Administrative Sovereignty: Expanding the Scope of Federal Agency Enforcement Powers in Alaska v. Environmental Protection Agency

Joshua Hill
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By Joshua Hill*

I. INTRODUCTION

In 1996, Teck Cominco Alaska, Inc. (Cominco) commenced an expansion of one of its zinc mine holdings in rural Alaska. Cominco applied to the Alaska Department of Environmental Conservation (ADEC) for a permit authorizing increased generation by its standby electric generator and the addition of a seventh generator to its mine. Pursuant to its duties under the Clean Air Act (CAA), ADEC initially chose selective catalytic reduction as the best available control technology (BACT) for Cominco’s generators. After objections from Cominco, ADEC instead selected Low NOx as

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2. Id. at 994.
3. Id. at 997. The CAA indicates that no facility like Cominco’s “may be constructed or modified unless a permit prescribing emission limitations has been issued for the facility.” Id.
4. Id. at 994. Selective catalytic reduction is a pollution control technology designed to reduce a combustion engine’s production of nitrogen oxide pollutants. Id. n.5. The technology requires the use of relatively expensive metals such as titanium, platinum, or vanadium as a catalyst. Id.
5. Cominco argued that selective catalytic reduction technology would be unreasonably expensive, advocating instead that ADEC choose Low NOx as BACT for the generators. Id. at 995. Selective catalytic reduction, while expensive,
BACT and issued the permit.6 The Environmental Protection Agency (EPA) responded by ordering Cominco to cease installation of the seventh generator,7 invalidating ADEC’s permit for failure to explain why the device originally determined to be BACT was not the technology ultimately selected by the agency.8

The Court ultimately upheld the EPA’s invalidation of the ADEC permit.9 Finding the EPA authorized to review the reasonableness of a state environmental agency’s BACT determination,10 the Court held that the EPA’s review of ADEC’s permit process and the substantive contents of Cominco’s permit was within the scope of its Congressionally mandated authority.11

This note will analyze the Court’s decision in Alaska Department of Environmental Conservation v. EPA and discuss its impact upon the field of administrative law. Part II will briefly outline the history of the CAA and the principles of administrative law at work in this case.12 Part III will introduce the particular facts of Alaska.13 Part IV presents and discusses the Court’s majority and dissenting opinions.14 Part V discusses the impact of the Alaska decision,15 and Part VI will conclude the note.16

II. HISTORICAL BACKGROUND

A. Clean Air Act and Cooperative Federalism

Toward the end of the 1950’s, there emerged a growing concern

would reduce nitrogen oxide emissions by ninety percent. Id. at 994. Low NOx, substantially less expensive, would reduce emissions by only thirty percent. Id.

6. Id. at 997.
7. Id.
8. Id. The EPA’s invalidation of the permit was due in large part to Cominco’s failure to offer any evidence to support its claim that the installation of selective catalytic reduction would be technologically infeasible. See id. at 996.
9. Id. at 1009.
10. Id.
11. Id.
12. See infra notes 17-137 and accompanying text.
13. See infra notes 138-166 and accompanying text.
14. See infra notes 167-312 and accompanying text.
15. See infra notes 313-338 and accompanying text.
16. See infra notes 339-341 and accompanying text.
over the health risks associated with air pollution.\textsuperscript{17} In an attempt to respond to that concern, Congress passed the first CAA in 1963.\textsuperscript{18} The 1963 CAA required that states take certain regulatory steps to reduce air pollution, but it failed to provide for a national supervisory agency that would ensure state compliance.\textsuperscript{19} As state reluctance to comply with the provisions of the Act became increasingly clear,\textsuperscript{20} Congress amended the CAA in 1970 with several provisions designed to “take a stick to the states” and ensure compliance.\textsuperscript{21} The 1976 Amendments invested the EPA with authority to penalize states which failed to comply with the provisions of the act.\textsuperscript{22} One of the most significant features of the CAA is the Act’s division of enforcement responsibilities between the EPA and state governments. While the EPA is charged with ensuring compliance, the CAA grants states the discretion to choose the particular means by which the

\textsuperscript{17} Train v. Natural Res. Def. Counsel, 421 U.S. 60, 63 (1975).
\textsuperscript{18} Id. The original act “authorized federal authorities to expand their research efforts, to make grants to state air pollution control agencies, and also to intervene directly to abate interstate pollution in limited circumstances.” Id. at 63-64.
\textsuperscript{19} See id.
\textsuperscript{20} Id. at 64. “The response of the States to these manifestations of increasing congressional concern with air pollution was disappointing.” Id.
\textsuperscript{21} Id. at 64. The 1970 amendments were the result of “congressional dissatisfaction with the progress of existing air pollution programs and a determination to ‘tak[e] a stick to the States.’” Union Elec. Co. v. EPA, 427 U.S. 246, 249. (1976), quoting Train, 421 U.S. at 64. The most significant change produced by the amendments was the requirement that states submit plans for EPA approval detailing how they would achieve the air quality standards promulgated by the Act within three years. Id. at 250. The amendments required EPA approval of the plans if they were adopted after public notice and hearing and met eight specific criteria: provide for attainment of air quality standards as quickly as possible; include emissions limitations, schedules, and timetables for compliances; include provisions for establishing and operating mechanisms for monitoring and analyzing ambient air quality; include a procedure for review of the location of new sources subject to the Act’s standards; contain adequate provisions for intergovernmental cooperation; provide assurance that the state will have the resources to carry out the implementation plan; provide for the periodic inspection and testing of motor vehicles; and provide for revision of the plan after public hearing. Id. at 252. The amendments further provide that an adopted plan may be challenged in a court of appeals within thirty days of its adoption or thirty days after “newly discovered or available information justifies subsequent review.” Id. at 249.
\textsuperscript{22} Train, 421 U.S. at 64.
Act's air quality criteria will be met.\textsuperscript{23} The CAA's careful balance of federal oversight with state autonomy has often led to confusion regarding the particular responsibilities and nuances of each party's enforcement powers.\textsuperscript{24}

As state agencies began to enforce the provisions and requirements of the act, conflict between environmental and government agencies began to produce case law addressing the balance of power between those and the guiding principles behind the Act's enforcement.\textsuperscript{25} The case of \textit{Train v. Natural Resources Defense Counsel} (NRDC) is illustrative of that process.\textsuperscript{26} In \textit{Train}, an environmental advocacy group challenged the EPA's approval of a state plan allowing particular pollution sources to be excused from meeting certain pollution limitations prior to the state's attainment date.\textsuperscript{27} Of central importance to the case was the amount of discretion allotted to a state agency in selecting the particular means by which it would achieve the nationally mandated standards.\textsuperscript{28} In upholding the state's implementation plan, the Court noted that "so long as the ultimate effect of a State's choice of emission limitations is compliance with national standards \ldots the State is at liberty to

\textsuperscript{23} 42 U.S.C. § 7407(a) (2004). "Each State shall have the primary responsibility for assuring air quality." \textit{Id.}

\textsuperscript{24} \textit{See Train}, 421 U.S. 60 (concerning the amount of discretion properly afforded a state agency in determining how CAA requirements will be met); \textit{Whitman v. American Trucking Ass'ns}, 531 U.S. 457 (2001) (concerning EPA power to make policy decisions); and \textit{Union Elec. Co. v. EPA}, 427 U.S. 246 (1976) (concerning the role of technological and economic considerations in approving a state's implementation plan).

\textsuperscript{25} \textit{See Train}, 421 U.S. 60.

