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Democratizing the Administrative State

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Democratizing the Administrative State

Richard J. Pierce, Jr.*

ABSTRACT

Scholars have long questioned the political and constitutional legitimacy of the administrative state. By 1980, a majority of Justices seemed to be poised to hold that large portions of the administrative state are unconstitutional. In 1984, the Court stepped back from that abyss and took a major step toward legitimating and democratizing the administrative state. The Court instructed lower courts to defer to any reasonable agency interpretation of an ambiguous agency-administered statute. The Court based this doctrine of deference on the superior political accountability of agencies. Henceforth, politically-unaccountable judges were prohibited from substituting their policy preferences for those of politically-accountable agencies. The Court recognized that agencies are politically accountable to the people because they are subject to the control of the elected President.

The Court's 1984 effort to democratize the administrative state has fallen far short of its potential because of temporal problems with the manner in which the Supreme Court defines and implements the deference doctrine the Court announced in 1984 and the other two doctrines that require courts to defer to agency interpretations of agency-administered texts. The most important of those deference doctrines is explicitly premised on the Court's understandable belief that policy decisions should be made by the politically accountable President rather than by politically unaccountable judges. Yet, the Court's present method of implementing the deference doctrines has two unfortunate effects. First, in a high proportion of cases, there is a lag of four to eight years between the time that a President takes office and the time when a court is willing to acquiesce in implementation of the policies preferred by the President. In other words, each President is required to implement the policies preferred by his predecessor for at least one term and perhaps even for two terms. Second, in some important situations, regulatees are required to incur large costs in enforcement actions to comply with interpretations of agency rules that have already been rejected by the incumbent President by the time courts impose the costs on the regulatees and that were disavowed by the agency at the time the regulatees engaged in the conduct that is the basis for the enforcement actions.

Professor Pierce explains why he believes that these results are unacceptable, and he proposes four changes in the Court's present methods of implementing the deference doctrines that will eliminate these effects and that will create a more democratic and constitutionally legitimate administrative state in which Presidents actually have the power to make changes in policy within the statutory boundaries set by Congress.

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I. INTRODUCTION

Scholars have long questioned the political and constitutional legitimacy of the administrative state.¹ By 1980, it appeared that a majority of Supreme Court Justices were prepared to outlaw large portions of the administrative state by holding that Congress cannot delegate major policy decisions to “politically-unaccountable

¹ E.g., John Ely, *Democracy and Distrust* 131-134 (1980); James Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* 78-94 (1978); Thodore Lowi, *The End of Liberalism: The Second Republic of the United States* 93 (1969); Peter Aronson, Ernest Gellhorn & Glen Robinson, *A Theory of Legislative Delegation*, 68 *Cornell L. Rev.* 1, 63-67 (1982).

bureaucrats.”² In 1984, however, the Supreme Court unanimously stepped back from that abyss and instead took a major step toward legitimating and democratizing the administrative state. In its opinion in *Chevron v. Natural Resources Defense Council*, the Court recognized that Congress has the ultimate power to define the terms it uses in statutory texts, but it went on to require a court to defer to any reasonable agency interpretation of an ambiguous statute that Congress has instructed the agency to implement.³ The Court made it clear that *Chevron* deference is based on constitutional principles that are central to our democratic system of government – politically accountable agencies, rather than politically unaccountable judges, should make the policy decisions that are necessarily inherent in the process of giving meaning to ambiguous texts that Congress has assigned agencies to implement.⁴

The Court anchored *Chevron* deference in the relationship between agencies and the President. Thus, it explained:

[A]n 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 Government to make such policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.⁵

The Court foreshadowed its 1984 recognition of the critical relationship between agency policy decisions and the elected President in a 1983 opinion:

The agency’s changed view . . . seems to be related to the election of a new President of a different political party. . . . A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.⁶

The Court’s methods of applying the *Chevron* doctrine and the other doctrines that require politically unaccountable judges to defer to politically accountable agencies

² In his concurring opinion in *Industrial Union Department v. American Petroleum Institute*, Justice Rehnquist argued that the Occupational Safety and Health Act was unconstitutional because it was an impermissible attempt by Congress to delegate a major policy decisions to “politically-unaccountable bureaucrats.” 448 U.S. 607, 671 (1980). The four-Justice plurality seemed to agree with Justice Rehnquist when they concluded that the statute would be unconstitutional were it not for the plurality’s decision to give it a saving construction. 448 U.S. at 646.

³ 467 U.S. 837, 843-844 (1984).

⁴ 467 U.S. at 865-866.

⁵ 467 U.S. at 865-866.

⁶ *Motor Vehicle Manufacturers’ Assn. V. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 59 (1983) (concurring and dissenting opinion of Justices Rehnquist, Burger, Powell & O’Connor).

regularly yield results that are inconsistent with the Court's attempt to infuse the administrative state with principles of democracy, however. As applied by the Supreme Court, the deference doctrines typically require a court to defer to the policy preferences of a President who left office years ago rather than to the policy preferences of the person who was elected to replace him. As a result of the Court's decisions with respect to the scope of the deference doctrines, a newly-elected President has little chance of announcing any of his policies in a form that a Court is willing to accept as worthy of deference during a single term in office, and a President is unlikely to be able to obtain judicial acquiescence in all of his preferred policies even if he is re-elected for a second term.

Chevron deference is implicitly based on the assumption that an incumbent President obtains control of the federal bureaucracy immediately upon taking the oath of office. That is well known to be a counterfactual assumption, however. It typically takes many months for a newly-elected President to get "his people" installed in all of the agency policy making positions. It then takes those neophyte political appointees many more months to figure out what the agency is doing and to begin to implement the policies the President prefers.

When the incumbent's preferred policies differ from those of his predecessor, the process of changing policy is difficult and time-consuming. The President's appointees must identify and implement means of reversing the powerful inertial forces that have developed in the permanent bureaucracy in support of the policies that were preferred by the President's predecessor in office. Even when the newly-elected President strongly disagrees with a policy adopted by his predecessor, it may well take him a year or more just to begin the process of switching to a policy that he, and presumptively a majority of the electorate, prefer. Once the President's appointees begin the process of attempting to announce and to implement policies that are consistent with the President's preferences, they often confront procedural hurdles that typically take years to overcome before the President's policy preferences can be announced in a manner that courts are willing to accept.

My goal in this article is to explore some of the issues courts encounter when they are required to review agency policy decisions during a period in which an agency is in the process of changing from the policies preferred by a prior President to the policies preferred by the incumbent. I then suggest ways of addressing those issues that are consistent with the constitutional bases for the deference doctrines as well as with other important principles of administrative law and constitutional law. I use two contemporary disputes to illustrate the kinds of questions that arise when a court is required to resolve a policy dispute during such a time of transition.

First, I discuss the Supreme Court's 2004 decision in *Bates v. Dow Agrosciences*.⁷ In that decision, the Court refused to defer to the interpretation of an ambiguous agency-administered statute urged by the Solicitor General (SG) on behalf of the Bush Administration and instead upheld the contrary interpretation previously adopted and applied by the agency during the Clinton Administration. Second, I discuss some of the many court opinions that have been handed down to date in the ongoing multi-billion dollar dispute with respect to the meaning of the word "modification" contained in the Clean Air Act. In resolving that dispute, a court must choose whether to defer to an

⁷ 125 S. Ct. 1788 (2004).

interpretation of an ambiguous agency-administered statute adopted by the agency in a rule issued in 2003 or to a 1999 agency interpretation of a pre-existing ambiguous agency rule. The 2003 rule reflects the policy preferences of President Bush, while the inherently inconsistent 1999 interpretation of the ambiguous pre-existing rule reflects the policy preferences of President Clinton.

In part II, I discuss the deference doctrines that are important in resolving policy disputes of this type, their bases, their scopes, and their corollaries. In part III, I describe the policy dispute that the Supreme Court addressed in *Dow* and the opinions in which the Court resolved that dispute. I then critique the Court's opinions. I conclude that the Court's decision was entirely consistent with prevailing doctrine, but I am troubled by the Court's rejection of the policy preferred by the incumbent President and its approval instead of the policy preferred by his predecessor even though the incumbent was elected to replace his predecessor over four years prior to the Court's decision.

In part IV, I describe the policy dispute that numerous lower courts have addressed with respect to the meaning of "modification" in the Clean Air Act, as well as the court opinions that address those disputes. I then critique the courts' opinions. I conclude that a court that resolves that dispute by applying prevailing doctrines, as the Supreme Court presumably will do in the next few years, will also reject the policy preferred by the incumbent in favor of the policy favored by his predecessor. I am troubled by that result both because of the long time lag between the election of a President and judicial acquiescence in his preferred policies and because it seems patently unfair in the context in which the dispute is being addressed by courts. In the many ongoing enforcement proceedings, EPA is urging courts to require electric utilities to incur many billions of dollars of regulatory costs by adopting a statutory interpretation EPA first urged in 1999 during the Clinton Administration, even though EPA urged the utilities to engage in the conduct that allegedly triggered these massive regulatory obligations by adopting announcing a contrary statutory interpretation in 1980 and EPA formally rejected the 1999 Clinton Administration interpretation in favor of the pre-existing 1980 Carter Administration interpretation in 2003. It does not seem right to impose many billions of dollars of regulatory costs on firms for engaging in conduct that would not have been required under the interpretations in effect at the time the firms engaged in the conduct or at the present time.

Finally, in part V, I propose changes in doctrine that would respond to the two problems I identify. I propose one means of reducing the long lag time between the election of a President and judicial acquiescence in the policies he prefers. At present, the Supreme Court instructs lower courts to defer to a policy announced by an agency through the process of giving meaning to an ambiguous statute only when the agency announces the policy in a legislative rule or a decision issued in a formal adjudication. It typically takes several years for an agency to take either of those highly formalized actions. I urge the Supreme Court to adopt instead the proposal of Justice Scalia. He has long argued that the Court should defer to a policy announced by an agency whenever it represents the agency's "fair and considered judgment on the matter in question," even if the agency makes the announcement through use of a procedure less formal than a legislative rule or a decision issued in a formal adjudication. Adoption of that approach would reduce by several years the present intolerably long lag between the election of a new President and judicial acquiescence in his preferred policies.

I propose three ways of avoiding the unfairness of subjecting firms to high costs attributable to agency claims in enforcement proceedings that an ambiguous agency rule means something dramatically different from the meaning the agency attributed to the rule when the firms engaged in the conduct at issue in the enforcement proceedings and the meaning the agency is now giving the rule. I attribute that result to the Supreme Court’s 1944 instruction to lower courts to give “controlling effect” to agency interpretations of ambiguous agency rules. To avoid the potential unfair results this doctrine of deference can create, I urge courts to adopt three practices that already have considerable support in the case law. Courts should refuse to defer to agency interpretations of ambiguous agency rules in three circumstances: (1) when the interpretation is announced as a litigating position and there is reason to believe that it does not represent the “fair and considered judgment of the agency on the matter in question;” (2) when the agency is interpreting an open-ended rule that merely repeats the vague language of the statute the rule purports to implement; and, (3) when the agency interpretation of the rule would require a regulatee to incur large regulatory costs and the interpretation urged in the enforcement proceeding is inconsistent with the interpretation in effect at the time the regulatee took the actions at issue in the enforcement proceedings.

