary rules, regulations, or orders" with respect to this new provision. § 602, *id.,* at 844.

The Department exercised that authority in 1970 and issued a regulation that defined the statutory terms "salesman," "partsman," and "mechanic." 35 Fed.Reg. 5896 (1970) (codified at 29 CFR § 779.372(c)). The Department intended its regulation as a mere interpretive rule explaining its own views, rather than a legislative rule with the force and effect of law; and so the Department did not issue the regulation through the notice-and-comment procedures of the Administrative Procedure Act. See 35 Fed.Reg. 5856; see also 5 U.S.C. § 553(b)(A) (exempting interpretive rules from notice and comment).

***216** The 1970 interpretive regulation defined "salesman" to mean " an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the vehicles or farm implements which the establishment is primarily engaged in selling." 29 CFR § 779.372(c)(1) (1971). By limiting the statutory term to salesmen who sell vehicles or farm implements, the regulation excluded service advisors from the exemption, since a service advisor sells repair and maintenance services but not the vehicle itself. The regulation made that exclusion explicit in a later subsection: "Employees variously described as service manager, service writer, service advisor, or service salesman ... are not exempt under [the statute]. This is true despite the fact that such an employee's principal function may be disagnosing [*sic*] the mechanical

condition of vehicles brought in for repair, writing up work orders for repairs authorized by the customer, assigning the work to various employees and directing and checking on the work of mechanics." § 779.372(c)(4).

Three years later, the Court of Appeals for the Fifth Circuit rejected the Department's conclusion that service advisors are not covered by the statutory exemption. *Deel Motors, supra*. Certain District Courts followed that precedent. See *Yenney v. Cass County Motors,* 81 CCH LC ¶ 33,506 (Neb.1977); ****2123** *Brennan v. North Bros. Ford, Inc.,* 76 CCH LC ¶ 33,247 (E.D.Mich.1975), aff'd *sub nom. Dunlop v. North Bros. Ford, Inc.,* 529 F.2d 524 (C.A.6 1976) (table); *Brennan v. Import Volkswagen, Inc.,* 81 CCH LC ¶ 33,522 (Kan.1975).

In the meantime, Congress amended the statutory provision by enacting its present text, which now sets out the exemption in two subsections. Fair Labor Standards Amendments of 1974, § 14, 88 Stat. 65. The first subsection is at issue in this case. It exempts "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements" at a covered dealership. ***217** 29 U.S.C. § 213(b)(10)(A). The second subsection exempts "any salesman primarily engaged in selling trailers, boats, or aircraft" at a covered dealership. § 213(b)(10)(B). The statute thus exempts certain employees engaged in servicing automobiles, trucks, or farm implements, but not similar employees engaged in servicing trailers, boats, or aircraft.

In 1978, the Department issued an opinion letter departing from its previous position. Taking a position consistent with the cases decided by the courts, the opinion letter stated that service advisors could be exempt under § 213(b)(10)(A). Dept. of Labor, Wage & Hour Div., Opinion Letter No. 1520 (WH–467) (1978), [1978–1981 Transfer Binder] CCH Wages–Hours Administrative Rulings ¶ 31,207. The letter acknowledged that the Department's new policy "represent [ed] a change from the position set forth in section 779.372(c)(4)" of its 1970 regulation. In 1987, the Department confirmed its 1978 interpretation by amending its Field Operations Handbook to clarify that service advisors should be treated as exempt under § 213(b)(10)(A). It observed that some courts had interpreted the statutory exemption to cover service advisors; and it stated that, as a result of those decisions, it would "no longer deny the [overtime] exemption for such employees." Dept. of Labor, Wage & Hour Div., Field Operations Handbook, Insert No. 1757, 24L04–4(k) (Oct. 20, 1987), online at https://perma.cc/5GHD–KCJJ (all Internet materials as last visited June 16, 2016). The Department again acknowledged that its new position represented a change from its 1970 regulation and stated that the regulation would "be revised as soon as is practicable." *Ibid.*

Twenty-one years later, in 2008, the Department at last issued a notice of proposed rulemaking. 73 Fed.Reg. 43654. The notice observed that every court that had considered the question had held service advisors to be exempt under § 213(b)(10)(A), and that the Department itself had treated service advisors as exempt since 1987. *Id.,* at 43658–43659. The

Department proposed to revise its regulations to accord ***218** with existing practice by interpreting the exemption in § 213(b)(10)(A) to cover service advisors.

In 2011, however, the Department changed course yet again. It announced that it was "not proceeding with the proposed rule." 76 Fed.Reg. 18833. Instead, the Department completed its 2008 notice-and-comment rulemaking by issuing a final rule that took the opposite position from the proposed rule. The new final rule followed the original 1970 regulation and interpreted the statutory term "salesman" to mean only an employee who sells automobiles, trucks, or farm implements. *Id.,* at 18859 (codified at 29 CFR § 779.372(c)(1)).

The Department gave little explanation for its decision to abandon its decades-old practice of treating service advisors as exempt under § 213(b)(10)(A). It was also less than precise when it issued its final rule. As described above, the 1970 regulation included a separate subsection stating ****2124** in express terms that service advisors "are not exempt" under the relevant provision. 29 CFR § 779.372(c)(4) (1971). In promulgating the 2011 regulation, however, the Department eliminated that separate subsection. According to the United States, this change appears to have been "an inadvertent mistake in drafting." Tr. of Oral Arg. 50.

B

Petitioner is a Mercedes–Benz automobile dealership in the Los Angeles area. Respondents are or were employed by petitioner as service advisors. They assert that petitioner required them to be at work from 7 a.m. to 6 p.m. at least five days per week, and to be available for work matters during breaks and while on vacation. App. 39–40. Respondents were not paid a fixed salary or an hourly wage for their work; instead, they were paid commissions on the services they sold. *Id.,* at 40–41.

Respondents sued petitioner in the United States District Court for the Central District of California, alleging that ***219** petitioner violated the FLSA by failing to pay them overtime compensation when they worked more than 40 hours in a week. *Id.,* at 42–44. Petitioner moved to dismiss, arguing that the FLSA overtime provisions do not apply to respondents because service advisors are covered by the statutory exemption in § 213(b)(10)(A). The District Court agreed and granted the motion to dismiss.

The Court of Appeals for the Ninth Circuit reversed in relevant part. It construed the statute by deferring under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), to the interpretation set forth by the Department in its 2011 regulation. Applying that deference, the Court of Appeals held that service advisors are not covered by the § 213(b)(10)(A) exemption. 780 F.3d 1267 (2015). The Court of Appeals recognized, however, that its decision conflicted with cases from a number of other courts. *Id.,* at 1274 (citing, *inter alia, Walton v. Greenbrier Ford, Inc.,* 370 F.3d 446 (C.A.4 2004); *Deel Motors,* 475 F.2d 1095; *Thompson v. J.C. Billion, Inc.,* 368 Mont.

299, 294 P.3d 397 (2013)). This Court granted certiorari to resolve the question. 577 U.S. ——, 136 S.Ct. 890, 193 L.Ed.2d 783 (2016).

II

A

The full text of the statutory subsection at issue states that the overtime provisions of the FLSA shall not apply to:

> "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." § 213(b)(10)(A).

The question presented is whether this exemption should be interpreted to include service advisors. To resolve that question, it is necessary to determine what deference, ***220** if any, the courts must give to the Department's 2011 interpretation.

[2] **[3]** In the usual course, when an agency is authorized by Congress to issue regulations and promulgates a regulation interpreting a statute it enforces, the interpretation receives deference if the statute is ambiguous and if the agency's interpretation is reasonable. This principle is implemented by the two-step analysis set forth in *Chevron*. At the first step, a court must determine whether Congress has "directly spoken to the precise question at issue." 467 U.S., at 842, 104 S.Ct. 2778. ****2125** If so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.*, at 842–843, 104 S.Ct. 2778. If not, then at the second step the court must defer to the agency's interpretation if it is "reasonable." *Id.*, at 844, 104 S.Ct. 2778.

[4] **[5]** **[6]** **[7]** A premise of *Chevron* is that when Congress grants an agency the authority to administer a statute by issuing regulations with the force of law, it presumes the agency will use that authority to resolve ambiguities in the statutory scheme. See *id.*, at 843–844, 104 S.Ct. 2778; *United States v. Mead Corp.*, 533 U.S. 218, 229–230, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). When Congress authorizes an agency to proceed through notice-and-comment rulemaking, that "relatively formal administrative procedure" is a "very good indicator" that Congress intended the regulation to carry the force of law, so *Chevron* should apply. *Mead Corp., supra*, at 229–230, 121 S.Ct. 2164. But *Chevron* deference is not warranted where the regulation is "procedurally defective"—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation. 533 U.S., at 227, 121 S.Ct. 2164; cf. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174–176, 127 S.Ct. 2339, 168 L.Ed.2d 54 (2007) (rejecting challenge to procedures by which regulation was issued and affording *Chevron* deference). Of course, a party might be foreclosed in some instances from challenging the procedures used to promulgate a given rule. Cf., *e.g.*, *JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 324–326 (C.A.D.C.1994); cf. also ***221** *Auer v. Robbins*, 519 U.S. 452, 458–459, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (party

cannot challenge agency's failure to amend its rule in light of changed circumstances without first seeking relief from the agency). But where a proper challenge is raised to the agency procedures, and those procedures are defective, a court should not accord *Chevron* deference to the agency interpretation. Respondents do not contest the manner in which petitioner has challenged the agency procedures here, and so this opinion assumes without deciding that the challenge was proper.

[8] **[9]** One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions. The agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (internal quotation marks omitted). That requirement is satisfied when the agency's explanation is clear enough that its "path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas–Best Freight System, Inc.,* 419 U.S. 281, 286, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974). But where the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law. See 5 U.S.C. § 706(2)(A); *State Farm, supra,* at 42–43, 103 S.Ct. 2856.

[10] **[11]** **[12]** **[13]** Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change. See, *e.g., National Cable & Telecommunications Assn. v. Brand X Internet Services,* 545 U.S. 967, 981–982, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005); *Chevron,* 467 U.S., at 863–864, 104 S.Ct. 2778. When an agency changes its existing position, it "need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate." ****2126** *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009). But the agency must at least "display awareness that it is changing position" and "show that there are good reasons for the new policy." *Ibid.* (emphasis deleted). In explaining its changed position, an agency must ***222** also be cognizant that longstanding policies may have "engendered serious reliance interests that must be taken into account." *Ibid.*; see also *Smiley v. Citibank (South Dakota), N.A.,* 517 U.S. 735, 742, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996). "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television Stations, supra,* at 515–516, 129 S.Ct. 1800. It follows that an " [u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Brand X, supra,* at 981, 125 S.Ct. 2688. An arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference. See *Mead Corp., supra,* at 227, 121 S.Ct. 2164.

B

[14] Applying those principles here, the unavoidable conclusion is that the 2011

regulation was issued without the reasoned explanation that was required in light of the Department's change in position and the significant reliance interests involved. In promulgating the 2011 regulation, the Department offered barely any explanation. A summary discussion may suffice in other circumstances, but here—in particular because of decades of industry reliance on the Department's prior policy—the explanation fell short of the agency's duty to explain why it deemed it necessary to overrule its previous position.

The retail automobile and truck dealership industry had relied since 1978 on the Department's position that service advisors are exempt from the FLSA's overtime pay requirements. See National Automobile Dealers Association, Comment Letter on Proposed Rule Updating Regulations Issued Under the Fair Labor Standards Act (Sept. 26, 2008), online at https://www.regulations.gov/#!documentDetail;D=WHD–2008–0003–0038. Dealerships and service advisors negotiated and structured their compensation plans against this background understanding. Requiring dealerships to adapt to the Department's new position could necessitate systemic, significant changes to the ***223** dealerships' compensation arrangements. See Brief for National Automobile Dealers Association et al. as *Amici Curiae* 13–14. Dealerships whose service advisors are not compensated in accordance with the Department's new views could also face substantial FLSA liability, see 29 U.S.C. § 216(b), even if this risk of liability may be diminished in some cases by the existence of a separate FLSA exemption for certain employees paid on a commission basis, see § 207(i), and even if a dealership could defend against retroactive liability by showing it relied in good faith on the prior agency position, see § 259(a). In light of this background, the Department needed a more reasoned explanation for its decision to depart from its existing enforcement policy.

The Department said that, in reaching its decision, it had "carefully considered all of the comments, analyses, and arguments made for and against the proposed changes." 76 Fed.Reg. 18832. And it noted that, since 1978, it had treated service advisors as exempt in certain circumstances. *Id.,* at 18838. It also noted the comment from the National Automobile ****2127** Dealers Association stating that the industry had relied on that interpretation. *Ibid.*

[15] But when it came to explaining the "good reasons for the new policy," *Fox Television Stations, supra,* at 515, 129 S.Ct. 1800 the Department said almost nothing. It stated only that it would not treat service advisors as exempt because "the statute does not include such positions and the Department recognizes that there are circumstances under which the requirements for the exemption would not be met." 76 Fed.Reg. 18838. It continued that it "believes that this interpretation is reasonable" and "sets forth the appropriate approach." *Ibid.* Although an agency may justify its policy choice by explaining why that policy "is more consistent with statutory language" than alternative policies, ***224** *Long Island Care at Home,* 551 U.S., at 175, 127 S.Ct. 2339 (internal quotation marks omitted), the Department did not analyze or explain why the statute should be interpreted to exempt

dealership employees who sell vehicles but not dealership employees who sell services (that is, service advisors). And though several public comments supported the Department's reading of the statute, the Department did not explain what (if anything) it found persuasive in those comments beyond the few statements above.

[16] **[17]** It is not the role of the courts to speculate on reasons that might have supported an agency's decision. "[W]e may not supply a reasoned basis for the agency's action that the agency itself has not given." *State Farm,* 463 U.S., at 43, 103 S.Ct. 2856 (citing *SEC v. Chenery Corp.,* 332 U.S. 194, 196, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947)). Whatever potential reasons the Department might have given, the agency in fact gave almost no reasons at all. In light of the serious reliance interests at stake, the Department's conclusory statements do not suffice to explain its decision. See *Fox Television Stations,* 556 U.S., at 515–516, 129 S.Ct. 1800. This lack of reasoned explication for a regulation that is inconsistent with the Department's longstanding earlier position results in a rule that cannot carry the force of law. See 5 U.S.C. § 706(2)(A); *State Farm, supra,* at 42–43, 103 S.Ct. 2856. It follows that this regulation does not receive *Chevron* deference in the interpretation of the relevant statute.

* * *

For the reasons above, § 213(b)(10)(A) must be construed without placing controlling weight on the Department's 2011 regulation. Because the decision below relied on *Chevron* deference to this regulation, it is appropriate to remand for the Court of Appeals to interpret the statute in the first instance. Cf. *Mead,* 533 U.S., at 238–239, 121 S.Ct. 2164. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

***225** Justice GINSBURG, with whom Justice SOTOMAYOR joins, concurring.

I agree in full that, in issuing its 2011 rule, the Department of Labor did not satisfy its basic obligation to explain "that there are good reasons for [a] new policy." *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009). The Department may have adequate reasons to construe the Fair Labor Standards Act automobile-dealership exemption as it did. The 2011 rulemaking tells us precious little, however, about what those reasons are. [1]

1 Unlike Justice THOMAS, I am not persuaded that, sans *Chevron,* the Ninth Circuit should conclude on remand that service advisors are categorically exempt from hours regulations. As that court previously explained, "[s]ervice advisors may be 'salesmen' in a generic sense, but they [may fall outside the exemption because they] do not personally sell cars and they do not personally service cars." 780 F.3d 1267, 1274 (2015). Moreover, in its briefing before this Court, the Department of Labor responded to the argument that "the exemption's application to a 'partsman' " "confirm[s] that a

service advisor is a salesman primarily engaged in servicing automobiles." *Post,* at 2129 – 2130 (THOMAS, J, dissenting). See Brief for United States as *Amicus Curiae* 22–23 (maintaining that partsmen, unlike service advisors, actually engage in maintenance and repair work); Brief for Respondents 11 (contending that partsmen "ge[t] their hands dirty" by "work[ing] as a mechanic's right-hand man or woman"); *id.,* at 32–35 (cataloguing descriptions of partsmen responsibilities drawn from occupational handbooks and training manuals). The Court appropriately leaves the proper ranking of service advisors to the Court of Appeals in the first instance.

**2128 I write separately to stress that nothing in today's opinion disturbs well-established law. In particular, where an agency has departed from a prior position, there is no "heightened standard" of arbitrary-and-capricious review. *Id.,* at 514, 129 S.Ct. 1800. See also *ante,* at 2125. An agency must "display awareness that it is changing position" and "show that there are good reasons for the new policy." *Fox,* 556 U.S., at 515, 129 S.Ct. 1800 (emphasis deleted). "But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *226 *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Ibid.*

The Court's bottom line remains unaltered: " '[U]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.' " *Ante,* at 2126 (quoting *National Cable & Telecommunications Assn. v. Brand X Internet Services,* 545 U.S. 967, 981, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005)). Industry reliance may spotlight the inadequacy of an agency's explanation. See *ante,* at 2126 ("decades of industry reliance" make "summary discussion" inappropriate). But reliance does not overwhelm good reasons for a policy change. Even if the Department's changed position would "necessitate systemic, significant changes to the dealerships' compensation arrangements," *ante,* at 2126, the Department would not be disarmed from determining that the benefits of overtime coverage outweigh those costs. [2] "If the action rests upon ... an *227 exercise of judgment in an area which Congress has entrusted to the agency [,] of course it must not be set aside because the reviewing court might **2129 have made a different determination were it empowered to do so." *SEC v. Chenery Corp.,* 318 U.S. 80, 94, 63 S.Ct. 454, 87 L.Ed. 626 (1943).

2 If the Department decides to reissue the 2011 rule, I doubt that reliance interests would pose an insurmountable obstacle. As the Court acknowledges, *ante,* at 2126, an affirmative defense in the Fair Labor Standards Act (FLSA) protects regulated parties against retroactive liability for actions taken in good-faith reliance on superseded agency guidance, 29 U.S.C. § 259(a). And a separate FLSA exemption covers many service advisors: retail or service workers who receive at least

half of their pay on commission, so long as their regular rate of pay is more than 1 1/2 times the minimum wage. *Ante,* at 2126 (citing § 207(i)); see Brief for Petitioner 13, n. 4 (many service advisors are paid on a commission basis). Thus, the cost of the Department's policy shift may be considerably less than the dealerships project. Finally, I note, the extent to which the Department is obliged to address reliance will be affected by the thoroughness of public comments it receives on the issue. In response to its 2008 proposal, the Department received only conclusory references to industry reliance interests. See *ante,* at 2126 (citing comment from National Automobile Dealers Association). An agency cannot be faulted for failing to discuss at length matters only cursorily raised before it.

Justice THOMAS, with whom Justice ALITO joins, dissenting.

The Court granted this case to decide whether an exemption under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.,* "requires payment of increased compensation to certain automobile dealership employees"—known as service advisors—"for overtime work." *Ante,* at 2121; see also *ante,* at 2121, 2124. The majority declines to resolve that question. Instead, after explaining why the Court owes no deference to the Department of Labor's regulation purporting to interpret this provision, see *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the majority leaves it "for the Court of Appeals to interpret the statute in the first instance." *Ante,* at 2127.

I agree with the majority's conclusion that we owe no *Chevron* deference to the Department's position because "deference is not warranted where [a] regulation is 'procedurally defective.' " *Ante,* at 2125. But I disagree with its ultimate decision to punt on the issue before it. We have an "obligation ... to decide the merits of the question presented." *CBOCS West, Inc. v. Humphries,* 553 U.S. 442, 472, 128 S.Ct. 1951, 170 L.Ed.2d 864 (2008) (THOMAS, J., dissenting). We need not wade into the murky waters of *Chevron* deference to decide whether the Ninth Circuit's reading of the statute was correct. We must instead examine the statutory text. That text reveals that service advisors are salesmen primarily engaged in the selling of services for automobiles. Accordingly, I would reverse the Ninth Circuit's judgment.

Federal law requires overtime pay for certain employees who work more than 40 hours per week. § 207(a)(2)(C). ***228** But the FLSA exempts various categories of employees from this overtime requirement. § 213. The question before the Court is whether the following exemption encompasses service advisors:

> "The provisions of section 207 of this title shall not apply with respect to—
>
> .....
>
> "(10)(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a

> nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." § 213(b).

I start with the uncontroversial notion that a service advisor is a "salesman." The FLSA does not define the term "salesman," so "we give the term its ordinary meaning." *Taniguchi v. Kan Pacific Saipan, Ltd.,* 566 U.S. ——, ——, 132 S.Ct. 1997, 2002, 182 L.Ed.2d 903 (2012). A "salesman" is someone who sells goods or services. 14 Oxford English Dictionary 391 (2d ed. 1989) ("[a] man whose business it is to sell goods or conduct sales"); Random House Dictionary of the English Language 1262 (1966) (Random House) ("a man who sells goods, services, etc."). Service advisors, whose role it is to "interact with customers and sell them services for their vehicles," *ante,* at 2121, are plainly "salesm[e]n." See *ibid.* (cataloguing sales-related duties of service advisors).

A service advisor, however, is not "primarily engaged in selling ... automobiles." § 213(b)(10)(A). On the contrary, a service advisor is a "salesman" who sells servicing solutions. *Ante,* at 2121. So the exemption applies only if it covers *not only* those salesmen primarily engaged in selling automobiles *but also* those salesmen ****2130** primarily engaged in servicing automobiles.

The exemption's structure confirms that salesmen could do both. The exemption contains three nouns ("salesman, ***229** partsman, or mechanic") and two gerunds ("selling or servicing"). The three nouns are connected by the disjunctive "or," as are the gerunds. So unless context dictates otherwise, a salesman can *either* be engaged in selling *or* servicing automobiles. Cf. *Reiter v. Sonotone Corp.,* 442 U.S. 330, 339, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979).