\textsuperscript{26} \textit{Id.}

\textsuperscript{27} \textit{Id.} at 70. An attainment date represents the time at which the state has reduced the quantity of pollutants such that the ambient air quality within its territory satisfies national standards. \textit{Id.} at 66. In \textit{Train}, the NRDC challenged a provision in Georgia's state implementation plan which allowed individually tailored variances in pollution limitations. \textit{Id.} at 69. Per the CAA, a state has three years to attain the national standards for air quality once its implementation plan is approved. \textit{Id.} at 66. Of concern to the parties in \textit{Train} was the stringency with which emissions limitations should be enforced prior to the attainment date. \textit{Id.} at 68.

\textsuperscript{28} \textit{Id.} at 78. Noting that \textit{Train} "reaches the broader issue of whether Congress intended the States to retain any significant degree of control of the manner in which they attain and maintain national standards." \textit{Id.}
adopt whatever mix of emission limitations it deems best suited to its particular situation." The Court further noted that the requirements of the CAA "relegate" the EPA to a "secondary role in the process of determining and enforcing the specific" provisions of the Act.

B. Balancing Power and Delegating Authority

Since the emergence of the EPA as the agency invested with the primary responsibility of ensuring national compliance with the provisions of the CAA, several problems have arisen concerning the manner in which the EPA interacts with state agencies charged with the substantive details of ensuring state compliance. The most significant problem has concerned the proper forum and mechanism for resolving conflicts between state agencies and the EPA over the proper interpretation and enforcement of CAA provisions. Judicial review and standards for agency deference have emerged as the usual solution to such problems, but the current solution merely represents the cumulative impact of several significant decisions addressing the proper division of power and responsibility between federal and state agencies.

29. Id. at 79.
30. Id.

The 1970 court battles were hardly the last conflicts between the federal and state governments over implementation of the Clean Air Act. After passage of the 1990 Amendments, state and local governments loudly protested EPA regulations on automobile emission inspection programs, carpool regulations, and permitting program requirements. More recently, states took the EPA back to court, raising constitutional objections to its uncooperative approach to "cooperative federalism."

Id.

32. See EPA v. Brown, 431 U.S. 99 (1977) (providing EPA with unlimited discretion in selecting which state implementation programs would be approved); see also Pennsylvania v. EPA, 500 F.2d 246 (3rd Cir. 1974) (holding the application of federal enforcement procedures to state non-compliance consistent with federal commerce power).

33. See Alaska, 124 S. Ct. at 1006 n.16 (noting that "federal-court" review will safeguard the "balance between State and Federal Governments"). Id.
In *Union Electric v. EPA*, the Court began addressing the balance of enforcement powers by establishing the competency of state courts to determine issues related to the economic and technological feasibility of pollution limitations.\(^{34}\) In *Union Electric*, the State of Missouri applied for and received EPA approval of its state implementation plan (SIP).\(^{35}\) The plan established a mechanism for controlling sulfur dioxide emissions in and around St. Louis.\(^{36}\) Since the levels of sulfur dioxide exceeded national primary standards in only one area, the plan focused on reducing sulfur dioxide emissions in that particular region.\(^{37}\) Union Electric Company (Union Electric), the region’s primary source of electric power, operated three coal-fired generators subject to pollution reductions.\(^{38}\) Union Electric applied for and received an exception to the pollution reduction requirements from the appropriate state agency,\(^{39}\) subject to renewal after a set period of time.\(^{40}\) When two of the applicable exceptions had expired, the EPA notified the company that it was in violation of Missouri’s SIP.\(^{41}\) Union Electric sought review of the Missouri SIP in federal court, arguing that the required pollution reductions were not technologically or economically feasible.\(^{42}\) The Supreme Court rejected the Union Electric’s argument,\(^{43}\) finding the policy aims of the Act necessarily of a “technology-forcing character.”\(^{44}\) After

\(^{34}\) 427 U.S. 146 at 252 (1976). The State’s plan specifically addressed control of sulfur dioxide emissions in and around St. Louis. *Id.* While the provisions of the plan were effective immediately, the State retained the authority to “grant variances to particular sources that could not immediately comply.” *Id.* See supra note 20 for a discussion of state implementation plans.

\(^{35}\) *Id.*

\(^{36}\) *Id.*

\(^{37}\) *Id.*

\(^{38}\) *Id.*

\(^{39}\) *Id.*

\(^{40}\) *Id.* at 255.

\(^{41}\) *Id.* at 253.

\(^{42}\) *Id.* at 255.

\(^{43}\) See *id.* at 256. “Congress intended claims of economic and technological infeasibility to be wholly foreign to the Administrator’s consideration of a state implementation plan.” *Id.*

\(^{44}\) See *id.* at 257 (quoting *Train*, 421 U.S. at 90-91). The Court notes that the 1970 amendments to the Act were “a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution.” *Id.* at 256.
determining that neither the EPA nor the federal judiciary had the 
authority to determine the technological or economic feasibility of a 
state’s implementation plan, the Court cited state agencies as the 
most appropriate forum for considering such claims. In so holding, 
the Court began the process of defining the contours of the 
relationship between state environmental agencies and the EPA in 
ensuring the provisions of the CAA.

In its opinion in *Whitman v. American Trucking Associations*, the 
Court helped to clarify the appropriate balance of power between 
state and federal administrative agencies in CAA enforcement by 
defining the point at which Congressional delegation of enforcement 
authority exceeds Constitutional bounds. In *Whitman*, several 
orGANizations representing the American trucking industry challenged 
a new set of National Ambient Air Quality Standards (NAAQS) 
adopted by the EPA. The organizations challenged the new 
standards on the premise that EPA’s adoption of revised NAAQS 
violated the constitution as an exercise of legislative authority.

45. *See id.* at 256. The Court notes that the responsibility of the EPA is solely 
to insure that the provisions of an approved plan are being satisfied and that the 
plan meets the “minimum compliance requirements” of the Act. *Id.*

46. *Id.* at 267 (noting that industries denied exemptions from a state’s 
implementation plan should have recourse to state agencies and state courts). *Id.*
The Court further noted that a State may select “whatever mix of control devices it 
desires” as long as the national standards established by the Act are satisfied. *Id.*
“[C]ongress plainly left with the States… the power to determine which sources 
would be burdened by regulation and to what extent.” *Id.* at 269.


48. *Id.* at 463. The CAA requires that the EPA review its adopted NAAQS 
every five years, making “such revisions . . . as may be appropriate.” 42 U.S.C. § 
7409 (d)(1) (2004). In *Whitman*, the trucking organizations challenged new EPA 
standards for particulate matter and ozone, both of which are the primary air 

49. *Id.* at 463. The Court notes that the proper analysis in such a challenge 
centers on the degree to which the statute has delegated legislative power to the 
agency. *Id.* at 472. Agencies are commonly understood to be part of the Executive 
Branch. As such, the delegation of legislative powers to agencies raises 
Constitutional issues. In order to avoid a Constitutional violation when conferring 
decision making authority on agencies, Congress must “lay down by legislative act 
an intelligible principle to which the person or body authorized to [act] is directed 
to conform.” *Id.* at 472 (quoting J.W. Hampton, Jr., & Co. v. United States, 276 
U.S. 394, 409 (1928)). The Court goes on to note that the “degree of agency 
discretion that is acceptable varies according to the scope of the power
They further argued that EPA was implicitly obligated to consider the financial burdens on regulated entities prior to adopting revised NAAQS. After addressing the role of the EPA in enforcing the CAA and the existence of standards to govern the exercise of the agency’s discretion, the Court rejected the arguments proffered by the trucking organizations and found the EPA’s exercise of authority to be within constitutional bounds. The Court’s holding is significant in that it effectively established the circumstances under which Congress may properly delegate complex policy decisions into agency hands.