II. THE DEFERENCE DOCTRINES

A. *Chevron Deference*

There are three deference doctrines that a court might be required to apply when it reviews an agency policy decision that takes the form of an interpretation of an ambiguous provision in an agency-administered text. The *Chevron* doctrine requires a court to defer to any reasonable agency interpretation of an ambiguous agency-administered statute if the agency has adopted the interpretation in a legislative rule or a formal adjudication.⁸ *Chevron* deference is based on constitutional principles – politically unaccountable judges can not overrule policy decisions made by politically accountable agencies.⁹

B. *Skidmore Deference*

If an agency announces an interpretation of an ambiguous agency-administered statute through use of a procedure less formal than a legislative rule or a formal adjudication,¹⁰ the agency interpretation is due the weaker and more contingent type of deference the Court announced in its 1944 decision in *Skidmore v. Swift & Co.*¹¹ Under *Skidmore*, the deference due an agency interpretation varies “with circumstances, and courts have looked to the degree of the agency’s care, its consistency, formality, and

⁸ *Chevron* deference also applies to some uncertain class of agency interpretations announced through use of less formal procedures, but the Court has not explained how it will identify the other circumstances in which *Chevron* deference is due an agency interpretation. U.S. v. Mead Corp., 533 U.S. 218, 229-231 (2001).

⁹ 437 U.S. at 865-866.

¹⁰ 533 U.S. at 229-231.

¹¹ 323 U.S. 134 (1944).

relative expertness, and to the persuasiveness of the agency's position."¹² *Skidmore* deference is based on an agency's comparative advantage in terms of its subject matter expertise, rather than on an agency's comparative advantage with respect to its political accountability.¹³

C. *Seminole Rock* Deference

Seminole Rock deference applies to an agency's interpretation of one of its rules, rather than to a statute the agency administers.¹⁴ *Seminole Rock* deference is about as strong as *Chevron* deference.¹⁵ In *Chevron*, the Court instructed courts to uphold any agency interpretation of an ambiguous agency-administered statute as long as it is reasonable, i.e., not arbitrary and capricious.¹⁶ In *Seminole Rock*, the Court instructed reviewing courts to give an agency interpretation of an agency rule "controlling weight unless it is plainly erroneous or inconsistent with the regulation."¹⁷ Those two deference rules are stated in slightly different ways, but they are functionally indistinguishable.¹⁸ The Court did not describe the basis for *Seminole Rock* deference in its 1945 opinion, but the Court has identified two bases for the doctrine in its subsequent opinions. Sometimes the Court says that *Seminole Rock* deference is based on the same constitutional/political accountability considerations as *Chevron* deference.¹⁹ In other cases, the Court says that it is based on the same considerations of relative subject matter expertise as *Skidmore*.²⁰

D. Differences Between the Deference Doctrines

The courts have announced corollaries to two of the deference doctrines that logically follow from the quite different bases for each. Thus, for instance, *Chevron* deference applies only to a statutory interpretation adopted by an agency that Congress has authorized to make policy decisions in the process of implementing a statute;²¹ *Chevron* deference does not apply when an agency adopts an interpretation of a statute based on the agency's interpretation of court opinions,²² and, *Chevron* deference applies with as much strength to an agency decision to change its interpretation of an ambiguous agency-administered statute as to an agency decision to adhere to a previously announced interpretation.²³ Each of those corollaries follows logically from the basis for *Chevron* deference. An agency that does not have the power to make policy decisions is not entitled to judicial deference when it exceeds its statutory authority by attempting to make a legally binding policy decision, and an agency that adopts a statutory

¹² 533 U.S. at 229-230; 323 U.S. at 139-140.

¹³ 323 U.S. at 139-140; 533 U.S. at 229-231.

¹⁴ 325 U.S. at 413-414.

¹⁵ John Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, Colum. L. Rev. 612, 627-629 (1996)..

¹⁶ 467 U.S. at 843-844.

¹⁷ 325 U.S. at 413-414.

¹⁸ Manning, *supra*. note 15, at 627-629.

¹⁹ 501 U.S. at 696-697.

²⁰ *Martin v. OSHRC*, 499 U.S. 144,151 (1991).

²¹ 499 U.S. at 151.

²² *Akins v. FEC*, 101 F. 3d 771 (D.C. Cir. en banc 1996).

²³ 517 U.S. at 742.

interpretation based on its interpretation of judicial decisions is not entitled to deference because its interpretation is not based on a policy decision.

The last of the three corollaries to the *Chevron* doctrine is particularly important. By instructing courts to confer as much deference on changes in pre-existing agency interpretations of ambiguous statutes as on reaffirmations of long-standing interpretations, the Supreme Court recognizes the need to allow any newly elected President to change government policies within the boundaries set by Congress. It would be inconsistent with the fundamental tenets of democratic government to force a President to adhere to the policies of his predecessor when Congress has written a statute that delegates policy making power to an agency in terms that permit a President to adopt either his preferred policies or those of his predecessor. People vote in Presidential elections because they prefer one candidate's policy preferences to those of his opponent. The courts should not be in the business of blocking implementation of the policies presumptively preferred by the electorate except in the rare case in which those policy preferences violate the Constitution.

By contrast, the *Skidmore* doctrine makes the extent of the deference due an agency's interpretation of an ambiguous agency-administered statute depend to some extent on the agency's consistency in interpreting the statute over time.²⁴ That approach to deference makes sense when deference is based on an agency's presumed comparative advantage with respect to the specialized subject matter expertise required to apply a statute to a complicated field of science. Inconsistency in an agency's treatment of the same scientific dispute naturally tends to reduce the credibility of the agency's claim of superior subject matter expertise. If the Food and Drug Administration, for instance, expresses the same opinion with respect to some important scientific principle every two years over a period of forty years, any judge is more likely to accept the agency's opinion on that issue than if the agency vacillates between two inconsistent opinions every other year for forty years.

The Court has not said much about the role of consistency in deciding whether to defer to an agency's interpretation of an agency rule. The Court's failure to address that question in a definitive way fits with the Court's multiple explanations for the *Seminole Rock* doctrine. To the extent that *Seminole Rock* deference is based on an agency's presumed superior political accountability for policy decisions, the doctrine should apply with equal strength to new interpretations that change pre-existing interpretations as to interpretations that an agency has consistently held over a long period of time. By contrast, a court should confer more deference on an agency's consistent and longstanding interpretation of a rule than on an agency's recently announced change in its interpretation of the rule if *Seminole Rock* deference is based on an agency's presumed superior expertise with respect to the subject matter of the rule.

In the next two parts of this article, I will describe the two policy disputes that I have chosen to illustrate the kinds of problems courts confront when they are required to review agency policy decisions at a time when agency policymaking is in transition from one presidential administration to another and the opinions courts have issued to grapple with those issues. I will then critique those opinions. In each case, I will begin with a doctrinal critique of the opinions. I will ask the question whether the reasoning and result in each case is based on an accurate application of prevailing doctrines. In that part of my

²⁴ 323 U.S. at 139-140; 533 U.S. at 229-231.

critique, I will assume that prevailing doctrines make sense in their substance, scope, and corollaries. In the second part of my critique, I will discuss the question whether prevailing doctrines should be changed in some way.

III. THE SCOPE OF EPA PREEMPTION OF STATE PESTICIDE REGULATION

A. *The Policy Dispute*

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizes the Environmental Protection Agency (EPA) to regulate pesticides.²⁵ FIFRA requires a manufacturer to apply to register a pesticide with EPA. The statute instructs EPA to approve an application to register a pesticide if, but only if, EPA determines that the pesticide “will not cause unreasonable effects on humans and the environment.”²⁶ The manufacturer must include its proposed product labeling with its application, and the statute instructs EPA to approve the proposed labeling if, but only if, it complies with the statutory prohibition on mislabeling.²⁷

FIFRA also pre-empts some, but not all, state regulation of pesticides. Like most preemption provisions in statutes that authorize a federal agency to regulate some subject matter, the preemption provision in FIFRA is extremely difficult to interpret and apply, particularly in the context of the forms of indirect state regulation that are accomplished through use of tort suits based on state law. FIFRA authorizes a state to regulate a federally-registered pesticide by prohibiting its use for some purpose that would otherwise be permissible pursuant to its federal registration and/or by approving its use for some purpose that otherwise would not be authorized by its federal registration as long as the state-authorized use is not prohibited by the federal registration.²⁸ In addition FIFRA has another preemption provision that has produced a great deal of litigation: “Such state shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this statute.”²⁹

EPA has taken several actions that relate to the scope and effect of the statutory prohibition on state labeling requirements that are in addition to or different from the EPA-approved labeling of a registered product. First, in 1978 EPA sought and obtained from Congress a statutory amendment that empowered EPA to waive the pre-existing statutory requirement that it register a pesticide only if it determined that the pesticide was effective for its intended use.³⁰ EPA convinced Congress that it lacked the resources required to determine whether a pesticide was effective or to evaluate the efficacy claims a manufacturer made in its proposed labeling. In 1979, EPA exercised the waiver power Congress granted it by issuing a rule in which it waived all regulation of pesticide efficacy.³¹ In a 1996 public notice, EPA confirmed that it had “stopped evaluating pesticide efficacy for routine label approvals almost two decades ago,” and that “EPA’s approval of a pesticide label does not reflect any determination on the part of EPA that

²⁵ 7 U.S.C. §136 et seq. (2000).

²⁶ 7 U.S.C. §136a(c)(5)(C),(D).

²⁷ 7 U.S.C. §136a(c)(5)(B).

²⁸ 7 U.S.C. §136v(a),(c).

²⁹ 7 U.S.C. §136v(b).

³⁰ 125 S.Ct. at 1796.

³¹ *Id.* at 1796.

the pesticide will be efficacious or will not damage crops or cause other property damage.”³²

In 2000, the Clinton-era EPA interpreted the FIFRA prohibition on state labeling that is in addition to or different from EPA-approved labeling not to pre-empt state tort suits that are based on alleged misbranding of a pesticide where the alleged misbranding relates to efficacy, crop damage, or other property damage. EPA announced that interpretation in the form of two amicus briefs EPA filed in state courts.³³ In 2003 and 2004, the SG under President Bush announced that “the United States” had determined that it had erred when it earlier interpreted FIFRA to be consistent with such state tort actions.³⁴ In two amicus briefs submitted to the Supreme Court, the SG stated that “the United States” now interprets FIFRA to prohibit such state tort suits. The SG explained that the government’s change in its interpretation of FIFRA was based on its examination of several judicial opinions in which courts had rejected EPA’s earlier interpretation.³⁵

B. Supreme Court Opinions Addressing the Pesticide Regulation Pre-emption Issue

Scores of court opinions address the pesticide regulation pre-emption issue described in part IIA.³⁶ I will describe only the opinions issued in the case that reached the Supreme Court in 2004. That dispute arose as a result of crop damage allegedly caused by a pesticide named Strongarm made by Dow. Dow applied to register Strongarm for application to peanut crops. Dow proposed labeling that included the statement: “Use of Strongarm is recommended in all areas in which peanuts are grown.”³⁷ EPA granted the application for registration and approved the proposed labeling. When peanut farmers in west Texas applied Strongarm to their crops, it allegedly stunted the growth of the peanuts because of its interaction with soil with a ph in excess of 7.0.³⁸ After the farmers complained to Dow, it reregistered Strongarm with a new label that included the statement: “Do not apply Strongarm to soils with a ph in excess of 7.2.”³⁹ The peanut farmers who had already suffered crop damage attributable to their use of Strongarm on peanut crops grown in high ph soil then sued Dow in state court for, inter alia, failure to warn and fraud.⁴⁰ The farmers claimed that Dow knew that Strongarm would damage peanut crops grown in high ph soil and affirmatively misled farmers by stating in its labeling that Strongarm should be used in all soil conditions.⁴¹

Dow filed a declaratory judgment action in federal court in which it argued that the farmers’ complaint under state tort law was pre-empted by FIFRA. The district court granted summary judgment for Dow, and the Fifth Circuit upheld that decision.⁴² The circuit court reasoned that application of state tort law to the facts of the case would

³² Id. at 1796.