Context does not dictate otherwise. A salesman, namely, one who sells servicing solutions, can be "primarily engaged in ... servicing automobiles." § 213(b)(10)(A). The FLSA does not define the term "servicing," but its ordinary meaning includes both "[t]he action of maintaining or repairing a motor vehicle" and "the action of providing a service." 15 Oxford English Dictionary 39; see also Random House 1304 (defining "service" to mean "the providing ... of ... activities required by the public, as maintenance, repair, etc."). A service advisor's selling of service solutions fits both definitions. The service advisor is the customer's liaison for purposes of deciding what parts are necessary to maintain or repair a vehicle, and therefore is primarily engaged in "the action of maintaining or repairing a motor vehicle" or "the action of providing a service" for an automobile.

Other features of the exemption confirm that a service advisor is a salesman primarily engaged in servicing automobiles. Consider the exemption's application to a "partsman." Like a service advisor, a partsman neither sells vehicles nor repairs vehicles himself. See 29 CFR § 779.372(c)(2) (2015) (defining "partsman" as "any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts"). For the provision to exempt partsmen, then, the phrase "primarily engaged in ... servicing" must cover some employees who do

not themselves perform repair or maintenance. So "servicing" refers not only to the physical act of repairing or maintaining a vehicle but also to acts integral to the servicing process more generally.

Respondents' contrary contentions are unavailing. They first invoke the distributive canon: "Where a sentence contains ***230** several antecedents and several consequents," the distributive canon instructs courts to "read [those several terms] distributively and apply the words to the subjects which, by context, they seem most properly to relate." 2A N. Singer & S. Singer, Sutherland on Statutory Construction § 47.26, on p. 448 (rev. 7th ed. 2014). Respondents accordingly maintain that 29 U.S.C. § 213(b)(10)(A) exempts *only* salesmen primarily engaged in selling automobiles. Brief for Respondents 20–26. But the distributive canon is less helpful in cases such as this because the antecedents and consequents cannot be readily matched on a one-to-one basis. Here, there are three nouns to be matched with only two gerunds, so the canon does not overcome the exemption's plain meaning. Perhaps respondents might have a better argument if the statute exempted "salesman or mechanics who primarily engage in selling or servicing automobiles." In such a case, one might assume that Congress meant the nouns and gerunds to match on a one-to-one basis, and the distributive canon could be utilized to determine how the matching should occur. But that is not the statute before us. For the reasons explained, *supra,* at 2122 – 2123, the plain meaning of the various terms in the exemption establish that the term "salesman" is not limited to only those who sell automobiles. It also extends to those " primarily engaged in ... servicing automobiles." § 213(b)(10)(A).

****2131** Respondents also resist this natural reading of the exemption by invoking the made-up canon that courts must narrowly construe the FLSA exemptions. Brief for Respondents 41–42. The Ninth Circuit agreed with respondents on this score. 780 F.3d 1267, 1271–1272, n. 3 (2015). The court should not do so again on remand. We have declined to apply that canon on two recent occasions, one of which also required the Court to parse the meaning of an exemption in § 213. *Christopher v. SmithKline Beecham Corp.,* 567 U.S. ——, —— – ——, n. 21, 132 S.Ct. 2156, 2172, n. 21, 183 L.Ed.2d 153 (2012); see also *Sandifer v. United States Steel Corp.,* 571 U.S. ——, ——, n. 7, 134 S.Ct. 870, 879, n. 7, 187 L.Ed.2d 729 (2014). There is no basis to ***231** infer that Congress means anything beyond what a statute plainly says simply because the legislation in question could be classified as "remedial." See Scalia, Assorted Canards of Contemporary Legal Analysis, 40 Case W. Res. L.Rev. 581, 581–586 (1990). Indeed, this canon appears to "res[t] on an elemental misunderstanding of the legislative process," viz., "that Congress intend[s] statutes to extend as far as possible in service of a singular objective." Brief for Chamber of Commerce of the United States of America et al. as *Amici Curiae* 7.

* * *

For the foregoing reasons, I would hold that the FLSA exemption set out in § 213(b)(10)(A) covers the service advisors in this case. Service advisors are "primarily engaged in ... servicing

automobiles," given their integral role in selling and providing vehicle services. Accordingly, I would reverse the judgment of the Ninth Circuit.

All Citations

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Ex. LA-3

RESPONDENT'S EXHIBIT

104 S.Ct. 2778
Supreme Court of the United States

CHEVRON, U.S.A., INC., Petitioner,
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.
AMERICAN IRON AND STEEL INSTITUTE, et al., Petitioners,
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.
William D. RUCKELSHAUS, Administrator, Environmental Protection Agency, Petitioner,
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., et al. *

* US Reports Title: Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.

Nos. 82-1005, 82-1247 and 82-1591.
|
Argued Feb. 29, 1984.
|
Decided June 25, 1984.

Synopsis
Rehearing Denied Aug. 16, 1984.

See 468 U.S. 1227, 105 S.Ct. 28, 29.

Petition was filed for review of order of the Environmental Protection Agency. The Court of Appeals, 685 F.2d 718,vacated regulations, and certiorari was granted. The Supreme Court, Justice Stevens, held that Environmental Protection Agency regulation allowing states to treat all pollution-emitting devices within same industrial grouping as though they were encased within single "bubble" was based on permissible construction of term "stationary source" in Clean Air Act Amendments.

Reversed.

Syllabus [a1]

a1 The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

The Clean Air Act Amendments of 1977 impose certain requirements on States **2779 that have not achieved the national air quality standards established by the Environmental Protection Agency (EPA) pursuant to earlier legislation, including the requirement that such "nonattainment" States establish a permit program regulating "new or modified major stationary sources" of air pollution. Generally, a permit may not be issued for such sources unless stringent conditions are met. EPA regulations promulgated in 1981 to implement the permit requirement allow a State to adopt a plantwide definition of the term "stationary source," under which an existing plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant, thus allowing a State to treat

all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble." Respondents filed a petition for review in the Court of Appeals, which set aside the regulations embodying the "bubble concept" as contrary to law. Although recognizing that the amended Clean Air Act does not explicitly define what Congress envisioned as a "stationary source" to which the permit program should apply, and that the issue was not squarely addressed in the legislative history, the court concluded that, in view of the purpose of the nonattainment program to improve rather than merely maintain air quality, a plantwide definition was "inappropriate," while stating it was mandatory in programs designed to maintain existing air quality.

Held: The EPA's plantwide definition is a permissible construction of the statutory term "stationary source." Pp. 2781–2793.

(a) With regard to judicial review of an agency's construction of the statute which it administers, if Congress has not directly spoken to the precise question at issue, the question for the court is whether the ***838** agency's answer is based on a permissible construction of the statute. Pp. 2781–2783.

(b) Examination of the legislation and its history supports the Court of Appeals' conclusion that Congress did not have a specific intention as to the applicability of the "bubble concept" in these cases. Pp. 2783–2786.

(c) The legislative history of the portion of the 1977 Amendments dealing with nonattainment areas plainly discloses that in the permit program Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality. Pp. 2786–2787.

(d) Prior to the 1977 Amendments, the EPA had used a plantwide definition of the term "source," but in 1980 the EPA ultimately adopted a regulation that, in essence, applied the basic reasoning of the Court of Appeals here, precluding use of the "bubble concept" in nonattainment States' programs designed to enhance air quality. However, when a new administration took office 1981, the EPA, in promulgating the regulations involved here, reevaluated the various arguments that had been advanced in connection with the proper definition of the term "source" and concluded that the term should be given the plantwide definition in nonattainment areas. Pp. 2787–2790.

(e) Parsing the general terms in the text of the amended Clean Air Act—particularly the provisions of §§ 302(j) and 111(a)(3) pertaining to the definition of "source"—does not reveal any actual intent of Congress as to the issue in these cases. To the extent any congressional "intent" can be discerned from the statutory language, it would appear that the listing of overlapping, illustrative terms was intended to enlarge, rather than to confine, the scope of the EPA's power to regulate particular sources in order to effectuate the policies of the Clean Air Act. Similarly, the legislative history is consistent with the ****2780** view that the EPA should have broad discretion in implementing the policies

of the 1977 Amendments. The plantwide definition is fully consistent with the policy of allowing reasonable economic growth, and the EPA has advanced a reasonable explanation for its conclusion that the regulations serve environmental objectives as well. The fact that the EPA has from time to time changed its interpretation of the term "source" does not lead to the conclusion that no deference should be accorded the EPA's interpretation of the statute. An agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. Policy arguments concerning the "bubble concept" should be addressed to legislators or administrators, not to judges. The EPA's interpretation of the statute here represents a reasonable accommodation of manifestly competing interests and is entitled to deference. Pp. 2790–2793.

222 U.S.App.D.C. 268, 685 F.2d 718 (1982), reversed.

Attorneys and Law Firms

Deputy Solicitor General Bator argued the cause for petitioners in all cases. With him on the briefs for petitioner in No. 82-1591 were *Solicitor General Lee, Acting Assistant Attorney General Habicht, Deputy Assistant Attorney General Walker, Mark I. Levy, Anne S. Almy, William F. Pedersen,* and *Charles S. Carter. Michael H. Salinsky* and *Kevin M. Fong* filed briefs for petitioner in No. 82-1005. *Robert A. Emmett, David Ferber, Stark Ritchie, Theodore L. Garrett, Patricia A. Barald, Louis E. Tosi, William L. Patberg, Charles F. Lettow,* and *Barton C. Green* filed briefs for petitioners in No. 82-1247.

***839** *David D. Doniger* argued the cause and filed a brief for respondents.†>>>

† Briefs of *amici curiae* urging reversal were filed for the American Gas Association by *John A. Myler;* for the Mid-America Legal Foundation by *John M. Cannon, Susan W. Wanat,* and *Ann P. Sheldon;* and for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *Robin L. Rivett.*

A brief of *amici curiae* urging affirmance was filed for the Commonwealth of Pennsylvania et al. by *LeRoy S. Zimmerman,* Attorney General of Pennsylvania, *Thomas Y. Au, Duane Woodard,* Attorney General of Colorado, *Richard L. Griffith,* Assistant Attorney General, *Joseph I. Lieberman,* Attorney General of Connecticut, *Robert A. Whitehead, Jr.,* Assistant Attorney General, *James S. Tierney,* Attorney General of Maine, *Robert Abrams,* Attorney General of New York, *Marcia J. Cleveland* and *Mary L. Lyndon,* Assistant Attorneys General, *Irwin I. Kimmelman,* Attorney General of New Jersey, *John J. Easton, Jr.,* Attorney General of Vermont, *Merideth Wright,* Assistant Attorney General, *Bronson C. La Follette,* Attorney General of Wisconsin, and *Maryann Sumi,* Assistant Attorney General.

James D. English, Mary-Win O'Brien, and *Bernard Kleiman* filed a brief for the United Steelworkers of America, AFL-CIO-CLC, as *amicus curiae.*

Opinion

Justice STEVENS delivered the opinion of the Court.

In the Clean Air Act Amendments of 1977, Pub.L. 95–95, 91 Stat. 685, Congress enacted certain requirements applicable ***840** to States that had not achieved the national air quality standards established by the Environmental Protection Agency (EPA) pursuant to earlier legislation. The amended Clean Air Act required these "nonattainment" States to establish a permit program regulating "new or modified major stationary sources" of air pollution. Generally, a permit may not be issued for a new or modified major stationary source unless several stringent conditions are met.[1] The EPA regulation promulgated to implement this permit requirement allows a State to adopt a plantwide definition of the term "stationary source."[2] Under this definition, an existing plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant. The question presented by these cases is whether EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble" is based on a reasonable construction of the statutory term "stationary source."

1 Section 172(b)(6), 42 U.S.C. § 7502(b)(6), provides:
"The plan provisions required by subsection (a) shall—
.....
"(6) require permits for the construction and operation of new or modified major stationary sources in accordance with section 173 (relating to permit requirements)." 91 Stat. 747.

2 "(i) 'Stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.
"(ii) 'Building, structure, facility, or installation' means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel." 40 CFR §§ 51.18(j)(1)(i) and (ii) (1983).

I

The EPA regulations containing the plantwide definition of the term stationary source were promulgated on October ***841** 14, 1981. 46 Fed.Reg. 50766. Respondents[3] filed a timely petition for review in the United States Court of Appeals for the District of Columbia Circuit pursuant to 42 U.S.C. § 7607(b)(1).[4] The Court of Appeals ****2781** set aside the regulations. Natural Resources Defense Council, Inc. v. Gorsuch, 222 U.S.App.D.C. 268, 685 F.2d 718 (1982).

3 National Resources Defense Council, Inc., Citizens for a Better Environment, Inc., and North Western Ohio Lung Association, Inc.

4 Petitioners, Chevron U.S.A. Inc., American Iron and Steel Institute,

American Petroleum Institute, Chemical Manufacturers Association, Inc., General Motors Corp., and Rubber Manufacturers Association were granted leave to intervene and argue in support of the regulation.

The court observed that the relevant part of the amended Clean Air Act "does not explicitly define what Congress envisioned as a 'stationary source, to which the permit program ... should apply," and further stated that the precise issue was not "squarely addressed in the legislative history." Id., at 273, 685 F.2d, at 723. In light of its conclusion that the legislative history bearing on the question was "at best contradictory," it reasoned that "the purposes of the nonattainment program should guide our decision here." Id., at 276, n. 39, 685 F.2d, at 726, n. 39.[5] Based on two of its precedents concerning the applicability of the bubble concept to certain Clean Air Act programs,[6] the court stated that the bubble concept was "mandatory" in programs designed merely to maintain existing air quality, but held that it was "inappropriate" in programs enacted to improve air quality. Id., at 276, 685 F.2d, at 726. Since the purpose of the permit ***842** program—its "raison d'être," in the court's view—was to improve air quality, the court held that the bubble concept was inapplicable in these cases under its prior precedents. Ibid. It therefore set aside the regulations embodying the bubble concept as contrary to law. We granted certiorari to review that judgment, 461 U.S. 956, 103 S.Ct. 2427, 77 L.Ed.2d 1314 (1983), and we now reverse.

5 The court remarked in this regard:

"We regret, of course, that Congress did not advert specifically to the bubble concept's application to various Clean Air Act programs, and note that a further clarifying statutory directive would facilitate the work of the agency and of the court in their endeavors to serve the legislators' will." 222 U.S.App.D.C., at 276, n. 39, 685 F.2d, at 726, n. 39.

6 Alabama Power Co. v. Costle, 204 U.S.App.D.C. 51, 636 F.2d 323 (1979); ASARCO Inc. v. EPA, 188 U.S.App.D.C. 77, 578 F.2d 319 (1978).

The basic legal error of the Court of Appeals was to adopt a static judicial definition of the term "stationary source" when it had decided that Congress itself had not commanded that definition. Respondents do not defend the legal reasoning of the Court of Appeals.[7] Nevertheless, since this Court reviews judgments, not opinions,[8] we must determine whether the Court of Appeals' legal error resulted in an erroneous judgment on the validity of the regulations.

7 Respondents argued below that EPA's plantwide definition of "stationary source" is contrary to the terms, legislative history, and purposes of the amended Clean Air Act. The court below rejected respondents' arguments based on the language and legislative history of the Act. It did agree with respondents contention that the regulations were inconsistent with the purposes of the Act, but did not adopt the construction of the statute advanced

by respondents here. Respondents rely on the arguments rejected by the Court of Appeals in support of the judgment, and may rely on any ground that finds support in the record. See Ryerson v. United States, 312 U.S. 405, 408, 61 S.Ct. 656, 658, 85 L.Ed. 917 (1941); LeTulle v. Scofield, 308 U.S. 415, 421, 60 S.Ct. 313, 316, 84 L.Ed. 355 (1940); Langnes v. Green, 282 U.S. 531, 533–539, 51 S.Ct. 243, 244–246, 75 L.Ed. 520 (1931).

8 E.g., Black v. Cutter Laboratories, 351 U.S. 292, 297, 76 S.Ct. 824, 827, 100 L.Ed. 1188 (1956); J.E. Riley Investment Co. v. Commissioner, 311 U.S. 55, 59, 61 S.Ct. 95, 97, 85 L.Ed. 36 (1940); Williams v. Norris, 12 Wheat. 117, 120, 6 L.Ed. 571 (1827); McClung v. Silliman, 6 Wheat. 598, 603, 5 L.Ed. 340 (1821).

II

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, ***843** as well as the agency, must give effect to the unambiguously expressed intent of Congress.[9] If, however, ****2782** the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute,[10] as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[11]

9 The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. See, e.g., FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 32, 102 S.Ct. 38, 42, 70 L.Ed.2d 23 (1981); SEC v. Sloan, 436 U.S. 103, 117–118, 98 S.Ct. 1702, 1711–1712, 56 L.Ed.2d 148 (1978); FMC v. Seatrain Lines, Inc., 411 U.S. 726, 745–746, 93 S.Ct. 1773, 1784–1785, 36 L.Ed.2d 620 (1973); Volkswagenwerk v. FMC, 390 U.S. 261, 272, 88 S.Ct. 929, 935, 19 L.Ed.2d 1090 (1968); NLRB v. Brown, 380 U.S. 278, 291, 85 S.Ct. 980, 988, 13 L.Ed.2d 839 (1965); FTC v. Colgate–Palmolive Co., 380 U.S. 374, 385, 85 S.Ct. 1035, 1042, 13 L.Ed.2d 904 (1965); Social Security Board v. Nierotko, 327 U.S. 358, 369, 66 S.Ct. 637, 643, 90 L.Ed. 718 (1946); Burnet v. Chicago Portrait Co., 285 U.S. 1, 16, 52 S.Ct. 275, 281, 76 L.Ed. 587 (1932); Webster v. Luther, 163 U.S. 331, 342, 16 S.Ct. 963, 967, 41 L.Ed. 179 (1896). If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

10 See generally, R. Pound, The Spirit of the Common Law 174–175 (1921).

11 The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. FEC v. Democratic Senatorial Campaign Committee, 454 U.S., at 39, 102 S.Ct., at 46; Zenith Radio Corp. v. United States, 437 U.S. 443, 450, 98 S.Ct. 2441, 2445, 57 L.Ed.2d 337 (1978); Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 75, 95 S.Ct. 1470, 1479, 43 L.Ed.2d 731 (1975); Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965); Unemployment Compensation Comm'n v. Aragon, 329 U.S. 143, 153, 67 S.Ct. 245, 250, 91 L.Ed. 136 (1946); McLaren v. Fleischer, 256 U.S. 477, 480–481, 41 S.Ct. 577, 577–578, 65 L.Ed. 1052 (1921).

"The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." Morton v. Ruiz, 415 U.S. 199, 231, 94 S.Ct. 1055, 1072, 39 L.Ed.2d 270 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation ***844** of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.[12] Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[13]

12 See, e.g., United States v. Morton, 467 U.S. 822, 834, 104 S.Ct. 2769, 2776, 81 L.Ed.2d 680 (1984) Schweiker v. Gray Panthers, 453 U.S. 34, 44, 101 S.Ct. 2633, 2640, 69 L.Ed.2d 460 (1981); Batterton v. Francis, 432 U.S. 416, 424–426, 97 S.Ct. 2399, 2404–2406, 53 L.Ed.2d 448 (1977); American Telephone & Telegraph Co. v. United States, 299 U.S. 232, 235–237, 57 S.Ct. 170, 172–173, 81 L.Ed. 142 (1936).

13 E.g., INS v. Jong Ha Wang, 450 U.S. 139, 144, 101 S.Ct. 1027, 1031, 67 L.Ed.2d 123 (1981); Train v. Natural Resources Defense Council, Inc., 421 U.S., at 87, 95 S.Ct., at 1485.

We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer,[14] and the principle of deference to administrative interpretations.

14 Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist., 467 U.S. 380, 389, 104 S.Ct. 2472, 2479–2480, 81 L.Ed.2d 301 (1984); Blum v. Bacon, 457 U.S. 132, 141, 102 S.Ct. 2355, 2361, 72 L.Ed.2d 728 (1982); Union Electric Co. v. EPA, 427 U.S. 246, 256, 96 S.Ct. 2518, 2525, 49 L.Ed.2d 474

(1976); Investment Company Institute v. Camp, 401 U.S. 617, 626–627, 91 S.Ct. 1091, 1097, 28 L.Ed.2d 367 (1971); Unemployment Compensation Comm'n v. Aragon, 329 U.S., at 153–154, 67 S.Ct., at 250–251; NLRB v. Hearst Publications, Inc., 322 U.S. 111, 131, 64 S.Ct. 851, 860, 88 L.Ed. 1170 (1944); McLaren v. Fleischer, 256 U.S., at 480–481, 41 S.Ct., at 577–578; Webster v. Luther, 163 U.S., at 342, 16 S.Ct., at 967; Brown v. United States, 113 U.S. 568, 570–571, 5 S.Ct. 648, 649–650, 28 L.Ed. 1079 (1885); United States v. Moore, 95 U.S. 760, 763, 24 L.Ed. 588 (1878); Edwards' Lessee v. Darby, 12 Wheat. 206, 210, 6 L.Ed. 603 (1827).

"has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full ****2783** understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. See, e.g., National Broadcasting Co. v. United States, 319 U.S. 190 [63 S.Ct. 997, 87 L.Ed. 1344]; Labor Board v. Hearst Publications, Inc., 322 U.S. 111 [64 S.Ct. 851, 88 L.Ed. 1170]; ***845** Republic Aviation Corp. v. Labor Board, 324 U.S. 793 [65 S.Ct. 982, 89 L.Ed. 1372]; Securities & Exchange Comm'n v. Chenery Corp., [332] 322 U.S. 194 [67 S.Ct. 1575, 91 L.Ed. 1995]; Labor Board v. Seven–Up Bottling Co., 344 U.S. 344 [73 S.Ct. 287, 97 L.Ed. 377].

