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## From *Chevron* to *Massachusetts*: Justice Stevens's Approach to Securing the Public Interest

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*During the past three decades, one Supreme Court justice — John Paul Stevens — has authored two of the most significant administrative law decisions that speak to the judiciary's role in checking agency interpretations of the statutes that they administer. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, Justice Stevens's landmark 1984 decision unanimously upheld the EPA's construction of a term found in the Clean Air Act. Subsequently, in *Massachusetts v. EPA*, Justice Stevens's 2007 opinion for a five-justice majority handed a major win to global environmental security by ordering the EPA to reconsider its refusal to regulate greenhouse gases under the Clean Air Act. Although both decisions were written by Justice Stevens and both involved the EPA and the Clean Air Act, the two decisions seem to send very different messages about the judiciary's policing function. In *Chevron*, the Court embraced a highly deferential, hands-off view of the judiciary, whereas in *Massachusetts*, the Court embraced a more protective, active judicial role. In light of the seemingly divergent messages in these two decisions, this Article assesses Justice Stevens's position on the judiciary's policing role concerning agency actions that impact matters of public security, health, safety, and welfare. This Article ultimately concludes that when Justice Stevens's opinions are viewed as a whole, a fairly clear picture emerges: Justice Stevens cannot accurately be labeled as either the proponent of a highly deferential, hands-off judiciary (à la *Chevron*), or the proponent of*

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*an active judiciary (à la Massachusetts). Rather, as a strong adherent of purposivism, Justice Stevens seeks to effectuate Congress's own animating goals, paying particularly close attention to Congress's protective and remedial purposes. Thus, although he expressly eschews deciding cases based on his own policy preferences, his purposivist approach to statutory interpretation often enables him to give agencies the leeway they need to achieve Congress's broad protective or remedial goals and conversely to check agencies when they act counter to Congress's purposes.*

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## INTRODUCTION

Administrative agencies in the United States play a wide-reaching, pervasive role in regulating matters that impact public health, safety, welfare, and security.<sup>1</sup> The Food and Drug Administration (“FDA”), for example, protects the safety, efficacy, and security of the nation’s food and drug supply.<sup>2</sup> Actions taken by the Environmental Protection Agency (“EPA”) limit threats to our air and water, as well as to the security of our global climate.<sup>3</sup> The Consumer Product Safety Commission aims to “save lives and keep families safe by reducing the risk of injuries and deaths associated with consumer products.”<sup>4</sup> And, as the recent financial crisis has highlighted, actions taken by a number of agencies, such as the Securities and Exchange Commission and the Department of Treasury, can significantly impact our nation’s financial security.<sup>5</sup>

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<sup>1</sup> This Article uses the term “security” broadly to include much more than simply military or national security. See S. NEIL MACFARLANE & YUEN FOONG KHONG, *HUMAN SECURITY AND THE UN: A CRITICAL HISTORY 1* (2006) (discussing how in last 20 years of 20th century, concept of “security” has expanded beyond its traditional focus on national or state security and has “expanded horizontally beyond military issues to take into account others, such as economy, environment, health, gender, and culture, in context of expansion of core values to include welfare and identity”); see also *id.* at 12 (noting that “[m]ost would agree that military affairs are intrinsically linked to notion of security” but that term “security” now implies much broader meaning); Emma Rothschild, *What Is Security?*, *DAEDALUS*, Summer 1995, at 53, 55 (discussing how concept of security has broadened from military issues to also cover “political, economic, social, environmental, or ‘human’ security”).

<sup>2</sup> See U.S. Food and Drug Administration, FDA’s Mission Statement, <http://www.fda.gov/opacom/morechoices/mission.html> (last visited May 28, 2009) (“The FDA is responsible for protecting the public health by assuring the safety, efficacy, and security of human and veterinary drugs, biological products, medical devices, our nation’s food supply, cosmetics, and products that emit radiation.”).

<sup>3</sup> See *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007) (noting that petitioners seeking certiorari called global warming “the most pressing environmental challenge of our time”); see also *Examining the Case for the California Waiver: Hearing Before the Subcomm. on Clean Air and Nuclear Safety of the S. Comm. on Env’t and Pub. Works*, 110th Cong. 27 (2007) (testimony of Edmund G. Brown, Jr., Att’y Gen. of Cal.) (“Global warming is the most important environmental and public health issue we face today.”).

<sup>4</sup> U.S. Consumer Product Safety Commission, Frequently Asked Questions, <http://www.cpsc.gov/about/faq.html> (last visited May 28, 2009).

<sup>5</sup> See generally Kevin G. Hall & Margaret Talev, *Obama to Financial Sector: More Regulation Is Coming*, *NEWS & OBSERVER*, Dec. 18, 2008, at 1A (discussing how regulatory agencies and their weak regulatory approaches have been blamed for economic crisis).

Given administrative agencies' pervasive powers over matters that impact the public's health, security, and welfare, it is not surprising that much of administrative law seeks to define the proper boundaries of agency action and how agency action will be policed. Of particular importance is the judiciary's role in policing agency constructions of enabling legislation. For example, what role should the judiciary play in evaluating the EPA's determination that it lacks the authority to regulate certain emissions that lead to global warming because the emissions, according to the EPA, fall outside the reach of the term "air pollutant" as it is used within the Clean Air Act ("CAA")?<sup>6</sup> Similarly, what role should the courts play in reviewing the FDA's legal conclusion that tobacco products — a major killer in the United States — can be regulated within the meaning of the Food, Drug and Cosmetic Act?<sup>7</sup>

During the past three decades, one Supreme Court Justice, John Paul Stevens, has authored two of the most significant administrative law decisions that address the judiciary's role in checking administrative agencies' statutory interpretations. In 1984, in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, Justice Stevens wrote a unanimous opinion for the Court, upholding the EPA's construction of the term "stationary source" found in the CAA, despite environmentalists' claims that the EPA's interpretation would fail to clean up air pollution.<sup>8</sup> Subsequently, in *Massachusetts v. EPA*, Justice Stevens authored an opinion in 2007 for a five-justice majority ordering the EPA to reconsider its refusal to regulate greenhouse gases under the CAA, thus handing a major win to global environmental security.<sup>9</sup> Today, *Chevron* stands as a landmark decision because it

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<sup>6</sup> Cf. *Massachusetts*, 549 U.S. at 497 (holding in split 5–4 decision that EPA has statutory authority to regulate certain emissions that lead to global warming).

<sup>7</sup> Cf. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (holding in split 5–4 decision that FDA lacks statutory authority to regulate tobacco products).

<sup>8</sup> *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 841–42 (1984). For an excellent history and discussion of the *Chevron* decision, see generally Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in *ADMINISTRATIVE LAW STORIES* 399 (Peter L. Strauss ed., 2006) (chronicling *Chevron's* creation).

<sup>9</sup> See generally *Massachusetts*, 549 U.S. at 497 (sending EPA back to drawing board to reconsider whether to regulate certain greenhouse gas emissions). Highlighting the significance of the case, one scholar has said that *Massachusetts* was an "enormous, if narrow, victory for environmentalists: it legitimized their concerns about global warming and their claims that the administration was not doing what it should to address it." Jonathan Z. Cannon, *The Significance of Massachusetts v. EPA*, 93 VA. L. REV. (IN BRIEF) 53, 53 (2007) [hereinafter Cannon, *Significance*], available at <http://www.virginialawreview.org/inbrief/2007/05/21/cannon.pdf>.

erected what is now known as *Chevron* deference, which calls for deference to certain agency constructions of ambiguous statutory terms.<sup>10</sup> *Massachusetts* similarly serves as a highly significant decision because it made major inroads in administrative law doctrine and also because it addressed a major social issue — global warming.<sup>11</sup>

Although Justice Stevens wrote both decisions and each involved the EPA and the CAA, *Chevron* and *Massachusetts* seem to send very different messages about the judiciary's policing function. In *Chevron*, the Court embraced a highly deferential, hands-off view of the judiciary in handing a win to the Reagan Administration's EPA and a loss to environmentalists. In contrast, in *Massachusetts*, the Court embraced a much more active judicial role in handing a win to global environmental security and a loss to the Bush Administration's EPA. Thus, as one scholar has commented, "[b]oth in tone and substance, Justice Stevens's [*Massachusetts*] opinion looks like his *Chevron* opinion turned inside out."<sup>12</sup>

In light of the seemingly divergent messages that *Massachusetts* and *Chevron* send, this Article assesses Justice Stevens's position on the judiciary's role in policing administrative action. Does Justice Stevens stand as the proponent of a hands-off judiciary (à la *Chevron*), or as an advocate of a more active, protective judiciary (à la *Massachusetts*)? More specifically, what is Justice Stevens's approach when it comes to policing statutory interpretations issued by agencies that impact the public interest?<sup>13</sup> Is there anything unique about his judicial approach

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<sup>10</sup> See *infra* Part I.A.

<sup>11</sup> See Kathryn A. Watts & Amy J. Wildermuth, *Massachusetts v. EPA: Breaking New Ground on Issues Other than Global Warming*, 102 NW. U. L. REV. 1029, 1030 (2007) (discussing legal significance of case); see also Cannon, *Significance*, *supra* note 9, at 61-62 (noting that decision provides "rallying point for climate changes advocates" and that it may be as close to "*Brown v. Board of Education* for the environment" as we will ever come).

<sup>12</sup> Ronald A. Cass, *Massachusetts v. EPA: The Inconvenient Truth About Precedent*, 93 VA. L. REV. (IN BRIEF) 75, 84 (2007), available at <http://www.virginialawreview.org/inbrief/2007/05/21/cass.pdf>.

<sup>13</sup> The phrase "public interest," which was commonly used in New Deal-era legislation, is often used by Congress in describing the boundaries of legislative delegations to agencies, as well as by agencies when they seek to justify their actions. See Paul R. Verkuil, *Understanding the "Public Interest" Justification for Government Actions*, 39 ACTA JURIDICA HUNGARICA 141, 141-150 (1998) ("The words 'public interest' are probably invoked more than any other to explain and justify government action, whether in delegations of legislative authority to agencies or in explanations by agency officials to the public."). The phrase is concededly broad and amorphous. See *id.* at 141 (noting that words "public interest" are "rarely self-actualizing" and that "in some cases they seem virtually devoid of meaning"). However, "the courts have accepted it as a delegable standard to agencies." *Id.* at 150. This Article seeks to

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that enables him to provide particular judicial protection when matters of public security, health, safety, or welfare are involved?<sup>14</sup>

In answering these questions, this Article reviews various opinions authored by Justice Stevens which, like *Massachusetts* and *Chevron*, involve the reasonableness of agencies' statutory interpretations. This Article contends that, when Justice Stevens's opinions are viewed as a whole, a fairly clear picture emerges: Justice Stevens cannot accurately be labeled as either the proponent of a highly deferential, hands-off judiciary or the proponent of an active, robust judiciary. Rather, as a strong adherent of interpretive purposivism,<sup>15</sup> Justice Stevens pays particularly close attention to Congress's own protective and remedial purposes, such as the protection of workers from discrimination or the protection of the integrity of animal species, air, and waters. As a result, although Justice Stevens expressly eschews deciding cases based on his own policy preferences, his purposivist approach to

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explore how Justice Stevens uses judicial review to ensure that agency action can be described as serving the "public interest." In other words, what role does judicial review play in helping to check agency action and to ensure that it serves the public interest?

<sup>14</sup> Although the two primary cases analyzed in this Article, *Massachusetts* and *Chevron*, involve environmental issues, this Article does not focus solely on environmental issues, but rather looks broadly at decisions written by Justice Stevens that involve agency action that can be said to touch in some way on matters of public security, health, safety, or welfare. In other words, this Article looks at Justice Stevens's decisions involving a broad range of agency action, not just environmental action.

