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PETER L. STRAUSS

Within *Marbury*: The Importance of Judicial Limits on the Executive's Power To Say What the Law Is

Anyone reading the newspapers today must be aware of our President's repeated insistence that he is the constitutional "decider"—that in many contexts (such as national security) he needs to be the one in charge of determining what the law is. Even in the more mundane context of domestic legislation and regulation, distinguished scholars have argued that a dominant presidential role in determining legal outcomes is appropriate as a matter of policy[1] if not commanded by the Constitution.[2] That these claims remain controversial is suggested by this summer's considerable flap over the President's use of signing statements to limit the reach of legislation he was formally approving—a flap that was highlighted by the ABA's condemnation[3] of the practice and that extended as well to blogs like *Balkinization*[4] and *The Georgetown Law Faculty Blog*.[5] Professor Cass Sunstein's recent essay[6] in *The Yale Law Journal*, discussing the Supreme Court's sensible decision in *Chevron,*

1. Elena R. Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

2. *E.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541 (1994).

3. Task Force on Presidential Signing Statements and the Separation of Powers Doctrine, Am. Bar Ass'n, Recommendation and Report (Aug. 2006), http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf.

4. Marty Lederman, *ABA Task Force Report on Presidential Signing Statements*, Balkinization, July 23, 2006, http://balkin.blogspot.com/2006/07/aba-task-force-report-on-presidential.html.

5. David Barron et al., *Untangling the Debate on Signing Statements*, Georgetown Law Faculty Blog, July 31, 2006, http://gulcfac.typepad.com/georgetown_university_law/2006/07/thanks_to_the_p.html.

6. Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580 (2006).

U.S.A., Inc. v. Natural Resources Defense Council, Inc.,[7] finds in that decision a basis for preferring executive over judicial interpretations, even when the former are made informally and without the benefit of public procedures. While he does not discuss the recent presidential claims of authority to determine legal issues, elements of his analysis appear to endorse them, in ways that in my judgment threaten the very foundations of our culture of legality.

Chevron articulated a two-step analysis of statutory interpretation: the first (judicial) step is to determine the possible meanings of the statute, and the second (agency) step is to choose among those possibilities. *Chevron* held that courts must accept agencies' "reasonable" interpretations of statutes if those interpretations fall within the possible range of a statute's terms. The opinion's term of reference, however, was a considered agency judgment made following established public procedures in relation to the agency's particular mandate, and not presidential instructions issued from the privacy of the White House, in the absence of public procedures, and affecting the whole field of governmental action. In eliding these differences, I suggest, Professor Sunstein's analysis overextends the executive's authority to interpret statutes and would lead courts to abandon their fundamental job of defining the scope of agency authority and supervising the exercise of that authority. A powerful and expert executive does need room for action, but to have such an executive we must also have a judiciary willing to define and police the bounds of the executive's authority.

Entitling his essay "Beyond *Marbury*," Professor Sunstein suggests that "*Chevron* is properly understood as a kind of counter-*Marbury* for the administrative state."[8] *Marbury v. Madison* famously asserted that it is "emphatically the province and duty of the judicial department to say what the law is."[9] *Chevron* would be a counter-*Marbury* if it had held that statutory interpretation is, rather, the responsibility of the executive branch—and therefore, in the eyes of those who celebrate a strong, unitary executive, the responsibility of the President. But in my judgment, the Supreme Court's sensible decision in *Chevron* can and should be read in a manner entirely consistent with *Marbury*.

With *Chevron*, the Court gave up the illusion that each question of statutory meaning has one sole determinate answer. Particularly in the administrative context, it is often impossible for courts to say more than what a statute could mean—to do more than to describe the boundaries of a set of possible meanings. But it is for the courts, always and irreducibly, to say what

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7. 467 U.S. 837 (1984).

8. Sunstein, *supra* note 6.

9. 5 U.S. (1 Cranch) 137, 177 (1803).

those possibilities are—to police the range of outcomes the statute permits. That is the *Marbury* function at a time when we acknowledge that statutes are indeterminate; that is the first step of the two-step *Chevron* analysis; and that question of range is indeed one to be "settled by the inclinations and predispositions of federal judges."[10] Within that range, policed by the courts, administrators can plausibly claim authority to determine the best policy outcome for today—at least, so long as they do so "reasonably," following appropriate procedures and exercising what a court can find to be rational judgment. And while the range of possible meanings of a statute may not change with the years, particular resolutions of matters falling within that range well may.