"... If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." United States v. Shimer, 367 U.S. 374, 382, 383, 81 S.Ct. 1554, 1560, 1561, 6 L.Ed.2d 908 (1961).

Accord Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699–700, 104 S.Ct. 2694, 2700–2701, 81 L.Ed.2d 580 (1984).

In light of these well-settled principles it is clear that the Court of Appeals misconceived the nature of its role in reviewing the regulations at issue. Once it determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was not whether in its view the concept is "inappropriate" in the general context of a program designed to improve air quality, but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one. Based on the examination of the legislation and its history which follows, we agree with the Court of Appeals that Congress did not have a specific intention on the applicability of the bubble concept in these cases, and conclude that the EPA's use of that concept here is a reasonable policy choice for the agency to make.

III

In the 1950's and the 1960's Congress enacted a series of statutes designed to encourage and to assist the States in curtailing air pollution. See generally Train v. Natural Resources

Defense Council, Inc., 421 U.S. 60, 63–64, 95 S.Ct. 1470, 1474–1475, 43 L.Ed.2d 731 (1975). The Clean Air Amendments of 1970, Pub.L. 91–604, 84 Stat. 1676, "sharply increased federal authority and responsibility ***846** in the continuing effort to combat air pollution," 421 U.S., at 64, 95 S.Ct., at 1474, but continued to assign "primary responsibility for assuring air quality" to the several States, 84 Stat. 1678. Section 109 of the 1970 Amendments directed the EPA to promulgate National Ambient Air Quality Standards (NAAQS's) [15] and § 110 directed the States to develop plans (SIP's) to implement the standards within specified deadlines. In addition, § 111 provided that major new sources of pollution would be required to conform to technology-based performance standards; the EPA was directed to publish a list of categories of sources of pollution and to establish new source performance standards (NSPS) for each. Section 111(e) prohibited the operation of any new source in violation of a performance standard.

15 Primary standards were defined as those whose attainment and maintenance were necessary to protect the public health, and secondary standards were intended to specify a level of air quality that would protect the public welfare.

Section 111(a) defined the terms that are to be used in setting and enforcing standards of performance for new stationary sources. It provided:

"For purposes of this section:

.....

"(3) The term 'stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant." 84 Stat. 1683.

****2784** In the 1970 Amendments that definition was not only applicable to the NSPS program required by § 111, but also was made applicable to a requirement of § 110 that each state implementation plan contain a procedure for reviewing the location of any proposed new source and preventing its construction if it would preclude the attainment or maintenance of national air quality standards. [16]

16 See §§ 110(a)(2)(D) and 110(a)(4).

In due course, the EPA promulgated NAAQS's, approved SIP's, and adopted detailed regulations governing NSPS's ***847** for various categories of equipment. In one of its programs, the EPA used a plantwide definition of the term "stationary source." In 1974, it issued NSPS's for the nonferrous smelting industry that provided that the standards would not apply to the modification of major smelting units if their increased emissions were offset by reductions in other portions of the same plant. [17]

17 The Court of Appeals ultimately held that this plantwide approach was prohibited by the 1970 Act, see ASARCO Inc., 188 U.S.App.D.C., at 83–84, 578 F.2d, at 325–327. This decision was rendered after enactment of the 1977 Amendments, and hence the standard was in effect when Congress enacted the 1977 Amendments.

Nonattainment

The 1970 legislation provided for the attainment of primary NAAQS's by 1975. In many areas of the country, particularly the most industrialized States, the statutory goals were not attained.[18] In 1976, the 94th Congress was confronted with this fundamental problem, as well as many others respecting pollution control. As always in this area, the legislative struggle was basically between interests seeking strict schemes to reduce pollution rapidly to eliminate its social costs and interests advancing the economic concern that strict schemes would retard industrial development with attendant social costs. The 94th Congress, confronting these competing interests, was unable to agree on what response was in the public interest: legislative proposals to deal with nonattainment failed to command the necessary consensus.[19]

18 See Report of the National Commission on Air Quality, To Breathe Clean Air, 3.3–20 through 3.3–33 (1981).

19 Comprehensive bills did pass both Chambers of Congress; the Conference Report was rejected in the Senate. 122 Cong.Rec. 34375–34403, 34405–34418 (1976).

In light of this situation, the EPA published an Emissions Offset Interpretative Ruling in December 1976, see 41 Fed.Reg. 55524, to "fill the gap," as respondents put it, until Congress acted. The Ruling stated that it was intended to ***848** address "the issue of whether and to what extent national air quality standards established under the Clean Air Act may restrict or prohibit growth of major new or expanded stationary air pollution sources." Id., at 55524–55525. In general, the Ruling provided that "a major new source may locate in an area with air quality worse than a national standard only if stringent conditions can be met." Id., at 55525. The Ruling gave primary emphasis to the rapid attainment of the statute's environmental goals.[20] Consistent with that emphasis, the construction of every new source in nonattainment areas had to meet the "lowest achievable emission rate" under the current state of the art for that type of facility. See Ibid. The 1976 Ruling did not, however, explicitly adopt or reject the "bubble concept."[21]

20 For example, it stated:
"Particularly with regard to the primary NAAQS's, Congress and the Courts have made clear that economic considerations must be subordinated to NAAQS achievement and maintenance. While the ruling allows for some growth in areas violating a NAAQS if the net effect is to insure further progress toward NAAQS achievement, the Act does not allow economic growth to be accommodated at the expense of the public health." 41 Fed.Reg. 55527 (1976).

21 In January 1979, the EPA noted that the 1976 Ruling was ambiguous concerning this issue:
"A number of commenters indicated the need for a more explicit definition of 'source.' Some readers found that it was unclear under the 1976 Ruling whether a plant with a number of different processes and emission points

would be considered a single source. The changes set forth below define a source as 'any structure, building, facility, equipment, installation, or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control.' This definition precludes a large plant from being separated into individual production lines for purposes of determining applicability of the offset requirements." 44 Fed.Reg. 3276.

****2785** IV

The Clean Air Act Amendments of 1977 are a lengthy, detailed, technical, complex, and comprehensive response to a major social issue. A small portion of the statute—91 Stat. ***849** 745–751 (Part D of Title I of the amended Act, 42 U.S.C. §§ 7501–7508)—expressly deals with nonattainment areas. The focal point of this controversy is one phrase in that portion of the Amendments. [22]

22 Specifically, the controversy in these cases involves the meaning of the term "major stationary sources" in § 172(b)(6) of the Act, 42 U.S.C. § 7502(b)(6). The meaning of the term "proposed source" in § 173(2) of the Act, 42 U.S.C. § 7503(2), is not at issue.

Basically, the statute required each State in a nonattainment area to prepare and obtain approval of a new SIP by July 1, 1979. In the interim those States were required to comply with the EPA's interpretative Ruling of December 21, 1976. 91 Stat. 745. The deadline for attainment of the primary NAAQS's was extended until December 31, 1982, and in some cases until December 31, 1987, but the SIP's were required to contain a number of provisions designed to achieve the goals as expeditiously as possible. [23]

23 Thus, among other requirements, § 172(b) provided that the SIP's shall—
"(3) require, in the interim, reasonable further progress (as defined in section 171(1)) including such reduction in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology;
"(4) include a comprehensive, accurate, current inventory of actual emissions from all sources (as provided by rule of the Administrator) of each such pollutant for each such area which is revised and resubmitted as frequently as may be necessary to assure that the requirements of paragraph (3) are met and to assess the need for additional reductions to assure attainment of each standard by the date required under paragraph (1);
"(5) expressly identify and quantify the emissions, if any, of any such pollutant which will be allowed to result from the construction and operation of major new or modified stationary sources for each such area; ...
.....
"(8) contain emission limitations, schedules of compliance and such other measures as may be necessary to meet

the requirements of this section." 91 Stat. 747.

Section 171(1) provided:

"(1) The term 'reasonable further progress' means annual incremental reductions in emissions of the applicable air pollutant (including substantial reductions in the early years following approval or promulgation of plan provisions under this part and section 110(a)(2)(I) and regular reductions thereafter) which are sufficient in the judgment of the Administrator, to provide for attainment of the applicable national ambient air quality standard by the date required in section 172(a)." Id., at 746.

***850** Most significantly for our purposes, the statute provided that each plan shall

"(6) require permits for the construction and operation of new or modified major stationary sources in accordance with section 173...." Id., 747.

Before issuing a permit, § 173 requires (1) the state agency to determine that there will be sufficient emissions reductions in the region to offset the emissions from the new source and also to allow for reasonable further progress toward attainment, or that the increased emissions will not exceed an allowance for growth established pursuant to § 172(b)(5); (2) the applicant to certify that his other sources in the State are in compliance with the SIP, (3) the agency to determine that the applicable SIP is otherwise being implemented, and (4) the proposed source to comply with the lowest achievable emission rate (LAER). [24]

24 Section 171(3) provides:

"(3) The term 'lowest achievable emission rate' means for any source, that rate of emissions which reflects—

"(A) the most stringent emission limitation which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or

"(B) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent. "In no event shall the application of this term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance." The LAER requirement is defined in terms that make it even more stringent than the applicable new source performance standard developed under § 111 of the Act, as amended by the 1970 statute.

****2786** ***851** The 1977 Amendments contain no specific reference to the "bubble concept." Nor do they contain a specific definition of the term "stationary source," though they did not disturb the definition of "stationary source" contained in § 111(a)(3), applicable by the terms of the Act to the NSPS program. Section 302(j), however, defines the term "major stationary source" as follows:

"(j) Except as otherwise expressly provided, the terms 'major stationary source' and 'major

emitting facility' mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator)." 91 Stat. 770.

V

The legislative history of the portion of the 1977 Amendments dealing with nonattainment areas does not contain any specific comment on the "bubble concept" or the question whether a plantwide definition of a stationary source is permissible under the permit program. It does, however, plainly disclose that in the permit program Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality. Indeed, the House Committee Report identified the economic interest as one of the "two main purposes" of this section of the bill. It stated:

"Section 117 of the bill, adopted during full committee markup establishes a new section 127 of the Clean Air Act. The section has two main purposes: (1) to allow reasonable economic growth to continue in an area while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) to allow ***852** States greater flexibility for the former purpose than EPA's present interpretative regulations afford.

"The new provision allows States with nonattainment areas to pursue one of two options. First, the State may proceed under EPA's present 'tradeoff' or 'offset' ruling. The Administrator is authorized, moreover, to modify or amend that ruling in accordance with the intent and purposes of this section.

"The State's second option would be to revise its implementation plan in accordance with this new provision." H.R.Rep. No. 95–294, p. 211 (1977), U.S.Code Cong. & Admin.News 1977, pp. 1077, 1290. [25]

25 During the floor debates Congressman Waxman remarked that the legislation struck

"a proper balance between environmental controls and economic growth in the dirty air areas of America.... There is no other single issue which more clearly poses the conflict between pollution control and new jobs. We have determined that neither need be compromised....

"This is a fair and balanced approach, which will not undermine our economic vitality, or impede achievement of our ultimate environmental objectives." 123 Cong.Rec. 27076 (1977).

The second "main purpose" of the provision—allowing the States "greater flexibility" than the EPA's interpretative Ruling—as well as the reference to the EPA's authority to amend its Ruling in accordance with the intent of the section, is entirely consistent with the view that Congress did not intend to freeze the definition of "source" contained in the

existing regulation into a rigid statutory requirement.

The portion of the Senate Committee Report dealing with nonattainment areas states generally that it was intended to "supersede the EPA administrative approach," and that expansion should be permitted if a State could "demonstrate that these facilities can be accommodated within its overall plan to provide for attainment of air quality standards." ****2787** S.Rep. No. 95–127, p. 55 (1977). The Senate Report notes the value of "case-by-case review of each new or modified major source of pollution that seeks to locate in a region exceeding an ambient standard," explaining that such a review "requires matching reductions from existing sources against ***853** emissions expected from the new source in order to assure that introduction of the new source will not prevent attainment of the applicable standard by the statutory deadline." Ibid. This description of a case-by-case approach to plant additions, which emphasizes the net consequences of the construction or modification of a new source, as well as its impact on the overall achievement of the national standards, was not, however, addressed to the precise issue raised by these cases.

Senator Muskie made the following remarks:
"I should note that the test for determining whether a new or modified source is subject to the EPA interpretative regulation [the Offset Ruling]—and to the permit requirements of the revised implementation plans under the conference bill—is whether the source will emit a pollutant into an area which is exceeding a national ambient air quality standard for that pollutant—or precursor. Thus, a new source is still subject to such requirements as 'lowest achievable emission rate' even if it is constructed as a replacement for an older facility resulting in a net reduction from previous emission levels.

"A source—including an existing facility ordered to convert to coal—is subject to all the nonattainment requirements as a modified source if it makes any physical change which increases the amount of any air pollutant for which the standards in the area are exceeded." 123 Cong.Rec. 26847 (1977).

VI

As previously noted, prior to the 1977 Amendments, the EPA had adhered to a plantwide definition of the term "source" under a NSPS program. After adoption of the 1977 Amendments, proposals for a plantwide definition were considered in at least three formal proceedings.

In January 1979, the EPA considered the question whether the same restriction on new construction in nonattainment areas that had been included in its December 1976 Ruling ***854** should be required in the revised SIP's that were scheduled to go into effect in July 1979. After noting that the 1976 Ruling was ambiguous on the question "whether a plant with a number of different processes and emission points would be considered a single source," 44 Fed.Reg. 3276 (1979), the EPA, in effect, provided a bifurcated answer to that question. In those areas that did not have a revised SIP in effect by July 1979,

the EPA rejected the plantwide definition; on the other hand, it expressly concluded that the plantwide approach would be permissible in certain circumstances if authorized by an approved SIP. It stated:

"Where a state implementation plan is revised and implemented to satisfy the requirements of Part D, including the reasonable further progress requirement, the plan requirements for major modifications may exempt modifications of existing facilities that are accompanied by intrasource offsets so that there is no net increase in emissions. The agency endorses such exemptions, which would provide greater flexibility to sources to effectively manage their air emissions at least cost." Ibid. [26]

26 In the same Ruling, the EPA added:
"The above exemption is permitted under the SIP because, to be approved under Part D, plan revisions due by January 1979 must contain adopted measures assuring that reasonable further progress will be made. Furthermore, in most circumstances, the measures adopted by January 1979 must be sufficient to actually provide for attainment of the standards by the dates required under the Act, and in all circumstances measures adopted by 1982 must provide for attainment. See Section 172 of the Act and 43 FR 21673–21677 (May 19, 1978). Also, Congress intended under Section 173 of the Act that States would have some latitude to depart from the strict requirements of this Ruling when the State plan is revised and is being carried out in accordance with Part D. Under a Part D plan, therefore, there is less need to subject a modification of an existing facility to LAER and other stringent requirements if the modification is accompanied by sufficient intrasource offsets so that there is no net increase in emissions." 44 Fed.Reg. 3277 (1979).

**2788 *855 In April, and again in September 1979, the EPA published additional comments in which it indicated that revised SIP's could adopt the plantwide definition of source in nonattainment areas in certain circumstances. See id., at 20372, 20379, 51924, 51951, 51958. On the latter occasion, the EPA made a formal rulemaking proposal that would have permitted the use of the "bubble concept" for new installations within a plant as well as for modifications of existing units. It explained:
" 'Bubble' Exemption: The use of offsets inside the same source is called the 'bubble.' EPA proposes use of the definition of 'source' (see above) to limit the use of the bubble under nonattainment requirements in the following respects:

"i. Part D SIPs that include all requirements needed to assure reasonable further progress and attainment by the deadline under section 172 and that are being carried out need not restrict the use of a plantwide bubble, the same as under the PSD proposal.

"ii. Part D SIPs that do not meet the requirements specified must limit use of the bubble by including a definition of 'installation' as an identifiable piece of process equipment." [27]

27 Id., at 51926. Later in that Ruling, the EPA added:

> "However, EPA believes that complete Part D SIPs, which contain adopted and enforceable requirements sufficient to assure attainment, may apply the approach proposed above for PSD, with plant-wide review but no review of individual pieces of equipment. Use of only a plant-wide definition of source will permit plant-wide offsets for avoiding NSR of new or modified pieces of equipment. However, this is only appropriate once a SIP is adopted that will assure the reductions in existing emissions necessary for attainment. See 44 FR 3276 col. 3 (January 16, 1979). If the level of emissions allowed in the SIP is low enough to assure reasonable further progress and attainment, new construction or modifications with enough offset credit to prevent an emission increase should not jeopardize attainment." Id., at 51933.

***856** Significantly, the EPA expressly noted that the word "source" might be given a plantwide definition for some purposes and a narrower definition for other purposes. It wrote: "Source means any building structure, facility, or installation which emits or may emit any regulated pollutant. 'Building, structure, facility or installation' means plant in PSD areas and in nonattainment areas except where the growth prohibitions would apply or where no adequate SIP exists or is being carried out." Id., at 51925. [28]

[28] In its explanation of why the use of the "bubble concept" was especially appropriate in preventing significant deterioration (PSD) in clean air areas, the EPA stated: "In addition, application of the bubble on a plant-wide basis encourages voluntary upgrading of equipment, and growth in productive capacity." Id., at 51932.

The EPA's summary of its proposed Ruling discloses a flexible rather than rigid definition of the term "source" to implement various policies and programs:

"In summary, EPA is proposing two different ways to define source for different kinds of NSR programs:

"(1) For PSD and complete Part D SIPs, review would apply only to plants, with an unrestricted plant-wide bubble.

"(2) For the offset ruling, restrictions on construction, and incomplete Part D SIPs, review would apply to both plants and individual pieces of process equipment, causing the plant-wide bubble not to apply for new and modified major pieces of equipment.

"In addition, for the restrictions on construction, EPA is proposing to define 'major modification' so as to prohibit the bubble entirely. Finally, an alternative discussed but not favored is to have only pieces of process equipment reviewed, resulting in no plant-wide bubble and allowing minor pieces of equipment to escape ****2789** NSR ***857** regardless of whether they are within a major plant." Id., at 51934.

In August 1980, however, the EPA adopted a regulation that, in essence, applied the basic reasoning of the Court of Appeals in these cases. The EPA took particular note of the two then-recent Court of Appeals decisions, which had created the bright-line rule that the "bubble concept" should be employed in a program designed to maintain air quality but not in one designed to enhance air quality. Relying heavily on those cases,[29] EPA adopted a dual definition of "source" for nonattainment areas that required a permit whenever a change in either the entire plant, or one of its components, would result in a significant increase in emissions even if the increase was completely offset by reductions elsewhere in the plant. The EPA expressed the opinion that this interpretation was "more consistent with congressional intent" than the plantwide definition because it "would bring in more sources or modifications for review," 45 Fed.Reg. 52697 (1980), but its primary legal analysis was predicated on the two Court of Appeals decisions.

29 "The dual definition also is consistent with Alabama Power and ASARCO. Alabama Power held that EPA had broad discretion to define the constituent terms of 'source' so as best to effectuate the purposes of the statute. Different definitions of 'source' can therefore be used for different sections of the statute....

"Moreover, Alabama Power and ASARCO taken together suggest that there is a distinction between Clean Air Act programs designed to enhance air quality and those designed only to maintain air quality....

.....

"Promulgation of the dual definition follows the mandate of Alabama Power, which held that, while EPA could not define 'source' as a combination of sources, EPA had broad discretion to define 'building,' 'structure,' 'facility,' and 'installation' so as to best accomplish the purposes of the Act." 45 Fed.Reg. 52697 (1980).

In 1981 a new administration took office and initiated a "Government-wide reexamination of regulatory burdens and complexities." 46 Fed.Reg. 16281. In the context of that ***858** review, the EPA reevaluated the various arguments that had been advanced in connection with the proper definition of the term "source" and concluded that the term should be given the same definition in both nonattainment areas and PSD areas.

In explaining its conclusion, the EPA first noted that the definitional issue was not squarely addressed in either the statute or its legislative history and therefore that the issue involved an agency "judgment as how to best carry out the Act." Ibid. It then set forth several reasons for concluding that the plantwide definition was more appropriate. It pointed out that the dual definition "can act as a disincentive to new investment and modernization by discouraging modifications to existing facilities" and "can actually retard progress in air pollution control by discouraging replacement of older, dirtier processes or pieces of equipment with new, cleaner ones." Ibid. Moreover, the new definition "would simplify EPA's rules by using the same definition of 'source' for PSD, nonattainment new source review and

the construction moratorium. This reduces confusion and inconsistency." Ibid. Finally, the agency explained that additional requirements that remained in place would accomplish the fundamental purposes of achieving attainment with NAAQS's as expeditiously as possible. [30] These conclusions were ****2790** expressed ***859** in a proposed rulemaking in August 1981 that was formally promulgated in October. See id., at 50766.

30 It stated:

"5. States will remain subject to the requirement that for all nonattainment areas they demonstrate attainment of NAAQS as expeditiously as practicable and show reasonable further progress toward such attainment. Thus, the proposed change in the mandatory scope of nonattainment new source review should not interfere with the fundamental purpose of Part D of the Act.

"6. New Source Performance Standards (NSPS) will continue to apply to many new or modified facilities and will assure use of the most up-to-date pollution control techniques regardless of the applicability of nonattainment area new source review.

"7. In order to avoid nonattainment area new source review, a major plant undergoing modification must show that it will not experience a significant net increase in emissions. Where overall emissions increase significantly, review will continue to be required." 46 Fed.Reg. 16281 (1981).