³³ Id. at 1794.

³⁴ Id. at 1801.

³⁵ Brief for the United States as Amicus Curiae in *Bates v. Dow Agrosiences* page 20.

³⁶ See cases discussed in id.

³⁷ 125 S.Ct. at 1793.

³⁸ Id. at 1793.

³⁹ Id. at 1793.

⁴⁰ Id. at 1793.

⁴¹ Id. at 1793.

⁴² 332 F. 3d 323 (5th Cir. 2003).

violate the statutory prohibition on state required “labeling . . . in addition to or different from” the labeling required by EPA because a jury verdict against Dow based on fraud or failure to warn “would induce it to alter its product label.”⁴³

The Supreme Court unanimously reversed the circuit court.⁴⁴ The Supreme Court held that a state tort verdict against Dow based on failure to warn or fraud is not pre-empted by FIFRA as long as state tort law imposes a duty to warn that is equivalent to the FIFRA prohibition on mislabeling.⁴⁵ FIFRA defines mislabeling to include false or misleading statements or inadequate instructions, so the Court thought it was entirely plausible that state tort law would impose labeling requirements equivalent to the requirements imposed by FIFRA.

The Court rejected the interpretation urged upon it by the SG for several reasons. First, it rejected the SG’s argument that the statute unambiguously pre-empted all tort actions based on failure to warn.⁴⁶ The Court concluded that “imposition of state sanctions that merely duplicate federal requirements is equally consistent with the text . . .”⁴⁷ It characterized the government’s interpretation as “particularly dubious given that just five years ago the United States advocated the interpretation that we adopt today.”⁴⁸ Second, the Court noted that “for much of [the period in which FIFRA has been in effect] EPA appears to have welcomed these suits”⁴⁹ because they “would seem to aid, rather than hinder, the functioning of FIFRA.”⁵⁰ Third, the Court rejected the government’s argument that any labeling requirement imposed by state tort law necessarily would be “in addition to or different from” the labeling EPA approved because EPA specifically disavowed any role in approving labeling based on considerations of product efficacy or risk of damage to crops – the subjects of the state tort complaint.⁵¹ Fourth, after concluding that the statute was ambiguous, the Court applied the canon of construction that requires a court to interpret ambiguous language in a statute in a manner that disfavors pre-emption.⁵² Finally, the Court noted that: “State law requirements must be measured against any relevant EPA regulations that give content to FIFRA’s misbranding standards.”⁵³

Three Justices wrote two separate opinions in *Dow*. In a concurring opinion, Justice Breyer emphasized the final point the Court made in its opinion – that the pre-emptive effect of an agency-administered statute depends critically on the agency’s interpretation of the statute:

[A]n administrative agency . . . ha[s] the legal authority within ordinary administrative constraints to promulgate agency rules and to determine the pre-emptive effect of those rules in light of the agency’s special understanding of

⁴³ Id. at 331.

⁴⁴ 125 S.Ct. 1788.

⁴⁵ Id. at 1802-1803.

⁴⁶ Id. at 1797-1799.

⁴⁷ Id. at 1797.

⁴⁸ Id. at 1801.

⁴⁹ Id. at 1803.

⁵⁰ Id. at 1802.

⁵¹ Id. at 1802.

⁵² Id. at 1801.

⁵³ Id. at 1803-1804.

“whether (or the extent to which) state requirements may interfere with federal objectives.”⁵⁴

Justices Thomas and Scalia stated their agreement with the Court’s opinion in most respects but they expressed their disagreement on one important point:

[T]he majority states that the presumption against pre-emption requires choosing the interpretation . . . that disfavors pre-emption. . . . That presumption does not apply, however, when Congress has included within a statute an express pre-emption provision.⁵⁵

C. Doctrinal Critique of the Dow Opinion

With one exception, the Supreme Court’s opinion in *Dow* is doctrinally sound. The Court began by concluding that the pre-emption provision of FIFRA that prohibits a state from imposing a pesticide labeling requirement that is in addition to or different from a labeling requirement imposed by EPA is ambiguous in its potential application to a tort suit in which a party alleges that the pesticide manufacturer committed fraud or failed to warn of a known adverse effect of a use of the pesticide in the form of the risk of damage to crops caused by the pesticide.⁵⁶ That conclusion was well-supported in the Court’s opinion. The Court reasoned that if applicable state tort law imposes a duty to warn that has the same meaning as FIFRA’s prohibition on mislabeling a pesticide, the action of a state court in enforcing the duty to warn is not in addition to or different from the requirements imposed by FIFRA.⁵⁷ In that entirely plausible situation, the Court reasoned that: “The imposition of state sanctions for violating state rules that merely duplicate federal requirements is equally consistent with the text of [that pre-emption provision]”⁵⁸ and that: “[p]rivate remedies that enforce federal misbranding requirements would seem to aid, rather than hinder, the functioning of FIFRA.”⁵⁹

The Court refused to defer to the SG’s interpretation of FIFRA to pre-empt all state tort actions that are based on an alleged failure to warn.⁶⁰ The Court’s refusal to confer *Chevron* deference on the SG’s interpretation was doctrinally sound on three different bases. First, courts have consistently held that *Chevron* deference is due only a statutory interpretation adopted by the agency Congress has charged with responsibility to make the policy decisions required to implement a statute.⁶¹ Congress has given EPA, not the SG, that policymaking power. Second, the Supreme Court has held that *Chevron* deference is due only an agency interpretation announced in a legislative rule or an opinion issued in a formal adjudication.⁶² The SG’s interpretation was announced only in

⁵⁴ Id. at 1804.

⁵⁵ Id. at 1806.

⁵⁶ Id. at 1797.

⁵⁷ Id. at 1798-1801.

⁵⁸ Id. at 1797.

⁵⁹ Id. at 1802.

⁶⁰ Id. at 1801.

⁶¹ 499 U.S. 144; Richard Pierce, *Administrative Law Treatise* §3.5 (4th ed. 2002).

⁶² 533 U.S. at 229-231.

a brief, and Congress has never authorized any agency to make a legally binding decision in the process of writing a brief. Third, courts have held that a court never owes *Chevron* deference to an agency interpretation that is based on the agency's analysis of judicial decisions, rather than an agency policy decision,⁶³ and the SG stated that his interpretation was based on his analysis of prior court opinions that had rejected EPA's interpretation.⁶⁴

The Court was also on firm doctrinal grounds when it declined to confer *Skidmore* deference on the SG's interpretation. The SG's interpretation fails to qualify for deference by reference to all of the criteria the Court uses to decide whether to confer *Skidmore* deference on an agency interpretation.⁶⁵ The SG announced his interpretation in an informal instrument. The SG has no comparative advantage vis a vis a court with respect to the subject matter of FIFRA regulation. The SG's interpretation was not a long and consistently held interpretation, rather, it contradicted EPA's long-held contrary interpretation. Finally, the SG's interpretation was not supported with persuasive reasoning; instead of discussing the policy reasons in support of his interpretation, the SG referred only to his agreement with an opinion of the California Supreme Court.

After the Court concluded that the FIFRA pre-emption provision is ambiguous and after it refused to defer to the SG's interpretation of that provision, the Court invoked the canon of construction that requires a court to interpret pre-emption provisions narrowly to support its interpretation of the pre-emption provision of FIFRA.⁶⁶ That was a doctrinal error. As Justices Scalia and Thomas pointed out in their separate opinion,⁶⁷ the canon of construction the Court invoked applies only when a statute is silent or ambiguous on the question of whether Congress intended to pre-empt state law. The Court does not apply that canon when Congress explicitly preempts state actions and the question before a court is the scope of that pre-emption provision. As Justice Breyer emphasized in his separate opinion,⁶⁸ when Congress includes a pre-emption provision in an agency-administered statute, and that provision is ambiguous with respect to its potential application to some class of state actions, the Court defers to any reasonable agency interpretation of the ambiguous pre-emption provision.⁶⁹

That doctrinal flaw in the Court's opinion in *Dow* is harmless, however, for two reasons. First, it had no effect on the outcome of the proceeding, as the separate opinions of Justices Scalia, Thomas, and Breyer recognize. Second, even though the Court based its interpretation of the statute on an inapplicable canon rather than on deference to the agency, the Court made it clear that it was greatly influenced by the agency's interpretation. The Court referred to EPA actions that influenced its decisionmaking in three different passages. First, it referred to EPA's 1996 Notice that it had not regulated labeling claims related to crop damage in decades to refute the argument that a plaintiff's victory based on an alleged failure to warn about risks to crops would conflict with

⁶³ 101 F. 3d 771.

⁶⁴ Brief, *supra*. note 40, at page 20.

⁶⁵ The criteria for application of *Skidmore* deference are set forth at 323 U.S. at 138-140 and 533 U.S. at 229-231.

⁶⁶ 125 S.Ct. at 1801.

⁶⁷ *Id.* at 1806.

⁶⁸ *Id.* at 1804.

⁶⁹ *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000); *United States v. Locke*, 592 U.S. 89 (2000).

EPA's implementation of FIFRA.⁷⁰ Second, the Court rejected the argument that allowing the state tort action to proceed would frustrate the purposes of FIFRA by referring to the fact that, until the SG decided to change the government's position, "EPA appears to have welcomed these tort suits."⁷¹ Third, the Court ended its opinion with the recognition that: "[s]tate law requirements must also be measured against any relevant EPA regulations that give content to FIFRA's misbranding standards."⁷²

I am confident that the Court would retreat quickly and unanimously from the one instance in which its opinion in *Dow* is doctrinally flawed if it were presented with a case in which invocation of the narrowing canon conflicted with deference to a reasonable agency interpretation of the FIFRA pre-emption provision. If, for instance, EPA were to issue a rule in which it announced that it was resuming its pre-1979 practice of regulating pesticide labeling with reference to the risks that pesticides pose to crops and that it considered all pesticide labeling requirements imposed by states to be impermissible impositions of requirements "in addition to or different" from the labeling requirements EPA determined to be required by FIFRA, I am confident that the Court would uphold that rule as a reasonable interpretation of the ambiguous pre-emption provision of FIFRA.⁷³

⁷⁰ 125 S.Ct. at 1796, 1802.

⁷¹ Id. at 1803.

⁷² Id. at 1803-1804.

⁷³ A hypothetical variation on the facts of *Dow* will suffice to illustrate my point. Imagine that Congress increases EPA's resources to implement FIFRA to the extent necessary for EPA to return to its pre-1979 practice of regulating the efficacy of pesticides and the risks that pesticides pose to crops. Imagine that EPA then revokes the waiver it issued in 1979 and announces that, henceforth, it will investigate with care the efficacy of each new pesticide that is the subject of a pesticide registration application and that it will approve the labeling of any such pesticide if but only if it concludes that all claims of efficacy are accurate and that any risks the pesticide poses to crops are disclosed in the labeling EPA approves for the pesticide. Imagine that EPA then issues a rule in which it states that, as a result of the changes EPA has made in its methods of implementing the FIFRA prohibition on misbranding, EPA has concluded that any labeling requirement imposed by a state through any means, including a tort suit based on failure to warn or fraud, is inherently "in addition to or different from" FIFRA's if the state attempts to impose that requirement on a pesticide the labeling of which EPA approved after it announced the expansion in the scope of its regulation of pesticide labeling. EPA explains further that its new comprehensive method of regulating pesticide labeling will be most effective if it is exclusive and uniform, and that allowing state judges and juries who lack any relevant expertise to second-guess EPA labeling decisions would create a chaotic regulatory environment in which pesticide manufacturers would not know which of several potentially-conflicting authorities to follow; pesticide manufacturers would incur unnecessary costs by having to comply with as many as fifty-one different labeling regimes, and consumers would confront a bewildering array of labels and warnings, many of which are based on some lay judge or juror's mistaken beliefs about the characteristics of a pesticide.