<sup>15</sup> Justice Stevens repeatedly has made clear that he believes that "[s]tatutes should be construed in a manner consistent with their underlying policies and purposes." *Sec'y of the Interior v. California*, 464 U.S. 312, 357 (1984) (Stevens, J., dissenting); see also *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 693 (2007) (Stevens, J., dissenting) (stating that "judges must always remain faithful to the intent of the legislature"); *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 107 (2007) ("The only 'policy' by which I have been driven is that which this Court has endorsed on repeated occasions regarding the importance of remaining faithful to Congress' intent."); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 577 (1982) (Stevens, J., dissenting) ("In final analysis, any question of statutory construction requires the judge to decide how the legislature intended its enactment to apply to the case at hand."). Accordingly, he is viewed as the leading champion of purposivism on the Court today. See generally Abner S. Greene, *The Missing Step of Textualism*, 74 *FORDHAM L. REV.* 1913, 1913 (2006) ("Throughout his more than thirty years on the U.S. Supreme Court, Justice John Paul Stevens has been a consistent proponent of a purposive, as opposed to textualist, brand of statutory interpretation."); John F. Manning, *Competing Presumptions About Statutory Coherence*, 74 *FORDHAM L. REV.* 2009, 2009 (2006) ("For some time now, Justice Stevens has been the Court's most vocal and, I believe, the ablest defender of what two generations of judges and lawyers took to be the post-New Deal consensus on statutory interpretation: the idea that legislation is a purposivist act, and that judges should interpret acts of Congress to implement the legislative purpose . . .").

statutory interpretation often enables him to facilitate Congress's broad protective goals. In particular, Justice Stevens often either explicitly or implicitly draws upon the "remedial purpose" canon, which provides that protective and remedial statutes should be construed liberally rather than narrowly to effectuate their beneficial goals and purposes.<sup>16</sup>

By giving a broad reading to Congress's protective and remedial goals and purposes, Justice Stevens's approach to statutory interpretation appears to give agencies the deference they need to achieve Congress's goals, and conversely, to check agencies when they act counter to Congress's protective or remedial purposes. This means that if an agency adopts a cramped reading of a statute that Congress intended to serve broad protective or remedial goals, Justice Stevens may refuse to defer to the agency's views. For example, in *Massachusetts*, Justice Stevens refused to defer to the EPA when it interpreted the CAA narrowly to foreclose the regulation of certain greenhouse gases that lead to global warming.<sup>17</sup> Conversely, if an agency adopts an expansive statutory reading that helps to further Congress's broad protective or remedial purposes, Justice Stevens often will give deference to the agency's views. For example, in his dissent in *Rapanos v. United States*,<sup>18</sup> he argued that Congress's broad goal of "protecting the physical, chemical and biological integrity of our waters" supported the Army Corps of Engineers' determination that certain wetlands fell within the reach of the Clean Water Act ("CWA").<sup>19</sup>

This Article will proceed in three parts. Part I details Justice Stevens's landmark opinions in *Chevron* and *Massachusetts* and discusses how these two decisions seem to offer two competing views of the judicial role: one that is highly deferential and another that envisions a much more active and protective judicial role. Part II then explores whether the apparent differences between *Massachusetts* and *Chevron* can be reconciled. It ultimately concludes that the cases' differing approaches and tones can be reconciled when considered in

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<sup>16</sup> See generally Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon*, 20 HARV. ENVTL. L. REV. 199, 201 (1996) (describing how remedial purpose canon of statutory construction "states that remedial legislation should be liberally construed in order to effectuate the beneficial purpose for which it was enacted").

<sup>17</sup> *Massachusetts v. EPA*, 549 U.S. 497, 527-29 (2007) (rejecting EPA's contention that certain emissions from new motor vehicles are not "air pollutants" within meaning of CAA).

<sup>18</sup> 547 U.S. 715 (2006).

<sup>19</sup> *Id.* at 799 n.8 (Stevens, J., dissenting).

light of Justice Stevens's strong commitment to purposivism, which calls upon him to construe different statutory provisions in light of Congress' animating goals and purposes. Finally, Part III describes how Justice Stevens's purposivist approach to statutory interpretation, which often relies upon the remedial purpose canon, enables him either to give agencies the deference that they need to resolve statutory ambiguities in favor of the remedial or protective purposes that the statute was designed to protect, or conversely, to check agencies when they act counter to those purposes.

#### I. CHEVRON AND MASSACHUSETTS: ONE AUTHOR, TWO VOICES

During his time on the Court, Justice Stevens has penned two of the most significant opinions that speak to the proper role of the judiciary in overseeing agencies' statutory interpretations: *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>20</sup> and *Massachusetts v. EPA*.<sup>21</sup> However, rather than fitting together to tell a coherent story of the proper judicial role in the regulatory arena, these two opinions seem, at least on their surface, to point in opposite directions.

##### A. *Chevron: A Win for Judicial Deference, a Loss for Environmental Interests*

Justice Stevens's opinion in *Chevron* stands today as a landmark decision, providing the Court's most significant pronouncement on the allocation of interpretive power between courts and agencies.<sup>22</sup> In its mere twenty-five years of life, *Chevron* has spawned voluminous scholarly commentary.<sup>23</sup> It also has been cited in more than 10,000

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<sup>20</sup> 467 U.S. 837 (1984).

<sup>21</sup> 549 U.S. 497 (2007).

<sup>22</sup> See Merrill, *supra* note 8, at 399 (noting that *Chevron* provides "leading statement about the division of authority between agencies and courts in interpreting statutes").

<sup>23</sup> See, e.g., David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201; Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637 (2003); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking under Chevron*, 6 ADMIN. L.J. AM. U. 187 (1992); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001); Thomas W. Merrill & Kathryn Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511; Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83 (1994); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990); Kathryn A. Watts, *Adapting to Administrative Law's Erie Doctrine*, 101 NW. U. L. REV. 997 (2007) [hereinafter Watts, *Adapting*]. Faced with this



judicial opinions,<sup>24</sup> easily surpassing famous cases such as *Marbury v. Madison*<sup>25</sup> and *Roe v. Wade*<sup>26</sup> in the number of subsequent citations to them. It also is quickly catching up to *Erie Railroad Co. v. Tompkins*.<sup>27</sup> *Chevron*'s landmark status is a bit ironic given that Justice Stevens did not expect the case to become a bestseller.<sup>28</sup> Nor did he think that he was breaking new doctrinal ground when he wrote the opinion for the Court.<sup>29</sup> In fact, as Professor Thomas Merrill has detailed, at the time *Chevron* was briefed, argued, and decided, the case was widely viewed as a routine but complex case turning on a technical statutory issue involving the CAA.<sup>30</sup>

At issue in *Chevron* was the meaning of one specific phrase found in the CAA Amendments of 1977 — the phrase “stationary source.”<sup>31</sup> The 1977 amendments contained various requirements applicable to states that had failed to achieve national air quality standards.<sup>32</sup> The amendments required these states, called “nonattainment” states, to establish permit programs that would regulate “new or modified major

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outpouring of scholarly attention, Justice Stevens has commented that the “opinion has been the subject of more scholarly comment than it really deserves.” John Paul Stevens, *Random Recollections*, 42 SAN DIEGO L. REV. 269, 279 (2005) [hereinafter Stevens, *Random Recollections*].

<sup>24</sup> According to a recent search using Westlaw's KeyCite, 10,463 judicial opinions cite *Chevron*. Online search for 467 U.S. 837, Westlaw (May 15, 2009).

<sup>25</sup> 5 U.S. (1 Cranch) 137 (1803). *Marbury* has been cited in some 3,331 judicial opinions. Online search for 5 U.S. 137, Westlaw (May 15, 2009).

<sup>26</sup> 410 U.S. 113 (1973). *Roe* has been cited in some 3,580 judicial opinions. Online search for 410 U.S. 113, Westlaw (May 15, 2009).

<sup>27</sup> 304 U.S. 64 (1938). *Erie* has been cited in 13,144 judicial opinions. Online search for 304 U.S. 64, Westlaw (May 15, 2009).

<sup>28</sup> See generally Kenneth A. Manaster, *Justice Stevens, Judicial Power, and the Varieties of Environmental Litigation*, 74 FORDHAM L. REV. 1963, 1999 (2006) (“Stevens himself did not consider his statement [in *Chevron*] as new in any respect, and he explicitly relied on numerous precedents to support his synthesis of analytic steps in judicial review.”); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 188 (2006) [hereinafter Sunstein, *Step Zero*] (“Ironically, Justice Stevens, the author of *Chevron*, had no broad ambitions for the decision; the Court did not mean to do anything dramatic.”).

<sup>29</sup> See Merrill, *supra* note 8, at 420 n.76 (describing how Justice Stevens has publicly stated that he viewed *Chevron* as simple restatement of established law); see also *Negusie v. Holder*, 129 S. Ct. 1159, 1170-71 (2009) (Stevens, J., concurring in part and dissenting in part) (“Judicial deference to agencies' views on statutes they administer was not born in *Chevron* . . .”).

<sup>30</sup> See Merrill, *supra* note 8, at 412-20.

<sup>31</sup> *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 839-40 (1984) (citing 42 U.S.C. § 7502(b)(6) (1982)).

<sup>32</sup> *Id.*

stationary sources” of air pollution.<sup>33</sup> In October 1981, the Reagan Administration’s EPA implemented the permit requirement by promulgating a regulation that allowed states to adopt a “plant-wide” definition of the term “stationary source.”<sup>34</sup> This definition meant that states could treat all pollution-emitting devices within the same industrial group as if they were encased within a “bubble.” In other words, under the EPA’s regulation, “an existing plant that contains several pollution-emitting devices [could] install or modify one piece of equipment without meeting the permit conditions if the alteration [would] not increase the total emissions from the plant.”<sup>35</sup>

After the EPA adopted its plant-wide definition, various environmental groups, including the National Resources Defense Council, Inc. and Citizens for a Better Environment, Inc., filed a petition for review in the D.C. Circuit seeking to set aside the EPA’s regulations.<sup>36</sup> These groups objected to the EPA’s interpretation. They believed that the bubble concept would fail to improve air quality and would have the effect of locking in the status quo because plants would not be required to implement new pollution control technology so long as overall emissions within the plant did not increase.<sup>37</sup> The D.C. Circuit ultimately agreed that the EPA’s regulations should be set aside, reasoning based on two of its prior precedents that the bubble concept was inappropriate in the context of a permit program that was designed to *improve* as opposed to merely *maintain* air quality.<sup>38</sup> The Supreme Court then granted certiorari.<sup>39</sup>

After the Court heard oral argument, the Justices were initially divided: Chief Justice Burger and Justices Brennan and O’Connor voted to affirm, whereas Justices White, Blackmun, Stevens, and Powell tentatively voted to reverse.<sup>40</sup> Justices Marshall and Rehnquist did not participate in the decision, and Justice O’Connor ultimately also recused herself.<sup>41</sup> Because Justice White was the senior Justice in

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<sup>33</sup> *Id.* (citing 42 U.S.C. § 7502(b)(6) (1982)) (emphasis added).

<sup>34</sup> Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 50,766 (Oct. 14, 1981).

<sup>35</sup> *Chevron*, 467 U.S. at 840.

<sup>36</sup> *See id.* at 841 n.3.

<sup>37</sup> *See Merrill*, *supra* note 8, at 403.

<sup>38</sup> Nat’l Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 720 (D.C. Cir. 1982).

<sup>39</sup> *Chevron U.S.A. Inc. v. Nat’l Res. Def. Council, Inc.*, 461 U.S. 956 (1983).

<sup>40</sup> *See John Paul Stevens, In Memoriam: Byron R. White*, 116 HARV. L. REV. 1, 2 (2002) [hereinafter Stevens, *In Memoriam*]; *see also Merrill*, *supra* note 8, at 415-16.

<sup>41</sup> *See Stevens, In Memoriam*, *supra* note 40, at 2; *see also Merrill*, *supra* note 8, at 415-19.

the majority, he was charged with assigning the writing of the opinion, and he chose to assign the opinion to Justice Stevens.<sup>42</sup> Justice Stevens ultimately crafted an opinion joined by all participating Justices that upheld the EPA's regulations.<sup>43</sup>

The first paragraph of Justice Stevens's opinion struck a reserved, nonjudgmental tone.<sup>44</sup> It was devoid of any discussion of the magnitude of the social issue involved, merely highlighting the technical complexities of the case by summarizing the statutory amendments and the specific statutory term at issue. In addition, the opening paragraph summarized the question presented in the case in a way that emphasized the Court's narrow judicial role: "The question presented by these cases is whether the EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble' is based on a *reasonable* construction of the statutory term 'stationary source.'" <sup>45</sup>

Justice Stevens's embrace of a deferential, narrow judicial role in *Chevron* is now best known as the *Chevron* "two step," which he articulated in the following passage:

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

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<sup>42</sup> See Stevens, *In Memoriam*, *supra* note 40, at 2 ("Byron was therefore the senior Justice in the majority, and he assigned the opinion to me."); see also *id.* at 2 n.9 (noting his gratitude to Justice White for assignment); Stevens, *Random Recollections*, *supra* note 23, at 279 ("I have always been grateful to Byron for asking me to write it.").

<sup>43</sup> Justice Stevens has commented that he is "sure that it was [his] thorough analysis of the facts, rather than any comment on the deference to be accorded to the agency, that persuaded both [Burger and Brennan] to switch sides and give [him] a unanimous Court." Stevens, *Random Recollections*, *supra* note 23, at 279.