VII

In this Court respondents expressly reject the basic rationale of the Court of Appeals' decision. That court viewed the statutory definition of the term "source" as sufficiently flexible to cover either a plantwide definition, a narrower definition covering each unit within a plant, or a dual definition that could apply to both the entire "bubble" and its components. It 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. Respondents place a fundamentally different construction on the statute. They contend that the text of the Act requires the EPA to use a dual definition—if either a component of a plant, or the plant as a whole, emits over 100 tons of pollutant, it is a major stationary source. They thus contend that the EPA rules adopted in 1980, insofar as they apply to the maintenance of the quality of clean air, as well as the 1981 rules which apply to nonattainment areas, violate the statute. [31]

31 "What EPA may not do, however, is define all four terms to mean only plants. In the 1980 PSD rules, EPA did just that. EPA compounded the mistake in the 1981 rules here under review, in which it abandoned the dual definition." Brief for Respondents 29, n. 56.

Statutory Language

The definition of the term "stationary source" in § 111(a)(3) refers to "any building, structure, facility, or installation" which emits air pollution. See supra, at 2784. This definition is applicable only to the NSPS program by the express terms of the statute; the text of the statute does not make this definition ***860** applicable to the permit program. Petitioners therefore maintain that there is no statutory language even relevant to ascertaining the meaning of stationary source in the permit program aside from § 302(j), which defines the term "major stationary source." See supra, at 2786. We disagree with petitioners on this point.

The definition in § 302(j) tells us what the word "major" means—a source must emit at least 100 tons of pollution to qualify —but it sheds virtually no light on the meaning of the term "stationary source." It does equate a source with a facility—a "major emitting facility" and a "major stationary source" are synonymous under § 302(j). The ordinary meaning of the term "facility" is some collection of integrated elements which has been designed and constructed to achieve some purpose. Moreover, it is certainly no affront to common English usage to take a reference to a major facility or a major source to connote an entire plant as opposed to its constituent parts. Basically, however, the language of § 302(j) simply does not compel any given interpretation of the term "source."

Respondents recognize that, and hence point to § 111(a)(3). Although the definition in that section is not literally applicable to the permit program, it sheds as much light on the meaning of the word "source" as anything in the statute.[32] As respondents point out, use of the words "building, structure, facility, or installation," as the definition of source, could be read to impose the permit conditions on an individual building that is a part of a plant.[33] A "word may have a character of its own not to be submerged by its association." ***861** Russell Motor Car Co. v. United States, 261 U.S. 514, 519, 43 S.Ct. 428, 429, 67 L.Ed. 778 (1923). On the other hand, the meaning of a word must be ascertained in the context of achieving particular objectives, and the words associated with it may ****2791** indicate that the true meaning of the series is to convey a common idea. The language may reasonably be interpreted to impose the requirement on any discrete, but integrated, operation which pollutes. This gives meaning to all of the terms—a single building, not part of a larger operation, would be covered if it emits more than 100 tons of pollution, as would any facility, structure, or installation. Indeed, the language itself implies a "bubble concept" of sorts: each enumerated item would seem to be treated as if it were encased in a bubble. While respondents insist that each of these terms must be given a discrete meaning, they also argue that § 111(a)(3) defines "source" as that term is used in § 302(j). The latter section, however, equates a source with a facility, whereas the former defines "source" as a facility, among other items.

32 We note that the EPA in fact adopted the language of that definition in its regulations under the permit program. 40 CFR §§ 51.18(j)(1)(i), (ii) (1983).

33 Since the regulations give the States the option to define an individual unit as a source, see 40 CFR § 51.18(j)(1)

(1983), petitioners do not dispute that the terms can be read as respondents suggest.

We are not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress.[34] ***862** We know full well that this language is not dispositive; the terms are overlapping and the language is not precisely directed to the question of the applicability of a given term in the context of a larger operation. To the extent any congressional "intent" can be discerned from this language, it would appear that the listing of overlapping, illustrative terms was intended to enlarge, rather than to confine, the scope of the agency's power to regulate particular sources in order to effectuate the policies of the Act.

34 The argument based on the text of § 173, which defines the permit requirements for nonattainment areas, is a classic example of circular reasoning. One of the permit requirements is that "the proposed source is required to comply with the lowest achievable emission rate" (LAER). Although a State may submit a revised SIP that provides for the waiver of another requirement—the "offset condition"—the SIP may not provide for a waiver of the LAER condition for any proposed source. Respondents argue that the plantwide definition of the term "source" makes it unnecessary for newly constructed units within the plant to satisfy the LAER requirement if their emissions are offset by the reductions achieved by the retirement of older equipment. Thus, according to respondents, the plantwide definition allows what the statute explicitly prohibits—the waiver of the LAER requirement for the newly constructed units. But this argument proves nothing because the statute does not prohibit the waiver unless the proposed new unit is indeed subject to the permit program. If it is not, the statute does not impose the LAER requirement at all and there is no need to reach any waiver question. In other words, § 173 of the statute merely deals with the consequences of the definition of the term "source" and does not define the term.

Legislative History

In addition, respondents argue that the legislative history and policies of the Act foreclose the plantwide definition, and that the EPA's interpretation is not entitled to deference because it represents a sharp break with prior interpretations of the Act.

Based on our examination of the legislative history, we agree with the Court of Appeals that it is unilluminating. The general remarks pointed to by respondents "were obviously not made with this narrow issue in mind and they cannot be said to demonstrate a Congressional desire...." Jewell Ridge Coal Corp. v. Mine Workers, 325 U.S. 161, 168–169, 65 S.Ct. 1063, 1067–1068, 89 L.Ed. 1534 (1945). Respondents' argument based on the legislative history relies heavily on Senator Muskie's observation that a new source is subject to the LAER requirement.[35] But the full statement is ambiguous and like the text of § 173 itself, this comment does not tell

us what a new source is, much less that it is to have an inflexible definition. We find that the legislative history as a whole is silent on the precise issue before us. It is, however, consistent with the view that the EPA should have broad discretion in implementing the policies of the 1977 Amendments.

35 See supra, at 2787. We note that Senator Muskie was not critical of the EPA's use of the "bubble concept" in one NSPS program prior to the 1977 amendments. See ibid.

***863** More importantly, that history plainly identifies the policy concerns that motivated the enactment; the plantwide definition is fully consistent with one of those concerns ****2792** —the allowance of reasonable economic growth—and, whether or not we believe it most effectively implements the other, we must recognize that the EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives as well. See supra, at 2789–2790, and n. 29; see also supra, at 2788, n. 27. Indeed, its reasoning is supported by the public record developed in the rulemaking process, [36] as well as by certain private studies. [37]

36 See, for example, the statement of the New York State Department of Environmental Conservation, pointing out that denying a source owner flexibility in selecting options made it "simpler and cheaper to operate old, more polluting sources than to trade up...." App. 128–129.

37 "Economists have proposed that economic incentives be substituted for the cumbersome administrative-legal framework. The objective is to make the profit and cost incentives that work so well in the marketplace work for pollution control.... [The 'bubble' or 'netting' concept] is a first attempt in this direction. By giving a plant manager flexibility to find the places and processes within a plant that control emissions most cheaply, pollution control can be achieved more quickly and cheaply." L. Lave & G. Omenn, Cleaning Air: Reforming the Clean Air Act 28 (1981) (footnote omitted).

Our review of the EPA's varying interpretations of the word "source"—both before and after the 1977 Amendments—convinces us that the agency primarily responsible for administering this important legislation has consistently interpreted it flexibly—not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena. The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations ***864** and the wisdom of its policy on a continuing basis. Moreover, the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute.

Significantly, it was not the agency in 1980, but rather the Court of Appeals that read the statute inflexibly to command a plantwide definition for programs designed to maintain clean air and to forbid such a definition for programs designed to improve air quality. The distinction the court drew may well be a sensible one, but our labored review of the problem has surely disclosed that it is not a distinction that Congress ever articulated itself, or one that the EPA found in the statute before the courts began to review the legislative work product. We conclude that it was the Court of Appeals, rather than Congress or any of the decisionmakers who are authorized by Congress to administer this legislation, that was primarily responsible for the 1980 position taken by the agency.

Policy

The arguments over policy that are advanced in the parties' briefs create the impression that respondents are now waging in a judicial forum a specific policy battle which they ultimately lost in the agency and in the 32 jurisdictions opting for the "bubble concept," but one which was never waged in the Congress. Such policy arguments are more properly addressed to legislators or administrators, not to judges. [38]

38 Respondents point out if a brand new factory that will emit over 100 tons of pollutants is constructed in a nonattainment area, that plant must obtain a permit pursuant to § 172(b)(6) and in order to do so, it must satisfy the § 173 conditions, including the LAER requirement. Respondents argue if an old plant containing several large emitting units is to be modernized by the replacement of one or more units emitting over 100 tons of pollutant with a new unit emitting less—but still more than 100 tons—the result should be no different simply because "it happens to be built not at a new site, but within a pre-existing plant." Brief for Respondents 4.

***865** In these cases, the Administrator's interpretation represents a reasonable accommodation of manifestly competing in ****2793** terests and is entitled to deference: the regulatory scheme is technical and complex, [39] the agency considered the matter in a detailed and reasoned fashion, [40] and the decision involves reconciling conflicting policies. [41] Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

39 See e.g., Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist., 467 U.S., at 390, 104 S.Ct., at 2480 (1984).

40 See SEC v. Sloan, 436 U.S., at 117, 98 S.Ct., at 1711; Adamo Wrecking Co. v. United States, 434 U.S. 275, 287, n. 5, 98 S.Ct. 566, 574, n. 5, 54 L.Ed.2d 538 (1978); Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944).

41 See Capital Cities Cable, Inc. v. Crisp, 467 U.S. at 699–700, 104 S.Ct. at 2700–2701; United States v. Shimer, 367 U.S. 374, 382, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908 (1961).

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making 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 ***866** agency charged with the administration of the statute in light of everyday realities.

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches." TVA v. Hill, 437 U.S. 153, 195, 98 S.Ct. 2279, 2302, 57 L.Ed.2d 117 (1978).

We hold that the EPA's definition of the term "source" is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth. "The Regulations which the Administrator has adopted provide what the agency could allowably view as ... [an] effective reconciliation of these twofold ends...." United States v. Shimer, 367 U.S., at 383, 81 S.Ct., at 1560.

The judgment of the Court of Appeals is reversed.

It is so ordered.

Justice MARSHALL and Justice REHNQUIST took no part in the consideration or decision of these cases.

Justice O'CONNOR took no part in the decision of these cases.

All Citations

467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694, 21 ERC 1049, 14 Envtl. L. Rep. 20,507

Ex. LA-4

RESPONDENT'S EXHIBIT

United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 3. Case Administration (Refs & Annos)
Subchapter II. Officers

11 U.S.C.A. § 323

§ 323. Role and capacity of trustee

Currentness

(a) The trustee in a case under this title is the representative of the estate.

(b) The trustee in a case under this title has capacity to sue and be sued.

CREDIT(S)

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2562.)

11 U.S.C.A. § 323, 11 USCA § 323
Current through P.L. 118-41. Some statute sections may be more current, see credits for details.

End of Document

Ex. LA-5

RESPONDENT'S EXHIBIT

42 U.S.F. L. Rev. 383

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Article

California Evidence Code--Federal Rules of Evidence

Daniel A. Austin [a1]

THE BANKRUPTCY CLAUSE AND THE ELEVENTH AMENDMENT: AN UNCERTAIN BOUNDARY BETWEEN FEDERALISM AND STATE SOVEREIGNTY

> Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. [1]

The ineluctable conclusion, then, is that States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to "Laws on the subject of Bankruptcies." [2]

Introduction

THE BANKRUPTCY CLAUSE of Article I of the Constitution [3] lives in uneasy coexistence with state sovereignty. The Bankruptcy Clause provides Congress with the authority to establish "uniform Laws on the subject of Bankruptcies throughout the United States." [4] Legal tradition, embodied in the Constitution by the Eleventh Amendment, [5] holds states immune from suit by citizens absent the state's consent. There are, nonetheless, many provisions of the Bankruptcy Code that permit litigation to recover assets of the debtor or to administer the debtor's estate. These include suits by debtors or trustees against creditors, suits by creditors against the debtor, and suits against third parties. [6] States or state agencies are interested parties in almost every ***384** bankruptcy and are frequently litigants because of their relationship to the debtor. The Bankruptcy Code generally does not differentiate between state and non-state actors, and section

106 of the Code expressly abrogates state immunity for most types of bankruptcy litigation.[7] These provisions come into conflict with the Eleventh Amendment.

The tension between bankruptcy jurisdiction and state immunity has been a heated issue in a number of court cases. There is no majority consensus on this subject, but the opposing positions--preeminence of a federal bankruptcy system versus strict application of state immunity--are clear, and their arguments exhaustively developed.

The most recent Supreme Court decision on this matter is Central Virginia Community College v. Katz.[8] In a five-to-four decision, the Court permitted a bankruptcy trustee to sue the State of Virginia to recover assets of the bankruptcy estate because states had consented to suit when they ratified the Bankruptcy Clause.[9] The Katz decision stunned observers because it essentially reversed the Court's decision ten years earlier in Seminole Tribe of Florida v. Florida.[10] Seminole Tribe held that Congress did not have authority to abrogate state immunity when legislating ***385** pursuant to Article I.[11] After Seminole Tribe, it was generally assumed that sovereign immunity would apply to bankruptcy.[12] Seminole Tribe, however, was also a five-to-four decision, and in light of the result in Katz, the boundary between state immunity and bankruptcy jurisdiction is clearly not fixed.

This Article will examine the conflict between the Bankruptcy Code and state sovereignty. The Article shows that while state substantive law is extensively incorporated into federal bankruptcy law, the Bankruptcy Code prevails over state sovereign immunity when applying bankruptcy law. In other words, under the present judicial regime, the Bankruptcy Code presents a glaring exception to the otherwise firm rule of state sovereignty.

Part I examines the Bankruptcy Clause and several national bankruptcy statutes, including the current Bankruptcy Code. This discussion includes an explanation of how the Bankruptcy Clause sits within the framework of the Supremacy Clause.[13] Part II discusses the doctrine of state sovereign immunity as embodied in the Eleventh Amendment and as applied in key cases. This part highlights the tension between court majorities that interpret federal powers broadly, and those that favor strict application of Eleventh Amendment immunity. Part III then considers this controversy in the context of national bankruptcy law, where the conflict is particularly sharp and enduring, and the majorities on either side are razor thin. The Article concludes in Part IV with a look at the future of bankruptcy law and state sovereignty under the rule of Katz and suggests that Katz might not be such a radical departure from the Eleventh Amendment after all.

I. Bankruptcy and the Constitution

A. The Bankruptcy Clause

The Bankruptcy Clause, contained in Article I, Section 8, clause 4 of the Constitution, reads simply enough: "The Congress shall have ***386** power . . . [t]o establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States." [14]

There is little in the record of the history of the Bankruptcy Clause. [15] One known fact, however, is that one of the Framers' concerns was the patchwork of bankruptcy laws (or lack of them) among the states in the early republic. [16]

Emblematic of the Framers' concern was the disparate treatment between the debtors in the cases of James v. Allen [17] and Millar v. Hall. [18] In James, a debtor who had been released from prison in New Jersey traveled to Pennsylvania, where he was arrested for nonpayment of a Pennsylvania debt. [19] The Pennsylvania court ruled that the New Jersey discharge did no more than release the debtor from the county gaol where he was imprisoned, but did not authorize a subsequent discharge anywhere else. [20] The court in Millar, however, ruled the opposite, holding that a debtor discharged in Maryland could not thereafter be imprisoned for a Pennsylvania debt, since, having been "obliged to transfer his effects for the benefit of all his creditors . . . [the debtor was] deprived of every means of payment." [21]

In drafting the Bankruptcy Clause, the Framers intended for United States bankruptcy law to have expansive application, well beyond the limited purpose of insolvency statutes under English law. [22] English bankruptcy law, from the time of Henry VIII, was intended ***387** primarily to protect the interests of trade creditors, as debtors were considered to be criminals. [23] In contrast, United States bankruptcy law at an early point not only protected trade creditors against debtor fraud, but also "rescue[d] the honest but unfortunate insolvent from the oppression of a vindictive creditor." [24] As Justice Sutherland noted, "From the beginning, the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberalization in respect of the operation of the bankruptcy power." [25] That is still the focus of American bankruptcy law today. [26]

B. Federal Bankruptcy Statutes

1. Pre-Bankruptcy Code Acts

Chief Justice Marshall considered the scope of congressional power under the Bankruptcy Clause to be broad: "The peculiar terms of the grant [in the Bankruptcy Clause] certainly deserve notice. Congress is not authorized merely to pass laws, the operation of which shall be uniform, but to establish uniform laws on the subject throughout the United States." [27] Notwithstanding, Congress used this power sparingly during the first one hundred years of the republic and only in response to economic pressures.

The first law enacted pursuant to the Bankruptcy Clause was the Bankruptcy Act of 1800[28] ("Act of 1800"), passed by Federalists in the wake of the Panic of 1797.[29] The Act of 1800 expanded upon English ***388** law by including traders, bankers, brokers, and underwriters as lawful debtors in insolvency proceedings.[30] Although it eliminated debtor's prisons,[31] the Act of 1800 had little impact otherwise for most people and was repealed in 1803.[32]

The Bankruptcy Act of 1841[33] ("Act of 1841") followed the Panic of 1837.[34] The law added merchants and corporations to bankruptcy law coverage and, for the first time, provided for voluntary petitions and rehabilitation of the debtor.[35] In 1843, the same Congress that passed the Act of 1841 also repealed it.[36] During the year the Act of 1841 was in effect, however, there were 40,000 bankruptcy filings, representing one percent of the total adult male population of the United States.[37]

The nation's third bankruptcy law, the Bankruptcy Act of 1867[38] ("Act of 1867"), was passed in the aftermath of the Civil War.[39] The scope of persons that file bankruptcy was expanded to include almost all persons and corporations, and for the first time, a debtor was permitted to propose terms that would be binding upon creditors, if approved by a majority of creditors.[40] Congress repealed the Act of 1867 in 1872.[41]

***389** The Bankruptcy Act of 1898[42] ("Act of 1898") was the nation's first "permanent" bankruptcy law. The Act of 1898 established rules for corporate reorganization, which at that time was a new concept.[43] The law provided for an adversarial system in which referees played mostly an adjudicative function, with the process left mostly to the parties themselves.[44] Later, the 1938 Chandler Act[45] ("Chandler Act") introduced consumer repayment plans and gave referees authority to grant discharges.[46] The Chandler Act gave rise to an efficient bankruptcy bar administration, but many viewed the bankruptcy process as prone to collusion and obscure to outsiders.[47]

2. The Bankruptcy Code of 1978 and Recent Amendments

The Bankruptcy Code of 1978[48] ("Code") is the current national bankruptcy law. The Code accommodates individual, business, farm, railroad, and municipal bankruptcy.[49] The Code is fluid, with new sections added or existing ones modified as Congress deems necessary to respond to changing national needs. For example, when passed, chapter 11 of the Code had detailed provisions for corporate reorganization.[50] Section 1113,[51] however, which places restrictions on the ability of a business debtor to modify collective bargaining agreements, was added in 1984 in response to the Supreme Court decision in NLRB v. Bildisco & Bildisco.[52] Section 1114[53]

was included in 1988 after the ***390** LTV Corporation, upon filing bankruptcy, terminated the health and life insurance benefits of 78,000 retirees.[54] Finally, Congress added section 524(g)[55] in 1994 as a means to deal with future personal injury claims against business debtors arising from exposure to asbestos-containing products.[56]

For individual debtors, the Code reflects contemporary consumer spending and a debtor-friendly political ideology. The Code allows a choice between chapter 7 "liquidation" and chapter 13 "reorganization." Under chapter 7, the debtor turns over all non-exempt assets to the bankruptcy trustee.[57] The trustee then sells the assets to pay creditors,[58] and the debtor is discharged from all its unsecured debt.[59] State or federal exemptions, however, may allow a debtor to retain much or all of his or her personal property.[60] If the debtor is current on his or her obligations for secured debt (such as a mortgage or car payments), the debtor can keep the asset[61] and continue payments.[62] Some debts cannot be discharged. This includes most taxes,[63] spousal or child support obligations,[64] and debt incurred by fraud.[65] State or federal exemptions may allow a debtor to keep most or all of his or her property.[66] Under chapter 13, however, the debtor pays back a portion of his or her debt over time (up to five years) through a plan of reorganization[67] and may "cure" arrearages on secured debt during the plan.[68]

***391** In 2004, Congress enacted the latest change to bankruptcy law, the Bankruptcy Abuse Prevention and Consumer Protection Act[69] ("BAPCPA"). BAPCPA tightened restrictions for individual debtors filing chapter 7 bankruptcy, inter alia, by requiring debtors with income above certain statutory amounts to pay back at least a portion of their debt.[70]

C. Bankruptcy and the Supremacy Clause

1. The Supremacy Clause

The Supremacy Clause[71] is a defining attribute of United States federalism. It makes federal law superior to state laws that deal with the same subject matter. The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[72]

The effect of the Supremacy Clause is that in areas where Congress intends to legislate, federal law preempts state law.[73] As stated by Chief Justice Marshall, "acts of the State Legislatures . . . [which] interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution," are invalid under the Supremacy Clause.[74] More simply, state law that conflicts with federal law is "without effect."[75] ***392** This includes state law dealing with insolvency, debtors, and the rights of creditors.