I have no doubt that the Supreme Court would ignore the Court's erroneous reference to the inapplicable canon of construction in *Dow* in this hypothetical situation. It would instead apply the reasoning in the Thomas, Scalia, and Breyer opinions as the basis for a unanimous holding that FIFRA pre-empts any tort action against a pesticide manufacturer that is based on an alleged failure to warn users about risks to crops if the suit is brought against the manufacturer of a pesticide the labeling of which was approved by EPA after it began to regulate the contents of proposed labeling related to risks of crop damage. Several passages in the Court's opinion foreshadow this resolution of my hypothetical variation on the facts of *Dow*. The Court notes that FIFRA "pre-empts competing state labeling standards," id. at 1803; that FIFRA pre-empts "any statutory or common-law rule that would impose a labeling requirement that diverges from those set forth in FIFRA and its implementing regulations," id. at 1803; and, that "[to the extent that EPA promulgates such regulations in the future, they will necessarily affect the scope of pre-

D. Normative Critique of the Dow Opinion

In the preceding section, I criticized the Court's opinion in *Dow* for relying on an inapplicable canon of construction, rather than on deference to EPA, as the basis for its holding that FIFRA does not preempt a state tort action that is based on an alleged failure to warn of a known risk to crops posed by a pesticide. I went on, however, to conclude that the opinion was doctrinally sound if the reasoning of the three concurring Justices is substituted for the erroneous reasoning in that part of the Court's opinion, with no resulting change in outcome. In this section, I will broaden the bases for my critique to include the question whether the doctrines that the Court properly applied are normatively appropriate in their substance and scope.

I find little to criticize in the substance of the doctrines the Court applied in *Dow*. Generally, the doctrines are well thought out and fit well in the context of a government in which agencies make a high proportion of policy decisions under broad authority delegated by Congress subject to supervision by the politically accountable President and review by politically unaccountable courts. I am concerned about one of the effects of the application of those doctrines in *Dow*, however. The Court rejects the policy preferred by the incumbent President and upholds instead the policy preferred by his predecessor, even though the incumbent replaced his predecessor over four years before the Court decided the case. I am concerned that the doctrines we have adopted may not be normatively appropriate if, and to the extent that, they frustrate the will of the electorate by increasing substantially the time between the election of a President whose policy preferences differ from those of his predecessor and the time when he is able to replace his predecessor's policies with those he prefers. I believe that we can improve the fit between the deference doctrines and the performance of our democracy by changing the scope of the deference doctrines.

E. Potential Changes in Doctrine

One potential change in doctrine would require a reviewing court to defer to the SG's interpretation of an ambiguous provision in an agency-administered statute when the SG adopts, announces, and urges on a court an interpretation that differs from the agency's interpretation. Justice Scalia suggested that courts should defer to interpretations urged by the SG in amicus briefs in his concurring opinion in *Christensen v. Harris County*.⁷⁴ That change in doctrine would have had the effect of requiring the court to uphold the incumbent President's preferred policy rather than the policy preferred by his predecessor in *Dow*.

emption," *id.* at 1804 n. 28. That opinion would be entirely consistent with, and required by, all of the current administrative law doctrines. It would be analogous to the Court's opinions in *Geier v. Honda American Motor Co.*, 529 U.S. 861 (2000), and *United States v. Locke*, 592 U.S. 89 (2000).

⁷⁴ 529 U.S. at 591. Justice Scalia qualified his position, however, by referring to a situation in which the SG represents that the head of the agency responsible for administering the statute at issue has adopted the interpretation urged by the SG. It is not clear that he would defer to the SG's interpretation in a case like *Dow*, in which the SG makes no representation that EPA has adopted the interpretation the SG urges.

Deferring to the SG, rather than the agency, has one appealing characteristic when measured with reference to the political and constitutional values that provide the underpinnings of *Chevron* deference. The SG typically is one of the members of an Administration who is particularly close to the President. When the SG supports a policy that differs from the policy adopted by an agency, the policy urged by the SG is far more likely to reflect the President's policy preferences than the policy adopted by the agency. Moreover, even if the SG and the agency share a preference for the policy that is preferred by the President, the agency cannot announce its preference in a form that entitles it to *Chevron* deference for several years after the agency adopts that preference. The Supreme Court has instructed reviewing courts to confer *Chevron* deference only on agency interpretations announced in legislative rules or in decisions issued in formal adjudications. It usually takes years for an agency to announce a new policy consistent with the President's policy preferences in a notice and comment rulemaking or a formal adjudication.⁷⁵ By contrast, the SG can announce a statutory interpretation that reflects the President's policy preferences in the briefs he files with courts shortly after the President takes office.

On balance, however, I believe that it would be a mistake to adopt a doctrine of deference to the SG. Such a doctrine would have many disadvantages. The *Chevron* doctrine recognizes and gives effect to the power of the President in the overall context of a constitutional democracy in which Congress has the ultimate power to make the vast majority of policy decisions.⁷⁶ In that context, *Chevron* deference makes sense. The President is not the only politically-accountable institution, however. Congress is also politically-accountable, and its preferences trump those of the President when Congress acts through use of the legislative process, as the Court recognized in step one of the two-part *Chevron* test.⁷⁷ It would not be consistent with recognition of legislative supremacy to extend *Chevron* deference to SG interpretations of agency-administered statutes. Congress has never delegated to the SG the power to make the policy decisions necessary to implement FIFRA.

Another potential change in doctrine would broaden the scope of *Chevron* deference to include agency interpretations adopted and announced through use of procedures less formal than a notice and comment rulemaking or a formal adjudication. Since 2000, Justice Souter and Justice Scalia have engaged in a lively debate about the appropriate scope of *Chevron* deference.⁷⁸ Justice Souter has urged the Court to confer *Chevron* deference only on agency interpretations announced in legislative rules, formal adjudications, and some uncertain set of less formal procedures if Congress has indicated an intent to authorize an agency to announce a legally binding interpretation through use of that procedure.⁷⁹ Justice Scalia has urged the Court to confer *Chevron* deference on

⁷⁵ See Richard Pierce, Seven Ways to Deossify Agency Rulemaking, 47 Admin. L. Rev. 59 (1995) (describing the multi-year process required to issue a major rule); Richard Pierce, The Choice Between Rulemaking and Adjudication for Formulating and Implementing Energy Policy, 30 Hastings L. J. 1 (1979) (describing the multi-year process required to complete a major formal adjudication).

⁷⁶ The Court said that: "First, always is the question of 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, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842.

⁷⁷ Id. at 842.

⁷⁸ See Richard Pierce, 2005 Cumulative Supplement to Administrative Law Treatise §3.5.

⁷⁹ 533 U.S. at 229-231.

any agency interpretation announced through any means as long as it represents the agency's "fair and considered judgment on the matter in question."⁸⁰ So far, Justice Souter has been successful in persuading a majority of the Court to adopt his views on the appropriate scope of *Chevron* deference.⁸¹

My focus on the temporal effects of administrative law doctrines places the Souter-Scalia debate in a new light. The narrow scope of Justice Souter's approach to *Chevron* produces a situation in which a newly-elected President with policy preferences that differ from those of his predecessor is unlikely to get most of his preferred policies approved by courts and in effect in his first term in office. He probably will not be able to get all of those policies approved even during his second term if he is fortunate enough to be re-elected. By contrast, Justice Scalia's broader approach to *Chevron* would allow a President to get most of his preferred policies approved and in effect within a couple of years of taking office. Since *Chevron* deference can yield judicial approval of a policy only if the agency can convince a court that the policy it has announced is reasonable and is within the boundaries Congress has established by statute, I believe that the Court could further the political and constitutional goals of *Chevron* far more effectively if it were to modify the *Chevron* doctrine by adopting Justice Scalia's approach to its scope.⁸²

⁸⁰ *Christensen v. Harris Cty.*, 529 U.S. 576, 591 (2000). For a longer version of Justice Scalia's views on this issue, see his dissenting opinion in *United States v. Mead Corp.*, 533 U.S. at 239-250.

⁸¹ 533 U.S. 218.

⁸² While I believe that the results of the Court's opinion in *Dow* illustrate the desirability of a change in the scope of *Chevron*, I do not believe that any defensible change in doctrine would change the outcome of the particular dispute the Court resolved in *Dow*. As I argued in section IIIC, I believe that the Court would have upheld an interpretation of FIFRA in which EPA announced both that it had resumed responsibility to regulate pesticide efficacy, including the accuracy of proposed labeling as it relates to efficacy and risk of crop damage, and that EPA's approval of a proposed pesticide label preempts a state tort suit based on alleged fraud or failure to warn. See *supra*. note 73 and accompanying text. I believe that EPA would have no difficulty persuading the Court that such a change in policy is reasonable and within the statutory boundaries on its discretion. That change of policy would require a large increase in the resources made available to EPA for pesticide regulation, however.

The Bush Administration did not attempt to make that change in policy. Instead, the Bush Administration attempted to change EPA's policies by retaining EPA's pre-existing refusal/inability to regulate pesticide efficacy, including its inability to review the accuracy of proposed pesticide labels as they relate to efficacy and risk of crop damage, while simultaneously announcing that all state regulation of pesticide labeling related to efficacy and risk of crop damage is pre-empted. I do not believe that EPA would be able to convince a court that such a peculiar combination of policies is either reasonable or consistent with the statutory boundaries on its discretion.

When Congress prohibited a state from imposing a labeling requirement "in addition to or different from" labeling required by FIFRA, Congress assumed that EPA would regulate each aspect of a pesticide's labeling, and Congress included the labeling pre-emption provision in FIFRA to obtain uniformity in regulating pesticide labeling. I have no doubt that EPA could choose to regulate pesticide labeling as it relates to efficacy and risk to crops and prohibit states from engaging in duplicative and potentially conflicting regulation of that subject matter if Congress gave it the resources required to perform that task. In that situation, pre-emption of all state regulation of labeling would further the statutory goal of assuring uniformity in regulating labeling. I do not believe that EPA would be acting in a manner consistent with FIFRA, however, if it continued to refuse to regulate an important aspect of pesticide labeling and simultaneously asserted that states lack any power to regulate that area. When Congress limited state regulatory power in FIFRA, by prohibiting states from imposing labeling requirements "in addition to or inconsistent with" EPA labeling requirements, it was attempting to further the goal of obtaining uniformity and consistency in pesticide regulation. Congress was not attempting to create a legal regime in which no institution at any level of government can regulate labeling claims related

IV. THE MEANING OF MODIFICATION IN THE CLEAN AIR ACT

A. *The Policy Dispute*

In 1970, Congress enacted amendments to the Clean Air Act (CAA) that applied expensive New Source Performance Standards (NSPS) to all major new stationary sources of air pollution, including coal-fired generating plants.⁸³ Old generating plants were exempt from the new requirements, however. Congress believed that owners of old plants should not be required to engage in expensive retrofitting of old plants that were likely to be retired from service in the near future. Thus, the NSPS requirements applied only to new plants or plants that had been modified. The statute defined a modification as “any physical change in, or change in the operation of, a stationary source which increases the amount of any air pollutant emitted by such source. . . .”⁸⁴ In 1977, Congress enacted another amendment to CAA that implemented a Prevention of Significant Deterioration (PSD) program that requires any owner of a major stationary source constructed after 1977 to obtain a special permit and to comply with expensive new air pollution control rules.⁸⁵ The 1977 amendment defined construction to include modification and followed its reference to modification with a parenthetical “(as defined in [the pre-existing NSPS provision of CAA]).”⁸⁶

Congress did not anticipate much controversy about the meaning of modification in these two amendments. Congress assumed that most of the old, relatively high-polluting coal-fired generating plants would be retired within a few years after the enactment of the amendments. That assumption proved to be mistaken. Most of the pre-existing coal-fired plants are still in operation today, primarily because they are the lowest cost source of electricity in the country. Indeed, those plants generate more electricity today than when Congress amended CAA in the 1970s, and they account for over half of the electricity consumed in the United States today.⁸⁷ All of those plants have been the subject of engineering projects that have rendered them quite different from the plants that existed in the 1970s.⁸⁸ The typical pre-existing coal-fired generating plant now has greater capacity to generate electricity and lower emissions of pollutants per unit of electricity generated. The question that has arisen repeatedly with respect to virtually all of the old coal-fired plants is whether the major construction projects that allow the plants to generate more electricity with lower per unit emissions constitute modifications within

to the efficacy of a pesticide or to the risk that it will cause crop damage, thereby leaving farmers with no source of legal protection from damage attributable to fraud or intentional mislabeling by pesticide manufacturers.