<sup>44</sup> *Chevron*, 467 U.S. at 840.

<sup>45</sup> *Id.* at 840 (emphasis added).

the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>46</sup>

As this passage explains, the first step of the inquiry asks whether Congress's "intent" is clear — an inquiry that Justice Stevens said can be determined using traditional tools of statutory construction.<sup>47</sup> Assuming that Congress's intent is not clear, then the second step asks whether the agency's resolution of any ambiguity in the statute is a reasonable reading, *not* whether it is the Court's own preferred reading. Thus, the judicial role envisioned in the second step is quite limited because courts must defer to reasonable agency constructions and cannot simply substitute their own preferred statutory readings.<sup>48</sup>

Applying this two-step inquiry to the facts at issue in *Chevron*, Justice Stevens concluded at step one that Congress did not have a specific intent as to the meaning of the term "stationary source." A clear answer concerning the propriety of the bubble concept was not provided by the actual statutory text, the legislative history, or the two main purposes surrounding the permit program: (1) an economic interest in permitting capital improvements to continue, and (2) an environmental interest in improving air quality.<sup>49</sup> This led Justice Stevens to conclude at step two that the EPA's reading of the statutory ambiguity was permissible. He emphasized that the permit program sought to navigate two competing policies. The EPA's construction, according to Justice Stevens, represented "a reasonable accommodation of manifestly competing interests."<sup>50</sup>

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<sup>46</sup> *Id.* at 842-43.

<sup>47</sup> *See id.* at 843 n.9. Although Justice Stevens framed the question in *Chevron* in terms of the clarity of Congress's intent, Justice Scalia, the Court's leading textualist, has framed the question in terms of whether the statute is clear rather than whether Congress's intent is clear. *See generally* Linda Jellum, *Chevron's Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 748-53 (2007) (discussing debate about whether step one is search for congressional intent or search for textual clarity and noting that Scalia has been champion of textualist approach to *Chevron*).

<sup>48</sup> After *Chevron* was handed down, scholars widely debated the basis for *Chevron's* mandatory rule of deference — some viewing it as hinging on quasi-separation of powers principles and others arguing that it rested on notions of congressional delegation. *See generally* Watts, *Adapting*, *supra* note 23, at 1005-06 (discussing how *Chevron's* basis was widely debated for years). The Supreme Court recently provided an answer, clarifying that *Chevron* does rest on notions of congressional delegation, which means that *Chevron* applies only when Congress delegated power to the agency to act with the force and effect of law. *See United States v. Mead Corp.*, 533 U.S. 218, 229-32 (2001).

<sup>49</sup> *Chevron*, 476 U.S. at 859-63.

<sup>50</sup> *Id.* at 865.

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As Justice Stevens explained, whether the Court would have selected the same reading of the statute if left to its own devices was irrelevant because the judicial task is not to resolve “the struggle between competing views of the public interest” but rather to defer to legislators and administrators who are politically accountable for their policy decisions.<sup>51</sup> Relying upon democratic theory, Justice Stevens stated:

Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibility may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices — resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by an agency charged with the administration of the statute in light of everyday realities.

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges — who have no constituency — have a duty to respect legitimate policy choices made by those who do.<sup>52</sup>

In this passage, Justice Stevens clearly articulated his view that when Congress has given an agency the power to fill statutory gaps, judges should respect the choices made by those agency officials who are more politically accountable than courts.<sup>53</sup>

B. *Massachusetts: A Loss for Judicial Deference, a Win for Global Environmental Security*

Approximately two decades after Justice Stevens wrote *Chevron*, he authored yet another major opinion for the Court that also involved

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<sup>51</sup> *Id.* at 865-66.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 865.

the EPA, the CAA, and statutory construction: *Massachusetts v. EPA*.<sup>54</sup> Unlike his *Chevron* opinion, however, Justice Stevens's opinion in *Massachusetts* did not defer to the policy choices made by the EPA.

*Massachusetts* involved the EPA's denial of a rulemaking petition requesting that the EPA regulate certain motor vehicle emissions, including carbon dioxide, under section 202(a)(1) of the CAA. That section provides that the EPA Administrator "shall by regulation prescribe" standards applicable to the emission of "air pollutants" from new motor vehicles, "which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."<sup>55</sup> The rulemaking petition at issue in *Massachusetts* was filed in October 1999 by a group of nineteen private organizations, including Friends of the Earth and Greenpeace USA, which requested that the EPA regulate greenhouse gas emissions from new motor vehicles that lead to global warming.<sup>56</sup> Years later, in 2003 during the Bush Administration, the EPA denied the rulemaking petition on two grounds. First, the EPA concluded that greenhouse gases were not "air pollutants" within the meaning of the Act and that it therefore lacked the statutory authority to regulate.<sup>57</sup> Second, even if it did have the legal authority to act, the EPA concluded that it was justified in its refusal to regulate because of a long list of policy considerations that advised against regulation at that time. Some of the specific policy considerations that the EPA relied on included its desire to avoid piecemeal regulation, its concerns about scientific uncertainty, and its desire to avoid interfering with the President's foreign policy initiatives.<sup>58</sup>

After the EPA denied the rulemaking petition, various states, cities, and environmental organizations sought review in the D.C. Circuit,

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<sup>54</sup> 549 U.S. 497 (2007). Many scholars have already noted the significance of the decision. See, e.g., Cannon, *Significance*, *supra* note 9, at 61-62 (discussing environmental importance of opinion); Cass, *supra* note 12 (asserting that Justices' political inclination colored outcome of decision); Watts & Wildermuth, *supra* note 11, at 1029 (discussing legal significance of opinion); see also Robert V. Percival, *Massachusetts v. EPA: Escaping the Common Law's Growing Shadow*, 2007 SUP. CT. REV. 111, 160 (noting that decision is "truly remarkable").

<sup>55</sup> 42 U.S.C. § 7521(a)(1) (2006).

<sup>56</sup> *Massachusetts*, 549 U.S. at 510.

<sup>57</sup> Notice of Denial of Petition for Rulemaking, Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,925-29 (Sept. 8, 2003); see also *Massachusetts*, 549 U.S. at 511-12.

<sup>58</sup> Notice of denial of Petition for Rulemaking, Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,929-31; see also *Massachusetts*, 549 U.S. at 511-12.

where a three-judge panel splintered three ways.<sup>59</sup> Judge Randolph ducked a tricky Article III standing issue raised in the case and concluded that even if the EPA had the statutory authority to regulate, the EPA had acted permissibly in declining to regulate for policy reasons.<sup>60</sup> Judge Sentelle would have decided the case on Article III standing grounds, concluding that no concrete or particularized injury was present in the case because global warming presents a generalized injury suffered by all.<sup>61</sup> And Judge Tatel would have ruled against the EPA, concluding that petitioners had standing, that the EPA had the statutory authority to regulate, and that the EPA's discretionary reasons for declining to regulate were not adequate.<sup>62</sup>

When the Supreme Court reviewed the case, it did not fare much better than the D.C. Circuit in terms of speaking with a unified voice. Rather, the Court split 5–4, with Justice Stevens writing the majority opinion, echoing in large part Judge Tatel's dissent below.<sup>63</sup> In contrast to his opinion in *Chevron*, which began with a highly deferential tone devoid of substantive judgments about the underlying environmental issues, Justice Stevens' opinion in *Massachusetts* began with a lengthy discussion of the history, the dangers, and the significance of global warming.<sup>64</sup> Specifically, the first paragraph of his opinion described the issue of global warming as follows:

A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related. For when carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected

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<sup>59</sup> *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005).

<sup>60</sup> *Id.* at 285-90 (Randolph, J., announcing judgment of court and filing opinion).

<sup>61</sup> *Id.* at 291 (Sentelle, J., dissenting in part and concurring in judgment).

<sup>62</sup> *Id.* at 293-94 (Tatel, J., dissenting).

<sup>63</sup> Justice Stevens was joined in the majority opinion by Justices Kennedy, Souter, Ginsburg and Breyer. Chief Justice Roberts wrote a dissenting opinion joined by Justices Scalia, Thomas, and Alito in which he argued that Article III standing was lacking in the case. In addition, Justice Scalia wrote a dissenting opinion, which was joined by Chief Justice Roberts and Justices Thomas and Alito, in which he argued that the EPA's denial of the rulemaking petition should be upheld on the merits.

<sup>64</sup> See generally Cass, *supra* note 12, at 76 ("By the end of the first paragraph, readers understand that — no matter what obstacles stand in the way — this decision is going to command the Bush administration's environmental decisionmakers to do what a Gore administration's more eco-friendly administrators surely would have done: take steps to order automobile makers to cut back on the emissions that '[r]espected scientists' connect to global warming.").

heat. It is therefore a species — the most important species — of a greenhouse gas.<sup>65</sup>

He then stated that global warming had been called “the most pressing environmental challenge of our time.”<sup>66</sup> In this sense, the Court made clear at the outset that it was acutely aware of what it called the “unusual importance of the underlying issue” of global warming.<sup>67</sup>

After Justice Stevens concluded that Article III standing requirements were met in the case, he turned to the merits,<sup>68</sup> first addressing the question of whether the CAA authorizes the EPA to regulate greenhouse gas emissions from new motor vehicles. He fairly quickly rejected the EPA’s conclusion that carbon dioxide and other greenhouse gases are not “air pollutants” within the meaning of section 202(a)(1) of the CAA. In rejecting the EPA’s narrow definition of the statutory term, Justice Stevens concluded that the statute was unambiguous. The CAA included a “sweeping” and “capacious” definition of the term “air pollutant,” expressly defining an “air pollutant” as including “any air pollution agent or combination of such agents, including any physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air.”<sup>69</sup> Justice Stevens acknowledged that the Congress that initially drafted section 202(a)(1) may not have “appreciated the possibility that burning fossil fuels could lead to global warming,” but he noted that Congress’s use

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<sup>65</sup> *Massachusetts v. EPA*, 549 U.S. 497, 504-05 (2007).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 505-06 (noting that Court had granted certiorari notwithstanding serious jurisdictional arguments involving standing and notwithstanding absence of any circuit splits because of “unusual importance of the underlying issue” involved in case); see also Cannon, *Significance*, *supra* note 9, at 56 (“If we assume that the Court uses the first page of an opinion to tell us what is most important about the case, the most important thing in this case is that anthropogenic climate change is real and very serious.”).

<sup>68</sup> Before turning to the merits of the case, Justice Stevens first had to deal with the question of whether Article III standing existed in the case. He ultimately concluded that the Commonwealth of Massachusetts — which deserved “special solicitude” in the standing analysis due to its status as a state — had standing because a rise in sea levels associated with global warming had already harmed and would continue to harm Massachusetts, which owned coastal land. See *Massachusetts*, 549 U.S. at 518-26. For discussion of *Massachusetts*’ handling of the Article III standing issue, see generally Dru Stevenson, *Special Solicitude for State Standing: Massachusetts v. EPA*, 112 PENN. ST. L. REV. 1 (2007) (discussing how Court erected new rule giving states special solicitude in Article III standing context); Watts & Wildermuth, *supra* note 11 (analyzing significance of Court’s standing analysis); Amy J. Wildermuth, *Why State Standing in Massachusetts v. EPA Matters*, 27 J. LAND RESOURCES & ENVTL. L. 273 (2007) (same).

<sup>69</sup> *Massachusetts*, 549 U.S. at 555-56 (citing 42 U.S.C. § 7602(g) (2006)).



of “broad language” indicated Congress’s intentional effort to ensure regulatory flexibility so that “changing circumstances and scientific developments” would not render the CAA obsolete.<sup>70</sup> Because greenhouse gases “fit well within the Clean Air Act’s capacious definition of ‘air pollutant,’ ” Justice Stevens held that the EPA indeed had the statutory authority to regulate.<sup>71</sup>

In reaching this conclusion, Justice Stevens arguably did little more than apply step one of *Chevron*. He ultimately concluded in light of Congress’s use of broad statutory language that in this instance, unlike in *Chevron*, Congress had a specific intent on the statutory question at issue. Whether Justice Stevens’s ultimate conclusion about the clarity of Congress’s intent was correct,<sup>72</sup> Justice Stevens’s opinion on the statutory authority issue remained true to the legal framework set forth in *Chevron* to the extent that it purported to assess whether or not Congress’s intent was clear.