In the absence of a national bankruptcy law, states were free to enact their own insolvency laws. The exercise of national bankruptcy power, not the mere existence of it, gives Congress exclusive right to legislate bankruptcy law.[76] In between the enactment and repeal of the several national bankruptcy laws, state bankruptcy laws were not repealed, but suspended. Upon repeal of the national bankruptcy law, state bankruptcy laws were again valid without further re-enactment.[77]

The supremacy of federal bankruptcy law is embodied in the landmark case, International Shoe Co. v. Pinkus.[78] In that case, a trade vendor, International Shoe, obtained a judgment in the amount of $463.43 in an Arkansas county court against Pinkus, an insolvent merchant.[79] Pinkus had some forty-six creditors and owed over $10,000, but his assets were less than $3,000.[80] Pinkus commenced a chancery action under the Arkansas insolvency law to declare himself an insolvent.[81] Arkansas statutes provided a much greater personal property exemption than the Act of 1898, which meant that Pinkus would keep more of his assets if his case was adjudicated under state law.[82] Moreover, Pinkus had been discharged in voluntary bankruptcy proceedings less than six years prior.[83] If the Act of 1898 applied, he could not have received another discharge before the expiration of six years, so the debt owed to International Shoe and other creditors would not be discharged.[84]

International Shoe filed suit in federal court, arguing that the Act of 1898 superseded the Arkansas bankruptcy law, and thus the chancery action was a nullity.[85] The Supreme Court found that the Arkansas bankruptcy law "operates within the field occupied by the . . . Act [of 1898]."[86] Therefore, the Court was compelled to strike down the Arkansas law.

> ***393** The power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States is unrestricted and paramount. The purpose to exclude state action for the discharge of insolvent debtors may be manifested without specific declaration to that end . . . . In respect of bankruptcies the intention of Congress is plain. The national purpose to establish uniformity necessarily excludes state regulation . . . . States may not pass or enforce laws to interfere with or complement the . . . Act [of 1898] or to provide additional or auxiliary regulations.[87]

Thus, according to the Supremacy Clause, [88] federal bankruptcy law must preempt state law where the effect of state law is to impede the full operation and purpose of federal bankruptcy law.

2. Bankruptcy Code Section 106

Section 106 of the Code [89] attempts to put state and non-state parties on parity by eliminating the defense of sovereign immunity for states and state agencies in bankruptcy. [90]

Section 106(a) eliminates state immunity as a defense to suit or process in bankruptcy, including proceedings to enforce the automatic stay, [91] treatment of leases and contracts, [92] proofs of claim, [93] effect ***394** of discharge, [94] discharge, [95] turnover of property of the estate, [96] and the trustee's lien avoidance powers, [97] such as avoidance of a preferential transfer. [98] Section 106(b) provides that if the government files a proof of claim, it waives sovereignty with respect to any claims arising out of the same occurrence from which the claim arose. [99] Pursuant to section 106(c), the debtor may assert a set-off to a claim or interest asserted by a governmental unit in bankruptcy. [100] Together, the provisions of section 106 clearly express Congress's intent to abrogate state immunity with respect to bankruptcy jurisdiction.

3. State Laws Incorporated into the Bankruptcy Code

The Code is highly amenable to state authority. Bankruptcy law is not, of itself, a source of property rights. Instead, it functions to re-adjust property rights that existed at the time that a bankruptcy was filed. [101] Thus, bankruptcy law looks to nonbankruptcy law to determine the existence of property of the estate. [102]

The Code frequently mandates the application of "nonbankruptcy law." For example, as provided in section 552, [103] the proceeds of property subject to a pre-petition security agreement are subject to the security agreement post-petition "to the extent provided by . . . applicable nonbankruptcy law." [104] Section 541(c)(2) mandates that a restriction on transfers of beneficial estates "that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title," even if the result is to reduce the amount of assets available to creditors. [105] Under section 365(c), state law will determine if a breach of contract occurred pre-petition, which may remove the contract as property of the estate and terminate a debtor's rights in the contract. [106] As provided in section 523(a)(5) and section 523(a)(15), state law will determine whether a divorce obligation is considered ***395** support or distribution of property, which can be critical in whether the obligation can be discharged in bankruptcy. [107] Although deference to individual state law often results in different outcomes to debtors under similar facts, the Code tolerates these differences where "nonbankruptcy law" applies. [108]

Even if the Code does not expressly reference "nonbankruptcy law" in a specific instance, bankruptcy courts almost always look to state law on any substantive legal issue. [109] Thus, a corporation that has been dissolved under state law may not resurrect itself by filing a petition in bankruptcy court, even though bankruptcy law does not prohibit this. [110]

The Code provides significant accommodation to the states by authorizing them to opt out of the federal exemption scheme. [111] The Code allows debtors to choose the federal exemptions set forth in section 522(d), [112] or the exemptions provided by the laws of the state in which they live. [113] The Code, however, provides that states may opt ***396** out of the federal scheme, thus limiting the debtor to state law exemptions. [114] Two-thirds of states have opted out and permit only state exemptions. [115]

A tort of recent vintage suggests the further intersection between bankruptcy law and state law. "Deepening insolvency" is a tort whereby corporate officers, directors, and auditors can be subject to liability for artificially attempting to prolong the life of an already insolvent company. "The premise underlying the deepening insolvency theory is that even an insolvent company has value, which could be salvaged if the company is liquidated or restructured in a timely manner." [116] To establish the cause of action, a plaintiff must prove that while the company was in the "zone of insolvency," actions by the directors and officers to continue the enterprise breached a fiduciary duty to creditors and the debtor itself. [117] Whether liability exists under a given set of facts depends upon state laws governing fiduciary duty. Some states do not even recognize the tort. [118]

***397** 4. State Laws in Conflict with the Bankruptcy Code

While the Code clearly preempts state insolvency laws, the Code may also preempt a state nonbankruptcy law if it interferes with the purposes of federal bankruptcy law.

An analysis of whether a federal statute preempts state law starts "with the assumption that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that [is] the clear and manifest purpose of Congress." [119] Justice Hugo Black in Hines v. Davidowitz, [120] stated:

> This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference . . . . In the final analysis . . . [o]ur primary function is to determine whether, under the circumstances of this particular case, [a challenged state statute] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. [121]

In the past, courts made preemption determinations by looking at the purpose of the state law in question, irrespective of its effects. In Kesler v. Department of Public Safety, [122] a Utah statute intended to promote automobile financial responsibility included a provision making judgments arising from automobile accidents non-dischargeable in bankruptcy. [123] A chapter 7 debtor challenged the law on the grounds that it frustrated the Act of 1898's purpose of giving a debtor a financial fresh start. [124] The Supreme Court upheld the Utah law because the purpose of the law was not "to aid collection of debts but to enforce a policy against irresponsible driving." [125] The Court reached this decision while admitting that the law left "the bankrupt to some extent burdened by the discharged debt" and in so doing, made "some inroad . . . on the consequences of bankruptcy." [126]

***398** Almost a decade after Kesler, the Court in Perez v. Campbell [127] abandoned the "purpose" test in favor of an "effects" test. [128] In 1956, the Arizona legislature adopted the Arizona Motor Vehicle Safety Responsibility Act [129] ("Arizona Act"). The Arizona Act required all motor vehicles registered in Arizona to be covered by a specified minimum level of liability coverage and provided that the license of a driver involved in an accident would be suspended if a judgment debt arising from the accident remained unpaid by the driver for more than sixty days after entry of such judgment. [130] The law also included a provision mandating that "a discharge in bankruptcy following the rendering of any such judgment shall not relieve the judgment debtor from any of the requirements of this article." [131] After the plaintiffs were involved in an auto accident, the other driver sued the plaintiffs and won a judgment of nearly $2500. [132] The plaintiffs filed a chapter 7 bankruptcy petition and listed the judgment as a dischargeable debt. [133] The debt was discharged, but Arizona suspended the plaintiffs' licenses and automobile registration in accordance with the Arizona Act. [134] The issue before the Supreme Court was whether a state, in enacting legislation to accomplish a legitimate public policy objective, could suspend the effect of a discharge under the Code as a means to achieve that objective. [135]

The Court held that deciding whether a state statute is in conflict with a federal one is "essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional ***399** question of whether they are in conflict." [136] The Arizona Act provided leverage for the collection of damages from drivers who admit negligence or are adjudicated negligent. [137] The primary purpose of federal bankruptcy law is to "give debtors 'a new opportunity in life, and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'" [138]

The Court expressly rejected the purpose test of Kesler, reasoning that such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply "publishing a legislative committee report articulating some state interest or policy--other than frustration of

the federal objective." [139] The Court invalided the Arizona Act, finding that "any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause." [140]

Since Perez, federal courts have held that state laws may not interfere with the full effect of bankruptcy discharge for public policy purposes. [141] For example, a state court was barred from proceeding with a foreclosure of a farm where the farmer had filed for bankruptcy and requested an extension of time in the bankruptcy court. [142] Federal bankruptcy law also discharged a debtor from a state court order directing the debtor to remediate a waste disposal site. [143] In Agnew v. Franchise Tax Board of California (In re Sharon Steel Corporation), [144] a major chapter 11 case, the court ruled that it had jurisdiction to determine the identity of the component members of a group for California franchise-tax purposes because section 106 provided for limited abrogation of sovereign immunity in bankruptcy cases. [145] More recently, ***400** in Sherwood Partners, Inc. v. Lycos, Inc., [146] the Ninth Circuit Court of Appeals ruled that section 544(b) of the Code, which allows a trustee to avoid a preferential transfer, preempts California's Assignment for the Benefit of Creditors. [147] States, of course, are bound by bankruptcy court discharge orders in the same way as any other creditor, and by other standard bankruptcy court rulings. [148]

5. Uniformity Theory of Bankruptcy Law

Central to the discussion of federalism and state sovereignty is the argument of uniformity--that the Bankruptcy Clause authorizes Congress to make "uniform laws" on the subject of bankruptcy, and that bankruptcy laws must be "uniform" and apply to states as equally as to all other creditors, in order to effectuate the purposes of bankruptcy. This argument is based upon Article I of the Constitution, which provides that Congress shall have the power to "establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States." [149] The use of the word "uniform" is key. In Federalist Number 32, Hamilton described how state sovereignty is abrogated where the Constitution "granted an authority to the Union, to which a similar authority granted to the States would be absolutely and totally contradictory and repugnant." [150] According to Hamilton, one example of this is the uniform powers of naturalization. [151] Thus, it can be concluded that by using the identical word, "uniform," in connection with the Bankruptcy Clause and in immediate proximity to the naturalization clause, the Framers intended that the congressional power of bankruptcy would also abrogate state immunity, as it did with the naturalization power. [152] The uniformity theory is not concerned with whether Article I per se abrogates state ***401** immunity. The use of the word "uniform" sets bankruptcy apart from the other Article I clauses. [153]

Moreover, uniformity does not mean just geographically uniform laws. It also means that bankruptcy law should be administered uniformly. Treating states as different from other creditors

would frustrate this purpose.[154] The uniformity theory is compelling because it offers the simplicity and consistency of treating state and non-state parties alike.

II. The Eleventh Amendment

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[155]

The meaning of the Eleventh Amendment is straightforward: states are immune from suit, even under federal law, absent their consent or a valid abrogation of their immunity by Congress.[156] Conversely, the Eleventh Amendment is not a bar to suits where the court determines that Congress clearly expressed its intent to abrogate state ***402** Eleventh Amendment immunity, and where Congress was authorized to do so.[157]

A. Chisholm v. Georgia on My Mind

Although many consider the concept of state sovereign immunity to be implicit in the American constitutional scheme,[158] the Eleventh Amendment owes its existence to Chisholm v. Georgia.[159] In 1792, Alexander Chisholm, as executor of the estate of Robert Farquhar, sued the State of Georgia in federal court to recover monies owed to Farquhar for materials supplied to Georgia during the Revolutionary War.[160] With the war won, and the memory of marauding British troops receding, Georgia reneged on its war debt and refused to appear in the case on the grounds that it was sovereign.[161] The district and appellate courts found in favor of Chisholm, and the Supreme Court affirmed, holding that Article III, Section 2 of the Constitution per se abrogated state immunity and granted federal courts jurisdiction to hear disputes between citizens and states.[162]

The popular reaction to Chisholm was largely unfavorable, since it subjected states with war debt to suit by creditors in federal court. Legislation to enact the Eleventh Amendment was introduced the next day in the United States House of Representatives, and the Massachusetts legislature formally declared the ruling "repugnant to the first principles of a federal government."[163] The Georgia House of Representatives went even further, decreeing that anyone attempting to enforce ***403** the Chisholm decision would be guilty of a felony and suffer death by hanging "without benefit of clergy."[164]

B. The Eleventh Amendment in the Courts

A suit comes under Eleventh Amendment scrutiny when either "the judgment sought would expend itself on the public treasury," or "the effect of the judgment would be 'to restrain the

Government from acting, or compel it to act.'" [165] The Eleventh Amendment insulates states from "private parties seeking to impose a liability [in federal court] which must be paid from public funds in the state treasury." [166]

The scope of state sovereignty under federal statutes has been a contentious issue in constitutional litigation, and there is currently no consensus. The history of Eleventh Amendment litigation suggests that the border between federalism and state sovereignty is far from established.

1. Hans v. Louisiana

Contemporary Eleventh Amendment law begins with Hans v. Louisiana. [167] In Hans, a citizen of Louisiana owned bonds issued by the State of Georgia. [168] The Georgia legislature proposed a change in the state constitution that would have re-directed the interest on the bonds to defray state expenses. [169] Hans sued the State of Georgia, alleging that such a change in the state constitution would render his bonds worthless, thereby impairing the obligations of a contract in ***404** violation of Article I, Section 10 of the United States Constitution. [170] The issue before the Supreme Court in Hans was that the Eleventh Amendment forbids citizens of one state from suing another state, but says nothing about citizens suing their own state. [171] The Court made little effort to establish a historical basis for state immunity, but simply concluded that immunity of the national government and of states "is called upon by the highest demands of natural and political law." [172]

2. Ex Parte Young

Ex parte Young [173] somewhat pared back the sweeping rule of Hans and in so doing, created a legal fiction that is still in use today. In 1907, Minnesota passed laws that restricted the tariffs that railroads could charge for carrying freight within the state. [174] The laws imposed heavy penalties for violations, including fines and jail. [175] Railroads strongly opposed the law, so a number of railroad company shareholders filed suit in federal court against the Attorney General of Minnesota, Edward T. Young, to enjoin him from enforcing the law. [176] Young moved to dismiss, asserting that the Eleventh Amendment barred the federal court from hearing the case. [177] The federal court rejected Young's argument and issued the injunction against enforcing the law. [178] The next day, Young filed in state court to enforce the law. [179] The federal court held Young in contempt of court and commenced proceedings to imprison him. [180] In response, Young filed a writ of habeas corpus with the Supreme Court. [181]

The case exposed a tension between the Fourteenth Amendment and the Eleventh Amendment. The railroads argued that the Minnesota law violated the Fourteenth Amendment by making freight rates so low that it amounted to a taking in violation of the right to due ***405** process. [182] On

the other hand, the Supreme Court had recently held in Hans that the Eleventh Amendment bars federal courts from hearing suits by citizens against their own states. [183]

To resolve the dilemma, the Court reasoned that when a state official does something that is unconstitutional, he or she must be acting as an individual, since, under the Supremacy Clause, states are forbidden to violate the Constitution. [184] Accordingly, a state official can act simultaneously in dual capacities: (1) as a non-state actor when doing the unconstitutional act, because the Fourteenth Amendment only prohibits unconstitutional state action; and (2) as an individual when sued to enjoin the state action, because a state cannot be sued. [185] Thus, pursuant to Ex parte Young, sovereign immunity is not a bar to actions seeking prospective injunctive relief against state officials to prevent a continuing violation of federal law. [186]

3. California v. Deep Sea Research, Inc.

California v. Deep Sea Research, Inc. [187] was the next significant development in the law of sovereign immunity. In 1994, Deep Sea Research located a valuable shipwreck four miles off the California coast. [188] The company filed a declaratory judgment action in federal court to adjudicate its rights to the wreck. [189] The State of California entered a limited appearance to dismiss the complaint for lack of jurisdiction and claimed title to the wreck under federal and California statutes purporting to grant the state title to abandoned shipwrecks. [190] The district court rejected the claim of immunity and the Ninth Circuit affirmed. [191] The issue before the Supreme Court was whether the ***406** Eleventh Amendment barred adjudication of the rights to a res when the res was not in the state's possession. [192]

The Court unanimously ruled that the Eleventh Amendment did not bar the federal district court from adjudicating California's rights in a shipwreck. The Court noted that under the Constitution, Article III, Section 2, clause 1, the judicial power of federal courts extends to all cases of admiralty and maritime jurisdiction, but that the Eleventh Amendment constrains the jurisdiction of federal courts. [193] There was no conflict in this case, however, because the res was not in the state's possession. [194] Owing to federal jurisdiction over admiralty, the federal court has jurisdiction in in rem admiralty actions where the state is not in possession of the disputed property. [195] This case stands for the rule that if the subject of jurisdiction is enumerated within the powers of Congress, federal courts have jurisdiction to adjudicate the state's interests in a res, even if the courts do not have authority to compel the state to hand over the res.

4. Pennsylvania v. Union Gas Company

Two major battles in the struggle between federalism and state sovereignty were fought just six years apart and on almost identical ground. Pennsylvania v. Union Gas Co. [196] held that Congress

had authority to abrogate state immunity under the Commerce Clause.[197] Seminole Tribe of Florida v. Florida[198] held that the Eleventh Amendment barred Congress from abrogating state immunity under the Indian Commerce Clause.[199] While Seminole Tribe was a slim five-to-four decision, there was no majority in Union Gas. The lack of a definitive consensus in these cases underscores the volatile nature of federalism versus state sovereignty.

Union Gas Co. dealt with whether Congress could properly subject states to suit by private individuals under the provisions of the Comprehensive Environmental Response, Compensation, and Liability Act ***407** of 1980[200] ("CERCLA"), enacted pursuant to the Commerce Clause.[201] A four-justice plurality, with Justice Stevens joining only in the result, upheld the private right of action under CERCLA on the grounds that "the States granted a portion of their sovereignty when they granted Congress the power to regulate commerce."[202] The Court cited Fitzpatrick v. Bitzer,[203] which held that Congress may subject states to suits for money damages in federal court when legislating under the Fourteenth Amendment.[204] "Such enforcement [of the prohibitions of the Fourteenth Amendment] is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact."[205] On this reasoning, the Court concluded, "[e]ach of these points is as applicable to the Commerce Clause as it is to the Fourteenth Amendment,"[206] thus equating the Commerce Clause with the Fourteenth Amendment, with both allowing for abrogation of state immunity. The dissent castigated the plurality, asserting that the Eleventh Amendment and Hans clearly forbade abrogation of state immunity pursuant to the Commerce Clause.[207]

5. Seminole Tribe of Florida v. Florida

The case of Seminole Tribe directly contradicted the plurality opinion in Union Gas Co. and, by its uncompromising approach, was clearly intended by the majority to be the definitive interpretation of the Eleventh Amendment.

***408** Seminole Tribe concerned the Indian Gaming Regulatory Act[208] ("IGRA"), enacted by Congress under the Indian Commerce Clause.[209] The IGRA allows an Indian tribe to conduct gaming activities, but only in conformance with a valid pact between the tribe and the state in which the gaming activities are located.[210] The IGRA requires states to negotiate in good faith with a tribe to formulate the compact[211] and provides that a tribe may sue a state in federal court to compel performance if the state refuses to negotiate.[212] After Florida allegedly refused to conduct negotiations for tribe-related gaming activities, the Seminole Tribe filed suit against Florida.[213]

The case hinged on two issues: first, whether Congress abrogated state immunity through the IGRA, and second, whether Congress acted pursuant to a valid exercise of power.[214] Since the

language abrogating state immunity was clear, the Court focused on the constitutional issue of whether Congress has power to abrogate state immunity.

Writing for a five-to-four majority, Justice Rehnquist argued that state immunity has its roots in the common law of England and in the "fundamental 'jurisprudence of all civilized nations.'" [215] The majority found that congressional abrogation of immunity had been upheld in only one case, Union Gas Co., which the Court characterized as a "solitary departure from established law." [216] The Court held that Article I does not give Congress power to abrogate state immunity, and as the Fourteenth Amendment was ratified after the Eleventh Amendment, Congress may only abrogate state immunity to the extent necessary to protect rights guaranteed under the Fourteenth Amendment. [217]

In an extraordinarily lengthy dissent, Justice Souter was not persuaded that the Framers intended federal law to be subordinate to state sovereign immunity. Rather, states would be part of a system, and power would be divided between the states and the Nation, with "the ***409** [Nation] to be invested with its own judicial power and the right to prevail against the States whenever their respective substantive laws might be in conflict." [218]

Before Katz, most bankruptcy courts followed this rule from Seminole Tribe. [219] Several bankruptcy courts creatively endeavored to find that the Code was enacted pursuant to the Fourteenth Amendment, [220] but this was clearly a minority position. [221]

6. Alden v. Maine

A discussion on the Eleventh Amendment and bankruptcy jurisdiction would be incomplete without a review of Alden v. Maine. [222] Coming on the heels of Seminole Tribe, and not long before Katz, the case shows just how deeply entrenched the opposing camps had become.