⁸³ Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970).

⁸⁴ 42 U.S.C. §7411(a)(4).

⁸⁵ Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977); Clean Air Act Technical and Conforming Amendments, Pub. L. No. 95-190, 91 Stat. 1393 (1977).

⁸⁶ 42 U.S.C. §7479.

⁸⁷ President of the United States, National Energy Policy, Report of National Energy Policy Development Group xiii (2000).

⁸⁸ See, e.g., *United States v. Duke Energy Corp.*, 411 F. 3d 539, 544 (4th Cir. 2005) (Duke Energy implemented 29 major engineering projects on coal-fired plants between 1988 and 2000. The projects cost as much as seven times the original cost of constructing the plant.)

the meaning of the PSD provisions of CAA. If they do, they were illegal when they were implemented and the owners of the plants must now either retire each plant or retrofit each with extraordinarily expensive new pollution control technology.

EPA issued rules that define modification in 1971,⁸⁹ 1975,⁹⁰ 1978,⁹¹ 1980,⁹² 1992,⁹³ and 2003.⁹⁴ With three exceptions, however, none of those rules addressed the most important recurring issue that arises in EPA's dealings with owners of old coal-fired generating plants. The statute defines a modification as a "change . . . which increases the amount of any air pollutant emitted by such source."⁹⁵ What if the owner of a facility implements a project that allows the facility to decrease the pollutants it emits per unit of electricity generated but that also allows the facility to generate so much more electricity that the aggregate quantity of some pollutant emitted by the facility increases even though the per unit quantity of the pollutant emitted actually decreases substantially? Does that qualify as an "increase" in emissions of a pollutant that causes implementation of the project to become a "modification," thereby triggering the expensive NSPS and PSD requirements of CAA?

The 1971, 1978, and 1980 EPA rules that defined modification did not address that issue. The 1975 rule addressed the issue by excluding from the definition of a "change" that might otherwise qualify as a modification "[a]n increase in the hours of operation or in the production rate."⁹⁶ The 1975 rule applied only to the definition of modification in the NSPS provisions, however, and not to the definition in the PSD provisions.⁹⁷

The 1992 rule applied to both NSPS and PSD. It excluded from the definition of modification any increase in emissions that was caused by increased demand for the output of a facility that was independent of any physical change to the facility.⁹⁸ No court ever resolved the dispute with respect to the legality of that rule, however, and the rule did not apply to the scores of engineering and construction projects that facility owners implemented before 1992. Facility owners challenged the validity of the 1992 rule, but the D.C. Circuit stayed the review proceedings to allow EPA to complete a new rulemaking that ultimately produced the 2003 rule.⁹⁹

The 2003 rule also applies to both NSPS and PSD. It retains parts of the 1992 rule, but it has two changes which, in the aggregate, reduce significantly the number of facilities and projects that qualify as modifications. It allows a facility owner to use its emissions in any year within a ten-year lookback period to compare its past emissions with its present or future emissions to determine whether its emissions have increased rather than the two-year lookback period that previously applied.¹⁰⁰ It also reaffirms the

⁸⁹ 36 Fed. Reg. 24,876 (Dec. 23, 1971).

⁹⁰ 40 Fed. Reg. 58,416 (Dec. 16, 1975).

⁹¹ 43 Fed. Reg. 26,380 (June 19, 1978).

⁹² 45 Fed. Reg. 52,676 (Aug. 7, 1980).

⁹³ 57 Fed. Reg. 32,314 (July 21, 1992).

⁹⁴ 67 Fed. Reg. 80,186 (Dec. 31, 2002).

⁹⁵ 42 U.S.C. § 7411(a)(4).

⁹⁶ 40 C.F.R. § 51.166(b)(2)(iii)(f).

⁹⁷ 411 F.3d at 545-546.

⁹⁸ 57 Fed. Reg. 32,314.

⁹⁹ *New York v. EPA*, 413 F. 3d 3,16 (D.C. Cir. 2005).

¹⁰⁰ 57 Fed. Reg. at 90,278.

exclusion for demand growth and expands that exclusion to cover other facilities in addition to electric generating plants.¹⁰¹ The 2003 rule was upheld in a 2005 D.C. Circuit opinion.¹⁰² By its terms, however, the 2003 rule does not apply to any activity that took place prior to 2003.¹⁰³ Indeed, it cannot apply retroactively because the Supreme Court issued an opinion in 1988 that prohibits agencies from issuing rules with retroactive effects.¹⁰⁴

Shortly after it issued its 1980 rule, EPA interpreted its definition of modification for PSD purposes to allow a facility owner to implement a project that had the effect of increasing its aggregate emissions of a pollutant only because of increased output from the unit without obtaining a PSD permit or otherwise complying with the expensive PSD requirements. EPA took the position that a project caused an increase in emissions only if it had the effect of increasing the emissions per unit of output.¹⁰⁵ EPA did not announce that interpretation in a rule or a formal adjudication, however. EPA's Director of the Division of Stationary Source Enforcement announced the interpretation in the context of decisions declining to take enforcement actions against facilities that implemented projects that increased total emissions because of increased output but that reduced emissions per unit of output.¹⁰⁶ The 1980 interpretation of modification was an important part of President Carter's effort to reduce the nation's dependence on expensive and politically insecure sources of imported oil by increasing consumption of inexpensive domestic coal supplies.¹⁰⁷

In 1999 and 2000, however, EPA initiated a large number of highly publicized enforcement actions against virtually all owners of coal-fired generating stations.¹⁰⁸ Those actions were a major part of President Clinton's effort to reduce air pollution. In each action, EPA alleged that the facility owner had acted illegally during the 1980 to 1999 period in implementing projects that had the effect of increasing aggregate emissions of one or more pollutant from each facility. In each case, the project had not increased emissions per unit of output; emissions had increased solely because the facility was being used to produce more electricity. EPA alleged that the projects constituted modifications within the meaning of that term as it is used in the 1980 PSD rules because the projects enabled the owner to increase the rate of utilization of the facility, thereby increasing aggregate emissions from the facility. In each case, the facility owner defended its past conduct by arguing that a project implemented with respect to an old coal-fired generating plant qualified as a modification for PSD purposes only if the project produced an increase in emissions of pollutants per unit of output, which was not the case with respect to any of the scores of old plants that had undergone major projects between 1980 and 1999.

¹⁰¹ Id. at 80,277.

¹⁰² *New York v. EPA*, 413 F.3d 3.

¹⁰³ 68 Fed. Reg. at 61,264.

¹⁰⁴ *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988).

¹⁰⁵ 411 F. 3d at 545-546.

¹⁰⁶ Id. at 545-546.

¹⁰⁷ President Carter's plan to reduce U.S dependence on imported oil by substituting coal for oil is described in Richard Pierce, Gary Allison & Patrick Martin, *Economic Regulation: Energy, Transportation, and Utilities* 445-451, 837-868 (1980)

¹⁰⁸ *U.S. v. Alabama Power Co.*, 372 F. Supp. 2d 1283, 1285 (N.D. Ala. 2005).

B. Court Opinions Addressing the Dispute About the Meaning of Modification

Between 2003 and 2005, five courts issued opinions in which they reviewed EPA interpretations of modification, as that term is used in the context of the CAA PSD provisions. In opinions issued in 2003, two district courts decided that Congress had unambiguously resolved the question of the meaning of modification and, thus, that EPA had no discretion with respect to the meaning of the term and a court owed no deference to any EPA interpretation of the term. Those courts resolved the issue of law in inconsistent ways, however.¹⁰⁹ The District Court for the Middle District of North Carolina held that EPA was required to define modification to exclude a project that increased emissions only because it enabled the facility to increase its output,¹¹⁰ while the District Court for the Southern District of Ohio held that EPA was required to define modification to include such a project.¹¹¹ By contrast, all three of the court opinions issued in 2005 concluded that the statutory term modification is ambiguous. Those opinions were issued by the District Court for the Northern District of Alabama,¹¹² the Fourth Circuit,¹¹³ and the D.C. Circuit.¹¹⁴

In *United States v. Alabama Power Co.*, the District Court for the Northern District of Alabama was required to determine the meaning of modification in the context of an enforcement proceeding in which EPA was urging the court to hold that a firm violated the PSD provisions of CAA by implementing projects during the period 1980-1999 that increased aggregate emissions from facilities only because the firm increased its rate of output from the facilities.¹¹⁵ EPA could prevail only if the court accepted EPA's 1999 interpretation of modification, rather than its 1980 or 2003 interpretation. The court first concluded that the term modification is ambiguous.¹¹⁶ The court then stated that: "[a]n abstract principle, the court agrees with EPA . . . that deference is due the EPA in the agency's interpretation of the CAA's . . . increased emissions provisions."¹¹⁷

The court then turned to the question of which of the inconsistent EPA interpretations were entitled to deference. It refused to defer to the interpretation announced in EPA's 2003 rule.¹¹⁸ The court noted that the 2003 rule, by its terms, applies only to conduct that took place after the rule was issued, while all of the conduct at issue in the case before the court took place well before 2003.¹¹⁹ The court also refused to defer to the 1999 interpretation EPA urged in its brief.¹²⁰ The court reasoned that an

¹⁰⁹ As the District Court for the Northern District of Alabama characterized the two opinions:

Both courts grounded their opinions on analysis of the statute. Both courts reasoned that the statute mandated the result reached. The courts reached diametrically opposed conclusions. 372 F. Supp. 2d at 1292.

¹¹⁰ *U.S. v. Duke Energy Corp.*, 278 F. Supp. 2d 619 (M.D.N.C. 2003).

¹¹¹ *U.S. v. Ohio Edison*, 276 F. Supp. 2d 829 (S.D. Ohio 2003).

¹¹² 372 F. Supp. 2d 1283.

¹¹³ 411 F. 3d 539.

¹¹⁴ 413 F. 3d 3.

¹¹⁵ 372 F. Supp. 2d at 1290-1292.

¹¹⁶ *Id.* at 1300-1302.

¹¹⁷ *Id.* at 1305.

¹¹⁸ *Id.* at 1300-1301.

¹¹⁹ *Id.* at 1300-1301.