Prior to its holding in Whitman, the Court’s opinion in Idaho v. Couer d’Alene Tribe of Idaho addressed the competency of State courts to elaborate state administrative law and decide issues concerning federal administrative agencies. In Idaho, a Native American tribe challenged the State’s determination of the tribe’s property boundaries. While a state forum was available to review
those boundary issues, the tribe chose to bring the action in federal court.\textsuperscript{56} The State moved to dismiss the tribe’s claim on the grounds that it had Eleventh Amendment immunity.\textsuperscript{57} Granting the motion for dismissal, the majority opinion noted that the state’s own courts were competent to decide the federal issues which the tribe presented.\textsuperscript{58} Citing the “elaboration of administrative law” as “one of the primary responsibilities of the state judiciary,”\textsuperscript{59} the Court implicitly legitimized the requirement that federal agencies challenge state agency action in state forums.\textsuperscript{60}

Following its decision in \textit{Idaho}, the majority in \textit{Alden v. Maine} further bolstered the competence of state courts to adjudicate federal issues by establishing the presumption that states act in good faith when interpreting and applying federal law.\textsuperscript{61} In \textit{Alden}, several probation officers filed suit in federal court against the State of Maine, alleging that the state’s overtime provisions violated the Fair Labor Standards Act of 1938.\textsuperscript{62} The case was dismissed and re-filed in state court, where it was dismissed again on the basis of Maine’s sovereign immunity.\textsuperscript{63} The United States Supreme Court granted
certiorari to decide whether Congress had the authority to “subject non-consenting States to private suits for damages in state courts.” Specifically recognizing the sovereign status of State governments, the Court noted that a state’s assertion of immunity requires an analysis not of the primacy of federal law but instead of whether that law was implemented in a “manner consistent with” state sovereignty. In addressing the importance of preserving the sovereignty of a state within its own courts, the majority was careful to note that a state’s constitutional privilege does not provide it with a “concomitant right to disregard the Constitution or valid federal law.” While the *Alden* Court ultimately upheld Maine’s exercise of immunity, it implicitly established a judicial presumption that states will “honor the Constitution” and “obey the binding the laws” of the federal government. That presumption is important in addressing the concern that states will disregard federal law in the absence of a federal supervisory authority.

64. *Id.* at 712.  
65. *Id.* at 713. “Although the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document ‘specifically recognizes the States as sovereign entities.’” *Id.* (quoting Seminole Tribe of Florida v. Florida, 517 U.S. at 71 n.15).  
66. *Id.* at 732. The Court further “reject[s] any contention that substantive federal law by its own force necessarily overrides the sovereign immunity of the states.” *Id.*  
67. *Id.* at 755. The Court ultimately held that States “retain immunity from private suit in their own courts,” based on a recognition that “[T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States—autonomy and independence in their legislative and independence in their judicial departments.” *Id.* at 754 (quoting Erie Ry. Co. v. Tompkins, 304 U.S. 64, 78 (1938)).  
68. See *id.* at 755. The presumption occurs in its original form as a negative: “We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance.” *Id.* The existence of the presumption is confirmed by Justice Kennedy in his dissenting opinion in ADEC: “EPA and *amici* . . . fail to overcome the established presumption that States act in good faith.” *Alaska*, 124 S. Ct. at 1012 (Kennedy, J. dissenting).  
69. *Alaska*, 124 S. Ct. at 1001. “Federal agency surveillance of a State’s BACT designation is needed, EPA asserts, to restrain the interjurisdictional pressures to which Congress was alert.” *Id.* Those pressures include the danger that States with more rigorous enforcement procedures would “lose existing
The federal concern with state agencies failing to act in good faith when interpreting federal regulations is reciprocated by the concern of state and private entities with the equitable problems arising from a federal agency's unreasonable delay in exercising its supervisorial authority. In the context of EPA enforcement of CAA provisions, few examples of such delay exist. United States v. AM General Corporation represents one of the few such instances. In AM General Corporation, a manufacturer of Hummer army vehicles obtained a state permit for an expansion of its facility that would significantly increase its production of regulated pollutants. AM General Corporation proceeded with its expansion after obtaining the permit, but was notified four months later by the EPA that it was in violation of the CAA due to a technical defect in the requirements of the permit. The EPA filed suit seeking the maximum penalty against AM General Corporation, a penalty amounting to more than $60 million in fines. In analyzing the EPA's claim, the court cited EPA's failure to seek review of the permit in state forums and ultimately rejected its argument based on the inequitable industrial plants to more permissive states.” Id. (quoting H.R. Rep. No. 95-294, p. 134 (1977)).

70. Alaska, 124 S. Ct. at 1005. ADEC raises this concern by suggesting that in the absence of state courts acting as "the exclusive judicial arbiters, EPA would be free to invalidate a BACT determination 'months, even years, after a permit has been issued.'" Id. (quoting Brief for Petitioner 35).

71. Id. at 1005-06. The Court in Alaska was able to find only one such instance of untimely agency enforcement. Id. See United States v. AM Gen. Corp., 34 F.3d 472, 475 (7th Cir. 1994).


73. Id. at 473. AM General Corporation applied a protective painting to its Hummer vehicles using a process that produced significant quantities of ground-level ozone. Id. The county in which AM General Corporation was located was a non-attainment area under the CAA, so any increase in pollution output was forbidden. Id. Even so, AM General Corporation applied for and obtained a permit authorizing an expansion of its pollution output pending the re-classification of its county as an attainment area. Id. The issuance of the regional body's permit was done over the objection of the EPA. Id.

74. Id. at 473. The EPA found the permit to be invalid because it failed to require AM General Corporation "either to achieve the lowest achievable rate of emissions or to offset any increased emissions" as required by Indiana's approved SIP. Id.

75. Id. at 474.
consequences of its delayed challenge to the issued permit.\textsuperscript{76} Significantly, \textit{AM General Corporation} reiterates the competence of state courts to hear federal agency challenges to state agency action.\textsuperscript{77} In addition, it addresses the potential consequences of unreasonable delay in the exercise of a federal administrative agency's supervisorial authority by reaffirming the judiciary's role as an equitable gatekeeper.\textsuperscript{78}

Prior to \textit{AM General Corporation}, the judiciary was established as the entity charged with checking the improper exercise of agency authority in \textit{Walz v. Tax Commission of the City of New York}.\textsuperscript{79} In \textit{Walz}, a taxpayer challenged the New York City Tax Commission's grant of a tax exemption to church property as a violation of the establishment clause of the First Amendment.\textsuperscript{80} In its opinion, the Court examined the legislative purpose of the tax exemption and the degree to which there was government "entanglement with religion."\textsuperscript{81} Concluding that New York City's exemption did not run afoul of the Constitution, the Court noted that the historical consequences of religious tax exemptions did not justify \textit{Walz}'s fear of a state established church.\textsuperscript{82} Ultimately, the holding in \textit{Walz}
established the judiciary as the guardian of the constitutionally mandated balance of power, implicitly investing in that body the role of insuring state action remained within constitutional bounds.\textsuperscript{83}

The concern with the balance of power in administrative decision making was addressed again more than twenty years later in \textit{Gregory v. Ashcroft}.\textsuperscript{84} As the scope of federal agency power increasingly expanded to include supervisory roles over equivalent state agencies,\textsuperscript{85} the Court was forced to address the particular circumstances in which Congress would be allowed to alter the constitutionally mandated balance of power between state and federal government.\textsuperscript{86} In \textit{Gregory}, several state judges challenged a mandatory retirement provision as a violation of the Age Discrimination in Employment Act (ADEA) and the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{87} Noting the existence of Constitutional authority for Congress to “impose its will on the States,” the Court held that the exercise of such authority should not be done “lightly.”\textsuperscript{88} Finding that the provisions of the ADEA were taxation has given the remotest sign of leading to an established church or religion. . . .” \textit{Id.} The Court further noted that “[a]ny move that realistically ‘establishes’ a church or tends to do so can be dealt with while this Court sits.” \textit{Id.}