But Professor Sunstein is alarmed at the political nature of courts' judgments and seems to intend a lesser role for them. He argues instead that courts ought to cede a greater role to the executive. In so doing, Professor Sunstein rejects the Supreme Court's signal in *United States v. Mead Corp.* that *Chevron*'s analysis applies only to procedurally intensive or regular agency behaviors, and not to more casual agency decisions. More dangerous still, Professor Sunstein's approach would aid the recent inclination of several Justices to reduce further the legal constraints on executive action.

Let me illustrate the point in relation to the Supreme Court's recent decision in *Gonzales v. Oregon*,[11] which Professor Sunstein mentions glancingly[12] (and in the briefing of which, the reader is entitled to know, I participated as an amicus curiae). In *Gonzales*, the Court considered the Attorney General's claim that his office had authority to interpret the Federal Controlled Substances Act of 1970 (CSA)[13]—a law that makes it a crime to possess or distribute addictive or psychotropic drugs—to preclude a doctor's lawful prescription of morphine to assist another's suicide in accordance with Oregon's Death with Dignity Act.[14] Without public procedure or consultation of any kind, the Attorney General had displaced Oregon's law regulating the medical profession and had defined a new crime. Not surprisingly, a majority of the Court, with Justice Kennedy writing, rejected the Attorney General's claim; perhaps the only real surprise was that Justice Scalia, with the new Chief Justice and Justice Thomas concurring, would have accepted it, relying on *Chevron*. The division was roughly the same as would occur in last Term's final

10. Sunstein, *supra* note 6, at 2582.

11. 126 S. Ct. 904 (2006).

12. Sunstein, *supra* note 6, at 2582 n.8, 2603 nn.104 & 106.

13. Pub. L. No. 91-513, 84 Stat. 1242 (codified as amended at 21 U.S.C. §§ 801-904 (2000)).

14. OR. REV. STAT. §§ 127.800-.995 (2005).

and more portentous discussion of presidential authority, *Hamdan v. Rumsfeld*.[15]

The Attorney General's claim was an entirely predictable, and professionally appropriate, claim by the government's lawyer. Of course one argues for judicial deference to one's client's view of the law, if it might be entitled to it in a litigation in which its interests are at stake. Whether that view is entitled to influence, however,—and, if so, to what kind of influence it is entitled—are questions for others, the judiciary, to address. Merely saying it is so does not make it so. When the judiciary does address these questions, one should expect careful attention to the risks and rewards of answering them in one way or another. And these equations may differ with one's assessment of the kinds of powers Congress has conferred on a given executive actor, the extent of that actor's engagement with the public in the formulation of its view, the actor's particular expertise, and so on.

The circumstances of *Gonzales* made it extremely unlikely that Congress had conferred such a power. In that case, the Attorney General had acted outside the structures of expert consultation that Congress provided in the CSA—indeed, had acted without any public procedure at all. On his own, the Attorney General had both displaced a considered state law regulating the medical profession and purported to define a new crime. It is difficult to imagine a more concerted assault on our ordinary principles of legality.

That the three dissenting Justices were the members of the Court as then constituted most strongly committed to a strong executive suggests the difficulty with Professor Sunstein's otherwise brilliant analysis. Attentive in some respects to the problems of foxes in chicken coops, it pays insufficient care to the virtues of having someone other than the executive tend the fence around executive authority and take care that that authority is exercised in a manner subject to public participation and control. One can accept the bulk of Professor Sunstein's analysis and nonetheless maintain that it is "emphatically the province and duty of the judicial department to say what the law is," by framing the executive's power to pinpoint the law within the bounds framed by judicial exercise of that duty, not outside of it. Doing so will lead one to just about the same place as Professor Sunstein reaches in respect of *Chevron* itself, but not to most of the specific conclusions that he reaches in Part II of his analysis, "*Marbury*'s Revenge?" The paragraphs following trace this analysis.

As early as 1940, the Supreme Court unselfconsciously revealed the tension between judicial and agency interpretation in an opinion[16] long (and erroneously) thought to have sent "plain meaning" statutory interpretation to

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15. 126 S. Ct. 2749 (2006).