¹²⁰ *Id.* at 1305-1306.

interpretation announced in a brief is not entitled to *Chevron* deference but only to the weaker and more contingent form of deference described in *Skidmore*.¹²¹ The court concluded that it should not confer *Skidmore* deference on that agency interpretation because it was inconsistent with both the informal interpretation EPA announced in declining to take enforcement actions in 1980 and the formal interpretation EPA announced in its 2003 rule.¹²² The court was particularly troubled by EPA’s argument that a court should defer in 2005 to an interpretation that was inconsistent with the agency’s prior interpretation and that the agency had formally rejected in the rule it issued in 2003. In the court’s words:

Finally, if one compares the 2003 Rule . . . with this civil action, what one sees is one office of EPA attempting to expand and clarify the . . . provisions [that exempt facilities from PSD] through rulemaking, while another is attempting to redefine them through enforcement actions and litigation.¹²³

* * *

This leaves the anomaly of utilities, like APC, being prosecuted for conduct that, if engaged in now, would not be prosecuted. Put another way, this action is a sport, which is not exactly what one would expect to find in a national regulatory enforcement program.¹²⁴

After concluding that EPA had not issued any interpretation of modification to which the court should defer, the district court adopted its own preferred interpretation of modification:

Emissions increases, for purposes of NSR/PSD analysis, are calculated only on the basis of “maximum hourly emission rates”, not “annual actual emissions”. Maximum hourly emissions must increase before PSD permitting is triggered; greater facility utilization is irrelevant to the analysis.¹²⁵

The Fourth Circuit addressed the same issues in a virtually identical context in its 2005 opinion in *United States v. Duke Energy Corp.*¹²⁶ The court held that modification was ambiguous with respect to the meaning of an increase in emissions.¹²⁷ Thus, the court emphasized that EPA has the power to adopt by rule either of the competing definitions of modification.¹²⁸ The court also concluded, however, that Congress did not give EPA discretion to interpret modification to have different meanings in the contexts

¹²¹ Id. at 1306.

¹²² Id. at 1306.

¹²³ Id. at 1306.

¹²⁴ Id. at 1306 n. 44.

¹²⁵ Id. at 1306-1307.

¹²⁶ 411 F. 3d 539.

¹²⁷ The court did not actually state that the term is ambiguous, but it stated that “EPA retains the power to amend this and other regulations ‘through exercise of appropriate rulemaking powers.’” Id. at 550. EPA could not make such a change in interpretation by rule unless the statutory term it is interpreting is ambiguous.

¹²⁸ Id. at 550.

of the NSPS and PSD programs.¹²⁹ The court recognized that Congress can, and sometimes does, permit an agency to define the same statutory term in different ways when the term is used for different purposes, and the court recognized that there are “vital differences” between the PSD and NSPS programs.¹³⁰ Still, the court concluded that the language Congress used in the 1977 amendment unambiguously required EPA to define modification the same way for both purposes.¹³¹ To the Fourth Circuit, the critical sentence in the definition section of the 1977 PSD amendments was: “The term ‘construction’ when used in connection with any source or modification includes the modification (as defined in [the analogous section of the NSPS provisions]) of any source or facility.”¹³² Since all parties, including EPA, agreed that EPA had issued a rule in 1975 that excluded increases in emissions attributable to increased output from the definition of modification in NSPS, the court concluded that EPA was required to use the same definition for purposes of PSD unless and until EPA issues a rule that changes the definition of modification for both purposes.¹³³

The third 2005 opinion that discussed the interpretation of modification was the D.C. Circuit’s opinion in *New York v. EPA*.¹³⁴ The issue arose in a different context in that case, however. The court reviewed the validity of the rule EPA issued in 2003. That rule interpreted modification to exclude most projects that increase emissions by enabling a facility to increase its output by allowing a facility owner to choose any year in a ten year lookback period to use as the baseline from which to determine whether an increase in emissions has occurred and by excluding any increase in emissions that is attributable only to growth in the demand for the output of the facility.¹³⁵ The court first held that the statutory definition of modification was ambiguous and then upheld EPA’s new interpretation of that term as reasonable.¹³⁶ Since the interpretation was announced in a legislative rule, the court applied *Chevron* deference to EPA’s interpretation.¹³⁷

The court noted that EPA “is entitled to balance environmental concerns with economic and administrative concerns.”¹³⁸ That is clearly what EPA did when it issued its 2003 rule. Of course, EPA engaged in the same balancing process when it adopted the quite different interpretation of modification for the purpose of taking the plethora of enforcement actions it initiated in 1999 and 2000. The difference in the outcomes of the two balancing processes should come as no surprise to anyone who follows politics. The 1999-2000 EPA interpretation was reflective of the policies of President Clinton, while the 2003 interpretation was reflective of the policies of President Bush. Indeed, in 2005 EPA proposed a new definition of modification that would give facility owners even greater discretion to make large changes to their old facilities without having to obtain a

¹²⁹ Id. at 546-550.

¹³⁰ Id. at 549.

¹³¹ Id. at 550.

¹³² Id. at 550.

¹³³ Id. at 550-551.

¹³⁴ 413 F. 3d 3.

¹³⁵ Id. at 10.

¹³⁶ Id. at 20-27.

¹³⁷ Id. at 17-18.

¹³⁸ Id. at 23.

PSD permit or to install the extraordinarily expensive pollution control equipment required to comply with the PSD rules.¹³⁹

C. Doctrinal Critique of the Opinions Interpreting Modification

It is particularly important to determine whether the five recent court opinions that review EPA's interpretations of modification are doctrinally sound. The Supreme Court is likely to resolve this dispute eventually, and the Court is likely to resolve it through application of prevailing doctrines. Thus, a hypothetical doctrinally-sound resolution of the issue is likely to replace the doctrinally-flawed and inconsistent lower court opinions that have been issued through 2005.

The two courts that issued opinions in which they reviewed EPA's interpretation of modification in 2003 held that Congress unambiguously resolved the question of how to determine whether a major construction project implemented at a facility increases its emissions of a pollutant and, hence, constitutes a modification for PSD purposes.¹⁴⁰ The reasoning in each of those opinions detracts from the plausibility of the conclusion in the other, however, since each court concluded that Congress clearly resolved the issue in a manner diametrically opposed to the other court's conclusion.¹⁴¹ The three courts that issued opinions on this issue in 2005 concluded that the statutory definition of modification is ambiguous in its potential application to a facility that has increased its total emissions solely because it has increased its output even though the changes made to the facility decreased its rate of emissions per unit of output.¹⁴²

The courts that concluded that the statutory term is ambiguous have the better of this argument. The CAA defines modification with reference to a project that has the effect of increasing emissions of any pollutant, but it leaves the term "increase" undefined.¹⁴³ In that situation, increase can refer either to an increase in aggregate emissions due solely to an increase in output or to an increase in the rate of emissions per unit of output. As the D.C. Circuit and the Fourth Circuit concluded, giving meaning to the term increase in the context of the PSD provisions of CAA requires some institution to make a policy decision in which it must balance the two conflicting goals of the Clean Air Act – reducing air pollution and enhancing or preserving economic prosperity.¹⁴⁴

When EPA interprets modification in a manner that permits a facility owner to implement a project that simultaneously reduces emissions per unit and increases output from the facility without having to comply with the expensive PSD rules, it is arguably furthering the policy goals of the CAA by refraining from inadvertently discouraging utilities from implementing socially-beneficial projects that allow utilities to continue to generate electricity in the lowest cost facilities available today with a resulting decrease in emissions of pollutants per unit of electricity generated. When EPA interprets modification in a manner that has the effect of applying the PSD rules to almost any

¹³⁹ See *New Rules Could Allow Power Plants to Pollute More*, *The Washington Post*, p. A1 (August 31, 2005); *EPA Issues Draft Rules on Plants' Emissions*, *The Washington Post*, p. A4 (October 14, 2005).

¹⁴⁰ *U.S. v. Ohio Edison*, 276 F. Supp. 2d 829; *U.S. v. Duke Energy Corp.*, 278 F. Supp. 2d 619.

¹⁴¹ *U.S. v. Alabama Power Co.*, 372 F. Supp. 2d 1283, 1296.

¹⁴² *New York v. EPA*, 413 F. 3d 3; *U.S. v. Duke Energy*, 411 F. 3d 539; *U.S. v. Alabama Power Co.*, 372 F. Supp. 2d 1283.

¹⁴³ 42 U.S.C. § 7411(a).

¹⁴⁴ 413 F. 3d at 23; 411 F. 3d at 550.

project implemented at an old, high-polluting plant, it is arguably furthering the policy goals of CAA by encouraging the owners of the highest polluting sources of electricity in the country to replace those old facilities with modern, low-polluting facilities. The two district courts that adopted their own interpretations of modification ignored the Supreme Court's admonition in *Chevron* that politically unaccountable judges should not substitute their own policy preferences for those of a politically accountable agency.¹⁴⁵ The three courts that concluded that modification is ambiguous acted in a manner that was true to the *Chevron* doctrine.

The D.C. Circuit concluded that the statutory term modification is ambiguous and then upheld as reasonable EPA's interpretation of that rule announced in its 2003 rule.¹⁴⁶ Since the rule is legislative, the D.C. Circuit properly invoked *Chevron* deference in the process of upholding EPA's interpretation.¹⁴⁷

Even though it concluded that modification is ambiguous, the Fourth Circuit also concluded that Congress had unambiguously required EPA to define modification in the same manner for purposes of both the NSPS program and the PSD program.¹⁴⁸ That conclusion had the effect of requiring EPA to define modification to exclude a change in a facility that increases emissions only by enabling the facility to increase its output for PSD purposes because EPA had issued a legislative rule in 1975 that defined modification in that manner in the context of the NSPS program.¹⁴⁹ If the Fourth Circuit is right with respect to its conclusion that Congress required EPA to give modification the same meaning for both purposes, the rest of the court's conclusions follow logically through application of well-established administrative law doctrines. A court owes deference to an agency's interpretation of an ambiguous agency-administered statute when the agency announces that interpretation in a legislative rule, and an agency can only amend a legislative rule by issuing another legislative rule.¹⁵⁰ I believe that the Fourth Circuit was wrong to conclude that EPA lacks the discretion to adopt different interpretations of modification for NSPS and PSD purposes, however.¹⁵¹ In any event, the

¹⁴⁵ 437 U.S. at 865-866.

¹⁴⁶ 413 F.3d at 20-27.

¹⁴⁷ *Id.* at 17-18.

¹⁴⁸ 411 F. 3d at 546-547.

¹⁴⁹ *Id.* at 550.

¹⁵⁰ 437 U.S. at 843-844.

¹⁵¹ Until 2005, I would have said that this element of the Fourth Circuit's opinion is clearly inconsistent with prevailing doctrine. As the Fourth Circuit was forced to admit, it and other courts, including the Supreme Court, have upheld different agency interpretations of the same ambiguous word that Congress used in two places in a statute where the contexts in which the word is used differ. The 2005 opinion by a seven-Justice majority in *Clark v. Suarez Martinez*, 125 S. Ct. 716 (2005), requires me to reconsider my views, however. The Supreme Court held that the Immigration and Naturalization Service is required to give the same statutory phrase the same meaning in two quite different contexts. The majority reasoned that its holding was required to avoid establishing "the dangerous principle that judges can give the same statutory text different meanings in different cases." *Id.* at 727.