\textsuperscript{83} \textit{See id. at 678.}


\textsuperscript{85} \textit{See Marlissa S. Briggett, Comment, State Supremacy in the Federal Realm: The Interstate Compact, 18 B.C. ENVTL. AFF. L. REV. 751, 772 n.130 (1991) (noting that federal agencies will want a supervisory role when there is federal participation in an interstate compact).}

\textsuperscript{86} \textit{See Gregory}, 501 U.S. at 460. Specifically, the Court addressed the particular concerns surrounding a state’s right to establish its own standards and regulations for state officials and other public employees of the state. \textit{Id. at 462}. Noting that the Equal Protection Clause was a valid check on state authority, the Court found that matters resting clearly within a state’s discretion demanded much lower scrutiny. \textit{Id.}

\textsuperscript{87} \textit{Id. at 456}. The Age Discrimination in Employment Act prohibits an employer from discharging any person who is at least forty years old due to his or her age. 29 U.S.C. §§ 623(a), 631(a) (2004).

\textsuperscript{88} 501 U.S. 460. Citing the Supremacy Clause for the proposition that Congress may “legislate in areas traditionally regulated by the States” as long at is acting “within the powers granted it under the Constitution.” \textit{Id.} The Supremacy Clause states: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any thing in the Constitution or Laws
not applicable to the judges in \textit{Gregory},\textsuperscript{89} the Court noted that a mere statutory ambiguity was not sufficient grounds for determining a Congressional intent to "alter the usual constitutional balance between the States and the Federal Government."\textsuperscript{90}

\textbf{C. Deference to Agency Interpretations}

Ambiguous statutory language, while not potent enough to alter the balance of power between state and federal government, has proven to be of central importance when considering the appropriate degree of deference that should be provided to a particular agency interpretation.\textsuperscript{91} The application of judicial deference is not foreign to the EPA's interpretations of CAA provisions,\textsuperscript{92} and it is often intertwined with questions concerning the balance of power and authority between the EPA and state environmental agencies.\textsuperscript{93}

The concept of judicial deference to an agency's interpretation of statutory language originated in the case of \textit{Skidmore v. Swift \\& Company}.\textsuperscript{94} In \textit{Skidmore}, employees of a packing plant brought an action to recover overtime under the Fair Labor Standards Act.\textsuperscript{95} The employees specifically challenged an interpretation by the administrator of the Act that hours spent sleeping and eating at work

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\begin{itemize}
\item of any state to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.
\item \textsuperscript{89} 501 U.S. at 473. "We will not read the ADEA to cover state judges unless Congress has made it clear the judges are \textit{included}." \textit{Id.} at 467 (emphasis in original).
\item \textsuperscript{90} \textit{Id.} at 461 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)). Any such intent must be made "unmistakably clear." \textit{Id.} The Court further noted that giving the "state-displacing weight of federal law to mere congressional ambiguity" would violate the balance of power preserved in the Constitution. \textit{Id.} at 464 (quoting L Tribe., American Constitutional Law § 6-25, 480 (2d ed. 1988)).
\item \textsuperscript{91} If the statutory text is sufficiently ambiguous, Courts will give conclusive weight to reasonable agency interpretations. \textit{See infra} notes 106-110 and accompanying text.
\item \textsuperscript{92} See discussion of \textit{Chevron v. Natural Res. Def. Counsel}, \textit{infra} notes 106-110 and accompanying text.
\item \textsuperscript{93} \textit{See Alaska}, 124 S. Ct. 983; \textit{see also Train}, 421 U.S. at 60.
\item \textsuperscript{94} Skidmore v. Swift \\& Co., 323 U.S. 134 (1944).
\item \textsuperscript{95} \textit{Id.} at 135. The Fair Labor Standards Act can be located at 29 U.S.C. § 201 (2004).
\end{itemize}
did not qualify as time subject to overtime provisions. The administrator of the Act rejected the interpretation of the employees, and the Court deferred to that interpretation in rejecting their claim. The *Skidmore* Court justified its deference to the interpretation of the Act's administrator by citing his specialized experience and expertise in applying the Act. The Court was careful to note that the interpretations of the administrator were "not controlling...by reason of their authority," but instead should be consulted for varying degrees of "guidance" based upon several factors, including the interpretation's "power to persuade."

The cases following *Skidmore* provided increasingly complex nuances for the application of judicial deference to administrative interpretations and to judicial review of agency action in general. In *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, the Court addressed the role of the reasonableness of an agency's decision-making process in dictating the degree to which a given decision should be afforded deference. In *Bowman*, several

96. *Id.* at 137-39. The employees in *Skidmore* were charged with monitoring and responding to fire alarms located throughout the Swift packing plant. *Id.* at 135. The requirements of the job forced the employees to remain continuously on-call. *Id.* The employees were provided with a climate controlled fire hall that contained sleeping quarters and some items for the employees' amusement. *Id.* at 136. The employees could use their free time as they saw fit, provided that they "stay in or close by the fire hall and be ready to respond to alarms." *Id.* The employees argued that the time spent in the fire hall constituted "hours worked" under the Fair Labor Standards Act. *Id.* The packing company disagreed, citing no indication in the act or the publications from its administrator that such hours were subject the overtime provisions of the act. *Id.*

97. *Id.* at 139-40.

98. *Id.* at 139. The "Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case." *Id.* The Court also noted that an administrator "has accumulated a considerable experience in the problems of ascertaining working time in employments involving periods of inactivity and a knowledge of the customs prevailing in reference to their solution." *Id.* at 137-38.

99. *Id.* at 140. The weight accorded to an administrator's decision "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Id.*

100. See *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281 (1975). The case also discusses the application of the "arbitrary and
companies authorized by the Interstate Commerce Commission to transport goods challenged the commission’s issuance of additional authorizations to their competitors. In affirming the issuance of the authorizations, the Court noted that the Commission’s decision had a “rational basis” sufficient to satisfy the arbitrary and capricious standard of review. While describing the Commission’s decision-making process as being less than “a paragon of clarity,” the Court noted that agency decisions will be upheld when “the agency’s path may reasonably be discerned.”

Several years after Skidmore and Bowman, the Court expanded the scope of judicial deference in Chevron U.S.A., Inc. v. Natural Resources Defense Council, elevating certain agency interpretations to the status of controlling authority. In Chevron, an environmental advocacy group challenged an EPA interpretation of the term “stationary source” as found in the CAA. The court of capricious” standard for judicial review of agency action. Under that standard, courts must reject any agency action found to be “arbitrary, capricious” or “an abuse of discretion.” 5 U.S.C. § 706(2)(A) (2004).

101. Id. at 285. The companies challenging the Interstate Commerce Commission’s action made “presentations designed to show that their existing service was satisfactory and that the [competitor] applicants would not offer measurably superior performance.” Id. The commission rejected their presentation, and the companies challenged that decision in federal court as a violation of the Federal Administrative Procedure Act in that it was arbitrary and capricious. Id.

102. Id.

103. Id. at 290. “But we can discern in the Commission’s opinion a rational basis for its treatment of the evidence, and the ‘arbitrary and capricious’ test does not require more.” Id.