16. United States v. Am. Trucking Ass'ns, 310 U.S. 534 (1940) (citations omitted).

its grave. The case involved interpretation of a statute governing the Interstate Commerce Commission's (ICC) regulatory authority, which the ICC had consistently interpreted (with support from other relevant executive agencies) to deny it the authority in question. At an early point in its analysis the Court reiterated the *Marbury* proposition that "[t]he interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function."[17] Yet just a few pages later, after reciting the ICC and other interpretations, the Court remarked that

> [i]n any case such [executive branch] interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." Furthermore, the Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions' enactment to Congress.[18]

Here resolution of the tension between court and agency prerogative is not so hard. One sees that the Court is deciding the statutory question for itself, (one might say, *Chevron* step one) but in doing so is according any respect merited to the views of responsible others. The same approach—unmistakable judicial decision of the issue, but with attention in doing so to the agency's view—characterizes its later iconic decision in *Skidmore v. Swift & Co*.[19]

Chevron's addition of a second step to the analysis makes it different, as was another iconic case of *Skidmore*'s times, *NLRB v. Hearst Publications, Inc*.[20] In both these cases, the Court's initial analysis of statutory meaning—its performance of the *Marbury* function—led it to conclude that within the bounds of statutory possibility, Congress would have wanted subsidiary questions, which one might frame as interpretation, to be decided by a responsible agency rather than by the courts, subject only to the usual judicial review of administrative action for "reasonableness." In *Hearst* the relevant question was who was an "employee"; in *Chevron* it was whether a number of

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17. *Id.* at 544.

18. *Id.* at 549.

19. 323 U.S. 134 (1944).

20. 322 U.S. 111 (1944). Professor Sunstein characterizes *Hearst* as reflecting "precisely [the] assumption" that "the executive ought not to be authorized to interpret the scope of statutes that limit its authority." Sunstein, *supra* note 6, at 2585. Given that the case famously acknowledged the NLRB's primary authority to give content to the labor-policy-pregnant term "employee," subject to judicial control only for reasonableness, this is a surprising characterization.

pollution sources on one industrial site could be treated as a single "stationary source."

Professor Sunstein properly argues that these two cases are not equivalent—that there was an actual delegation in *Hearst* and merely a fictive one in *Chevron*. The thing to note, however, is that in both settings the Court attended to what it constructed, on its own, to have been Congress's wishes. Operating within the province that is "emphatically" its own, it found for itself a sufficient reason in the statute to believe a task had been assigned primarily to another; the constitutionality of such an assignment, under appropriate judicial safeguards for its regularity, was and is not open to doubt. Once a court has found such an assignment, it is merely following its own nose when it concludes that its task is not to assign meaning to contested terms de novo but rather to assure itself that an agency's interpretation of those terms has the indicia of administrative legality—for example, that the agency's action falls within its legal authority, was made following any requisite procedure, is supported to whatever extent is called for by the known facts, and reflects reasonable judgment.

I doubt that Professor Sunstein and I would disagree about any of the foregoing. The difficulties arise when one moves from administrative decisions that exercise delegated authority, following public procedures and subject to judicial supervision, to less formal executive behavior—to behavior that does not profit from the same level of public engagement and may, indeed, escape the effective oversight even of politically responsible agency heads. Sunstein relies on cases like *Hearst* and *Chevron*—cases in which agencies followed formal, public procedures in carrying out delegated authority—for the much broader claim that courts must also defer to less formal executive behavior—to choices made away from public scrutiny and without full administrative oversight.

It is striking that the "most important" case Professor Sunstein invokes as exemplifying the Court's tendency to sometimes give "relatively little deference to agencies," *Citizens To Preserve Overton Park v. Volpe*,[21] was the latter sort of case, and not the product of APA rulemaking or adjudication.[22] The practice of intensive, "hard look" review of the reasonableness of agency action that this case foreshadowed, with its insistence on reason-giving and regularity, does not embody distrust of agency discretion in the sense of denying primary agency responsibility for the matter being reviewed. Instead, "hard look" review accepts the agency's responsibility, but asserts the need for careful

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21. 401 U.S. 402 (1971).