In Alden, a group of probation officers filed suit against their employer, the State of Maine, for violating the Fair Labor Standards Act of 1938 ("FLSA"). After being dismissed on the grounds of sovereign immunity from federal court, the officers then filed the same action in state court, which likewise dismissed the suit on the basis of sovereign immunity. [223] The Maine Supreme Court upheld the lower court's decision. [224] In a five-to-four ruling, the Supreme Court affirmed. [225]

For the majority in Alden, state sovereign immunity is inherent in the Constitution and does not arise from the Eleventh Amendment. [226] Well before the Constitution was drafted, the Framers assumed that states naturally possessed "residual and inviolable sovereignty." [227] Thus, the majority in Alden concluded,

> ***410** [T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Constitution or certain constitutional Amendments. [228]

The minority in Alden, however, could find no evidence that state immunity was immutable to the Framers. The dearth of notes or debate on the issue among the Framers, [229] and the fact that two of the four-justice plurality in Chisholm were participants in the Constitutional Convention (as was Chisholm's attorney, Edmund Randolph), [230] led the dissent to conclude that state sovereign immunity was anything but sacrosanct. Pre-Constitution, some states did not even consider themselves to be immune from suit, while other states were ambivalent. [231] Moreover, there was at least some popular sentiment at the time that no sovereign should be immune from suit by citizens. [232] The dissent concluded that sovereign immunity was considered by the Framers to be, at most, a right under common law, not natural law. [233] Such a right was not properly amenable to contemporary circumstances, which were unlike anything that existed at the time of the Framers. [234]

7. Ex Parte Young Meets Bankruptcy: In re Dairy Mart

In re Dairy Mart [235] extended Ex parte Young's sovereign immunity exception. Dairy Mart operated a chain of convenience stores, some of which sold gasoline. [236] The gasoline was stored under the gas pumps in underground tanks, which were subject to the Resource Conservation and Recovery Act [237] ("RCRA"). The State of Kentucky administered a fund to assist owners of underground tanks to comply ***411** with RCRA cleanup requirements, but the fund program had a strict claim application deadline of October 12, 2001. [238]

Dairy Mart filed for chapter 11 bankruptcy reorganization on September 24, 2001 in the Southern District of New York. [239] Twenty-two of its Kentucky stores were eligible for assistance under the fund, but Dairy Mart missed the claim deadline by four days, and its claims were denied. [240] Dairy Mart asserted that its claims should be approved because section 108(b) of the Code automatically extends any nonbankruptcy claim filing deadline for an additional sixty days from the initial bankruptcy filing date. [241] That would have given Dairy Mart until November 24, 2001 to file its claims.

Dairy Mart brought an adversary proceeding to compel payment of the claims.[242] Kentucky state officials filed a motion to dismiss on the grounds of sovereign immunity, arguing that the remedy sought by Dairy Mart went beyond the Ex parte Young rule of allowing suits to enjoin unconstitutional conduct. The state officials argued that the effect of allowing the bankruptcy court to rule on the injunction would be to require the State of Kentucky to pay money to plaintiffs from the state treasury.[243] Thus, the action was directed, not just towards state officials, but the State of Kentucky itself. The bankruptcy court denied the motion on the grounds that the suit sought injunctive relief to enjoin violation of federal law, thereby falling within the Ex parte Young exception to Eleventh Amendment sovereign immunity.[244] The district court affirmed.[245]

The Second Circuit found that the Eleventh Amendment was not absolute. "In tension with the immunity of the states is the supremacy of the Union and its Constitution."[246] The Second Circuit noted that payment of state funds, an "ancillary effect" of proper injunctive relief, ***412** was "a permissible and often an inevitable consequence" of the Ex parte Young doctrine.[247] In this case, eligibility for the state funds was entirely within the purview of state law--ordering injunctive relief that the claim be accepted was not an order that the State of Kentucky pay money.[248] It could still refuse to pay the claims, if allowed under state law.[249] The Second Circuit concluded that "the Supremacy Clause demands that any rights of Dairy Mart under the bankruptcy code must be equitably met, and the payment is simply an ancillary effect of a properly issued injunction."[250]

The court in Dairy Mart did not actually abrogate state immunity--Kentucky had already provided for payment of the funds to eligible citizens. Rather, the court invoked its bankruptcy powers against Kentucky to restore the debtor's eligibility for the funds. This is conceptually different from a case in which a bankruptcy court orders a state to restore a preferential payment. In the latter situation, the debtor's interest only exists because of the Code. The result, however, is the same: state money is paid to a citizen as a consequence of the exercise of bankruptcy jurisdiction. It is almost certain that the Seminole Tribe majority would not have approved of this outcome if they had reviewed the case.

III. Conflict at the Border: Central Virginia Community College v. Katz

A. Bankruptcy Opinions Leading up to Katz

The road leading to Katz is a study in judicial progression and shifting court majorities. It mirrors the judicial gyrations of the Eleventh Amendment.

1. Hoffman v. Connecticut Department of Income Maintenance

The Court's decision in Hoffman v. Connecticut Department of Income Maintenance[251] shows the Court's tentative approach to state abrogation of immunity. In Hoffman, a chapter 7 trustee in a

bankruptcy case filed two unrelated adversarial proceedings against the State of Connecticut. [252] One proceeding, filed pursuant to section 542(b) of ***413** the Code, [253] demanded "turnover" of Medicare payments made for services performed by a bankrupt nursing home. [254] The other action was brought pursuant to section 547 of the Code to recover a "preferential" transfer of funds paid for state taxes, interest, and penalties within ninety days before the bankruptcy filing. [255] Connecticut filed a motion to dismiss both complaints on the grounds of sovereign immunity. [256]

The bankruptcy court ruled that by enacting section 106(c) of the Code, Congress abrogated state sovereign immunity in bankruptcy litigation for turnover and preference actions. [257] The district court reversed, [258] and the court of appeals affirmed, holding that section 106(c) abrogates state immunity to the extent necessary to determine a state's right in property of the estate, but not to the extent of recovering a money judgment or other property from a state. [259] The Supreme Court affirmed the lower court decision, but without deciding the constitutional validity of section 106. [260] Instead, after minutely explicating the language of section 106(a) and (b), the Court concluded that it was "unlikely" that Congress intended "broad abrogation" of the Eleventh Amendment. [261] Rather, section 106(c) was "more indicative of declaratory and injunctive relief than of monetary recovery." [262] In cases involving possible abrogation of the Eleventh Amendment, Congress's intent to do so must be "unmistakably clear in the language of the statute." [263]

Such was the five-to-four majority opinion. However, in their concurring opinions, both Justices Scalia and O'Connor flatly asserted that Congress had no power under the Bankruptcy Clause to abrogate the states' Eleventh Amendment immunity. [264] Justice Scalia would have affirmed the Second Circuit decision "without the necessity of considering whether Congress intended to exercise a power it did not ***414** possess." [265] In contrast, Justice Stevens wrote in his dissenting opinion that the legislative history showed that the drafters of the Code were "well aware of the value to the bankruptcy administration process of a waiver of federal and state sovereign immunity." [266]

Congress responded to this decision, [267] by strengthening the language of section 106(c) to more clearly express the intent to abrogate state sovereignty in bankruptcy litigation. [268]

2. Tennessee Student Assistance Corporation v. Hood

The case of Tennessee Student Assistance Corp. v. Hood, [269] a seven-to-two decision, was a critical stepping-stone to Katz, although decided upon far narrower grounds. In Hood, a bankruptcy debtor owed student loans to a Tennessee state student loan agency. [270] Ordinarily, government-guaranteed student loans are not dischargeable in bankruptcy unless the debtor can demonstrate

that the debtor and any dependents would suffer "undue hardship" if required to repay the loans.[271] The debtor filed a complaint against the state agency seeking a hardship discharge, and the agency moved to dismiss the complaint for lack of jurisdiction.[272] The bankruptcy court denied the motion, holding that, pursuant to section 106(a) of the Code, the Bankruptcy Clause gave Congress the power to abrogate state sovereignty.[273] The district courts and Sixth Circuit affirmed.[274]

The Supreme Court also affirmed, but on different grounds.[275] Justice Rehnquist, writing for the majority, reasoned that the discharge ***415** of a debt by a bankruptcy court is an in rem proceeding, and that a bankruptcy court has exclusive jurisdiction over a debtor's property, wherever located.[276] Because the court's jurisdiction is premised upon the res, a nonparticipating creditor cannot be subjected to personal liability.[277] Thus, a debtor is not seeking money damages or other affirmative relief by filing a complaint for discharge of a student debt--he seeks only the discharge of the debt.[278] The fact that Federal Bankruptcy Rules[279] require a bankruptcy court to issue process was not an "indignity to the sovereignty of a State" because it was only a procedural modus to bring the issue before the bankruptcy court.[280] For the dissent, even an adjudication of discharge of a state debt violated the Eleventh Amendment, because "the State is compelled to either subject itself to the Bankruptcy Court's jurisdiction or to forfeit its rights."[281]

Numerous bankruptcy courts followed the ruling in Hood.[282] In Flores v. Illinois Department of Public Health,[283] a chapter 7 debtor filed an adversary proceeding to determine the dischargeablity of a scholarship obligation owed to Vermont.[284] Vermont filed a motion to dismiss based on sovereign immunity.[285] The bankruptcy court denied the motion, pursuant to Hood, and suggested that the Supreme Court in Seminole Tribe "painted its picture of sovereign immunity . . . with an overly broad brush."[286]

In Florida Furniture Industries, Inc. v. Maheffey (In re Florida Furniture Industries, Inc.),[287] the court denied the motion of a taxing authority to dismiss a complaint for determination of a tax liability.[288] Citing ***416** Hood, the court ruled that since the res at issue in the case--a tax liability--is not in possession of the state, the court's action would not require in personam jurisdiction against the state.[289]

The bankruptcy court in Georgia Higher Education Assistance Corp. v. Crow (In re Crow)[290] drew a distinction between adjudicating rights to a res in the debtor's possession, and ordering affirmative relief for money damages against a state. In In re Crow, the court rejected a motion by a state agency to dismiss the debtor's student discharge complaint, but dismissed the debtor's count for wrongful damages for collection efforts instead.[291] "Because count two seeks affirmative relief from the state through a coercive judicial process, the bankruptcy court's jurisdiction over it is

premised on the persona of the state, not on the res of the debtor's property. Because jurisdiction is in personam, Eleventh Amendment concerns are not obviated by Hood." [292]

3. Official Committee v. Public Utilities Commission (In re 360networks (USA), Inc.)

In Official Committee v. Public Utilities Commission (In re 360networks (USA), Inc.), [293] the court considered whether the New York Public Utilities Commission ("NYPUC") was subject to a lawsuit for the return of a preferential transfer under the preference avoidance provisions of section 547. [294] The bankruptcy court, citing Hood, ruled that its in rem jurisdiction allowed it to "determine all claims that anyone . . . has to the property or thing in question" and that an in rem proceeding is "one against the world . . . to establish an unquestionable title to the res." [295] The court did not exercise in personam jurisdiction against New York or its agencies or officials, since they were not compelled to appear, and no personal liability would be created. [296] ***417** Rather, "the power of the court [was] limited . . . to the disposition of the property." [297] Therefore, since the bankruptcy court has in rem jurisdiction over the property of the debtor, "it has in rem jurisdiction to decide issues involving that property, notwithstanding a State's sovereign immunity." [298] Since there was no pending motion under section 550 to compel return of the money, the bankruptcy court could rule that the transfer was avoidable without ruling at the same time that New York had to return the money. [299]

360networks was not the first case in which a court confronted the difference between the authority to declare the status of property of the estate, and the authority to enforce its declaration against a state. In Suhar v. Burns (In re Burns), [300] the court stated, "The fact that avoidance and recovery are distinct does not mean that avoidance cannot trigger recovery, but it does suggest that avoidance need not always trigger recovery." [301] Similarly, in United States Lines, Inc. v. United States (In re McLean Industries, Inc.), [302] the court stated that a bankruptcy court has power to determine that a transfer is avoidable under section 547, even if it lacks power to order affirmative relief. [303] The bankruptcy ***418** court in Bliemeister v. Industrial Commission of Arizona (In re Bliemeister), [304] however, foresaw the arguments to be made in Katz and concluded that the states had surrendered their sovereignty to bankruptcy jurisdiction when they ratified the Bankruptcy Clause.

B. Central Virginia Community College v. Katz

When confronted with the ominous prospect of having to order the NYPUC to actually do something (pay back the debtor's money) the bankruptcy court in 360networks did what any courageous federal court would do when faced with a challenge--it left the question for another court to decide. The issue appeared again two years later in Katz. Partisans of expanded bankruptcy powers saw a victory for their view.

Wallace's Bookstores, Inc. ("WBI") is an American saga. The business was founded by Wallace G. Wilkinson, who dropped out of college in 1960 to start a used bookstore. [305] WBI ultimately grew into one of the nation's largest retailers of new and used college textbooks, with more than ninety-one locations on sixty college campuses around the country. [306] In 1987, Wilkinson, then a political unknown, used his ***419** considerable financial resources to fund his candidacy in the Democratic primary for governor of Kentucky, including hiring political consultant James Carville. [307] His plan to introduce a state lottery was popular with voters, and after winning the primary against a field that included two former Kentucky governors and a former lieutenant governor, Wilkinson went on to the defeat the Republican nominee in the fall election by a landslide. [308]

Ethics concerns, however, soon dogged his administration, which saw investigations of his overseas business dealings (culminating in an audit by Italian tax police), state contracts awarded to companies contributing to his wife's political war chest, charges that a company he owned conspired to buy stolen books, and prison time for his nephew on corruption charges. [309] At that time, the Kentucky Constitution prohibited a governor from serving consecutive terms. [310] Not gauging the political winds very astutely, Wilkinson pushed for an amendment to allow gubernatorial succession, grandfathered to include him. [311] When the General Assembly refused to pass the proposed amendment, Wilkinson's wife, Martha Wilkinson, announced her candidacy for the 1991 Democratic nomination to replace him, but she withdrew from the primary. [312] Diagnosed with lymphoma, Wallace Wilkinson retired from public life at the end of his term. He died in 2002. [313]

WBI suffered a similar fall from grace. Once valued at up to $450 million, creditors of the company filed an involuntary chapter 7 bankruptcy petition against WBI on February 5, 2001, seeking immediate liquidation of the assets of WBI and affiliated companies. [314] Two weeks later, WBI and its subsidiaries filed to convert the cases to voluntary chapter 11 cases, jointly administered in the Bankruptcy Court for the Eastern District of Kentucky. [315] A plan of liquidation was approved a year later, and the bankruptcy court appointed Bernard ***420** Katz, an accountant, to serve as liquidating supervisor to oversee the orderly liquidation of assets. [316]

One of Mr. Katz's duties as trustee was to investigate and recover all "preferential transfers" made by WBI to creditors within the ninety days immediately preceding the bankruptcy filing. Several hundred of these "preference" actions were ultimately filed in the case. One of these was Katz v. Central Virginia Community College, filed on February 12, 2003. [317] The complaint alleged that the debtors made preferential transfers to the college in the amount of $63,387. [318] The complaint demanded that the transfers be avoided pursuant to section 547 of the Code and recovered by the trustee pursuant to section 550. [319]

Central Virginia Community College ("CVCC") filed a motion to dismiss the adversary complaint.[320] CVCC argued that under the rule of Seminole Tribe, section 106 was unconstitutional as a violation of state sovereignty, to which the State of Virginia never consented.[321]

The bankruptcy court denied CVCC's motion to dismiss, and the district court and Sixth Circuit affirmed, all on the basis of the Sixth Circuit's decision in Hood.[322] The Court granted certiorari in Katz in order to consider the question left open in Hood: whether Congress's attempt to abrogate state sovereign immunity in section 106(a) was valid.[323]

In the same way that Seminole Tribe and Alden were premised upon detailed historical grounds, the majority in Katz took pains to promulgate its own careful version of the history of the Bankruptcy Clause and state immunity. The Court began by noting that bankruptcy jurisdiction "at its core, is in rem."[324] Such jurisdiction "does not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction."[325] Still, in modern times as well as in the eighteenth century, the jurisdiction of courts in adjudicating rights to property of a bankrupt ***421** estate must naturally include "the power to issue compulsory orders to facilitate the administration and distribution of the res."[326]

The Court presumed that the Framers were familiar with the contemporary legal context at the time they adopted the Bankruptcy Clause,[327] and that the Framers drafted the Bankruptcy Clause with full knowledge of what was necessary to create an effective national bankruptcy regime. Thus, the Court concluded that in ratifying the Constitution, the States abrogated their sovereign immunity to the extent necessary to implement that regime.[328]

The Court then surveyed the status of bankruptcy before the Constitution to support its interpretation that the Framers intended to imbue the Bankruptcy Clause with broad powers in order to effectuate a national bankruptcy regime. For example, the Court noted the disparate results of James v. Allen[329] and Millar v. Hall,[330] which posed a genuine impediment to travel and commerce in the early republic.[331]

It was against this backdrop that the Framers agreed that Congress should have the power to establish "uniform Laws on the subject of Bankruptcies."[332] Although the Framers' immediate interest may have been to avoid unjust imprisonment for debt and to make federal bankruptcy discharge enforceable in every state, "the power granted to Congress by that Clause is a unitary concept rather than an amalgam of discrete segments."[333] Thus, the Framers realized that an effective bankruptcy regime would require more than "simple adjudications of rights in the res."[334] English law, for example, as well as the first United States bankruptcy law, gave courts and commissioners the power to force third parties to turn over property of the estate and to issue

writs of habeas corpus directing states to release debtors from prison.[335] Accordingly, "those who crafted the Bankruptcy Clause would have understood it to give Congress the power to authorize courts to avoid preferential transfers and to recover the transferred property."[336] To the extent that such powers ancillary to the ***422** bankruptcy court's in rem jurisdiction may infringe upon state sovereign immunity, "the States agreed in the plan of the Convention not to assert that immunity."[337]

As further proof that the states consented to broad abrogation of immunity under the Bankruptcy Clause, the Court noted that the Act of 1800, the country's first bankruptcy law, included a provision granting federal courts the power to issue habeas corpus writs directing states to release imprisoned debtors.[338] This was extremely significant since Congress passed the Act of 1800 just five years after the ratification of the Eleventh Amendment in 1798, when national sentiment was strongly in favor of states' rights. Yet there was no objection to the bankruptcy legislation or grant of habeas corpus based upon infringement of sovereign immunity. In addition, section 62 of the Act of 1800 specifically exempted debts owed to the United States, "or to any of them" from bankruptcy discharge.[339] The fact that the statute had to expressly carve out this exemption in favor of states suggests that states were otherwise assumed to be fully subject to the Act of 1800.[340] Taken together, the Court reached the "ineluctable conclusion" that "States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the in rem jurisdiction of the bankruptcy courts."[341] In light of this history, the enactment of section 106(a) "was not necessary to authorize the Bankruptcy Court's jurisdiction over these preference avoidance proceedings."[342]

The Court endeavored to clarify that the decision does "not mean to suggest that every law labeled a 'bankruptcy law' could, consistent with the Bankruptcy Clause, properly impinge upon state sovereign immunity."[343] Presumably, the door was open for review of bankruptcy laws in the future. The Court's decision was that under the authority of the Bankruptcy Clause, Congress could determine whether states should be amenable to such proceedings.[344]

In dissent, Justice Thomas argued that nothing in Article I indicates an intention to abrogate state sovereignty.[345] Citing Seminole ***423** Tribe and Alden, he found no reason to override "settled doctrine" that Article I "cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."[346] Judge Thomas also found fault with the Court's historical review, opining that the scant attention paid to bankruptcy language in adopting the Constitution, and the twelve-year delay in passing the first national bankruptcy law after the Constitution was ratified, indicate that there was very little concern in the early republic for a national bankruptcy law.[347] As for uniformity, the remedy intended by the Framers to redress the refusal of one state to recognize a bankruptcy discharge from another state is the Full Faith and Credit Clause,[348] not the authorization of private suits against the States.[349] Finally, Justice Thomas found disingenuous the Court's determination that recovery of assets under section 550 was properly ancillary to in

rem authority.[350] For Thomas, the result of Katz was to effectively overrule Seminole Tribe. "That would be wrong," he concluded, "but at least the terms of our disagreement would be transparent."[351]

Katz is not a direct refutation of Seminole Tribe. Seminole Tribe held that sovereign immunity is abrogated if a state consents to suit or if Congress abrogates it by an express statement made pursuant to a valid grant of congressional power.[352] Rather than moor its decision on a finding that section 106 is constitutionally valid, the Katz Court found that Florida had consented to suit under the Code through ratification of the Bankruptcy Clause.[353]

The Katz decision has been followed in subsequent cases. In Chattanooga State Technical Community College v. Johnson (In re North American Royalties, Inc.),[354] the bankruptcy court denied a motion to dismiss a bankruptcy preference claim, finding that as determined in Katz, the state of Tennessee gave up its right to assert sovereign immunity to preference suits when it ratified the Bankruptcy Clause.[355] In Florida Department of Revenue v. Omine (In re Omine),[356] the district court affirmed ***424** the bankruptcy court award of damages and sanctions against the Florida Department of Revenue ("DOR"), after the DOR repeatedly violated the automatic stay by attempting to collect a debt for repayment of public assistance money paid to the debtor's ex-wife and children.[357] As sanctions for its violation of the stay, however, the bankruptcy court discharged the remainder of the debt owed to the DOR and ordered it to pay the debtor $1000 in fines and $1600 for his attorneys fees.[358] Citing Katz, the district court held that actions to force a creditor to honor the automatic stay are necessary to enforce the bankruptcy court's in rem jurisdiction.[359]

IV. Conclusion: What Will Katz Drag In? The Future of State Sovereignty in Bankruptcy

State law will continue to act as the primary substantive law of bankruptcy, both because as a practical matter, there is little federal common law, and because many provisions of the Code expressly incorporate state substantive law. In this sense, state sovereignty largely prevails. State authority, however, gives way to bankruptcy jurisdiction in three situations: (1) when federal bankruptcy law preempts state insolvency law under the Supremacy Clause; (2) when a state law that is not specifically a bankruptcy law has the effect of preempting federal bankruptcy law; and (3) when state sovereignty is abrogated because it conflicts with provisions of federal bankruptcy law. Under the present Code, the restrictions on state sovereignty are set forth in section 106.[360] The rationale behind these restrictions is to eliminate the difference between state and non-state actors for purposes of defining property of the bankruptcy estate and administering the estate.