104. Id.

105. Id. at 286.

106. Chevron U.S.A., Inc. v. Natural Res. Def. Counsel, 467 U.S. 837, 866 (1984). “When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy . . . 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.” Id. Prior to Chevron, agency interpretations were treated as persuasive but not controlling authority by reviewing judges. See Skidmore, 323 U.S. at 140.

107. Id. at 842. The EPA interpretation allowed an entity to adopt a plant...
appeals rejected the agency’s interpretation, adopting instead a “static judicial definition” that lacked a basis in Congressional intent.\(^{108}\) The United States Supreme Court reversed the lower court’s finding, establishing a strong standard of deference whereby agency interpretations are controlling on reviewing courts.\(^{109}\) Application of the *Chevron* standard requires that the statutory language at issue be “ambiguous” and that the agency’s interpretation of the language be “reasonable.”\(^{110}\)

Following its creation of *Chevron* deference, the Court addressed the question of when agency action is final in *Bennett v. Spear*\(^ {111}\). Determining the finality of agency action is significant in administrative law, because it is generally a prerequisite to obtaining judicial review.\(^ {112}\) In *Bennett*, the Fish and Wildlife Service issued a biological opinion concluding that the continued operation of a particular dam would jeopardize the existence of certain species of fish native to the region.\(^ {113}\) The service suggested that maintaining minimum water levels in the dam’s reservoir would reduce the danger to the fish.\(^ {114}\) Several entities that would be affected by a change in the dam’s operation brought suit in federal court to

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\(^{108}\) Id. at 842.

\(^{109}\) Id. at 842-43. “[A] court must give effect to an agency’s regulation containing a reasonable interpretation of an ambiguous statute.” Christensen v. Harris County, 529 U.S. 576, 586-87 (2002).

\(^{110}\) 467 U.S. at 842-43. For a recent application of *Chevron* and *Skidmore* deference principles, see Washington State Dep’t of Soc. and Health Servs. v. Keffeler, 537 U.S. 371 (2003).

\(^{111}\) *Bennett*, 520 U.S. at 159.

\(^{112}\) See 5 U.S.C. § 704 (2004) (“A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.”) *Id.*

\(^{113}\) *Id.* at 159. The operation of the Klamath Project Dam in southern Oregon was thought to have a potential long term impact on the population of the Lost River Sucker and the Shortnose Sucker, both of which were listed as endangered species. *Id.*

\(^{114}\) *Id.*
challenge the service's opinion as arbitrary and capricious. One of the central issues addressed by the majority in deciding the case involved the degree to which the biological opinion represented final agency action. Holding that the opinion constituted such action as a result of its "direct and appreciable legal consequences," the Court established a two part test for determining when agency action is final.

Several years later, the Court's decision in Christensen v. Harris County began to narrow the broad scope of Chevron deference by excluding interpretations lacking finality. In Christensen, employees of a county sheriff's department sued the county for an alleged violation of the Fair Labor Standards Act of 1938. Prior to adopting the policy challenged by its employees, the county wrote to the Department of Labor and inquired about the proposed policy's legality. The Department of Labor responded with an opinion letter establishing the circumstances under which the county's policy

115. *Id.*

116. *Id.* at 161. The three central issues in the case concerned the standing of the affected entities to challenge the agency action, the degree to which judicial review of the subject matter of the decision was precluded, and the degree to which judicial review was precluded on the grounds that the agency's action was not final. *Id.* The requirement that agency action be final is found in the Federal Administrative Procedure Act, which "provides a right to judicial review of all "final agency action for which there is no other adequate remedy."" *Id.* (quoting 5 U.S.C. § 704 (2004)).

117. *Id.* at 178. The first requirement for agency action to be considered final is that it must "mark the 'consummation' of the agency's decisionmaking process." *Id.* at 177-78, quoting Chicago v. S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948). The second requirement for agency action to be considered final is that it "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 178 (quoting Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970)).


119. *Id.* at 578. The employees challenged a county policy which required them to schedule time off in order to reduce the amount of their accrued compensatory time. *Id.* The policy was adopted by the county after concerns that it lacked the fiscal resources to compensate employees for unused compensatory hours. *Id.*

120. *Id.* at 580. The county asked the Department of Labor "whether the Sheriff may schedule non-exempt employees to use or take compensatory time." *Id.* (quoting Brief for Petitioner 18-19).
would be permitted.\textsuperscript{121} In challenging the policy, the county employees argued that \textit{Chevron} deference applied to the Department of Labor’s opinion letter.\textsuperscript{122} Holding opinion letters to be in a category of interpretations which do not qualify for \textit{Chevron} deference, the Court refused to grant them controlling authority.\textsuperscript{123} Applying instead the test for \textit{Skidmore} deference, the Court concluded that the Department of Labor’s opinion letter was not persuasive and upheld the county’s policy.\textsuperscript{124}

In the same year that the Court decided \textit{Christensen}, its decision in \textit{Barnhart v. Walton} directly contradicted \textit{Chevron}’s requirement of finality by applying such deference to agency regulations which were not the product of formal rulemaking procedures.\textsuperscript{125} In \textit{Barnhart}, an individual named Cleveland Walton applied for disability and supplemental security income benefits.\textsuperscript{126} The Social Security Administration denied his application, interpreting one of its regulations to require that an individual be unable to engage in “substantial gainful activity” for at least twelve months prior to receiving benefits.\textsuperscript{127} Mr. Walton challenged that finding, arguing

\begin{itemize}
  \item \textsuperscript{121} \textit{Id.} at 581. The opinion letter provided that the county could order employees to use compensatory time if a prior agreement with the employees “specifically provided such a provision.” \textit{Id.}
  \item \textsuperscript{122} \textit{Id.} at 586.
  \item \textsuperscript{123} \textit{Id.} The Court noted that interpretations which “lack the force of law,” including “policy statements, agency manuals, and enforcement guidelines,” do not qualify for \textit{Chevron} deference. \textit{Id.} Instead, non-binding interpretations are entitled to \textit{Skidmore} deference to the extent which they have the “power to persuade.” \textit{Id.} (quoting \textit{Skidmore}, 323 U.S. at 140).
  \item \textsuperscript{124} \textit{Id.} “[W]e find unpersuasive the agency’s interpretation of the statute at issue in this case.” \textit{Id.}
  \item \textsuperscript{125} \textit{See} \textit{Barnhart v. Walton}, 535 U.S. 212, 221 (2002). Formal rulemaking procedures include an opportunity for public comment and several other procedures that ensure an agency gives substantial consideration to its newly proposed rules. Matthew Bender, 3-13 Administrative Law § 13.02, 2004. “Formal rulemaking requires an agency to comply with the full hearing procedures described in Sections 556 and 557 of the APA, whenever a statutory provision other than the APA mandates agency creation of a ‘record after opportunity for an agency hearing.’” \textit{Id.} (quoting 5 U.S.C. § 553(c) (2004)). Regulations produced outside of formal rulemaking are generally only binding on the agency. \textit{See} 535 U.S. at 212.
  \item \textsuperscript{126} \textit{Id.} at 215. Mr. Walton had developed several mental problems which caused him to lose his job as a full-time teacher. \textit{Id.}
  \item \textsuperscript{127} \textit{Id.} at 216. Mr. Walton had only been unable to engage in substantial gainful activity for eleven months. \textit{Id.}
\end{itemize}
that the text of the regulation made the twelve month requirement applicable only to the length of the individual’s impairment. In upholding the agency’s interpretation, the Court noted that “particular deference” was appropriate for agency interpretations of longstanding duration. Responding to Mr. Walton’s contention that the regulations at issue in this case were informal and only recently adopted, the Court noted that an agency’s interpretation will not automatically be deprived of deference when it is reached through means which are not traditionally part of the formal rulemaking process.