The same, however, cannot be said about the next portion of Justice Stevens’s opinion, which considered the propriety of the EPA’s reliance upon various policy concerns in declining to make a “judgment” regarding whether greenhouse gases endanger the public health and welfare. In declining to make a judgment, the EPA interpreted section 202(a)(1), which states that the EPA administrator shall regulate emissions “which *in his judgment* cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”<sup>73</sup> The EPA read the statute’s use of the term “judgment” as providing it with the discretion to decline to make a judgment for policy reasons, such as concerns about scientific uncertainty and a desire to avoid stepping on the President’s toes in the foreign realm.

In rejecting all of the EPA’s policy justifications, Justice Stevens reasoned that the EPA’s “laundry list” of reasons for not regulating was “divorced from the *statutory text*.”<sup>74</sup> In other words, the EPA was required to “ground its reasons for action or inaction *in the statute*.”<sup>75</sup> According to Justice Stevens:

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<sup>70</sup> *Id.* at 532-35.

<sup>71</sup> *Id.* at 532.

<sup>72</sup> Justices Scalia, Thomas, and Alito and Chief Justice Roberts did not find the statute to be unambiguous but rather felt that they were faced with “textual ambiguity.” *Id.* at 557-58 (Scalia, J., dissenting).

<sup>73</sup> 42 U.S.C. § 7521(a)(1) (2006) (emphasis added).

<sup>74</sup> *Massachusetts*, 549 U.S. at 531-34 (emphasis added).

<sup>75</sup> *Id.* at 535.

While the statute does condition the exercise of the EPA's authority on its formation of a "judgment," that judgment must relate to whether an air pollutant "cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare." Put another way, the use of the word "judgment" is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits.<sup>76</sup>

Here, Justice Stevens made clear that he read the statute to require the EPA to ground its reasons for action or inaction *in the statute*, not in broader policy considerations outside of the four corners of the statute.<sup>77</sup>

As Justice Scalia pointed out in his dissenting opinion, one difficulty with Justice Stevens's reasoning is that the relevant statutory text makes it quite clear that *when* the EPA administrator actually "*makes* a judgment whether to regulate greenhouse gases, that judgment must relate to whether they are air pollutants that 'cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.'"<sup>78</sup> But the statute "*says nothing at all* about the reasons for which the Administrator may *defer* making a judgment."<sup>79</sup> Although this congressional silence would seem to call for *Chevron* deference to the agency's own reasonable interpretation of what constitutes an appropriate decisional factor, Justice Stevens's opinion for the Court never explained why the EPA's interpretation of the statutory term "judgment" did not deserve deference under *Chevron*.<sup>80</sup> It is here that Justice Stevens's opinion diverges most dramatically from *Chevron's* legal framework. Instead of giving the EPA room to make policy judgments in the face of statutory silence and ambiguity, Justice Stevens seemed to scold the EPA for relying on policy concerns when the statutory text said nothing about what types of extra

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<sup>76</sup> *Id.* at 532-33 (citation omitted).

<sup>77</sup> See generally Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 S. CT. REV. 51, 80 (explaining that Court determined that relevant statutory factors were scientific and causal and that they did "not include broader considerations of foreign affairs and public policy").

<sup>78</sup> *Massachusetts*, 549 U.S. at 552 (Scalia, J., dissenting); see also Freeman & Vermeule, *supra* note 77, at 84 (describing how Justice Scalia "excoriated the majority for collapsing" question of what statutory factors constrain making of judgment with question of what factors constrain agency's decision not to make such judgment in first place).

<sup>79</sup> *Massachusetts*, 549 U.S. at 552 (Scalia, J., dissenting).

<sup>80</sup> See *id.* at 552-53.

statutory factors the EPA could consider in declining to make a judgment.<sup>81</sup>

### C. Contrasting Chevron and Massachusetts

When comparing *Chevron* and *Massachusetts*, the differences seem to far outweigh the similarities. Although both *Chevron* and *Massachusetts* involved major environmental issues of their eras and both involved the EPA, the CAA, and issues of statutory interpretation, the opinions look in many ways like ships passing in the night in terms of their outcomes, their substance, and their tones.

In particular, the winners and losers in the cases differ. *Chevron* handed a win to the Reagan Administration's EPA and a loss to the environmental groups challenging the EPA's interpretation, whereas *Massachusetts* handed a loss to the Bush Administration's EPA and a major win to global environmental security. The opinions also differ dramatically in tone. *Chevron* struck a reserved tone that highlighted the technical complexities involved, whereas *Massachusetts* used a much more searching, critical tone that played up the monumental significance of global warming.<sup>82</sup> Finally, the opinions differ substantively in terms of the role that the Court played. *Chevron* embraced a type of "counter-*Marbury*" that envisions judicial restraint,<sup>83</sup> whereas *Massachusetts* seems to embrace a more searching and active judiciary. Of course, the irony of all this is that the work of one man, Stevens, could be cited by litigants seeking a deferential,

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<sup>81</sup> For a general discussion of the role *Massachusetts* might play in speaking to the issue of what kinds of extrastatutory factors agencies can take into account when making decisions, see Richard J. Pierce, *What Factors Can an Agency Consider in Making a Decision?*, 2009 MICH. ST. L. REV. 67, 81 ("I have no doubt that many petitioners will argue that *Massachusetts* . . . stand[s] for the proposition that congressional silence with respect to a decisional factor should be interpreted as congressional rejection of that factor and as a prohibition on agency consideration of that factor in making decisions."); see also Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 50-52 (2009) (discussing how *Massachusetts* could be read to limit types of extrastatutory factors that agencies consider but arguing that this is not best reading of *Massachusetts*).

<sup>82</sup> See Cass, *supra* note 12, at 82 (arguing that Court in *Massachusetts* "put on the mantle of climatologists-in-chief, second-guessing every consideration that supports the positions taken by the EPA").

<sup>83</sup> See, e.g., Sunstein, *Step Zero*, *supra* note 28, at 189 (arguing that *Chevron* went "so far as to create a kind of counter-*Marbury*"); see also Richard W. Murphy, *A "New" Counter-Marbury: Reconciling Skidmore Deference and Agency Interpretive Freedom*, 56 ADMIN. L. REV. 1, 37 (2004) (noting "tension between the *Marbury* norm that [courts] control legal meaning and the *Chevron* norm that agencies control policymaking, which in turn, sometimes controls legal meaning").

restrained judiciary as well as by litigants seeking a more active and protective judiciary. This leaves one wondering whether there is some explanation for these seemingly inconsistent decisions.

## II. RECONCILING *CHEVRON* AND *MASSACHUSETTS*

This Part identifies and considers three possible explanations for the apparent differences between the two decisions: (1) that Justice Stevens is willing to embrace a less deferential and more active judicial role in cases involving major social issues, such as global warming; (2) that Justice Stevens never meant what *Chevron* has been read to mean over time; or (3) that Justice Stevens's strong commitment to interpretive purposivism dictates that he apply a different analysis to every statutory scheme to best effectuate Congress's animating purposes and goals.<sup>84</sup> This Part ultimately concludes that the third explanation, resting on Justice Stevens's purposivist approach, is the most useful in reconciling differences between *Massachusetts* and *Chevron*. This suggests that Justice Stevens will not embrace a more "active" or more "protective" judicial role simply because a case presents a major social issue like global warming, but he will pay particular attention to Congress's own protective goals and purposes when reviewing agency action. As such, it seems that he will seek to ensure that agencies act in a way that furthers Congress's view of what will best secure and protect the public interest.

### A. *Theory One: Major Social Issues Require More Active Judicial Intervention*

One possible explanation for the differences between *Chevron* and *Massachusetts* could simply be that *Massachusetts* presented a highly charged, political issue that had major ramifications for global environmental security.<sup>85</sup> Under this theory, perhaps Justice Stevens in

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<sup>84</sup> A fourth possible explanation worth mentioning might simply be that over time, Justice Stevens's style, approach, and views have changed. In other words, sometime between *Chevron* being decided in 1984 and *Massachusetts* being handed down in 2007, perhaps Justice Stevens's views on deference and judicial review have changed. Although this is possible, it seems unlikely to adequately explain the apparent tension between *Chevron* and *Massachusetts*. Justice Stevens, after all, has spoken publicly about *Chevron* on multiple occasions, see Merrill, *supra* note 8, at 420 n.76, and although he has suggested that he did not expect the case to turn into a blockbuster, see *id.*, he has never suggested that he now disagrees with what he wrote in the case.

<sup>85</sup> Cf. Watts & Wildermuth, *supra* note 11, at 1043 ("Perhaps the Court's willingness to apply such rigorous review is limited to the specifics of this case,

*Massachusetts* was willing to ignore *Chevron*'s rule of deference (or at least to "soft pedal" *Chevron*, as one scholar has put it)<sup>86</sup> because the magnitude of the evils of global warming convinced Justice Stevens that the judiciary had to play an active role in securing the public interest where the Executive Branch had dragged its heels and failed to act. In other words, Justice Stevens may have felt that the Executive Branch had delayed long enough and that it was time for the judiciary to send a clear message about the need for the executive to address this major environmental issue.

Articulating a similar take on *Massachusetts*, Professor Ronald Cass has argued that the justices in the majority ran roughshod over administrative law principles, such as *Chevron* deference, in order to promote their own political preferences.<sup>87</sup> Specifically, Professor Cass charged that the Justices "stretch[ed], twist[ed], and torture[d] administrative law doctrines" in their "eagerness to promote government action."<sup>88</sup> Similarly, in his dissenting opinion in *Massachusetts*, Justice Scalia engaged in a related attack, suggesting that the majority had improperly "substitute[ed] its own desired outcome for the reasoned judgment of the responsible agency" due to the importance of the underlying policy issues at stake.<sup>89</sup>

Although it is certainly possible that Justice Stevens's concerns about the tremendous significance of global warming led him to take on a more active judicial role and to espouse heightened environmental awareness in *Massachusetts*, this possibility alone does not adequately explain the significant differences between *Massachusetts* and *Chevron*. *Chevron*, after all, also involved a very significant environmental issue: national air pollution control.<sup>90</sup> Yet, as Professor Kenneth Manaster has pointed out, *Chevron*, unlike *Massachusetts*, "was decided without any direct analysis of the environmental questions it raised."<sup>91</sup>

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namely the immense importance of global warming.").

<sup>86</sup> DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 2006-2007, at xiv (Jeffrey S. Lubbers ed., 2008) (noting that *Chevron* was "soft-pedaled" in *Massachusetts*).

<sup>87</sup> See Cass, *supra* note 12, at 75 ("In their eagerness to promote government action to address global warming, the Justices stretch, twist, and torture administrative law doctrines to avoid the inconvenient truth that this is not a matter on which judges have any real role to play.").

<sup>88</sup> *Id.*

<sup>89</sup> *Massachusetts v. EPA*, 549 U.S. 497, 560 (2006) (Scalia, J., dissenting).

<sup>90</sup> See Manaster, *supra* note 28, at 1965 (noting that *Chevron* involved "issues of tremendous significance for air pollution control across the country").

<sup>91</sup> See *id.*

Furthermore, Justice Stevens repeatedly has made clear that he avoids deciding cases based on his own policy preferences.<sup>92</sup> For example, in *Zuni Public School District No. 89 v. Department of Education*,<sup>93</sup> a 2007 case involving the permissibility of the Secretary of Education's interpretation of a statute, Justice Stevens stated the following in response to concerns raised by Justice Scalia that judicial departures from statutory text might represent policy-driven interpretations:

Justice Scalia's argument today rests on the incorrect premise that every policy-driven interpretation implements a judge's personal view of sound policy, rather than a faithful attempt to carry out the will of the legislature. Quite the contrary is true of the work of the judges with whom I have worked for many years. If we presume that our judges are intellectually honest — as I do — there is no reason to fear “policy-driven interpretation[s]” of Acts of Congress.<sup>94</sup>

Obviously, the fact that Justice Stevens repeatedly says in cases like *Zuni* that he avoids deciding cases based on his own policy preferences does not necessarily make the statement true. But there is ample evidence to support his statements. Professor Manaster, for example, has thoroughly detailed how Justice Stevens has disappointed environmentalists by refusing to alter his judicial approach in environmental cases simply to achieve environmental protection.<sup>95</sup> According to Professor Manaster, Justice Stevens routinely approaches

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<sup>92</sup> See, e.g., *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 107 (2007) (“The only ‘policy’ by which I have been driven is that which this Court has endorsed on repeated occasions regarding the importance of remaining faithful to Congress’ intent.”); *Rapanos v. United States*, 547 U.S. 715, 799 n.8 (2006) (Stevens, J., dissenting) (noting that he was implementing Congress’ policy choices, not his own); *Chevron U.S.A. Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (“Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences.”); see also Manaster, *supra* note 28, at 1993 & nn.148-49 (quoting Justice Stevens as saying that he has decided cases as judge in ways that conflict with his own personal “views as to what would be most advantageous or desirable in our modern day society”).