I am not sure what to make of the Court's opinion in *Clark*. It is potentially distinguishable from the cases reviewing EPA's different definitions of modification on two bases – INS never announced an interpretation of the statutory text at issue in *Clark* in a form that was even arguably entitled to *Chevron* deference, and the term modification in CAA is not "the same statutory text;" rather, it is the same word used in different parts of the same statute. Moreover, as my colleague Jonathan Siegel has shown, the Supreme Court has frequently embraced the principle the *Clark* majority rejected as dangerous. Jonathan Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 *Tex. L. Rev.* ___,

Fourth Circuit recognized that EPA could change its 1975 interpretation of modification for purposes of both the PSD program and the NSPS program, but it could only do so by using the cumbersome and time-consuming legislative rulemaking process to amend its pre-existing legislative rule that defined modification for purposes of the NSPS program.¹⁵²

The District Court for the Northern District of Alabama concluded that modification is ambiguous and stated that “in the abstract,” it was required to defer to any reasonable EPA interpretation of modification.¹⁵³ The court then refused to defer to the interpretation EPA announced in its 2003 rule because, even though EPA announced that interpretation in a form that renders it subject to *Chevron* deference, the rule has prospective effect only, and all of the conduct at issue before the court took place prior to 2003.¹⁵⁴ The court also refused to defer to the contrary interpretation EPA urged in its brief submitted in the case before the court because that interpretation was announced in a form that entitled it only to the weaker and contingent form of deference the Court described in *Skidmore*.¹⁵⁵ The court concluded that the interpretation EPA urged in its brief was not entitled to *Skidmore* deference because it was inconsistent both with EPA’s prior interpretation announced by a senior enforcement official in 1980 and with EPA’s present interpretation reflected in EPA’s 2003 rule.¹⁵⁶ Lacking any agency interpretation to which it was willing to defer, the court announced and applied its own preferred interpretation – a facility has been modified for PSD purposes only if it has been changed in a way that increases its emissions per unit of output.¹⁵⁷

The District Court applied prevailing doctrine when it declined to defer retroactively to the interpretation EPA announced in its 2003 rule, but it departed from applicable doctrine when it held that the interpretation EPA urged in its brief was entitled only to *Skidmore* deference. The interpretation EPA adopted and announced in the context of bringing the enforcement actions it initiated in 1999-2000 was not just an

_____. In fact, as recently as 2004, the Supreme Court characterized as a “presumption” the canon of construction that the same term has the same meaning in every context when it is used in the same statute. *General Dynamics Land System v. Kline*, 540 U.S. 581, 595 (2004). The Court went on to explain that the “presumption is not rigid and readily yields whenever there is such variation in the connection in which the terms are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.” *Id.* at 595.

Siegel has also argued that courts should continue that practice in the many circumstances in which a court can further the goals of a statute most effectively by adopting different interpretations of the same ambiguous statutory language in different contexts. Siegel, *supra*. note 74, at _____. I find Siegel’s arguments persuasive. They apply with particular force to a situation in which a politically-accountable agency gives different meanings to the same word when that word is used in two quite different contexts in the same statute. In that context, the court should simply cite *Chevron* and defer to any reasonable agency interpretation of the ambiguous word. The Fourth Circuit now seems to agree with me on that point. In an opinion issued after the Fourth Circuit issued its opinion in *Duke* and after the Supreme Court issued its opinion in *Suarez Martinez*, the Fourth Circuit upheld a Bureau of Prisons decision in which the agency gave the same term different meanings in different contexts even though the term was used in the same sentence of the same statute. *Yi v. Federal Bureau of Prisons*, 412 F. 3d 526 (4th Cir. 2005).

¹⁵² 411 F. 3d at 550.

¹⁵³ 372 F. Supp. At 1300-1302, 1305.

¹⁵⁴ *Id.* at 1300-1301.

¹⁵⁵ *Id.* at 1306.

¹⁵⁶ *Id.* at 1306.

¹⁵⁷ *Id.* at 1306-1307.

interpretation of ambiguous language in an agency-administered statute, it was also an interpretation of the ambiguous language in the legislative rule EPA issued in 1980. As such, it was entitled to *Seminole Rock* deference. That form of deference is stronger than *Skidmore* deference and, unlike *Skidmore* deference, it is not contingent on consistency in the agency's interpretation of the rule.¹⁵⁸ Moreover, unlike *Chevron* deference, *Seminole Rock* deference necessarily applies to agency interpretations announced through use of procedures less formal than notice and comment rulemaking or a decision issued in a formal adjudication.¹⁵⁹ In fact, the Supreme Court has held that a court must confer *Seminole Rock* deference on at least some agency interpretations of ambiguous agency rules that are announced only as litigating positions in briefs.¹⁶⁰

Seminole Rock requires a court to give an agency's interpretation of an ambiguous rule "controlling weight unless it is plainly erroneous or inconsistent with the regulation."¹⁶¹ The District Court did not conclude, and could not have concluded, that the agency's 1999 interpretation of its ambiguous 1980 rule was either "plainly erroneous or inconsistent with the regulation," so the court should have deferred to that interpretation. There are three bases on which the court might have attempted to defend its decision not to defer to EPA's interpretation of its 1980 rule, but the court did not mention any of the three.¹⁶² I will discuss those potential bases for escaping from the duty to defer to an agency's interpretation of a rule in section IVE.

The District Court also departed from precedent when it gave the ambiguous term modification the court's own preferred meaning. A court has no choice but to adopt its own preferred construction of an ambiguous provision in an agency-administered statute when the agency has not announced an interpretation to which the court can defer.¹⁶³ That was not the situation the district court confronted, however. It was required to defer to EPA's interpretation of its 1980 rule, and since that rule is a legislative rule, EPA's interpretation of that rule also resolves the ambiguity in the statutory definition of modification.

D. Normative Critique of the Opinions on the Meaning of Modification

In section IVC, I concluded that the three 2005 opinions that reviewed EPA interpretations of the term modification, as that term is used in the PSD provisions of CAA, accurately applied prevailing doctrines when they concluded that the term is ambiguous, that the D.C. Circuit acted in a manner consistent with prevailing doctrine when it upheld the interpretation of modification EPA announced in its 2003 rule, and that the District Court for the Northern District of Alabama accurately applied prevailing doctrine when it declined to apply the statutory interpretation EPA announced in its 2003 rule retroactively. I also concluded that the District Court for the Northern District of Alabama acted in a manner inconsistent with prevailing doctrine when it refused to defer

¹⁵⁸ Text at notes 13-19 supra.

¹⁵⁹ Pierce, supra. note 61, at §6.11.

¹⁶⁰ Auer v. Robbins, 519 U.S. 452, 462 (1997).

¹⁶¹ 325 U.S. at 413-414.

¹⁶² See text at notes ____, infra.

¹⁶³ See National Cable v. Brand X Internet, 125 S. Ct. 2688, 2700-2701.

to EPA's interpretation of its 1980 rule defining modification and when it adopted its own preferred interpretation of the statutory term modification. Finally, I concluded that the Fourth Circuit was wrong when it concluded that EPA must give modification the same meaning in the context of both the NSPS program and the PSD program.

If my doctrinal critique is correct, any court that applies prevailing doctrines accurately to the scores of pending EPA CAA enforcement actions will have no choice but to defer to EPA's 1999 interpretation of modification that it is continuing to urge courts to apply in its ongoing enforcement proceedings in 2005. I am troubled by that result for two reasons, however. First, like the results of applying prevailing doctrines in *Dow*,¹⁶⁴ it has the effect of requiring a court in 2005 to reject the policy preferred by the incumbent President in favor of the contrary policy of his predecessor, even though the incumbent took office four years earlier in 2001. Second, I share the concerns about fairness and regularity expressed by the District Judge in the *Alabama Power* case.¹⁶⁵ It does not seem right to conclude that a firm violated the law during the period between 1980 and 1999, and to require the firm to incur hundreds of millions of dollars of mandated costs, based on an interpretation of an ambiguous rule and statute that the government did not announce until 1999, when the firm acted on the basis of the agency's contrary interpretation announced in 1980 and when a court would have to conclude that the firm acted in an entirely lawful manner if its conduct were to be judged with reference to the definitive interpretation of the statute the agency announced in 2003.

E. Potential Changes in Doctrine

My concerns about the unfortunate results of the application of prevailing doctrines to the dispute with respect to the meaning of modification motivates me to consider critically whether today's prevailing doctrines make sense or whether we should change one or more of those doctrines.

There are several changes in doctrine that could avoid the two adverse effects of applying prevailing doctrine in these problematic enforcement cases. The Supreme Court could overrule *Seminole Rock* and substitute a less powerful and more contingent form of deference for *Seminole Rock* deference. Such a change in doctrine would allow a court to refuse to defer to EPA's 1999 interpretation of its 1980 rule. That, in turn, would allow a court to adopt an interpretation of modification that is consistent with the policy preferences of the incumbent President and that would avoid penalizing firms for engaging in conduct that they had no reason to believe was unlawful at the time the firms engaged in the conduct.

John Manning wrote an excellent article in 1996 in which he urged just such a change in doctrine.¹⁶⁶ Manning argued that courts should not confer a strong form of deference on agency interpretations of ambiguous agency rules because such a doctrine of deference encourages agencies to issue ambiguous rules.¹⁶⁷ Manning makes some good points, but I do not support his proposed change in doctrine for two reasons. First,

¹⁶⁴ See text at notes 72-73 *supra*.

¹⁶⁵ see text at notes 122-124 *supra*.

¹⁶⁶ Manning, *supra*. note 15.

¹⁶⁷ *Id.* at 631-680.

as Manning acknowledges, adoption of his proposal would have costs of three types: it would increase the power of politically unaccountable judges to substitute their own preferred policies for those of politically accountable agencies; it would discourage agencies from issuing rules; and, it would delay final resolution of many policy disputes.¹⁶⁸ I believe those costs exceed the benefits of the doctrinal change Manning urges. Second, while adoption of Manning's proposal would have a salutary effect in the context of the pending CAA enforcement disputes, it would have the opposite effect in most cases. One of the few ways in which an agency can change its policies to reflect those of the incumbent President expeditiously is to adopt an interpretation of an ambiguous agency rule. *Seminole Rock* then requires a court to defer to the agency interpretation. Thus, by overruling *Seminole Rock*, the Court would be exacerbating the problem of delay between the time a President is elected and the time when the courts will allow his policy preferences to replace those of his predecessor.

There are three more modest changes in existing doctrines that offer some potential to avoid the adverse effects of applying existing doctrines in the CAA enforcement cases, however. Each has some support in judicial decisions.

First, courts, including the Supreme Court, have begun to refuse to defer to agency interpretations of ambiguous agency rules where the rules were written in an extraordinarily open-ended manner.¹⁶⁹ The Tenth Circuit explained the basis for this judicial tendency in a 1998 opinion.¹⁷⁰ In that case, the agency had issued a rule that did little more than parrot the open-ended language of the statute the rule was supposed to implement. The agency then attempted to rely entirely on informal interpretations of its open-ended rule to announce all of its interpretations of the statute the rule was supposed to implement. The court noted that Congress authorizes agencies to issue rules to implement statutes primarily to provide a means through which an agency can particularize the often vague and open-ended commands contained in regulatory statutes.¹⁷¹ The court refused to defer to the agency's interpretation of its rule because, by doing so, the court would encourage agencies to substitute regulatory ambiguity for statutory ambiguity, thereby making a "mockery of . . . the [Administrative Procedure Act]."¹⁷² The D.C. Circuit has provided a more colorful explanation for this limit on *Seminole Rock* deference: "An agency cannot create mush and then give it form only through subsequent less formal 'interpretations.'"¹⁷³

Application of that reasoning to the CAA enforcement cases would avoid the results that concern me. It would provide a basis to refuse to defer to the 1999 interpretation of modification, thereby allowing a court to adopt instead the 2003

¹⁶⁸ Id. at 690-696.