22. *See* Peter L. Strauss, Citizens To Preserve Overton Park v. Volpe—*Of Politics and Law, Young Lawyers and the Highway Goliath*, *in* ADMINISTRATIVE LAW STORIES 258 (Peter L. Strauss ed., 2006).

review given the consequences of agency action—and does so out of the same congeries of factors that Professor Sunstein evokes, including a healthy respect for the fox-henhouse problem. If we put aside the ordinary procedures for public engagement in executive action, including the possibility of reviewing it on the basis of some kind of administrative record, haven't we simply set the fox free?[23] There is a "high risk of unreliable or biased interpretations"[24] where agency interpretations are not the product of public procedures; and that risk increases when the interpreter has some assurance that the very fact of its making an interpretation may entitle it to prevail.[25]

Professor Sunstein most strongly urges the persuasiveness of *Chevron* analysis for these informal kinds of decision in Part II of his essay, entitled "*Marbury*'s Revenge?" As he has in previous essays,[26] he expresses doubt about the soundness of the Court's decision in *United States v. Mead Corp.*,[27] in which the Supreme Court refused to apply *Chevron* to a Customs Bureau interpretive letter that had not been the product of APA rulemaking or other public procedures. In my judgment, however, *Mead* and the decisions that have followed it—*Gonzales* most recently—get matters about right. Within *Marbury*, the courts have the duty to determine agencies' authority to act—that is, the duty to determine whether Congress intended the agency to have the primary responsibility to interpret the law, and if so following what procedures, subject only to the usual judicial review of administrative action; or, rather, whether that primary responsibility lies with the courts. That duty is "emphatically the province and duty of the judicial department," and is "exclusively a judicial function," the irreducible minimum of the judicial task. And this is the duty the Court performed in *Mead*. This is not a restriction of *Chevron*'s domain unless we are to assume from the outset that *Chevron* marked an unprincipled retreat from courts' duties. If it did mark such a retreat, we should be relieved that in *Mead* the judiciary has now discovered that it, and not the fox, is responsible for identifying the relevant fences.

The problem with the proposition that "pure questions of law" are for the courts, and mixed questions of law and fact are for agencies, is about the same.

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23. The problem is compounded by the view the Court has sometimes expressed that when an agency is interpreting its own regulations, the judicial obligation to accept agency views is even stronger than it is in *Chevron*. *See, e.g.*, Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994); Udall v. Tallman, 380 U.S. 1 (1965). For a definitive critique of this view, see John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996).

24. Sunstein, *supra* note 6, at 2596.

25. This point is persuasively made in Manning, *supra* note 23.

26. Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006).

27. 533 U.S. 218 (2001).

Administrative Law teachers for decades enjoyed torturing their students with the contrast between *Hearst*, where the Court said it had been given to the NLRB to say whether newsboys were "employees" within the meaning of the statute, and *Packard Motor Car Co. v. NLRB*,[28] which seemed totally to disregard the NLRB's view of whether foremen could come within the statute. But if we regard the fence—the difference between the question what a statute could mean and the question what it does mean—the cases are readily reconciled. In *Hearst* the question for the Court was whether "employee" could mean what the Board had concluded it did mean; and once the Court had located the fence and placed the NLRB's choice reasonably within it, its function changed from decider to reviewer. In *Packard* the only question the Court was asked to decide was whether foremen could possibly fall within the Act; *Packard*'s only assertion was that they lay outside the fence, not that the NLRB had made an unreasonable judgment about a possible meaning. Deciding that issue was the Court's prerogative.

So also in *INS v. Cardoza-Fonseca*,[29] another opinion Professor Sunstein criticizes.[30] In that case, Justice Stevens's opinion addressed what the statute in question could mean—in other words, the location of the fence—and answered that question using an entirely conventional tool of statutory interpretation, namely, that different phrases used in proximity to one another in the same statute are to be given differing, not identical, meanings. The Attorney General had chosen identical meanings, and that possibility was excluded as beyond the pale. Questions about permissible meaning are irreducibly judicial.

On "jurisdictional" issues, the reader might expect me to insist that these questions are for the court. But this is so only at their initial stages, in my judgment. Whether one best characterizes a judgment about the extent of "public lands" or "employee" as jurisdictional depends, ultimately, on whether the agency in question has exceeded the latitude a reader of that statute would understandably have concluded Congress left to agency judgment. As in *Hearst*, setting the outer bounds of "employee" is irreducibly judicial work. Deciding who is an "employee" within those (judicially determined) bounds of possible meaning is for the agency, acting under the appropriate procedures and subject to judicial review.

Finally, Professor Sunstein sees a possible exception to *Chevron* for "Major Cases." In my judgment, the Court's observably closer supervision of agency judgments in such cases—even when agencies have fully complied with procedural formalities and have acted within room one could easily find that

28. 330 U.S. 485 (1947).