<sup>93</sup> 550 U.S. 81.

<sup>94</sup> *Id.* at 105 (Stevens, J., concurring); see also *id.* at 107 (“The only ‘policy’ by which I have been driven is that which this Court has endorsed on repeated occasions regarding the importance of remaining faithful to Congress’ intent.”).

<sup>95</sup> See Manaster, *supra* note 28, at 1965-66, 2001 (“[W]hen regulatory actions of environmental and other types of agencies are subjected to judicial review, there is no reason to expect that Justice Stevens’s emphatic rejection of a policy making role for judges will be diluted or ignored.”).

environmental cases through general doctrines of administrative law and statutory interpretation instead of bending his judicial approach to protect the environment.<sup>96</sup>

Specifically, Professor Manaster has pointed to Justice Stevens's dissenting opinion in *City of Chicago v. Environmental Defense Fund*<sup>97</sup> as an example of a case in which Justice Stevens might have felt that what the "law authorized" was "divorced from" his own judgment.<sup>98</sup> In *City of Chicago*, the majority in an opinion by Justice Scalia held that ash generated by Chicago's incineration of solid waste was subject to a scheme governing hazardous waste set up by the Resource Conservation Recovery Act ("RCRA"). In dissent, Justice Stevens stated that he would have deferred to the EPA and reached a contrary conclusion.<sup>99</sup> He conceded that "[t]he majority's decision today may represent sound policy" because "[r]equiring cities to spend the necessary funds to dispose of their incinerator residues in accordance with the strict requirements of [RCRA] will provide additional protections to the environment."<sup>100</sup> However, he noted that "the conservation of scarce landfill space and the encouragement of the recovery of energy and valuable materials in municipal wastes were major concerns motivating RCRA's enactment" as well.<sup>101</sup> According to Justice Stevens, it was up to the EPA, *not* to the Court, to decide "[w]hether those purposes will be disserved by regulating municipal incinerators under Subtitle C [of RCRA] and, if so, whether environmental benefits may nevertheless justify the costs of such additional regulation."<sup>102</sup>

Hence, in light of both *Chevron*'s and *Massachusetts*'s involvement in pressing environmental issues and in light of cases like *City of Chicago*, it seems tough to square *Massachusetts* and *Chevron* solely by noting that *Massachusetts* involved a highly significant environmental issue. Other possible explanations for the apparent tension between *Chevron* and *Massachusetts* must be explored as well.

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<sup>96</sup> *Id.* at 1965-66.

<sup>97</sup> 511 U.S. 328 (1994).

<sup>98</sup> See Manaster, *supra* note 28, at 1993 n.149.

<sup>99</sup> *City of Chicago*, 511 U.S. at 348 (Stevens, J., dissenting).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

B. *Theory Two: Justice Stevens Does Not Believe that Chevron Means What It Has Been Read to Mean*

Another possible and perhaps more promising way of explaining the differences between *Massachusetts* and *Chevron* would be to say that Justice Stevens never meant to say what *Chevron* has been read to mean as time has passed. Since being decided in 1984, *Chevron* certainly has taken on a life of its own, morphing into a mandatory rule of deference that legal scholars have read to shift significant interpretive power from the courts to agencies.<sup>103</sup> *Chevron*'s rule of deference also has grown in complexity — consisting, for example, not only of the step one and step two inquiries, but now also of a “step zero” inquiry, which focuses on whether or not *Chevron* is applicable in a certain case and thus operates as a kind of on/off switch for *Chevron* deference.<sup>104</sup>

Justice Stevens, a fan of flexible standards rather than rigid rules,<sup>105</sup> has not hidden the fact that he has serious reservations about the broad, mandatory reading of *Chevron* that has taken hold over the years.<sup>106</sup> Immediately after the *Chevron* decision, for example, Justice Stevens wrote the opinion for the Court in *INS v. Cardoza-Fonseca*,<sup>107</sup> in which he debated the scope of *Chevron* with Justice Scalia, a strong supporter of *Chevron* deference. *Cardoza-Fonseca* involved a pure

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<sup>103</sup> See generally Sunstein, *Step Zero*, *supra* note 28, at 188-89 (“[S]hortly after it appeared, *Chevron* was quickly taken to establish a new approach to judicial review of agency interpretations of law, going so far as to create a kind of counter-*Marbury* for the administrative state.”); Watts, *Adapting*, *supra* note 23, at 998 (“[T]he Court’s decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council* effected a dramatic reallocation in authority between the branches, shifting significant power from the judicial branch and handing it over to administrative agencies.”).

<sup>104</sup> See Sunstein, *Step Zero*, *supra* note 28, at 190-91 (discussing step zero inquiry, which involves question of whether *Chevron* applies at all); see also Cass, *supra* note 12, at 81 (noting that *Chevron*’s development has “enough twists and turns for a slalom run”).

<sup>105</sup> Cf. Norman Dorsen, *John Paul Stevens*, 1993 ANN. SURV. AM. L. xxv, xxvi (stating that Stevens “eschews bright-line rules in favor of standards that permit judges adequate discretion to tailor results to nuanced evaluation of facts and circumstances”); Stevens, *Random Recollections*, *supra* note 23, at 270 (noting that in context of working on committee charged with endorsing rules that would apply to all statutes including antitrust exemption, his committee ultimately recommended not bright-line rule or set of rules, “but a recommendation to read each federal regulatory statute with great care because each provides its own solutions to the specific problems that Congress confronted”).

<sup>106</sup> Cf. Merrill, *supra* note 8, at 420-21 (describing how Stevens did not desire to alter status quo when he wrote *Chevron*); see also Sunstein, *Step Zero*, *supra* note 28, at 188 n.2.

<sup>107</sup> 480 U.S. 421 (1987).



question of law: whether the Immigration and Nationality Act (“INA”) required the Attorney General to use the same or different standards of proof when evaluating requests for withholding deportation and requests for asylum.<sup>108</sup> In the course of his opinion, Justice Stevens strongly implied that *Chevron* deference does not apply broadly to all questions of statutory ambiguity, but rather applies only where questions of law application or implementation are involved, as opposed to pure questions of law.<sup>109</sup> Because Justice Stevens viewed the question whether Congress intended the standards governing asylum and deportation “to be identical” as a “pure question of statutory interpretation,” he deemed it a question for the courts, not the agency, to decide.<sup>110</sup> Accordingly, Justice Stevens seems to have tried to make clear in *Cardoza-Fonseca* that not *all* statutory ambiguities call for *Chevron* deference to agencies. Rather, Congress intends some kinds of statutory ambiguities to be resolved by the courts.

Justice Scalia wrote a concurrence in *Cardoza-Fonseca* in which he agreed that the agency’s interpretation was not entitled to deference because its interpretation of the relevant standard was “clearly inconsistent” with the INA.<sup>111</sup> Justice Scalia, however, took issue with Justice Stevens’s attempts to paint *Chevron* in a narrow light. Justice Scalia argued that the Court’s discussion of *Chevron* was “flatly inconsistent” with the broad rule of deference set forth in *Chevron*.<sup>112</sup> In particular, Justice Scalia contended that the issue in *Chevron* turned on a question of “abstract interpretation” (i.e., a pure question of law involving the meaning of the term “stationary source”) rather than a question of law application. Hence, according to Justice Scalia, *Chevron* cannot be read to embrace the dichotomy between questions of law application and pure questions of statutory interpretation as suggested by Justice Stevens.<sup>113</sup>

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<sup>108</sup> See *id.* at 423.

<sup>109</sup> See Merrill, *supra* note 8, at 421; see also *Cardoza-Fonseca*, 480 U.S. at 454 (Scalia, J., concurring) (arguing that Court “implies that courts may substitute their interpretation of a statute for that of an agency whenever they face ‘a pure question of statutory construction for the courts to decide’”).

<sup>110</sup> *Cardoza-Fonseca*, 480 U.S. at 446. Having concluded that the standards for withholding deportation and asylum were not the same under the statute and that a “well-founded fear” statute applied to review requests for asylum, Justice Stevens did note that it would be up to the agency to give the “well-founded fear” standard meaning through actual application. *Id.* at 448.

<sup>111</sup> *Id.* at 453-54 (Scalia, J., concurring).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 454-55. For a detailed discussion of the debate between Justice Scalia and

Despite Justice Scalia's claim that *Chevron* applies across the board regardless of whether a question of law or law application is involved, Justice Stevens apparently still believes that the dichotomy between pure questions of law and questions of law application has relevance in the *Chevron* context. Most recently, in the 2009 *Negusie v. Holder* decision, Justice Stevens wrote a partial concurrence and partial dissent in which he again expressed his view that pure questions of statutory "construction" are reserved for the courts to decide, even if the statute is not entirely clear, whereas questions of statutory "implementation" or "application" are reserved for agencies.<sup>114</sup> *Negusie* involved the question whether the so-called "persecutor bar," which bars an alien from seeking asylum if he has persecuted others, applies even if the alien's involvement in persecution was the product of coercion or duress.<sup>115</sup> According to Justice Stevens, the case's narrow question of statutory interpretation was for the Court, not the agency, to decide.<sup>116</sup> He distinguished *Chevron* as a question of statutory implementation, noting that "[c]ourts are expert at statutory construction, while agencies are expert at statutory implementation."<sup>117</sup> Thus, Justice Stevens again expressed his discomfort with applying *Chevron* broadly to all cases involving agency interpretations of statutory ambiguities, suggesting that courts should save *Chevron* deference for agency constructions that turn on agency policy expertise.

Perhaps Justice Stevens's clearly articulated desire to cabin rather than to expand *Chevron* reveals why in *Massachusetts* he was willing to shy away from *Chevron*'s deferential approach in determining the meaning of section 202(a)'s use of the word "judgment."<sup>118</sup> By this account, one could argue that Justice Stevens may have viewed *Massachusetts* as presenting a pure question of statutory interpretation

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Justice Stevens in *Cardoza-Fonseca*, see Bernard Schwartz, "Shooting the Piano Player"? Justice Scalia and Administrative Law, 47 ADMIN. L. REV. 1, 46-50 (1995).

<sup>114</sup> *Negusie v. Holder*, 129 S. Ct. 1159, 1171-73 (2009) (Stevens, J., dissenting in part and concurring in part) ("The *Chevron* framework thus accounts for the different institutional competencies of agencies and courts: Courts are experts at statutory construction, while agencies are expert at statutory implementation."). It is notable that Justice Breyer, one of the Court's administrative law experts, joined Justice Stevens in *Negusie*.

<sup>115</sup> *Id.* at 1159. Justice Kennedy wrote the opinion for the Court, ultimately holding that the statute was ambiguous and that the agency's interpretation was not entitled to deference because it was based on an erroneous understanding of a court decision. *Id.*

<sup>116</sup> *Id.* at 1170 (Stevens, J., dissenting in part and concurring in part).

<sup>117</sup> *Id.* at 1171.

<sup>118</sup> See *supra* Part I.B.

for the courts to decide — namely, whether section 202(a) required the EPA to make a “judgment” about whether the pollutants pose a danger, or whether section 202(a) enabled the EPA to decline to make a “judgment” based on policy considerations.<sup>119</sup> If Justice Stevens viewed the issue in this way, then he may well have felt that *Massachusetts*, like *Cardoza-Fonseca* and *Negusie*, posed a pure question of statutory interpretation involving the metes and bounds of what the agency was legally required to do, *not* the kind of technical question of statutory implementation that *Chevron* raised that called for deference to the expert agency due to its exercise of policy expertise.

Although this explanation for why Justice Stevens jumped over *Chevron* in his discussion of the “judgment” issue in *Massachusetts* is certainly plausible, it does not seem entirely satisfactory because the EPA in *Massachusetts* did *not* engage in pure statutory construction on the “judgment” issue, but rather seems to have decided a policy question involving whether the EPA should or should not regulate. Specifically, the EPA argued that a variety of discretionary, policy-driven considerations (such as scientific uncertainty and Presidential foreign policy initiatives) persuaded it to decline to make a judgment about whether certain emissions pose a danger.<sup>120</sup> In other words, the EPA did not purport to be engaging in traditional statutory construction, but rather seems to have been engaged in public administration aimed at deciding as a policy matter, rather than a legal matter, whether or not regulation was called for at that particular time. This kind of public administration would seem to call for the application of *Chevron*,<sup>121</sup> even under Justice Stevens’s approach to *Chevron* deference since Justice Stevens views *Chevron* as being applicable when an agency renders a construction that implicates its policy expertise.<sup>122</sup>

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<sup>119</sup> See 42 U.S.C. § 7521(a)(1) (2006); see also *supra* Part I.B.