¹⁶⁹ E.g., *Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994) (Justices divide five-to-four with respect to question whether agency rule is too vague to justify deference to agency interpretation of rule); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994) (Justices divide six-to-three with respect to same question); *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87 (1995) (Justices divide five-to-four with respect to same question). See discussion of these cases in *Pierce*, supra. note 61, at §6.11.

¹⁷⁰ *Mission Group Kansas v. Riley*, 146 F. 3d 775 (10th Cir. 1998). See also *Pearson v. Shalala*, 164 F. 3d 650 (D.C. Cir. 1999) (APA requires agency to give some definitional content to statutory language when it issue rules.)

¹⁷¹ 146 F. 3d at 782.

¹⁷² Id. at 782.

¹⁷³ *Paralyzed Veterans of America v. D.C. Arena*, 117 F. 3d 579, 584 (D.C. Cir. 1997).

interpretation as its own. More broadly, general application of this reasoning would have the beneficial effects of adoption of Manning’s proposal without incurring the high costs attendant to adoption of the Manning proposal. The disadvantage of this approach lies in the difficulty of drawing the line between a rule that an agency is free to interpret because it is merely ambiguous and a rule that adds so little to a vague provision of a statute that a court should not confer deference on an agency interpretation of the rule. The Supreme Court divided five-four and six-to-three in resolving three such line-drawing disputes in the 1990s.¹⁷⁴ As difficult as it may be to draw that line in some cases, however, I believe it is a line worth drawing. A good argument can be made that the 1980 rule EPA interpreted in bringing its enforcement proceedings in 1999 added so little to the vague statutory definition of modification that courts should not defer to agency interpretations of that rule.

A second promising approach is for a court to refuse to defer to an agency interpretation of a rule when that interpretation is announced only as a litigating position and when there is reason to believe that the interpretation is not the “agency’s fair and considered judgment on the issue.”¹⁷⁵ The D.C. Circuit explained the basis for its reluctance to defer to agency interpretations of rules announced only as litigating positions in a 1997 opinion:

This reluctance to defer to agency counsel stems from two concerns. First, . . . counsel’s interpretation may not reflect the views of the agency itself Second, it is likely that a position established only in litigation may have been developed hastily, or under special pressure, and is not the result of the agency’s deliberative processes. However, as the Supreme Court has recently reaffirmed, deference to an interpretation offered in the course of litigation is still proper as long as it reflects the “agency’s fair and considered judgment.”¹⁷⁶

The D.C. Circuit’s approach makes a lot of sense. Agency supervision of agency lawyers is highly uneven. Sometimes the positions a lawyer proposes to take in litigation have been discussed and approved at the highest levels of the agency. In other cases, however, no policymaking official has even considered, much less approved, the position the lawyer is taking in litigation.

If a court were to apply this approach to the interpretation of the 1980 rule that EPA is urging in the pending enforcement cases, it would have little difficulty concluding that the interpretation is not the agency’s “fair and considered judgment on the issue.” After all, the policymaking officials in the agency have announced policies in 2003 and 2005 that are the opposite of the positions the agency’s lawyers have taken in the enforcement proceedings during the same time period. This strange situation strongly supports the inference that the agency’s lawyers are engaged in a frolic of their own in the pending enforcement cases.

¹⁷⁴ See cases cited in note 169, *supra*.

¹⁷⁵ The Court held that courts should defer to agency interpretations of agency rules announced in briefs when they represent the agency’s “fair and considered judgment on the issue.” 519 U.S. at 462. By implication, a court should not defer to such an interpretation when it does not represent the agency’s “fair and considered judgment on the issue.”

¹⁷⁶ *National Wildlife Federation v. Browner*, 127 F. 3d 1126, 1129 (D.C. Cir. 1997).

Third, a court could justify a refusal to defer to EPA's 1999 interpretation of its 1980 rule based on an equitable extension of an administrative law doctrine that is rooted in the due process clause. Courts regularly refuse to defer to agency interpretations of ambiguous rules in the context of enforcement proceedings in which agencies seek to impose penalties on firms for violating agency rules. A court will impose a penalty on a firm for violating an ambiguous agency rule only if the court concludes that the agency provided the firm with adequate notice that the firm's conduct would violate the rule before the firm engaged in the conduct that is the basis for the agency's attempt to impose a penalty for violating the rule.¹⁷⁷

Direct application of this constitutionally-based doctrine to the CAA enforcement cases would have some beneficial effects. Since EPA fell far short of providing adequate notice of its 1999 interpretation of its 1980 rule before the firms implemented the changes to their facilities during the 1980-1999 period, EPA cannot rely on its 1999 interpretation as the basis to penalize the firms for engaging in that pre-1999 conduct. That direct effect of the adequate notice requirement would provide little real relief to the firms who are defendants in those actions, however. If a court determines that a firm violated the rule, and thus the statute, by making a change in its facility that constituted a "modification" during the 1980-1999 period, the firm is required to install new pollution control technology that costs up to one billion dollars per facility, or to abandon the facility, in order to comply with the PSD provisions of CAA. I doubt that those costs qualify as a penalty for purposes of invocation of the adequate notice requirement.¹⁷⁸

A court would have to be willing to extend the adequate warning requirement, or something like it, to the context of costs of compliance with regulatory statutes, as well as penalties, in order to relieve the defendants in these enforcement cases from having to incur scores of billions of dollars of costs for engaging in conduct that they reasonably believed to be free of all regulatory costs at the time they took those actions. Two recent precedents – a 2003 opinion of the Sixth Circuit¹⁷⁹ and a 2004 opinion of the First Circuit¹⁸⁰ -- support just such an extension of the adequate notice requirement in circumstances in which an agency has affirmatively misled regulates. Both opinions involved attempts by the Department of Justice (DOJ) to rely on a new interpretation of an agency rule in enforcement actions as the basis for its claim that regulatees were required to make extremely expensive changes in their facilities.

In 1992, DOJ issued a rule to implement the Americans with Disabilities Act. The rule required owners of movie theaters to provide seating for disabled individuals that provide the individuals with "lines of sight comparable" to those enjoyed by non-disabled people.¹⁸¹ DOJ proceeded to announce myriad inconsistent interpretations of that rule over the following decade.¹⁸² Then, in 2000, DOJ initiated enforcement actions against several firms that had built many hundreds of new theaters during the time the rule was in

¹⁷⁷ E.g., *Upton v. SEC*, 75 F. 3d 92 (2d Cir. 1996); *General Electric Co. v. EPA*, 53 F. 3d 1324 (D.C. Cir. 1995). See the discussion of numerous other cases with the same reasoning and holding in *Pierce*, supra. note 61, at §6.11.

¹⁷⁸ For discussion of what constitutes a penalty, see *Pierce*, supra. note 61, at §6.11.

¹⁷⁹ *United States v. Cinemark*, 348 F. 3d 569 (6th Cir. 2003)

¹⁸⁰ *United States v. Hoyt's Cinemas Corp.*, 380 F.3d 558 (1st Cir. 2004).

¹⁸¹ Standard 4.33.3, 28 C.F.R. §§36.401-.402, 36.406 (2003).

¹⁸² 380 F. 3d at 563, 569; 348 F.3d at 573-574.

effect.¹⁸³ Each of the theaters complied with the rule, as it had been interpreted at the time the theater was built, but none complied with the rule as DOJ interpreted it for the first time in the enforcement proceedings. Both the Sixth Circuit and the First Circuit upheld DOJ's new interpretation of the ambiguous rule, but both also concluded that the defendants did not have adequate notice of the interpretation to justify imposition of penalties against them.¹⁸⁴ Both courts then referred to the need for the district courts to apply equitable principles in the enforcement actions on remand.¹⁸⁵ In the words of the First Circuit:

Due process may furnish a floor [against having to make large expenditures] based primarily on lack of fair warning, but we think that equitable principles give the district court even greater latitude to decline or limit retroactivity. For example, the court might equitably consider not only the level of warning but also government indolence or misleading advice and the avoidance of extravagant expenditure for little gain.¹⁸⁶

The equitable considerations alluded to by the First Circuit apply a fortiori to the pending CAA enforcement proceedings. The government should not be able to play gotcha with regulatees by first announcing an interpretation of a rule in 1980 that encourages them to make large capital investments in improvements to their facilities by assuring them that they are not thereby subjecting themselves to massive regulatory costs, and then in 1999 announcing a new interpretation that requires them to choose between spending billions of dollars on those facilities or closing them.

If EPA had announced its 1999 interpretation of modification in 1980, owners of most old, coal-fired generating plants would have closed them rather than spending close to a billion dollars on each to comply with PSD. Perhaps that would have been the better policy decision in 1980 – though it would have increased our dependence on oil imported from the middle east, increased the price of electricity significantly, and increased the severity of the stagflation conditions that then plagued the economy. Perhaps that would be the better policy decision today. EPA should be, and is, free to make that policy decision at any time as long as it makes the decision for prospective application only. EPA should not be free, however, to make that policy decision in 1999 with retroactive application to conduct that took place before 1999.

V. CONCLUSION

My analysis of the Supreme Court's opinion in *Dow* and of the court decisions issued in response to the Clinton Administration's efforts to redefine modification for CAA PSD purposes has uncovered what I believe to be two serious problems that are attributable to our current administrative law doctrines. First, a newly elected President often cannot get his policies announced in a form that courts will accept for many years after he is elected. This produces such a large lag between the election of a President and

¹⁸³ 380 F. 3d at 563-564; 548 F. 3d at 574-575.

¹⁸⁴ 380 F. 3d at 571-573; 548 F. 3d at 578-579, 581-582.

¹⁸⁵ 380 F. 3d at 573-574; 348 F. 3d at 581-583.

¹⁸⁶ 380 F. 3d at 573.

judicial acquiescence in his preferred policies that the policies the government is implementing are at least one, and often two, Presidential elections behind. Second, through judicial application of our present deference doctrines, it is quite possible to get a situation in which regulatees are required to make extremely large regulatory expenditures for having taken actions in the past that would be free of regulatory costs today and that the government encouraged them to take at the time they took the actions.

The first problem is attributable in large measure to the Supreme Court's refusal to defer to an agency's policy decision reflected in a statutory interpretation unless and until the agency announces that decision in either a legislative rule or a decision issued in a formal adjudication. To reduce the magnitude of the time lag problem, I urge the Supreme Court to adopt Justice Scalia's proposed broader approach to *Chevron* deference. A court should confer *Chevron* deference on an agency's reasonable interpretation of ambiguous language in an agency-administered statute whenever the agency announces its interpretation in a manner that reflects the agency's "fair and considered judgment on the matter in question."

The second problem is attributable in part to the willingness of court's to defer to agency interpretations of ambiguous agency rules in enforcement proceedings even when the interpretation urged in the enforcement proceeding is inconsistent with both the interpretation of the rule the agency announced before the conduct at issue took place and with the agency's current rules. I urge courts to respond to that problem by qualifying deference doctrine in three ways that have some support in the case law – a court should not defer to an agency interpretation of an agency rule that is open-ended and that merely parrots the vague language of the statute it purports to implement; a court should not defer to an agency interpretation of a rule when the interpretation is announced only as a litigating position and when there is reason to believe that the interpretation does not reflect the agency's "fair and considered judgment on the issue;" and, a court should not allow an agency to apply retroactively a new interpretation of an ambiguous rule when the result would be to compel a regulatee to make large regulatory expenditures because of conduct the agency encouraged the regulatee to take.