29. 480 U.S. 421 (1987).

30. Sunstein, *supra* note 6, at 2604.

the statutory text affords them—is closely tied to the "nondelegation canons" toward which Professor Sunstein is more favorably disposed. In a later case than *FDA v. Brown & Williamson Corp.*,[31] the case Sunstein discusses in this regard, Justice Scalia poignantly observed that the Congress should not be found to "hide elephants in mouseholes."[32] This plangent proposition is a delegation canon, uttered by a Justice who self-evidently would like to be able to deploy delegation analysis if only he could persuade himself that judicially manageable standards existed. But Scalia cannot find those standards and so instead, on major questions, he often finds reasons to think agency action lies outside the statutory fence. A large enough surprise—a sufficient departure from what one could reasonably suppose congressional expectations to have been—requires further legislative action.

Brown & Williamson is just such a case. Whatever one could say in the abstract about the possibility of regarding nicotine as a "drug" and a cigarette as a "device," years of agency inaction and affirmative representations to Congress had, in any realistic political sense, taken that action off the table. The conclusion that fresh congressional authority was needed should come as no surprise, and is no significant constraint on *Chevron*.

None of this is to deny, as other of Professor Sunstein's scholarship has so strikingly shown,[33] that in their opinions our judges reveal themselves to be politicians—those with the longest terms in office. Yet we dare not abandon the "least dangerous branch" and the restraint it can offer against shorter-term political departures from our culture of legality. Our hopes lie rather in what Roscoe Pound described as the toughness of the "taught tradition,"[34] in the obligations of reason and sought coherence, and in the voice of scholars like Professor Sunstein when the perhaps inevitable politics become excessive.

A further hope for moderation might lie in turning the insights of *Chevron* to those settings where courts interpret statutes without an agency in the picture. In these settings, too, one can find statutes that are ambiguous—statutes for which it is readily possible to say what they could mean, but artificial, as if one were decoding instructions actually given, to say what they do mean. In such cases, too, one must give up the illusion that all questions of statutory meaning have determinate answers. Faced with such statutes, why should courts not be free, as if at common law, and like agencies under *Chevron*, to reason to the best outcome in current circumstances, without

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31. 529 U.S. 120 (2000).

32. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

33. *See* Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823 (2006).

34. Roscoe Pound, *Economic Interpretation and the Law of Torts*, 53 HARV. L. REV. 365, 367 (1940).

purporting to decide for all time what the statute precisely means? In such a case, the court deciding within the framework of textual possibility is also expressing a policy judgment; for it to endow that judgment with the quality of law for all time—correctable only by Congress[35]—is to aggregate to itself a degree of authority that is the more objectionable for its demonstrable politicality. The judiciaries of other developed systems live easily without any such conceit.[36] Might not ours?

This Essay perhaps seems a rather sweeping critique. Please observe how little disagreement you find here with Professor Sunstein's brilliant exposition of the virtues of the *Chevron* approach. The suggestion here is only that if overextended—if taken to abandon the fundamental and irreducible judicial job of defining the field of agency play and then supervising the legality of agencies' acts—its costs will

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35. *See* Neal v. United States, 516 U.S. 284, 295 (1996); *cf.* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

36. The comparative law scholar Mitchel de S.-O.-L'E. Lasser describes the French refusal to concede that judges made law:

> To the French, then, to universalize the Anglo-American presupposition that "cases" make "law" is to fall into two crass assumptions. First, it assumes that just because judges exercise significant normative control, this control must qualify as lawmaking. To make this flawed assumption is to fail to acknowledge that while a few legal systems have decided to exalt the judge by treating his work product as Law, most have not, preferring to reserve this special status to legislative enactments.
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> Secondly . . . . One need hardly call judicial decision-making "law" in order to stress that judges must make normative choices . . . . To [call it that] . . . produces . . . potentially negative side-effects, such as the glorification of the judiciary and a concomitant tendency to compromise popular control through legislative, administrative, grass-roots, or other processes.
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> It is for this reason that so many of even the most progressive French jurists . . . have . . . refused to affirm that French judges make law.

MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 172 (2005).

be greater than we should ever wish. A powerful and expert executive needs room for action, and can do better in many ways than the courts; but the safety of having such an executive depends on our having a judiciary willing to define and police its bounds.

Peter L. Strauss is Betts Professor of Law, Columbia University.

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