The Court’s decision in Barnhart was by no means the first time it expanded the applicability of Chevron deference. Prior to that decision, the Court’s opinion in Bragdon v. Abbott addressed the availability of Chevron deference to interpretations of statutes delegating authority to multiple agencies. In Bragdon, an HIV-infected woman was denied dental services in the office of her treating clinician. She filed suit in federal court, alleging that her dentist violated the American’s With Disabilities Act. In determining whether HIV constituted one of the disabilities covered by the Act, the Court consulted the interpretations of the various agencies charged with enforcing the Act’s provisions. The Court justified its approach by noting that Chevron deference would not be precluded even though the Act delegated authority to several agencies, and ultimately found HIV to be included within the Act’s

128. Id.
129. Id. at 220. Walton attempted to preempt the Court’s use of this reasoning in granting deference by arguing that the regulations were recently adopted and were likely the result of this very lawsuit. Id.
130. Id. at 221. Noting the direct contradiction of Christensen suggested by its opinion, the Court commented: “If this Court’s opinion in Christensen v. Harris County suggested an absolute rule to the contrary, our later opinion in United States v. Mead denied the suggestion.” Id. (internal citations omitted).
133. Id. at 628-29.
134. Id. at 629.
135. Id. at 642. “Our holding is confirmed by a consistent course of agency interpretation before and after enactment of the ADA. Every agency to consider the issue . . . found statutory coverage for persons with asymptomatic HIV.” Id.
136. Id. Referencing its holding in Skidmore, the Court noted that “[it] is
III. FACTS

In 1996, Cominco began a project to expand zinc concentrate production at one of its mines in rural Alaska. The mine, which was the region's largest employer, opened in 1988 and was classified as a major emitting facility under the CAA. Located in a region classified as an attainment area under the CAA, the mine

enough to observe that the well-reasoned views of the agencies implementing a statute may properly be consulted for guidance. Id. (citing Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944)).

137. Id. at 655.

138. Alaska, 124 S. Ct. at 994. The expansion was to take place at Cominco's Red Dog mine. Id. Cominco anticipated that the expansion would increase production by forty percent. Id. The expansion was also anticipated to increase nitrous oxide emissions from the plant's power generators by more than forty tons each year. Id.

139. Id. Changes to major emitting facilities that result in a nitrogen oxide emission increase of more than forty tons per year require a permit under the Prevention of Significant Deterioration program. Id. at 472. Changes include "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4) (2004). A major emitting facility is defined as a "stationary sourc[e] of air pollutants which emit[s], or [has] the potential to emit, one hundred tons per year or more of any pollutant." 42 U.S.C. § 7479(1) (2004). A stationary source is "any building, structure, facility or installation which emits or may emit any air pollutant." 42 U.S.C. § 7411(a)(3) (2004).

140. Alaska, 124 S. Ct. at 992. The region had attained the national standards for concentrations of nitrous oxide in the ambient air. Id. The CAA provides for three categories of classification: nonattainment, attainment, and unclassifiable. 42 U.S.C. § 7407 (d)(1)(A)(i)-(iii) (2004). A nonattainment area is a "geographic area in which the level of a pollutant is higher than the level allowed by the federal standards." The Plain English Guide to the Clean Air Act (2004), at http://www.epa.gov/oar/oaqps/peg_caa/pegcaalO.html (italics omitted) [hereinafter Plain English Guide]. An attainment area is a "geographic area in which levels of [an]...air pollutant meet the health-based primary standard for the pollutant." Id. A primary standard is "a pollution limit based on health effects," and a secondary standard is a "pollution limit based on environmental effects such as damage to property, plants, visibility, etc." Id. (italics omitted). The CAA defines an unclassifiable area as one that "cannot be classified on the basis of available information as meeting or not meeting the national primary or secondary ambient air quality standard for the pollutant." 42 U.S.C. § 7407(d)(1)(A)(iii) (2004).
employed the use of six diesel electric generators to provide power for its operations. As part of its plan to expand its capacity for zinc production, Cominco applied to the ADEC for a permit authorizing increased electricity generation by the mine’s standby generator. Since the mine was located in a region that had attained NAAQS, any expansion or modification of its facilities required review to ensure that increases in nitrous oxide emissions would not significantly deteriorate air quality in the region.

Subject to the provisions of the CAA, a state permitting authority is required to select the best available control technology (BACT) to minimize the amount of pollutants emitted by a new or modified source. Since Cominco’s standby generator was a source of

141. Alaska, 124 S. Ct. at 994.
142. Id. Alaska’s State Implementation Plan (SIP) had been approved by the EPA, pursuant to the requirements of the CAA. Id. at 991. Accordingly, Alaska was vested with the primary responsibility to issue permits and insure that the national air quality standards were being met. Id. at 992. The language of the CAA vests States with the “primary responsibility for assuring air quality within the entire geographic area comprising such State.” 42 U.S.C. § 7407(a) (2004). One of the key aspects of that responsibility involves the submission of an “implementation plan . . . which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained.” Id. A state’s SIP is a “detailed description of the programs a state will use to carry out its responsibilities under the Clean Air Act.” Plain English Guide, supra note 140, (italics omitted).
143. Alaska, 124 S. Ct. at 992. Ambient air quality standards refer to the maximum level of pollutants allowed in outdoor air. See 42 U.S.C. § 7409(b) (2004). The national standards are divided into primary and secondary standards. Id. A primary standard limits pollutants which pose a threat to public health. Id. Secondary standards impose limits on pollutants which damage buildings and destroy the environment. See Air Quality Planning and Standards, at http://www.epa.gov/air/oaqps/cleanair.html.
144. Alaska, 124 S. Ct. at 992. Specifically, the modifications were subject to the CAA’s Prevention of Significant Deterioration of Air Quality (PSD) program. Id. The program was “designed to ensure that air quality in attainment areas or areas that are already ‘clean’ will not degrade.” Id. (quoting Roy S. Belden, CLEAN AiR ACT 43 (2001)).
145. 42 U.S.C. § 7475(a)(4) (2004). The CAA defines BACT as “an emission limitation based on the maximum degree of reduction of each pollutant . . . emitted from or which results from any major emitting facility, which the permitting authority . . . determines is achievable for such facility.” 42 U.S.C. § 7479(3) (2004). An agency’s BACT determination must take “into account energy, environmental, and economic impacts and other costs.” Id. Depending on the
nitrogen oxide emissions, expanding its generating capacity would make it subject to the CAA's BACT requirement. In reviewing Cominco's permit application, ADEC employed the EPA's recommended top-down methodology to determine the appropriate BACT technology for the standby generator. ADEC found selective catalytic reduction (SCR) to be the best available technology for controlling nitrogen oxide emissions and issued a draft permit which required Cominco to equip its standby generator with SCR. Cominco responded to the initial draft proposal by questioning the economic feasibility of SCR technology and suggesting instead that it equip the standby generator with a less effective and less expensive control technology.

location of the emitting facility, some BACT determinations must be approved in advance by the EPA. Alaska, 124 S. Ct. at 993.

146. Id. at 994.

147. Id. "Modifications to major emitting facilities that increase nitrogen oxide emissions in excess of 40 tons per year require a PSD permit." Id. at 472. "[N]o PSD permit may issue unless 'the proposed facility is subject to'” a BACT determination for each pollutant that the facility emits. Id. (quoting 42 U.S.C. § 7475(a)(4) (2004)).