<sup>120</sup> See *supra* Part I.B.

<sup>121</sup> If Justice Stevens had applied *Chevron* to the “judgment” issue, it seems that the relevant questions under *Chevron* would have been: (1) whether Congress unambiguously stated which factors the EPA could consider in deciding whether to make a “judgment,” and (2) if not, whether the EPA’s interpretation of the factors that it could consider was reasonable. Cf. *Massachusetts v. EPA*, 549 U.S. 497, 551-53 (2006) (Scalia, J., dissenting) (discussing *Chevron*’s applicability).

<sup>122</sup> In *Negusie*, for example, Justice Stevens explained that deference had been warranted in *Chevron* because *Chevron* did not involve a pure question of statutory construction. There, the EPA “cast its activity not as statutory construction but as public administration; its rulemaking sought to achieve policy goals, such as reducing regulatory complexity and promoting plant modernization.” *Negusie*, 129 S. Ct. at

Indeed, in another case decided in 2009, *Entergy Corp. v. Riverkeeper, Inc.*,<sup>123</sup> Justice Stevens seemed to concede that *Chevron*'s two-step framework was relevant to determining what factors govern an agency's regulatory approach when Congress is silent.<sup>124</sup> In *Entergy*, the Justices divided in a case involving a CWA provision directing the EPA to require that certain water intake structures "reflect the best technology available for minimizing adverse environmental impact."<sup>125</sup> The relevant statutory provision said nothing express about whether "cost" was a relevant factor that the EPA could consider in making decisions. Writing for the Court, Justice Scalia read Congress's silence about the propriety of considering "cost" to mean that the EPA, relying upon *Chevron* deference, could reasonably conclude that a cost-benefit analysis was an appropriate decisional factor. Specifically, Justice Scalia explained that he read Congress's silence in the relevant statute "to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree."<sup>126</sup>

In contrast, Justice Stevens, joined by Justice Souter and Justice Ginsburg in dissent, contended that the provision's silence about the relevance of cost should *not* be read "as an implicit source of cost-benefit authority, particularly when such authority is elsewhere expressly granted" in other statutory provisions.<sup>127</sup> In arguing that Congress actually "intend[ed] to control, not delegate when cost-benefit analysis" could be used,<sup>128</sup> Justice Stevens took issue with Justice Scalia's failure to consider, at step one of *Chevron*, the possibility that Congress's silence was meant to foreclose a cost-benefit analysis.<sup>129</sup> However, he did not appear to take issue with *Chevron*'s applicability in *Entergy*. In other words, he did not suggest that the case presented an issue of pure statutory "construction" to which *Chevron* was wholly inapplicable. Rather, he affirmatively cited *Chevron*, and he seems to have decided the case at step one of *Chevron*, ultimately reaching a different conclusion than Justice Scalia about the clarity of Congress's intent.<sup>130</sup>

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1171 n.1 (Stevens, J., dissenting).

<sup>123</sup> 129 S. Ct. 1498 (2009).

<sup>124</sup> *Id.* at 1518 & n.5 (Stevens, J., dissenting).

<sup>125</sup> *See id.* at 1516; *see also* 33 U.S.C. § 1326(b) (2006).

<sup>126</sup> *Entergy*, 129 S. Ct. at 1508.

<sup>127</sup> *Id.* at 1517 (Stevens, J., dissenting).

<sup>128</sup> *Id.* at 1518.

<sup>129</sup> *Id.* at 1518 n.5.

<sup>130</sup> *Id.* at 1518.

Given that *Massachusetts* presented the very same kind of issue as *Entergy* (namely, the question of what factors the EPA can consider in administering a statute that is silent about relevant decisional factors), Justice Stevens's implicit acceptance of *Chevron*'s framework in *Entergy* could be read to suggest that he likewise should have applied *Chevron* in *Massachusetts* with respect to the "judgment" issue. And yet he did not. Hence, it does not seem entirely satisfying to say that his willingness to skip over *Chevron*'s framework in *Massachusetts* with respect to the "judgment" issue can be easily explained simply by pointing to his overall desire to limit *Chevron* to those cases that turn on questions of statutory application rather than statutory interpretation.

C. *Theory Three: Every Statutory Scheme Requires a Different Analysis Designed to Effectuate Congress's Unique Purposes and Goals*

A third way to reconcile Justice Stevens's opinions in *Massachusetts* and *Chevron* is to consider Justice Stevens's strong commitment to purposivism — meaning his adherence to a method of statutory interpretation that calls on judges to determine a statute's original purpose and to interpret the statute in light of that purpose.<sup>131</sup> Justice Stevens currently stands as one of the Court's most staunch proponents of using a purposivist interpretive method of statutory construction.<sup>132</sup> As Professor John Manning has put it, purposivists, like Justice Stevens and Justice Breyer, believe "that legislation is a purposive act, and that judges should interpret acts of Congress to implement the legislative purpose, even if doing so requires some deviation from the semantic detail of the enacted text."<sup>133</sup> The purposivist approach is typically contrasted with textualism, which "gives precedence to a statute's semantic meaning, when clear, and eschews reliance on legislative history or other indicia of background

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<sup>131</sup> See generally Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking Is Better than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231, 1235 (1996) ("[P]urposivists go beyond the legislature's original intent to estimate the statute's spirit or purpose because either it may be difficult to determine the statute's original intent or a court must apply a statute to circumstances that the enacting legislature did not foresee.").

<sup>132</sup> See *supra* note 15. Justice Breyer is another strong supporter of purposivism. See, e.g., *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2342-43 (2008) (Breyer, J., dissenting).

<sup>133</sup> See Manning, *supra* note 15, at 2009-10 ("For Justice Stevens, respect for Congress means fidelity to that purpose rather than to the often-faulty semantic details of whatever text it happened to adopt.").

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purpose to vary the conventional meaning of the text.”<sup>134</sup> Textualists, like Justice Scalia, criticize purposivism’s attempt to find the collective intent or purpose of the legislature because “legislatures usually have no determinate collective expectations about many (if any) of the concrete issues posed by their statutes.”<sup>135</sup>

Despite recent momentum in favor of textualism (including Justice Scalia’s elevation from the D.C. Circuit to the Supreme Court in 1986), Justice Stevens remains highly committed to purposivism.<sup>136</sup> As a longstanding champion of purposivism, Justice Stevens seeks to interpret statutes to implement Congress’s original purposes and goals.<sup>137</sup> Justice Stevens’s seemingly divergent opinions in *Massachusetts* and *Chevron*, accordingly, might be explained by considering the simple fact that the cases involved different provisions of the CAA, each with its own history and its own animating congressional purposes.

In *Chevron*, Justice Stevens made clear that Congress was driven by two competing purposes when it enacted the amendments containing the permit program at issue in the case: the *economic* interest in permitting capital improvements to continue and the *environmental* interest in improving air quality.<sup>138</sup> Because Congress did not clearly answer how these competing interests should be balanced, and because the EPA reached a result that sought to navigate these two competing interests,<sup>139</sup> Justice Stevens, as a purposivist, seems to have

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<sup>134</sup> *Id.* at 2010.

<sup>135</sup> William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 642 (1990). Because Justice Scalia and Justice Stevens adhere to very different interpretive methods, they often disagree when it comes to cases raising questions of statutory interpretation. See generally Robin Kundis Craig, *The Stevens/Scalia Principle and Why It Matters: Statutory Conversations and a Cultural Critical Critique of the Strict Plain Meaning Approach*, 79 TUL. L. REV. 955 (2005) (comparing approaches of Justices Stevens and Scalia).

<sup>136</sup> This Article does not seek to take a position on the advantages or disadvantages of purposivism vis-à-vis textualism. That debate has received thorough attention elsewhere. See, e.g., Eskridge, *supra* note 135 (discussing traditional approach to statutory interpretation, as well as describing “new textualism” approach embraced by Scalia); Manning, *supra* note 15 (contrasting Scalia’s textualist approach and Stevens’s purposivist approach). Rather, this Article seeks to analyze how Justice Stevens’s commitment to purposivism might help to reconcile his opinions in *Chevron* and *Massachusetts* and what, if anything, his commitment to purposivism says about his view of the proper judicial role in cases impacting the public’s health, welfare, and safety.

<sup>137</sup> See Manning, *supra* note 15, at 2009; see also Greene, *supra* note 15, at 1913.

<sup>138</sup> *Chevron U.S.A. Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 851-52 (1984).

<sup>139</sup> *Id.* at 865.

felt comfortable deferring to the agency and taking a hands-off judicial role. In other words, deference seemed appropriate to him because the EPA's "interpretation represent[ed] a reasonable accommodation" of the "manifestly competing interests" that Congress had in mind when creating the permit program.<sup>140</sup>

In contrast, in *Massachusetts*, although Justice Stevens focused rather narrowly (and perhaps uncharacteristically) on the statute's *text* instead of on section 202(a)'s general *purposes*, one can tease out of his opinion a general concern for furthering the statute's main protective purpose: protection from harm resulting from air pollutants. For example, Justice Stevens was unconcerned that Congress "might not have appreciated the possibility that burning fossil fuels could lead to global warming" because he concluded that Congress had used broad language in the statute in order to confer the "flexibility" needed to ensure that "changing circumstances and scientific developments" would not render the CAA obsolete.<sup>141</sup> In other words, Justice Stevens seems to have believed that Congress drafted section 202(a)(1) with some breadth in order to ensure that the CAA's spirit would be served even as circumstances changed and new developments occurred.<sup>142</sup> Viewed in this light, it seems that what bothered Justice Stevens about the EPA's reading of the term "air pollutant" in section 202(a) was that it was too narrow and too cramped given the overarching statutory purpose.<sup>143</sup> Accordingly, Justice Stevens may have felt comfortable interpreting the statutory term "air pollutant" in a way that would ensure that the EPA could not undermine Congress's protective purpose of ensuring that the public health and welfare are protected.<sup>144</sup>

Similarly, Justice Stevens's nondeferential treatment of the other merits issue in *Massachusetts* — namely, whether the EPA had the statutory authority to decline to make a judgment based on policy considerations — also makes sense when considered in light of his purposivist leanings. Imagine that Justice Stevens had read section 202(a) to allow the EPA to rely upon policy reasons wholly unconnected to the statute in declining to make a judgment about

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<sup>140</sup> *Id.* ("Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases.")

<sup>141</sup> *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* (noting that EPA has been charged with protecting public's "health" and "welfare" and discussing how Congress used capacious terms to ensure that Act would have regulatory flexibility to handle changing circumstances and scientific developments).

<sup>144</sup> *See id.* (quoting 42 U.S.C. § 7521(a)(1) (2006)).

whether or not carbon dioxide emissions endanger the public health and welfare. If he had adopted such an expansive reading of the statute, then the EPA might fairly easily have been able to forever postpone making the endangerment judgment foreseen by section 202(a). In this sense, as Professors Jody Freeman and Adrian Vermeule have aptly explained, the EPA might have been able to “circumvent” the statutory provision’s *very purpose* of ensuring that the EPA actually makes judgments about the health and welfare effects of air pollutants.<sup>145</sup> From the perspective of a purposivist who is concerned with interpreting statutes in ways that will effectuate Congress’s main goals, one can see why Justice Stevens would not have been eager to read section 202(a) to allow this result. According to Professors Freeman and Vermeule, a purposivist might think it “absurd for the statute to require strong, and tightly constrained, first-order judgment about pollution’s effects on health and welfare while conferring unbounded discretion on EPA to decide never to make such judgments.”<sup>146</sup>

Hence, under this view, it seems likely that *Chevron* and *Massachusetts* reach different results, strike different tones, and send different messages about the judicial role simply because they involved different provisions of the CAA that were motivated by different congressional purposes. In *Chevron*, Congress had not definitively resolved how the struggle between two competing interests should be reconciled, so Justice Stevens embraced a narrow, highly deferential judicial role to allow the EPA, rather than an unelected judiciary, to resolve the struggle between competing interests.<sup>147</sup> In contrast, in *Massachusetts*, Justice Stevens may have believed that Congress’s basic goal embodied in the relevant statutory provision was clear: to protect the public health and welfare from air pollutants.<sup>148</sup> Justice Stevens, accordingly, may not have seen a need in *Massachusetts* to defer to the

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<sup>145</sup> See Freeman & Vermeule, *supra* note 77, at 85 (arguing that Justice Stevens’s opinion in *Massachusetts* might be explained by “anticircumvention principle,” which calls on courts to interpret statutes “so as not to allow circumvention of a statute’s main provisions”). Professor Jack Beermann has reached a similar conclusion, arguing that the Court in *Massachusetts* — even though it may have gotten it wrong — “was doing its best to work with Congress to achieve the congressional goals embodied in the statute rather than advance an agenda unrelated to those policies.” Jack M. Beermann, *The Turn Toward Congress in Administrative Law*, 89 B.U. L. REV. 727, 742 (2009).