The first two elements are firmly established in American constitutional law. However, given the debate within the Court, as characterized by the opposing-- and slim--majorities in Seminole Tribe and Katz, abrogation of state immunity under the Bankruptcy Clause is clearly not as

established under the law. For the majority in Seminole Tribe (and like-minded jurists), the boundary between state sovereignty and federal bankruptcy jurisdiction is fixed--the reach of bankruptcy law ends where the state becomes subject to suit for any reason, whether in bankruptcy court or elsewhere, except pursuant to the Fourteenth ***425** Amendment.[361] In contrast, the majority in Katz concluded that states surrendered their sovereign immunity when they ratified the Bankruptcy Clause. The Katz decision suggests that in the future, any exercise of bankruptcy jurisdiction over the state can be defended upon the principal that such jurisdiction is ancillary to the purposes of the bankruptcy power.

Katz abrogates state immunity as to the process of bankruptcy. This very fact is itself abhorrent to the majority in Seminole Tribe. The rule in Katz, however, is not likely to cause a fundamental change in the process or substance of bankruptcy. Katz does not create any new rights under state law. For example, by filing bankruptcy, a debtor does not suddenly gain the right to sue a state for a tort liability that would otherwise be barred by sovereign immunity under nonbankruptcy law. Where a cause of action arises solely under state law, it does not offend the preemption doctrine to bar suits against state actors.

A tort, or any other state-based cause of action, is fundamentally different from a cause of action that exists only in bankruptcy and would not exist but for bankruptcy, such as preference avoidance actions, turnover proceedings, or discharge litigation. Where the jurisdictional basis is bankruptcy law, the rule from Katz is that sovereign immunity cannot be used to differentiate a state actor from a non-state actor.[362] Thus, Katz will most heavily impact the procedural aspects of bankruptcy, and not the substantive aspects.

To be sure, Katz is radical because it sweeps away a state's defense to a bankruptcy action. It establishes a fundamental exception to the Eleventh Amendment, similar to Ex parte Young,[363] and one that will be used far more frequently. But no substantive rights will be created by Katz. The case of Dairy Mart[364] is an example of this. The right to an environmental clean-up subsidy from the State of Kentucky was strictly a state-law right--it was not a right that arose because of the debtor's bankruptcy, nor was it a cause of action created by any surrender of state sovereignty. The law of Kentucky already provided the subsidy--the debtor was merely late in filing for it under the state law.[365] Bankruptcy law intervened only to enforce the Code provision of tolling a ***426** regulatory statute for sixty days.[366] The decision in Dairy Mart did not create an interest that would otherwise not have existed.

Nor is the Katz decision at odds with the thoughtful opinion of Justice Sutherland in Continental Bank v. Rock Island Railway Co.,[367] who reviewed the several bankruptcy acts and codes enacted since the ratification of the Constitution, and concluded:

> Taken altogether, they demonstrate in a very striking way the capacity of the bankruptcy clause to meet new conditions as they have been disclosed as a result of the tremendous growth of business and development of human activities from 1800 to the present

> day. And these acts, far-reaching though they be, have not gone beyond the limit of congressional power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed. [368]

Katz, monumental as it is, is just a part of that "revealing" process. Moreover, given the disparity in views regarding the limits of sovereignty when confronted by bankruptcy law, it is certainly not the last extension into this uncertain and controversial field.

Footnotes

a1 Daniel A. Austin is a lawyer in Pittsburgh, Pennsylvania. He thanks Wendy W. Austin, Emily F. Gibb, Joachim Thomas, and Nick Warren for their valuable assistance.

1 Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72 (1996).

2 Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 377 (2006).

3 U.S. Const. art. I, § 8, cl. 4.

4 Id.

5 U.S. Const. amend. XI.

6 A bankruptcy trustee (including a trustee in a chapter 7 liquidation as well as a trustee in a reorganization under chapters 9, 11, 12, and 13) may request the bankruptcy court to avoid certain types of pre- and post-petition liens and transfers of property that are prejudicial to the bankruptcy estate. The types of liens and transfers subject to the trustee's "avoidance" powers are set forth in Chapter 5 of the Bankruptcy Code, 11 U.S.C. §§ 544-549 (2000), and include, inter alia, transfers that could otherwise be avoidable by a secured creditor in the ordinary course of business, § 544, statutory liens that become fixed due to insolvency, § 545, fraudulent transfers made to third parties or "insiders" for less than fair value in order to move assets out of the reach of legitimate creditors, § 548, and post-petition transfers not authorized by the bankruptcy court, § 549. The most common use of the trustee's avoidance powers is "preferential transfers" under section 547. A preferential transfer is a transfer made for the benefit of a creditor on account of an antecedent (pre-petition) debt within the ninety days immediately prior to the petition date (one year if the transferee is an insider) and while the debtor is insolvent, and which enables the creditor to receive more than the creditor

would have received in a liquidation or if the transfer had not been made. Id. § 547. There are several defenses to a preference action set forth in section 547, and much of the litigation over preference deals with whether the transfer at issue in the case falls within one of the defenses.

An avoidance action is commenced as an "adversary proceeding" under Bankruptcy Rule 7003 and acts as a separate litigation within the underlying bankruptcy case. Fed. R. Bankr. P. 7003. If the bankruptcy court rules that a lien or transfer is avoided, section 550 provides that "the trustee may recover, for the benefit of the estate, the property transferred, or ... the value of such property." 11 U.S.C. § 550. Thus, exercise of the bankruptcy trustee's avoidance power typically involves two steps: first, adjudication that the transfer is avoidable under sections 544 through 549, and second, recovery of the funds or res by the trustee pursuant to section 550.

7 11 U.S.C. § 106(a).

8 546 U.S. 356 (2006).

9 Id. at 377-78.

10 517 U.S. 44 (1996).

11 Id. at 72-73.

12 See, e.g., Leonard H. Gerson, A Bankruptcy Exception to Eleventh Amendment Immunity: Limiting the Seminole Tribe Doctrine, 74 Am. Bankr. L.J. 1, 2 (2000).

13 U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

14 U.S. Const. art. I, § 8, cl. 4.

15 Many believe that it was drafted by Charles Pinckney of South Carolina and passed late in the Constitutional Convention Proceedings after very little debate. Jonathon C. Lipson, Debt and Democracy: Towards a Constitutional Theory of Bankruptcy, 83 Notre Dame L. Rev. (forthcoming 2007) (manuscript at 12-14), available at http://lsr.nellco.org/

cgi/viewcontent.cgi? article=1153&context=upenn/wps. Lipson's article provides a concise overview of facts and authorities on the history of the Bankruptcy Clause.

16 Some states had no insolvency laws, while others provided for release from debtor's prison, but not for discharge of debt. Bruce H. Mann, Republic of Debtors: Bankruptcy in the Age of American Independence 55, 59-60 (2002). Pennsylvania had an actual bankruptcy law which permitted discharge of unpaid debts, but only to commercial debtors. Id.

17 1 U.S. (1 Dall.) 188 (Pa. Ct. Com. Pl. 1786).

18 1 U.S. (1 Dall.) 229 (Pa. 1788).

19 James, 1 U.S. (1 Dall.) at 188.

20 Id. at 192.

21 Millar, 1 U.S. (1 Dall.) at 232, cited in Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 368 (2006). In the time-honored tradition of legal practice, the lawyer for the debtor Millar, Jared Ingersoll, made exactly the opposite argument when he represented the State of Pennsylvania in James. Id. at 229. The majority in Katz would cite these two cases over two hundred years later. Katz, 546 U.S. at 366-86.

22 In re Klein, 42 U.S. (1 How.) 277 (1843) (holding that the extent of Congress's power under the Bankruptcy Clause is not limited to the principles of English bankruptcy law).

23 See Mann, supra note 16, at 46; see generally Kurt H. Nadelmann, On the Origin of the Bankruptcy Clause, 1 Am. J. Legal Hist. 215 (1957).

24 Statement of Harrison Gray Otis, Federalist party member and early U.S. Representative in debates regarding the proposed Bankruptcy Act of 1800, cited in Mann, supra note 16, at 212 (quoting 9 Annals of Cong. 2660, 2675 (1799)).

25 Cont'l Bank v. Rock Island Ry., 294 U.S. 648, 668 (1935).

26 Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (holding that a key purpose of bankruptcy law is to give debtors "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt"); accord Harris v. Zion's Sav. Bank & Trust Co., 317 U.S. 447, 451 (1943); Stellwagen v. Clum, 245 U.S. 605, 617 (1918).

Bankruptcy law does not preempt other rights under the Constitution. For example, oral testimony that is compelled pursuant to bankruptcy authority may not be used for self-incrimination. 11 U.S.C § 344 (2000). Creditors cannot be denied the right of due process. Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 589, 602 (1935).

27 Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 193-94 (1819).

28 Ch. 19, 2 Stat. 19, repealed by Act of 1803, ch. 6, 25 Stat. 248.

29 Erik Berglöf & Howard Rosenthal, Power Rejected: Congress and Bankruptcy in the Early Republic 5 (May 31, 2005) (unpublished manuscript), available at http://www.finance.ox.ac.uk/NR/rdonlyres/0FCCE7A6-408E-4E1D-B224-DB33C9DAA4A9/0/howardrosenthalPowerRejected7.pdf. The Panic of 1797 started with the contraction of credit in Europe incident to the outbreak of war in 1793. David J. Skeel, Jr., Debt's Dominion: A History of Bankruptcy Law in America 202-04 (2001). Additionally, depravation on American shipping disrupted American commerce, further driving up the cost of money. Id. Holders of private notes, which were ubiquitous during an era of primitive banking, suddenly looked to the guarantors for payment, most of who could not pay. Id. Businesses failed, and hundreds of otherwise reputable merchants went to prison or fled to avoid creditors. Id.

30 Mann, supra note 16, at 253.

31 The Act's most significant result may have been to release Robert Morris, signer of the Declaration of Independence and member of the Constitutional Convention, from debtor's prison in Philadelphia. Id.

32 Id.

33 Ch. 9, 5 stat. 440, repealed by Act of 1843, ch. 82, 5 Stat. 614.

34 Skeel, supra note 29, at 25. The panic of 1837 was caused by the sudden collapse in the value of unregulated paper notes, much of it issued by states to encourage settlement. Charles Warren, Bankruptcy in United States History 52-55 (1935). Easy credit caused widespread speculation in land and commodities, leading in turn to inflation, then more paper notes, and eventually the value of the notes fell. Id. Thousands of banks and businesses closed, and the country went into depression. Id.

35 Warren, supra note 34, at 60, 66 (1935).

36 Id. at 81.

37 Id. at 86. Given that the law did not apply to agrarian debtors or to laborers (the vast majority of American workers at the time), this is a significant number.

38 Ch. 176, 14 Stat. 517, amended by Act of 1874, ch. 390, § 17, 18 Stat. 178.

39 Warren, supra note 34, at 103-09.

40 In re Reiman, 20 F. Cas. 490 (S.D.N.Y. 1874) (No. 11673).

41 Ch. 390, § 17, 18 Stat. 178.

42 Ch. 541, 30 Stat. 544, amended by Chandler Act, ch. 575, 52 Stat. 840 (1938), repealed by Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

43 Skeel, supra note 29, at 58-60.

44 Id. at 43.

45 Ch. 575, 52 Stat. 838.

46 Skeel, supra note 29, at 131.

47 Id. at 67-70, 131, 133.

48 Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101-112, 301-308, 321-333, 341-351, 361-366, 701-707, 721-727, 741-753, 761-767, 781-784, 901-904, 921-930, 941-946, 1101-1116, 1121-1129, 1141-1146, 1161-1174, 1201-1208, 1221-1231, 1301-1308, 1321-1330, 1501-1532 (2000)).

49 Individual debtors may file under chapter 7, 11 U.S.C. § 109(B) (2000) (liquidation), chapter 13, § 109(e) (adjustment of debts of an individual with regular income), and chapter 11, § 109(d) (reorganization). Businesses may file under chapter 7, § 109(B), chapter 11, §

109(d), and chapter 15, § 1501 (cross-border bankruptcies). Chapter 12, § 109(f), is for family farmers and family fishermen, while railroads may file under a special subchapter of chapter 11, § 109(d), and chapter 9, § 109(c), is for municipal bankruptcies.

50 See id. §§ 1123, 1129 (setting forth detailed provisions for the restructuring of business debt).

51 Id. § 1113.

52 465 U.S. 513 (1984). Bildisco held that the decision by a chapter 11 debtor to reject a collective bargaining agreement must be subject to the same standard applicable to an executory contract under section 365 of the Code. Id. at 516. The Court also held that a bargaining unit could not enforce the provisions of a bargaining agreement pending the debtor's decision to assume or reject the agreement. Id. at 515.

53 11 U.S.C. § 1114.

54 Id. (Legislative History and Comment); see also Norton Bankruptcy Law and Practice 1231 (2d ed. 2006).

55 11 U.S.C. § 524(g).

56 Id. (Legislative History and Comment); see also Norton Bankruptcy Law and Practice, supra note 54, at 724-25. Section 524(g) is notable in that it gives authority to the court to issue a "channel injunction" binding all future claims against the estate. 11 U.S.C. § 524(g).

57 11 U.S.C. § 704. Section 522 specifies which assets of the debtor are exempt from turnover to the trustee. Id. § 522.

58 Id. § 726.

59 Id. § 727.

60 Id. § 522.

61 Id. § 521(a)(2)(A).

62 Id. § 522(c)(l).

63 Id. § 523(a)(1).

64 Id. § 523(a)(5).

65 Id. § 523(a)(4).

66 Id. § 522.

67 Id. § 1322.

68 Id. § 1325(a)(5).

69 Pub. L. No. 109-8, 119 Stat. 23 (2005).

70 11 U.S.C. § 707(b)(2). See A Year After BAPCPA: How the Bankruptcy Abuse Prevention and Consumer Protection Act Has Impacted Practitioners, Lenders, Consumers, Turnaround Managers and Trustees (Oct. 16, 2006), http://www.abiworld.org/pdfs/OneYearProgramTranscript.pdf, for an extensive analysis of BAPCPA.

71 U.S. Const. art. VI, cl. 2.

72 Id.

73 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 427 (1819).

74 Gibbons v. Odgen, 22 U.S. (9 Wheat.) 1, 211 (1824).

75 Maryland v. Louisiana, 451 U.S. 725, 746 (1981). Federal law preemption can be express or implied. The question is whether, in passing the law, Congress intends to "occup[y] the field." Pennsylvania v. Nelson, 350 U.S. 497, 502 (1956). In Pennsylvania v. Nelson, the Supreme Court employed a three-part test to determine whether a federal law would preempt a state law. The first element of the test is whether "'[t]he scheme of federal regulation [is] so pervasive as to make reasonable inference that Congress left no room for the States to supplement it.'" Id. at 502 (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). The second element is whether the statute "'touch[es] a field in which the federal interest

is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject.'" Id. at 504 (citing Rice, 331 U.S at 230). The third element is whether the enforcement of a state statute "presents a serious danger of conflict with the administration of the federal program." Id. at 505.

76 Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 368 (1827); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 199 (1819).

77 Butler v. Goreley, 146 U.S. 303, 314 (1892).

78 278 U.S. 261 (1929).

79 Id. at 262.

80 Id.

81 Id.

82 Id. at 264.

83 Id.

84 Id. at 264-65.

85 Id. at 263.

86 Id. at 264.

87 Id. at 265 (internal citations omitted).

88 U.S. Const. art. VI, cl. 2.

89 11 U.S.C. § 106 (2000).

90 Section 106 states:

> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
>
> Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.
>
> The court may hear and determine an issue arising with respect to the application of such sections to governmental units.
>
> The court may issue against a governmental unit an order, process, or judgment under such sections ... including an order or judgment awarding a money recovery, but not including an award of punitive damages ....
>
> Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law ....
>
> Id. Section 106 was revised in 1994 after the Supreme Court ruled in Hoffman v. Conn. Department of Income Maintenance, 492 U.S. 96 (1989), and United States v. Nordic Village, Inc., 503 U.S. 30 (1992), that section 106 was not "unmistakably clear" in abrogating state immunity. See FDIC v. Meyer, 510 U.S. 471, 484 (1994).

91 11 U.S.C. § 362.

92 Id. § 365.

93 Id. § 502.

94 Id. § 524.

95 Id.

96 Id. § 542.

97 Id. § 545.

98 Id. § 547.

99 Id. § 106(b).

100 Id. § 106(c).

101 Butner v. United States, 440 U.S. 48, 54-55 (1979).

102 Zaylor v. U.S. Dep't of Agric. (In re Supreme Beef Processors, Inc.), 468 F.3d 248, 255 (5th Cir. 2006).

103 11 U.S.C. § 552.

104 Id.

105 Id. § 541(c)(2).

106 Id. § 365(c).

107 Id. §§ 523(a)(5), 523(a)(15).

108 See Daniel A. Austin, For Debtor or Worse: Discharge of Marital Debt Obligations Under The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 51 Wayne L. Rev. 1369 (2005), for a discussion of differences among bankruptcy jurisdictions in how the discharge of domestic support obligations is treated.

109 See, e.g., Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 190 (1902). See Paul R. Glassman, Choice of Law State Law in Bankruptcy Cases, 24 A.B.I.J. 32 (2005), for a comprehensive discussion of choice of state law in bankruptcy.

110 Chi. Title & Trust Co. v. Wilcox Bldg. Corp., 302 U.S. 120, 129-30 (1937).

111 Exemptions are governed by section 522 of the Bankruptcy Code. See 11 U.S.C. § 522. Exemptions allow individual debtors to retain the unencumbered value of property they own, up to certain federal- or state-law maximum amounts. Id.

112 Section 522(d) exemptions include up to $20,200 in the debtor's residence (the "homestead exemption"), up to $3225 in one motor vehicle, $10,775 in household goods, $1350 in jewelry, plus a $1075 "wildcard" exemption and up to $10,125 in unused homestead

exemption. 11 U.S.C. § 522(d). Some assets, such as social security benefits, alimony payments, and ERISA-qualified retirement assets are completely exempt from property of the estate. § 522(d)(10).

113 State exemption laws are intended to shield certain assets of a judgment debtor from seizure to pay judgments or creditors. The state exemptions vary widely. Florida's famous "homestead exemption" provides that the unencumbered value of a house is completely shielded from judgment creditors, whereas Florida's personal property exemption is only $1000 per person. Fla. Const. art. X, § 4. Pension assets and insurance proceeds are shielded from creditors. Fla. Stat. § 222.21 (2007). Pennsylvania exemptions, in comparison, are not generous to debtors. Pennsylvania has no homestead exemption, but property held jointly by spouses is exempt from creditors of an individual spouse. See Patwardhan v. Brabant, 439 A.2d 784 (Pa. Super. Ct. 1982). Other Pennsylvania exemptions include bibles, clothing, municipal pensions, and private pensions up to $15,000 per year. See 42 Pa. Cons. Stat. §8124 (2007). California has opted out of the federal scheme, but allows debtors to choose from two sets of exemptions. The first set, including California Code of Civil Procedure sections 704.010 and 704.730, allows a minimum homestead exemption of $50,000, but somewhat less generous exemptions in certain personal property. See Cal. Civ. Proc. Code §§ 704.010, 704.730 (West 2007). The second set, California Code of Civil Procedure section 703.140, mostly mirrors the federal scheme under Bankruptcy Code section 522(d), but is slightly more generous. See id. § 703.140.

114 11 U.S.C. §522(b)(2).

115 States allowing debtors to choose either federal or state exemptions include Arkansas, Connecticut, District of Columbia, Hawaii, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, Washington, and Wisconsin.

116 Kyung S. Lee et al., Deepening Insolvency - An Emerging Remedy Against Contemporary Corporate Malfeasance, Univ. of Tex. 23d Annual Bankr. Conf. (Nov. 18-19, 2004) (on file with author).

117 Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., 267 F.3d 340, 347 (3d Cir. 2001) (defining the tort of deepening insolvency as "fraudulent expansion of corporate debt and prolongation of corporate life"); cf. Seitz v. Detweiler, Hershey & Assocs., P.C. (In re CitX Corp., Inc.), 448 F.3d 672, 680 (3d Cir. 2006) (suggesting at note 11 that the Third Circuit en banc should reconsider the case).

118 See, e.g., Official Comm. of Unsecured Creditors v. Rural Tel. Fin. Coop. (In re VarTec Telecom, Inc.), 335 B.R. 631, 634-35 (Bankr. N.D. Tex. 2005) (accusing VarTec's lender

of (1) making improper loans to the debtor; and (2) fraudulently arranging for the debtor to pay down those loans shortly before VarTec filed for bankruptcy). The bankruptcy court dismissed the case on motion of the lender under Federal Bankruptcy Rule 7012(b) for failure to state a claim upon which relief can be granted, since it determined that Texas courts would not recognize deepening insolvency as an independent cause of action. Id. at 646; see also N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92 (Del. 2007) (holding that no duties owed to creditors by directors and officers while the corporation was in the "zone of insolvency").

119 Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

120 312 U.S. 52 (1941).

121 Id. at 67. This test is has been adopted for analysis of state law under the Supremacy Clause. See, e.g., Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 229 (1964); Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141, 165 (1963); Hill v. Florida, 325 U.S. 538, 542 (1945).

122 369 U.S. 153 (1962).

123 Id. at 155.

124 Id.

125 Id. at 169.

126 Id. at 171. The Court conceded that the law made "it more probable that the debt will be paid despite the discharge." Id. at 173; see also Reitz v. Mealey, 314 U.S. 33, 37 (1941), in which a similar law in New York survived challenge from a debtor, despite the fact that the effect of the law frustrated the policy of the Act of 1898:

> The penalty which [the New York law] imposes for injury due to careless driving is not for the protection of the creditor merely, but to enforce a public policy that irresponsible drivers shall not, with impunity, be allowed to injure their fellows .... [T]he legislature declared that a discharge in bankruptcy should not interfere with the operation of the statute. Such legislation is not in derogation of the Bankruptcy Act. Rather it is an enforcement of permissible state policy touching highway safety.
>
> Id.