148. Alaska, 124 S. Ct. at 994. To make a BACT determination using the top-down methodology, an agency ranks all available pollution control technologies in order of effectiveness. Id. The most stringent technology (i.e., the first technology listed) is selected as BACT unless the entity applying for the permit can show that "technical considerations, or energy, environmental, or economic impacts justify a conclusion that the most stringent technology is not 'achievable' in that case." Id. at 995. (quoting EPA, New Source Review Workshop Manual B2 (Draft Oct. 1990)). If the applicant can demonstrate that the most stringent option is not achievable, then the next most stringent option will be selected as BACT unless the applicant can show that standard is also not achievable. Id. The process continues down the list until the agency selects the first “achievable” BACT device. Id. Application of the top-down methodology is recommended by the EPA, but states are not required to use it. Id. at n.7.

149. Id. at 994. SCR is a pollution control technology that employs metals such as titanium and platinum combined with ammonia or urea to reduce nitrogen oxide emissions from the exhaust of diesel combustion engines. Id. at n.5. While somewhat expensive, the technology reduces nitrogen oxide emissions by ninety percent. Id. at 994-95.

150. Id. Cominco proposed fitting all of its generators with Low NOx technology, a process in which the combustion space of a generator is modified to enhance the mixing of air and diesel fuel. Id. at 994 n.6. While substantially less expensive than SCR, Low NOx technology reduces nitrogen oxide emissions by only thirty percent. Id.
ADEC rejected Cominco’s alternative proposal, finding the estimated cost of using SCR on the standby generator to be well within the range that EPA would consider economically feasible.\textsuperscript{151} Cominco responded by proposing to fit all six of its generators with the less expensive technology, achieving a net pollution reduction comparable to that which would be obtained by fitting the standby generator with SCR.\textsuperscript{152} ADEC accepted Cominco’s alternative proposal,\textsuperscript{153} but was immediately confronted by warnings from the National Park Service and the EPA that Cominco’s emissions off-setting alternative was not a valid justification for not requiring the use of SCR on the standby generator.\textsuperscript{154} In response to these comments, ADEC issued a revised permit which excluded the emissions off-setting justification but retained the less expensive control technology as BACT.\textsuperscript{155}

EPA protested the revised permit, citing the absence of evidence to support ADEC’s economic justification for not selecting SCR as BACT.\textsuperscript{156} EPA suggested that ADEC could justify the permit by including substantive evidence of the adverse economic effect that SCR would have on Cominco.\textsuperscript{157} Citing confidentiality, Cominco

\textsuperscript{151} Id. at 995. Cominco initially characterized the cost of using SCR technology as close to $5,643 per ton. Id. Using Cominco’s own data, ADEC determined the cost of using SCR technology to be “between $1,586 and $2,279 per ton.” Id.

\textsuperscript{152} Id. Net emissions would be lowered by an estimated 396 tons per year if Cominco installed Low NOx technology on all of its generators. Id. Even with Low NOx installed, however, emissions would increase by seventy-nine tons per year if the expansion of the Red Dog mine required that all six generators go into operation. Id.

\textsuperscript{153} Id. ADEC approved Cominco’s alternative by noting that it was “logistically and economically less onerous to Cominco.” Id.

\textsuperscript{154} Id. The National Park Service commented that Cominco’s alternative solution would fail to achieve the same emissions reduction achievable by installation of SCR on all of its generators. Id. at 995-96. The EPA agreed with the National Park Service, noting that new emissions could not be offset by “imposing new controls on other” emissions sources which were “not subject to BACT.” Id. at 996. The EPA further commented that the CAA does not allow a permitting authority to choose a less stringent limit than the technology that it determines to be BACT. Id.

\textsuperscript{155} Id.

\textsuperscript{156} Id.

\textsuperscript{157} Id. at 997.
refused to provide any such evidence.\textsuperscript{158} In December of 1999, ADEC approved Cominco’s permit application without including the economic analysis which the EPA suggested.\textsuperscript{159} That same day, EPA ordered ADEC not to issue Cominco’s permit until it “satisfactorily documents why SCR is not BACT for...[Cominco’s] generator.”\textsuperscript{160} Two months later, the EPA ordered Cominco to stop construction or modification activities at the Red Dog Mine.\textsuperscript{161} On July 6, 2003, ADEC issued Cominco a permit authorizing modification of its standby generator and requiring the less expensive control technology.\textsuperscript{162}

In response to the EPA’s order requiring Cominco to stop construction or modification activities, ADEC and Cominco petitioned the Ninth Circuit Court of Appeals for judicial review.\textsuperscript{163} The Ninth Circuit found that the EPA had authority to issue the order and “had properly exercised its discretion in doing so.”\textsuperscript{164} ADEC and Cominco appealed the Ninth Circuit’s findings, alleging that EPA’s actions were arbitrary and capricious since the CAA could not be interpreted to give EPA the authority to scrutinize the reasonableness of a state agency’s BACT determination.\textsuperscript{165} The United States Supreme Court granted certiorari, affirming the Ninth Circuit’s holding and noting that such “checking” authority is authorized by the provisions of the CAA.\textsuperscript{166}

\begin{itemize}
  \item 158. \textit{Id.} Cominco’s sole economic justification was the extent of its overall debt. \textit{Id.}
  \item 159. \textit{Id.}
  \item 160. \textit{Id.}
  \item 161. \textit{Id.}
  \item 162. \textit{Id.}
  \item 163. \textit{Id.} at 998. \textit{See} Alaska v. EPA, 244 F.3d 748 (9th Cir. 2002). The CAA provides that parties may petition the applicable Court of Appeals to review EPA action relating to the regulations in a state’s SIP, provided that the action is considered final. 42 U.S.C. § 7607(b)(1) (2004). For a discussion of when agency action is final, see \textit{supra} notes 111-117 and accompanying text.
  \item 164. \textit{Id.} at 998.
  \item 165. \textit{Id.} at 999.
  \item 166. \textit{Id.} at 991. Holding that EPA may “act to block construction of a new major pollutant emitting facility” when it finds a state agency’s BACT determination to be unreasonable. \textit{Id.}
IV. ANALYSIS

A. Scope of EPA Authority

Justice Ginsburg’s opinion begins with a detailed recitation of the facts leading up to ADEC’s filing of a petition for review with the Ninth Circuit Court of Appeals. Framing the entire case as one centering on the scope of the EPA’s power to enforce the CAA’s PSD program, Justice Ginsburg discusses the disputed EPA interpretations of several CAA provisions. Noting that the State of Alaska is the permitting authority in this instance, Justice Ginsburg defines the relevant legal issue as that of whether the EPA may invalidate a state issued permit when it believes that the state agency’s BACT determination is unreasonable.

In analyzing the proper mechanism for EPA enforcement of CAA provisions, the majority begins by citing the intent of Congress in passing the PSD requirements. As part of the CAA, the PSD requirements reflected the product of a larger Congressional concern with the protection of public health and safety. The problem of air pollution in the United States was one that Congress believed to merit special attention such that the need arose to invest power in an

167. Id. at 983-88. See supra notes 138-166 and accompanying text.
168. Id. at 990. Relevant to this case, the CAA confers supervisory authority on the EPA in two specific instances. See id. The CAA provides the EPA with the authority to issue an “order prohibiting construction, to prescribe an administrative remedy, or to commence a civil action for injunctive relief” when it finds that “a State is not complying with a CAA requirement governing construction of a pollutant source . . . .” Id. at 990-91 (citing 42 U.S.C. § 7413(a) (2004)). The EPA is also authorized to “take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction of a major pollutant emitting facility” which fails to meet the PSD requirements. Id. at 991 (quoting 42 U.S.C. § 7477 (2004)).
169. Id. at 990 (discussing whether the EPA may act to block construction of a new major pollutant emitting facility permitted by ADEC when EPA finds ADEC’s BACT determination unreasonable in light of the guides § 747(3) prescribes).
170. Id. at 992 (discussing the purpose of the PSD program).
171. Id. The CAA lists the first objective of the PSD program as “protect[ing] public health and welfare from any actual or potential adverse effect which in the [EPA’s] judgment may reasonably be anticipated to occur from air pollution or from exposures to pollutants in other media . . . .” 42 U.S.C. § 7470(1) (2004).
executive agency to achieve the CAA's ultimate goals. Finding
the EPA to be the appropriate agency to be charged with CAA
enforcement, Congress provided it with a significant collection of
supervisory tools. Two of the arrows placed in the EPA's quiver for
the enforcement of PSD requirements provide the agency with the
authority to issue an order or seek injunctive relief to "prevent the
construction or modification of a major emitting facility which does
not conform" to those requirements. After reciting the facts
surrounding ADEC's issuance of a permit to Cominco, and the
subsequent EPA response, the majority turns to the locus of its
authority to review the action taken by the EPA.