<sup>146</sup> See Freeman & Vermeule, *supra* note 77, at 86.

<sup>147</sup> *Chevron U.S.A. Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 859-63 (1984).

<sup>148</sup> Cf. *Massachusetts*, 549 U.S. at 528 (quoting 42 U.S.C. § 7521(a)(1)).



EPA, which adopted a statutory construction that flouted Congress's main purpose.

Put another way, Justice Stevens seems to have concluded that the EPA in *Massachusetts* was essentially thumbing its nose at Congress's protective goals and hence had to lose at step one of *Chevron*. By contrast, the EPA in *Chevron* was doing its best to reconcile two competing interests contemplated but not resolved by Congress and hence deserved deference at step two of *Chevron*.<sup>149</sup>

### III. A PROTECTOR OF CONGRESS'S VIEW OF THE PUBLIC INTEREST

The picture just painted of how *Massachusetts* and *Chevron* can be reconciled suggests that Justice Stevens cannot accurately be labeled as the proponent of an active, protective judiciary (à la *Massachusetts*) or a highly deferential, hands-off judiciary (à la *Chevron*). Rather, as a strong purposivist, he strives to ensure that agencies act to effectuate Congress's own animating purposes. In doing so, however, many of Justice Stevens's decisions seem to pay particularly close attention to protective and remedial purposes set by Congress. As a result, although Justice Stevens expressly eschews deciding cases based on his own policy preferences, his purposivist approach to statutory interpretation does seem to enable him to give agencies the leeway they need to facilitate broad protective or remedial goals set by Congress,<sup>150</sup> and conversely to check agencies when they act counter to Congress's overarching protective or remedial purposes.<sup>151</sup>

<sup>149</sup> See *supra* note 50 and accompanying text (discussing two competing purposes).

<sup>150</sup> Cf. Diane L. Hughes, Note, *Justice Stevens's Method of Statutory Interpretation: A Well-Tailored Means for Facilitating Environmental Regulation*, 19 HARV. ENVTL. L. REV. 493, 497 (1995) (arguing that "Justice Stevens's method of statutory analysis in the environmental context is superior to rigid textualism in satisfying the purposes of environmental regulation").

<sup>151</sup> In this sense, the conclusions reached here might help to explain Professor William Eskridge and Lauren Baer's recent finding that Justice Stevens is the third least deferential justice of 17 recent justices they studied. See William N. Eskridge & Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1154 (2008). As Professor Eskridge and Baer noted, it is a bit ironic that the very author of *Chevron* stands as the "third least deferential justice," *id.*, but they hint that Justice Stevens's failure to consistently defer might be explained by his "general philosophy of strictly enforcing congressional expectations and constitutional norms against agencies." *Id.*

A. *Reading Congressional Purposes and Remedial Goals Broadly*

Some specific examples should easily demonstrate Justice Stevens's willingness to read protective or remedial congressional purposes broadly in the context of reviewing agency action. Consider, for example, Justice Stevens's dissent in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC), a 2001 decision involving whether the Army Corps of Engineers could exercise jurisdiction under the CWA over abandoned sand and gravel pits that provide habitat for migratory birds.<sup>152</sup> In an opinion by Chief Justice Rehnquist, the Court read the Corps' jurisdiction narrowly and refused to extend the Corps' jurisdiction to areas not adjacent to navigable water.<sup>153</sup> In reaching this conclusion, the Court mentioned that Congress passed the CWA "for the stated purpose of 'restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters.'"<sup>154</sup> Yet as one commentator has pointed out, the Court ultimately "gave little interpretive weight to the CWA's broad remedial purpose."<sup>155</sup>

In contrast, in his dissenting opinion, Justice Stevens (joined by Justices Souter, Ginsburg, and Breyer) looked to Congress's animating remedial purpose and argued for a broad reading of the CWA, noting that Congress sought to protect "the quality of our Nation's waters for esthetic, health, recreational, and environmental uses."<sup>156</sup> Justice Stevens also noted that the "major purpose" of the CWA was "to establish a *comprehensive* long-range policy for the elimination of water pollution."<sup>157</sup> Citing *Chevron*, Justice Stevens ultimately concluded that the "Corps' interpretation of the statute as extending beyond navigable waters, tributaries of navigable waters, and wetlands adjacent each is manifestly reasonable and therefore entitled to deference."<sup>158</sup> According to Justice Stevens, the majority, in reaching a contrary conclusion, had "needlessly weaken[ed] our principal

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<sup>152</sup> *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs* (SWANCC), 531 U.S. 159, 162-63 (2001).

<sup>153</sup> *Id.* at 168.

<sup>154</sup> *Id.* at 166 (quoting 33 U.S.C. § 1251(a) (2000)).

<sup>155</sup> Courtney Covington, Note, *Rapanos v. United States: Evaluating the Efficacy of Textualism in Interpreting Environmental Laws*, 34 *ECOLOGICAL L.Q.* 801, 809 (2007).

<sup>156</sup> See SWANCC, 531 U.S. at 175, 180 (Stevens, J., dissenting); see also Covington, *supra* note 155, at 810 ("Stevens' willingness to consider Congressional purpose and intent allowed him to conclude that an interpretation of the Corps' jurisdiction that covers the ponds at issue in SWANCC is consistent with the CWA.").

<sup>157</sup> SWANCC, 531 U.S. at 179 (Stevens, J., dissenting).

<sup>158</sup> *Id.* at 192.

safeguard against toxic water” and had done violence to Congress’s chosen protective scheme.<sup>159</sup>

Another useful example of Justice Stevens’s willingness to read protective statutes broadly (and to respect agencies’ protective readings of such statutes) can be found in Justice Stevens’s dissenting opinion in *Rapanos v. United States*, a 2006 case that asked whether the CWA’s protections extended to certain wetlands.<sup>160</sup> A plurality of the Court led by Justice Scalia, following a textualist approach, read the CWA narrowly, concluding that the Corps’s expansive interpretation of the phrase “waters of the United States” is not based on a permissible construction of the statute and hence did not merit *Chevron* deference.<sup>161</sup> In contrast, Justice Stevens (joined again by Justices Ginsburg, Breyer, and Souter) dissented by stating that the Army Corps’ determination that certain wetlands *are* encompassed within the CWA was reasonable and hence called for *Chevron* deference. Specifically, Justice Stevens concluded that “[t]he Corps’ . . . decision to treat these wetlands as encompassed within the term ‘waters of the United States’ is a quintessential example of the Executive’s reasonable interpretation of a statutory provision.”<sup>162</sup>

Justice Stevens acknowledged in *Rapanos* that his ultimate conclusion was influenced by policy considerations, but he made clear that the pro-environmental “policy considerations” that influenced his thinking were “Congress’ rather than his own.”<sup>163</sup> Specifically, Justice Stevens stated that he sought to effectuate Congress’s broad goal of “protecting the physical, chemical and biological integrity of our waters.”<sup>164</sup> Hence, Justice Scalia’s textualist approach served to constrain the CWA, whereas Justice Stevens’s purposivist approach enabled him to read Congress’s protective goals and purposes broadly so that he could defer to the agency’s reasonable reading of the statute.<sup>165</sup> Justice Stevens’s approach, accordingly, sought to enable the

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<sup>159</sup> *Id.* at 175 (Stevens, J., dissenting); *see also id.* at 191 (arguing that it is “majority’s reading, not the agency’s, that does violence to the scheme Congress chose to put into place”).

<sup>160</sup> *See Rapanos v. United States*, 547 U.S. 715, 719-20 (2006).

<sup>161</sup> *Id.* at 716 (plurality opinion) (Scalia, J., joined by Roberts, C.J., and Thomas & Alito, JJ.).

<sup>162</sup> *Id.* at 788 (Stevens, J., dissenting) (citing *Chevron U.S.A. Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984)).

<sup>163</sup> *Id.* at 798 n.8.

<sup>164</sup> *Id.* He then cited *Chevron* for the proposition that Congress’s policy concerns are relevant to determining whether the agency regulation is permissible. *See id.*

<sup>165</sup> *See Covington, supra* note 155, at 817-33 (arguing that Justice Scalia’s textualist approach serves to constrain CWA in way that undermines its main purpose).

agency to resolve any ambiguity in the statute in favor of the environmental interests that the statute was designed to protect.

Yet another helpful example of how Justice Stevens's purposivist approach enables him to give particular attention to Congress's broad protective purposes is his opinion in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, a 1995 decision involving the Endangered Species Act ("ESA").<sup>166</sup> The issue was whether the Secretary of the Interior exceeded his authority under the ESA in promulgating a regulation that defined the statute's prohibition on takings to include "significant habitat modification or degradation where it actually kills or injures wildlife."<sup>167</sup> In upholding the regulation's broad definition of the ESA's prohibition on "taking" endangered or threatened species, Justice Stevens relied in part on what he labeled the "broad purpose" of the ESA: "[T]he broad purpose of the ESA supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid."<sup>168</sup> He noted that among the central purposes of the ESA was "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,"<sup>169</sup> and he highlighted the Court's previous description of the ESA as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."<sup>170</sup> In light of "Congress' clear expression of the ESA's broad purpose to protect endangered and threatened wildlife," Justice Stevens concluded that the Secretary's broad definition was "reasonable" and warranted deference.<sup>171</sup>

A final illustrative example of Justice Stevens's willingness to draw on Congress's own broad protective purposes is his dissenting opinion in *Sutton v. United Air Lines, Inc.*, a case involving the question whether myopic job applicants were disabled within the meaning of the Americans with Disabilities Act ("ADA").<sup>172</sup> Each of the three executive agencies charged with administering the ADA had concluded that it mandates that "the presence of disability turns on an

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<sup>166</sup> *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Or.*, 515 U.S. 687, 698 (1995).

<sup>167</sup> *Id.* at 690.

<sup>168</sup> *Id.* at 698.

<sup>169</sup> *Id.* (quoting 16 U.S.C. § 1531(b) (1994)).

<sup>170</sup> *Id.* (quoting *TVA v. Hill*, 437 U.S. 153 (1978)).

<sup>171</sup> *Id.* at 700. Justice Scalia wrote a dissenting opinion in the case joined by Chief Justice Rehnquist and Justice Thomas in which he took a textualist approach. *Id.* at 717 (Scalia, J., dissenting).

<sup>172</sup> See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475-77 (1999).

individual's uncorrected state."<sup>173</sup> Yet the majority, in an opinion written by Justice O'Connor, held that myopic applicants were not disabled under the ADA because the applicants could correct their visual impairment with corrective lenses.<sup>174</sup> Arguing in dissent that the job applicants should be entitled to the ADA's protections, Justice Stevens, joined by Justice Breyer, stressed that the Court's task should be to interpret the statute in light of the purposes Congress sought to serve.<sup>175</sup> Congress's central purpose in the ADA was clear to Justice Stevens: Congress meant the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."<sup>176</sup> In order to be faithful to the ADA's remedial purpose, Justice Stevens argued that the Court should give the ADA "a generous, rather than a miserly, construction."<sup>177</sup>

As these various examples illustrate, if an agency reads a statute narrowly despite Congress's broad protective or remedial goals, then Justice Stevens may well refuse to defer to the agency's views. *Massachusetts* serves as a prime example of where this occurred within the confines of step one of *Chevron*: the agency's claim to *Chevron* deference lost out to Justice Stevens's fidelity to the CAA's text, as well as its protective goals and purposes.<sup>178</sup> Conversely, if an agency adopts an expansive statutory reading that helps to further Congress's own broad protective or remedial purposes, then Justice Stevens appears likely to give deference to the agency's reasonable views — as he did, for example, in his dissenting opinions in *SWANCC*, *Rapanos*, and *Sutton* and in his majority opinion in *Babbitt*.

### B. The Remedial Purpose Canon

In seeking to ensure that administrative agencies implementing Congress's statutory schemes respect Congress's broad protective or remedial purposes, Justice Stevens's purposivist interpretive approach overlaps significantly with the so-called remedial purpose canon. The remedial purpose canon, which serves as a tool of statutory construction, calls upon courts to construe protective or remedial statutes broadly to effectuate their animating purposes.<sup>179</sup> Although it

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<sup>173</sup> *Id.* at 501 (Stevens, J., dissenting).