127 402 U.S. 637 (1971).

128 Id. at 652.

129 Ariz. Rev. Stat. Ann. 28-1163 (1956). This act was based on the Uniform Motor Vehicle Safety Responsibility Act promulgated by the National Conference on Street and Highway Safety.

130 Perez, 402 U.S. at 639-40.

131 Ariz. Rev. Stat. Ann. 28-1163(B).

132 Perez, 402 U.S. at 638.

133 Id. at 639.

134 Id.

135 Id. at 643.

136 Id. at 644.

137 Id. at 646-47. The Court concluded that the purpose of the law was not one of deterrence. The Court noted that the victim of the tortfeasor's negligence could voluntarily waive the payment requirement, that there was no provision keeping careless drivers off the road, and that if both drivers were found negligent, then there was no liability for damages arising from the accident. Id. at 647-48.

138 Id. at 648 (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934)).

139 Id. at 652.

140 Id.

141 The New York State Attorney General later concluded that a motor vehicle law providing that a civil penalty is not dischargeable in bankruptcy is unconstitutional and superseded by the

Bankruptcy Code. See N.Y. Op. Att'y Gen. 98-F10 (1998), available at www.oag.state.ny.us/lawyers/opinions/1998/formal/98_f10.html.

142 Kalb v. Feuerstein, 308 U.S. 433 (1939).

143 Ohio v. Kovacs, 469 U.S. 274 (1984).

144 118 B.R. 30 (Bankr. W.D. Pa. 1990).

145 Id.

146 394 F.3d 1198 (9th Cir. 2005).

147 Id. at 1204.

148 Davie v. Rudgers (In re Davie), 302 B.R. 432 (Bankr. W.D.N.Y. 2003); see New York v. Irving Trust Co., 288 U.S. 329, 333 (1932) (holding that New York proof of claim for taxes is barred as untimely); Van Huffle v. Harkelrode, 284 U.S. 225, 228-29 (1931) (holding that the bankruptcy court has authority to sell debtor's property free and clear of state tax lien); In re Bluewater Palmas, Ltd., No. 02-07967, 2006 Bankr. LEXIS 3813 (Bankr. D.P.R. May 1, 2006) (holding that a debtor's estate is entitled to payment of interest on fees properly payable by the state to the estate).

149 U.S. Const. art. I, § 8, cl. 4.

150 The Federalist No. 32, at 241 (Alexander Hamilton) (Terrence Ball ed., 2003).

151 Id. The most complete articulation of this theory is in J. Haines, The Uniformity Power: Why Bankruptcy is Different, 77 Am. Bankr. L.J. 129 (2003).

152 This was the conclusion of the Sixth Circuit in Hood v. Tenn. Student Assistance Corp. (In re Hood), 319 F.3d 755, 766 (6th Cir. 2003), aff'd on other grounds, 541 U.S. 440 (2004).

153 See Gray v. Univ. of Alaska (In re Dehon, Inc.), 327 B.R. 38, 54-56 (Bankr. D. Mass. 2005).

154 An example of this holding can be found in Official Comm. of Unsecured Creditors v. New York State Department (In re Operation Open City, Inc.), 148 B.R. 184, 185-86 (Bankr. S.D.N.Y. 1992), aff'd, 170 B.R. 818 (Bankr. S.D.N.Y. 1994):

> Bankruptcy is a collective process in which all parties share in an inevitably inadequate estate. The bankruptcy court is the forum in which all parties resolve disputes regarding distribution of estate assets. This process, however, cannot function properly if any significant participant remains immune from the system's fundamental rules. This adversary proceeding involves a governmental unit which has extracted funds from a debtor's estate without seeking prior court approval and now claims that sovereign immunity precludes this Court from reviewing the governmental unit's actions.

Id.; see also In re Dehon, 327 B.R. at 57-58. For a critique of the "uniformity theory," see Cecily Fuhr, Sovereign Immunity: The "Uniform Laws" Theory Tries (And Fails) to Take a Bankruptcy-sized Bite out of the Eleventh Amendment, 77 Wash. L. Rev. 511 (2002).

155 U.S. Const. amend XI.

156 See, e.g., Bd. of Trustees v. Garrett, 531 U.S. 356 (2001) (holding that states are immune from suit brought under Title I of the Americans with Disabilities Act); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (holding that states are immune from suit brought under the Age Discrimination in Employment Act); College Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (holding that states are immune from suit brought under the Lanham Act); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (holding that the state is immune from suit brought under the Indian Gaming Regulatory Act). Eleventh Amendment immunity does not extend to counties. See N. Ins. Co. of N.Y. v. Chatham County, 547 U.S. 189 (2006).

157 United States v. Georgia, 546 U.S. 151 (2006) (holding that Title II of Americans with Disabilities Act abrogates state immunity); Tennessee v. Lane, 541 U.S. 506 (2004) (holding that Title II of Americans with Disabilities Act abrogates state sovereign immunity); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) (holding that family care provisions of Family Medical Leave Act abrogate state immunity).

158 Alexander Hamilton's statement in Federalist 81 is frequently cited: "It is inherent in the nature of sovereignty not to be amendable to the suit of an individual without its consent .... Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States ...." The Federalist No. 81, at 511 (Alexander Hamilton) (Terrence Ball ed., 2003); see also Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267-68 (1997) (noting "the broader concept of immunity, implicit in the Constitution").

159 2 U.S. (2 Dall.) 419 (1793).

160 Id.

161 Id.

162 Id. at 423-24.

163 15 Papers of Alexander Hamilton 314 (H. Syrett & J. Cooke eds., 1969).

164 D. Currie, The Constitution in Congress: The Federalist Period 1789-1801 196 (1997).

165 Dugan v. Rank, 372 U.S. 609, 620 (1963) (internal citations omitted). Not all suits seeking monetary relief from a state automatically offend the Eleventh Amendment. It is well established that a suit that 'serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect' of compelling a state to expend public funds. Papasan v. Allain, 478 U.S. 265, 278 (1986). However, "[r]elief that in essence serves to compensate a party injured in the past ... even though styled as something else," is barred under the Eleventh Amendment. Id.

166 Hufford v. Rodgers, 912 F.2d 1338, 1341 (11th Cir. 1990) (citing Edelman v. Jordan, 415 U.S. 651 (1974)) (internal quotations omitted). Strictly interpreted, the Eleventh Amendment applies only to state and not local government. Bd. of Trustees v. Garrett, 531 U.S. 356 (2001).

167 134 U.S. 1 (1890); see Alden v. Maine, 527 U.S. 706 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

168 Hans, 134 U.S. at 1.

169 Id. at 3.

170 Id. at 2-3; see U.S. Const. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.").

171 Hans, 134 U.S. at 10.

172 Id. at 21.

173 209 U.S. 123 (1908).

174 Id. at 127.

175 Id.

176 Id. at 129.

177 Id. at 132.

178 Id.

179 Id.

180 Id.

181 Id. at 133.

182 Id. at 143-44.

183 Hans v. Louisiana, 134 U.S. 1, 3 (1890).

184 Ex parte Young, 209 U.S. 123, 159 (1908).

185 Id. at 159-60.

186 In re Deposit Ins. Agency, 482 F.3d 612, 618 (2d Cir. 2007). In order to determine whether the Ex parte Young exception applies, a court must ask "whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 645 (2002). The exception does not apply if Congress has provided a remedial scheme so that equitable remedy through the courts is not necessary. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 76 (1996).

Additionally, the exception may not apply if certain state sovereign interests are present, such as state ownership and control of land. Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 281, 287 (1997).

187 523 U.S. 491 (1998).

188 Id. at 496.

189 Id. at 495.

190 Id. at 496.

191 Deep Sea Research v. Brother Jonathan, 102 F.3d 379, 387 (9th Cir. 1996).

192 California v. Deep Sea Research, 523 U.S. at 506-07.

193 Id. at 501.

194 Id. at 504.

195 Id. at 507.

196 491 U.S. 1 (1989).

197 U.S. Const. art. I, § 8, cl. 3 (providing that Congress shall have Power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

198 517 U.S. 44 (1996).

199 U.S. Const. art. I, § 8, cl. 3.

200 42 U.S.C. § 9601 (1980), amended by Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499, 100 Stat. 1613.

201 U.S. Const. art. I, § 8, cl. 3.

202 Union Gas Co., 491 U.S. at 14 (citing Parden v. Terminal Ry. of Ala. Docks Dep't, 377 U.S. 184, 191 (1964)). Other cases cited by the Court to the effect that states surrendered some of their sovereignty under the Commerce Clause include Welch v. Texas Department of Highways & Public Transportation, 483 U.S. 468, 475-76 (1987); County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 252 (1985); Employees v. Missouri Department of Public Health & Welfare, 411 U.S. 279, 286 (1973) ("the states surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce"). CERCLA invoked the Commerce Clause because environmental harm is "often not susceptible of a local solution," as hazardous wastes and dumping and clean-up very often occur across state lines. Union Gas Co., 491 U.S. at 20-21.

203 427 U.S. 445 (1976).

204 Id. at 445-46.

205 Union Gas Co., 491 U.S. at 16 (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 454 (1976)).

206 Id.

207 See id. at 32, 35.

208 25 U.S.C. § 2710(d) (1988).

209 U.S. Const. art. I, § 8, cl. 3.

210 11 U.S.C. § 2710(d)(1)(C).

211 Id. § 2710(d)(3)(A).

212 Id. § 2710(d)(7)(B).

213 Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 45 (1996).

214 Id. at 57-58.

215 Id. at 69 (citing Hans v. Louisiana, 134 U.S. 1, 17 (1889)).

216 Id. at 66.

217 Id. at 59. There was extensive criticism of the case among commentators. A measured critique of Seminole Tribe is found in Leonard G. Gershon, A Bankruptcy Exception to Eleventh Amendment Immunity: Limiting the Seminole Tribe Doctrine, 74 Am. Bankr. L.J. 2 (2000).

218 Seminole Tribe, 517 U.S. at 104 (Souter, J., dissenting).

219 Techs. Int'l Holdings, Inc. v. Kentucky (In re Technologies Int'l Holdings, Inc.), Nos. 99-50867, 99-50868, 99-50869, 2003 Bankr. LEXIS 1541, at *30 (Bankr. E.D. Ky. Nov. 24, 2003) (citing Seminole Tribe in ruling that bankruptcy debtor suit against Kentucky barred by the Eleventh Amendment as only the Fourteenth Amendment, and not the Bankruptcy Code, validly abrogated state immunity).

220 In re Willis, 230 B.R. 619 (Bankr. E.D. Okla. 1999); In re Straight, 209 B.R. 540 (Bankr. D. Wyo. 1997); In re Headrick, 203 B.R. 805 (Bankr. S.D. Ga. 1996).

221 See Techs. Int'l Holdings, 2003 Bankr. LEXIS 1541, at *30, and cases cited therein.

222 527 U.S. 706 (1999). Whereas Seminole Tribe dealt with the authority of a federal court to hear citizen suits against a state agency, Alden addressed whether a state court had jurisdiction to hear citizen suits against state agencies. Id. at 711-12.

223 Id. at 711-12.

224 Id.

225 Id. at 712.

226 Id. at 713.

227 The Federalist No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961).

228 Alden, 527 U.S. at 713.

229 Id. at 772-73.

230 Id. at 789.

231 Id. at 769-70, 772.

232 Id. at 784-85.

233 Id. at 774-78.

234 Id. at 807.

235 Dairy Mart Convenience Stores, Inc. v. Nickel (In re Dairy Mart), 411 F.3d 367 (2d Cir. 2005).

236 Id. at 369.

237 42 U.S.C. §§ 6901-6992k (2000).

238 Dairy Mart, 411 F.3d at 370.

239 Id. at 368.

240 Id. at 370.

241 Section 108(b) provides as follows:

> [I]f applicable nonbankruptcy law ... fixes a period within which the debtor ... may file any pleading, demand, notice, or proof of claim or loss ... and such period has not expired before the date of the filing of the petition, the trustee may ... file, cure, or perform, as the case may be ... 60 days after the order for relief.
>
> 11 U.S.C. § 108(b) 2000.

242 Dairy Mart, 411 F.3d at 370.

243 Id. at 375.

244 Id.

245 Id.

246 Id. at 371.

247 Id. at 375 (citing Edelman v. Jordan, 415 U.S. 651, 668 (1974)).

248 Id. at 375-76.

249 See id. at 376.

250 Id.

251 492 U.S. 96 (1989).

252 Id. at 99.

253 11 U.S.C. § 542(b) (2000).

254 Hoffman, 492 U.S. at 99.

255 Id.

256 Id.

257 Id.

258 Conn. Dep't of Income Maint. v. Hoffman (In re Willington Convalescent Home), 72 B.R. 1002 (Bankr. D. Conn. 1987), aff'd, 850 F.2d 50, 55 (2d Cir. 1988), aff'd 492 U.S. 96 (1989).

259 Hoffman v. Conn. Dep't of Income Maint. (In re Willington Convalescent Home), 850 F.2d 50, 55 (2d Cir. 1988), aff'd 492 U.S. 96 (1989).

260 Hoffman, 492 U.S. at 104.

261 Id. at 101.

262 Id. at 102.

263 Id. at 101 (citing Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

264 Id. at 105 (O'Connor, J. & Scalia, J., concurring).

265 Id. (Scalia, J., concurring).

266 Id. at 111 (Stevens, J., dissenting).

267 This was also a response to a similar decision in United States v. Nordic Village, Inc., 503 U.S. 30 (1992).

268 11 U.S.C. § 106(b) (2000).

269 541 U.S. 440 (2004).

270 Id. at 444.

271 11 U.S.C. § 523(a)(8). This is a difficult showing to make. Many courts have adopted the three-prong test used in Brunner v. New York Higher Education Services Corp., 831 F.2d 395 (2d Cir. 1987): present dire financial circumstances, likelihood of condition continuing in the future, and the debtor's good faith attempt to repay the loan. See id. at 396.

272 Brunner, 831 F.2d at 444-45. Federal bankruptcy procedures require the debtor seeking a student loan discharge to file a complaint and serve the complaint with a summons upon a representative of the lender. Fed. R. Bankr. Proc. 7001(6), 7003, 7004.

273 Brunner, 831 F.2d at 445.

274 Hood v. Tenn. Student Assistance Corp. (In re Hood), 319 F.3d 755 (6th Cir. 2003).

275 Later, several bankruptcy courts continued to cite the Sixth Circuit opinion in Hood in holding that section 106 validly abrogated state immunity. See, e.g., Quality Stores, Inc. v. Vt. Dep't of Taxes (In re Quality Stores, Inc.), 324 B.R. 631, 635 (Bankr. M.D. Mich. 2005) (holding that adversary proceeding for turnover of funds held by Vermont Department of Revenue could proceed since section 106(a) was a valid abrogation of state immunity).

276 Hood, 541 U.S. at 448.

277 Id.

278 Id. at 450.

279 Fed. R. Bankr. Proc. 7001(b), 7003.

280 Hood, 541 U.S. at 452.

281 Id. at 458 (Thomas, J., dissenting).

282 See, e.g., Texas v. Davis (In re Davis), 340 B.R. 767, 771 (Bankr. E.D. Tex. 2006) (holding that discharge of debt owed to state by bail bond operator not in violation of the Eleventh Amendment); Gray v. Fla. State Univ. (In re Dehon), 327 B.R. 38, 58 (Bankr. D. Mass. 2006) ("[T]he Framers intended that the Constitution would alienate state's sovereign immunity with regard to bankruptcy matters upon ratification.").

283 300 B.R. 599 (Bankr. Vt. 2003).

284 Id. at 600.

285 Id. at 601.

286 Id. at 602.

287 342 B.R. 838 (Bankr. M.D. Fla. 2005).

288 Id. at 841.

289 Id.

290 394 F.3d 918 (11th Cir. 2004).

291 Id. at 921.

292 Id.

293 316 B.R. 797 (Bankr. S.D.N.Y. 2004).

294 Bankruptcy Code section 547 is one of the sections enumerated in section 106(a) and allows a bankruptcy trustee or its representative (in this case, the creditors' committee) to demand return of funds paid by the debtor to a creditor for a pre-bankruptcy debt within ninety days before the filing of the bankruptcy. 11 U.S.C. § 547 (2000). There are defenses set forth under section 547 which may well have been available to NYPUC, but the threshold issue in 360networks was whether the trustee could sue NYPUC, a state agency, for preference in the first place. See 360networks, 316 B.R. at 799.

295 360networks, 316 B.R. at 803 (internal citations omitted). A bankruptcy court has "exclusive jurisdiction" of all property of the debtor and the debtor's estate "wherever located." Id. at 803 (citing Begier v. IRS, 496 U.S. 53, 58 (1990)).

296 Id.

297 Id. (internal citations omitted). A preference claim falls within the bankruptcy court's in rem jurisdiction because property subject to a preference action is "best understood as that property that would have been part of the estate had it not been transferred before the commencement of the bankruptcy." Id.; see also In re Bullion Reserve of N. Am., 836 F.2d 1214, 1217 (9th Cir. 1988), cert. denied, 486 U.S. 1056 (1988) ("[P]roperty belongs to the debtor for purposes of section 547 if its transfer will deprive the bankruptcy estate of something which could otherwise be used to satisfy the claims of creditors."); cf. FDIC v. Hirsch (In re Colonial Realty Co.), 980 F.2d 125, 131 (2d Cir. 1992) (holding that in

a preference action, property transferred does not become property of the estate until it is recovered).

298 360networks, 316 B.R. at 803, 804; see also Gardner v. New Jersey, 329 U.S. 565, 577 (1947) (holding that a bankruptcy court's in rem jurisdiction over a debtor's property "is not limited to the prevention of interference with the use of the debtor's property ... but it extends also to the adjudication of questions respecting title"); In re N.C. Technical Dev. Authority, Inc., No. 03-83278C-7D, 2005 Bankr. LEXIS 1087, at *11 (Bankr. M.D.N.C. Mar. 30, 2005) (debtor's adversary proceeding to set aside state corrective deed was solely an in rem proceeding and not an affront to the sovereignty of the state).

299 360networks, 316 B.R. at 805.

300 322 F.3d 421 (6th Cir. 2003).

301 Id. at 427.

302 196 B.R. 670 (Bankr. S.D.N.Y. 1996).

303 Id. at 677. The bankruptcy court in Sticka v. Oregon State Lottery Commission (In re Judy A. Moore), 323 B.R. 752 (Bankr. D. Or. 2005), confronted almost identical facts as the court in 360networks and reached a different conclusion. As in 360networks, a chapter 7 trustee filed an adversary proceeding against the Oregon State Lottery Commission to avoid an alleged preferential transfer. 360networks, 316 B.R. at 754. There were two issues: first, whether section 106(a) was a valid exercise of constitutional authority; and second, whether the trustee's preference claim could be used to set off a claim for income taxes filed by the lottery commission against the debtor's estate. Id. at 754-55. As to the first issue, the bankruptcy court noted that since Hood had avoided the issue of whether section 106(a) was constitutional, and the Ninth Circuit had previously held that section 106(a) was unconstitutional as applied to states, the trustee had no authority to bring a preference avoidance action against the state. Id. As for the setoff claim under section 502(d), the bankruptcy court found that immunity did not apply, for two reasons. First, setoff is part of the bankruptcy claims process, a strictly in rem proceeding that does not offend state sovereignty. Id. at 756-57. Second, section 502(d) includes a waiver provision whereby if a state files a proof of claim as a creditor in a bankruptcy case, it waives immunity with respect to adjudication of that proof of claim, including any defenses or objections to the claim. Id. at 757. Some courts were in agreement with this conclusion. Schlossbera v. Maryland (In re Creative Goldsmith of D.C., Inc.), 119 F.3d 1140, 1147 (4th Cir. 1997) ("Congress' effort to abrogate the states' Eleventh Amendment immunity through its 1994 enactment of 11 U.S.C. § 106(a) is unconstitutional and ineffective."); Heritage Associates v. Maryland (In re Heritage Associates), 336 B.R. 255 (Bankr. Md. 2006) (finding an avoidance complaint filed

by chapter 11 debtor's plan committee against state agency was barred under the Eleventh Amendment). Other courts were not in such agreement. Quality Stores, Inc. v. Vt. Dep't of Taxes (In re Quality Stores, Inc.) 324 B.R. 631, 635 (Bankr. M.D. Mich. 2005) (noting a split among the circuits on this issue, adopted the Sixth Circuit rule in Hood v. Tennessee Student Assistance Corp. (In re Hood), 319 F.3d 755 (6th Cir. 2003), to find that section 106 represented a valid abrogation of state immunity).

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322 Katz, 546 U.S. at 356 (2006).

323 Id.

324 Id. at 362 (citing Gardner v. New Jersey, 329 U.S. 565, 574 (1947)).

325 Id. at 361 (citing Tennessee v. Hood, 541 U.S. 440, 450-51 (2004)).

326 Id. at 362.

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332 Katz, 546 U.S. at 370.

333 Id.

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336 Id.

337 Id.

338 Id. at 375.

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341 Id. at 377-78.

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346 Id. at 381 (Thomas, J., dissenting).

347 Id. at 385-86.

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349 Katz, 546 U.S. at 390-91.

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358 Id.

359 Id.

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364 See supra notes 235-50 and accompanying text.

365 See supra note 240 and accompanying text.

366 See supra note 241 and accompanying text.

367 294 U.S. 648 (1935).

368 Id. at 671.

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