<sup>174</sup> *Id.* at 488-89 (majority opinion).

<sup>175</sup> *Id.* at 504-05 (Stevens, J., dissenting).

<sup>176</sup> *Id.* at 497 (quoting 42 U.S.C. § 12101(b)(1) (1994)).

<sup>177</sup> *Id.* at 495.

<sup>178</sup> *Massachusetts v. EPA*, 549 U.S. 497, 500-01 (2007).

<sup>179</sup> See generally Watson, *supra* note 16 (providing general discussion of remedial purpose canon).

has been the subject of much criticism and debate,<sup>180</sup> the canon has been invoked in a wide range of cases covering topics such as workplace safety, public health, discrimination, and securities.<sup>181</sup> Often, it plays a role in cases that involve safety legislation, such as the Federal Food, Drug and Cosmetic Act.<sup>182</sup> In 1943, for example, in *United States v. Dotterweich*, Justice Frankfurter noted that the purposes of the Federal Food, Drug and Cosmetic Act touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection.<sup>183</sup> Implicitly invoking the remedial purpose canon, Justice Frankfurter noted that “[r]egard for these purposes should infuse construction of the legislation if it is to be treated as a working instruction of government and not merely as a collection of English words.”<sup>184</sup>

Similarly, in 2000 in *FDA v. Brown & Williamson* — an opinion holding that the FDA lacked the statutory authority to regulate tobacco — Justice Breyer’s dissenting opinion joined by Justice Stevens implicitly invoked the remedial purpose canon in arguing that the statute should be read to allow the FDA to regulate tobacco.<sup>185</sup> Specifically, Justice Breyer argued that the “statute’s basic purpose — the protection of public health — supports the inclusion of cigarettes within its scope.”<sup>186</sup>

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<sup>180</sup> See *id.* at 266-69 (discussing how debate surrounding canon has “heated up” in recent years).

<sup>181</sup> *Id.* at 201.

<sup>182</sup> For some examples of opinions that invoke the remedial purpose canon either explicitly or implicitly to liberally construe congressional statutes to effectuate remedial or protective purposes, see, for example, *Whirlpool v. Marshall*, 445 U.S. 1, 13 (1980) (“[S]afety legislation is to be liberally construed to effectuate the congressional purpose.”); *United States v. Bacto-Unidisk*, 394 U.S. 784, 798 (1969) (noting that there is “well-accepted principle that remedial legislation such as the Food, Drug, and Cosmetic Act is to be given a liberal construction consistent with the Act’s overriding purpose to protect the public health”); *Nutritional Health Alliance v. FDA*, 318 F.3d 92, 98 (2d Cir. 2003) (“[W]hen we are dealing with the public health, the language of the Food, Drug and Cosmetic Act should not be read too restrictively, but rather as ‘consistent with the Act’s overriding purpose to protect the public health.’”) (internal citations omitted).

<sup>183</sup> *United States v. Dotterweich*, 320 U.S. 277, 280 (1943).

<sup>184</sup> *Id.*

<sup>185</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 162 (2000) (Breyer, J., dissenting). For the proposition that the Food, Drug and Cosmetic Act “is to be given a liberal construction consistent with [its] overriding purpose to protect the public health,” Justice Breyer cited *United States v. Article of Drug Bacto-Unidisk*, 394 U.S. 784, 798 (1969).

<sup>186</sup> *Brown & Williamson Tobacco Corp.*, 529 U.S. at 162.

Although only some of Justice Stevens's opinions consciously cite the remedial purpose canon,<sup>187</sup> the canon seems to be operating in the background of many of Justice Stevens's opinions to the extent that he reads statutes broadly rather than narrowly in order to effectuate what he perceives to be Congress's remedial or protective goals.<sup>188</sup> In particular, he often appears willing to read statutes impacting the public's security, safety, and welfare (such as environmental laws, anti-discrimination statutes, and safety legislation) generously rather than narrowly in order to effectuate their overriding purposes. This means that when agency action serves the central protective purposes of a statute, Justice Stevens seems likely to view judicial deference at *Chevron* step two as being particularly appropriate because such deference ensures that the agency is given the leeway it needs to serve the broad protective goals of the statute.<sup>189</sup> Conversely, if an agency adopts a narrow reading of a remedial or protective statute that the agency administers (as the EPA arguably did in *Massachusetts*), then Justice Stevens may well refuse to defer to the agency, finding the statute to be clear at step one.

This kind of reliance on the remedial purpose canon, of course, is subject to attack on different fronts. One could argue, for example, that Justice Stevens's implicit reliance on the remedial purpose canon is vulnerable to the charge that he is discerning broad congressional purposes and reading statutes broadly not because he is truly seeking to advance Congress's own goals and purposes, but rather because he is sympathetic to the underlying remedial goals of the statutes.<sup>190</sup> Justice Scalia would likely be one to make this kind of a charge. He

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<sup>187</sup> See, e.g., *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (“[W]e have explained that the [Securities Exchange Act] should be construed ‘not technically and restrictively, but flexibly to effectuate its remedial purposes.’ ”); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 504 (1999) (Stevens, J., dissenting) (“It has long been a ‘familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes.’ ”).

<sup>188</sup> See *Rapanos v. United States*, 547 U.S. 715, 788 (2006) (Stevens, J., dissenting); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 175-80 (2001) (Stevens, J., dissenting); *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Or.*, 515 U.S. 687, 704-05 (1995).

<sup>189</sup> See *Rapanos*, 547 U.S. at 788 (Stevens, J., dissenting); *Zandford*, 535 U.S. at 820, 821-22; *SWANCC*, 531 U.S. at 175-80 (Stevens, J., dissenting); *Babbitt*, 515 U.S. 687, 704-05.

<sup>190</sup> Cf. Jonathan Z. Cannon, *Words and Worlds: The Supreme Court in Rapanos and Carabell*, 25 VA. ENVTL. L.J. 277, 309 (2007) (“Justices sympathetic to the remedial goals of these statutes (e.g., restoring and protecting the integrity of ecosystems) will also be Justices who opt for intentionalists' emphasis on legislative purpose and standard-like interpretations to facilitate full expression of these goals.”).

has attacked the remedial purpose canon in the past, arguing that it is “wonderfully indeterminate” because “no one knows what a ‘remedial statute’ is” and “no one knows how liberal is a liberal construction.”<sup>191</sup> Specifically, Justice Scalia has charged that judges use (or refrain from using) the canon depending on whether it will assist “in reaching the result the court wishes to achieve.”<sup>192</sup> Others have levied similar charges against the canon, suggesting that it can be used as a “tool of manipulation wielded by judges desirous of cloaking judicial willfulness in formalistic verbiage.”<sup>193</sup>

If directed at Justice Stevens, however, such criticism seems misdirected in light of various Stevens decisions that suggest that he will not reject any and all agency constructions that undercut protective or remedial values. Nor will he simply rubber stamp any and all agencies constructions that reach broad, protective results. Take *Chevron* itself, for example. There, Justice Stevens ultimately made no reference to the remedial purpose canon in his opinion even though the environmental groups challenging the EPA’s “bubble concept” argued in their brief to the Court that rejecting the EPA’s reading was consistent with “settled principles for construing a remedial statute which seeks to protect public health from hazards over which people have no personal control.”<sup>194</sup> In fact, after taking into account the two competing interests that Congress sought to accommodate, Justice Stevens ultimately deferred to the EPA despite environmentalists’ claims that the EPA’s reading would fail to improve air quality.<sup>195</sup>

Another example can be found in Justice Stevens’s opinion for the Court in *Potomac Electric Power Co. v. Director, Office of Workers Compensation Programs*.<sup>196</sup> There, Justice Stevens rejected an argument that the Longshoremen’s and Harbor Workers’ Compensation Act (“LHWCA”) should be read broadly, consistent with the remedial purpose canon, to provide a complete and adequate remedy to an injured employee. He noted that implicit in this argument was the incorrect “assumption that the sole purpose of the Act was to provide

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<sup>191</sup> Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE WEST. RES. L. REV. 581, 586 (1990).

<sup>192</sup> *Id.*

<sup>193</sup> Watson, *supra* note 16, at 267 (summarizing criticism aimed at remedial purpose canon).

<sup>194</sup> See *id.* at 259 n.253 (citing Respondents’ Brief at 38-39, *Chevron U.S.A. Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (No. 82-1005)).

<sup>195</sup> See *Chevron U.S.A. Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984); see also *supra* Part I.A.

<sup>196</sup> 449 U.S. 268 (1980).



disabled workers with a complete remedy for their industrial injuries.”<sup>197</sup> Specifically, he noted that the LHWCA “represents a compromise between the competing interests of disabled laborers and their employers.”<sup>198</sup>

Similarly, in *Stearns Electric Paste Co. v. EPA*,<sup>199</sup> Justice Stevens (then a judge sitting on the Seventh Circuit) reached a result that diverges from what would have been most protective of the public’s health. In *Stearns*, then-Judge Stevens was faced with deciding whether the EPA had acted improperly in determining that a rat poison — which had killed and led to the hospitalization of both adults and children — was “misbranded” within the meaning of the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”) when subjected to “willful misuse.”<sup>200</sup> Despite the protective goals of FIFRA, then-Judge Stevens concluded that there was “no statutory support” for application of the Act’s “misbranding” standard to “misuse” of a product.<sup>201</sup> In reaching this conclusion, he quoted Justice Frankfurter for the following proposition: “In our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.”<sup>202</sup> Hence, as *Stearns* illustrates, Justice Stevens clearly recognizes that there are limits to how liberally the protective aims of a statute can be read and to how much leeway agencies can be given to achieve protective aims.

#### CONCLUSION

The picture of Justice Stevens that should emerge from this Article is that of a justice whose purposivist interpretive method enables him to give deference to agency interpretations that resolve ambiguities in favor of protective statutory purposes and conversely to refuse to defer to narrow agency constructions where doing so would undermine the

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<sup>197</sup> *Id.* at 280-81.

<sup>198</sup> *Id.* at 282.

<sup>199</sup> 461 F.2d 293 (7th Cir. 1972).

<sup>200</sup> *Id.* at 296, 308.

<sup>201</sup> *Id.* at 307 (“Although it is consistent with the statutory language and purpose to apply a substantive standard of product safety to the use of a product in compliance with its manufacturer’s directions, there is no statutory support for the application of that standard to misuse of a product. Without such support, the formulation of substantive standards of product safety by an administrative agency expands the scope of administrative discretion beyond permissible limits.”).

<sup>202</sup> *Id.* at 309 n.52 (quoting *62 Cases More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 600 (1951)).

protective or remedial design of a statute.<sup>203</sup> This means that Justice Stevens's opinions, such as his landmark global warming decision in *Massachusetts*, often support results that might be viewed as "liberal" in the sense that they serve to protect the public's health, safety, security, and welfare.<sup>204</sup> But this does not appear to be because he is imposing his own view of wise policy or his own view of what would best protect the public interest. Instead, he recognizes the limits of advancing the public interest within the confines of statutory constraints, and he appears to be considering Congress's animating goals and seeking to ensure that agencies act in ways that further rather than undercut Congress's own remedial and protective goals. Justice Stevens's opinion in *Massachusetts*, accordingly, ought not be viewed as his *Chevron* opinion "turned inside out."<sup>205</sup> Rather, when viewed alongside other Stevens opinions, *Massachusetts* and *Chevron* nicely illustrate Justice Stevens's longstanding commitment to purposivism.

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<sup>203</sup> Opinions from the Second Circuit — relying in part on Supreme Court precedents — have embraced a very similar approach in cases involving the Food, Drug and Cosmetic Act. *See, e.g.,* *Nutritional Health Alliance v. FDA*, 318 F.3d 92, 98 (2003) ("[W]hen agency rulemaking serves the purposes of the statute, courts should refuse to adopt a narrow construction of the enabling legislation which would undercut the agency's authority to promulgate such rules . . ." (quoting *United States v. Nova Scotia Food Prods.*, 568 F.2d 240 (2d Cir. 1977))).

<sup>204</sup> *Cf. Eskridge & Baer, supra* note 151, at 1153-54 n.191 & Table 20 (finding in study of 1,014 statutory cases that Justice Stevens supported agency decisions coded as liberal 79.2 percent of the time and supported agency interpretations coded as conservative 49.6 percent of the time).

<sup>205</sup> *Cass, supra* note 12, at 84.