B. Finality of EPA Action

Prior to commencing its analysis of the substantive legal issues
presented in the case, the majority addresses the question of whether
it has subject matter jurisdiction to review the EPA's action. ADEC
filed its motion for review under 42 U.S.C. § 7607(b)(1), alleging that the issuance of a stop order by the EPA constituted final
agency action. The EPA initially contested the legitimacy of
judicial review, arguing that its orders were "interlocutory" and

1990, available at http://www.epa.gov/history/topics/caa70/11.htm (last visited
December 21, 2004).

One of the reasons the 1967 Air Quality Act failed and thus
spurred Congress to enact a tough national air quality program in
1970 was the almost complete lack of enforcement of the earlier
statute. It will be critical to keep the pressure on in order to
see to it that those who are covered by the statute obey it - or pay
the requisite penalties for violations.


174. Id. at 998. The majority discusses the process by which Cominco applied
and subsequently obtained a permit to add an additional generator with Low NOx
technology. Id. at 994-98.

175. Id. at 998-99.

176. Id. at 998. Judicial review of agency action is generally limited to those
situations where the agency has acted with finality. See supra note 178 and
accompanying text. The provisions in the CAA which provide for judicial review
requires that agency action be "final" before being subject to review in an
“unreviewable” until it chose to take action to enforce them. The majority rejects that argument and agrees with the reasoning supplied by the court of appeals, holding that the EPA’s stop orders had the “requisite degree of finality.”

In finding the action taken by the EPA to be final, thus reviewable under 42 U.S.C. § 7607(b)(1), Justice Ginsburg begins by noting that the court of appeals correctly applied the standards established by the Court in prior case law. To be considered final, agency action must signify the end of its “decisionmaking process” and determine the “rights or obligations” of a party while creating “legal consequences” for a party’s failure to fulfill those obligations. Justice Ginsburg notes that the EPA stated its “final position” on the circumstances surrounding ADEC’s issuance of its permit, satisfying the requirement that the agency’s action mark the close of its decisionmaking process. She continues by noting that Cominco would risk suffering “practical and legal consequences” if it chose to begin construction pursuant to ADEC’s permit. Agreeing with the holding of the court of appeals, Justice Ginsburg concludes that the EPA’s issuance of a stop order to Cominco was sufficiently final to merit judicial review. Prior to turning to more substantive legal issues, Justice Ginsburg briefly notes that no relevant due process concerns have been raised by ADEC or Cominco. After briefly rejecting ADEC’s contention that the record was

177. Id. at 998. The lower court dismissed EPA’s contention, finding the “new legal obligations” imposed by the stop orders to have the requisite degree of finality. Id. at n.10 (244 F.3d at 750-751).

178. Id. at 998.

179. Id. The court of appeals noted that it was “undisputed...that EPA had spoken its ‘last word’ on whether ADEC had adequately justified its conclusion that Low NOx was” BACT for the proposed generator. Id. The court of appeals further noted that defying EPA’s order would cause Cominco to “risk civil and criminal penalties.” Id. Based on those facts, the Court noted that the principles established in Bennet v. Spear, 520 U.S. 154, were correctly applied. Id. For a discussion of Bennet, see supra notes 111-117 and accompanying text.

180. Bennet, 520 U.S. at 177-78.

181. Alaska, 124 S. Ct. at 999 (citing Alaska, 244 F.3d at 750).

182. Id.

183. Id.

184. Id. “No question has been raised here...about the adequacy of EPA’s preorder procedures...” Id.
incomplete, Justice Ginsburg turns her attention toward one of the key issues of the case: the proper interpretation of sections 113(a)(5) and 167 of the CAA.

C. Interpretation of CAA Provisions

Prior to beginning its analysis of the EPA’s interpretation of sections 113(a)(5) and 167, the majority again frames the central issue of the case as whether the relevant sections of the CAA grant the EPA the ability to “ensur[e] that a state permitting authority’s BACT determination is reasonable in light of the statutory guides.”

The Court notes that the sections lodge general “supervisory responsibility” in the EPA with regard to the construction or modification of a polluting facility subject to the provisions of the PSD program. Specifically, the supervisory role granted in the statute “arm[s]” the EPA with the authority to order construction halted when a State fails to comply with CAA requirements or prohibitions and when the construction of a particular facility fails to satisfy applicable PSD requirements. With respect to the PSD program, the majority notes that one express “preconstruction

185. Id. While the case was before the Ninth Circuit, ADEC complained that the record was incomplete and not sufficient for appellate review. Id. Responding to that concern, the Ninth Circuit provided EPA the opportunity “to supplement the record.” Id. Based on the additional materials added to the record by EPA, all parties agreed that the record was “adequate to resolve [ADEC’s review petition].” Id. (quoting 298 F.3d at 818).

186. Alaska, 124 S. Ct. at 999.

187. Id.


Whenever, on the basis of any available information, the Administrator finds that State is not acting in compliance with any requirement or prohibition of the Act relating to the construction of new sources or the modification of existing sources, the Administrator may—issue an order prohibiting the construction or modification . . . ; issue an administrative penalty order . . . ; or bring a civil action . . . .

Id; see also 42 U.S.C. § 7477 (2004). “The Administrator shall . . . take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part . . . .” Id. For the basic provisions of the PSD program, see supra notes 144 and 147.
requirement is inclusion of a BACT determination in a facility’s PSD permit." While the “permitting authority” exercises “primary or initial responsibility for identifying BACT,” the Court notes that the EPA has the primary responsibility to insure that a BACT limitation is included in a given PSD permit. It further notes as undisputed the EPA’s authority to issue a stop order when a facility is being constructed pursuant to a PSD permit which lacks a BACT designation entirely. It is at this point where the disagreement between ADEC and EPA arises.

1. EPA Interpretation – Majority Approach

Justice Ginsburg next addresses the specific interpretation that the EPA arrives at in determining the scope of its authority to enforce CAA provisions. The EPA interprets the relevant provisions of the CAA as granting it the authority not merely to determine that PSD permits contain any BACT designation, but that such permits contain “reasonable” BACT designations. The agency arrives at this interpretation by reading the statutory definition of BACT together with the CAA’s “explicit listing of BACT as a ‘[p]reconstruction [r]equirement.’” The EPA argues that there is implicit in the statutory language a grant of authority to insure that state BACT determinations are “reasonably moored to” CAA provisions. Finding the EPA’s statutory construction to be “rationally construed,” the majority notes that it warrants the “respect and approbation” of the Court.

189. Alaska, 124 S. Ct. at 999. The Court again notes that BACT is defined as “an emission limitation based on the maximum degree of reduction of [a] pollutant . . . which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for [a] facility.” Id. at 485 (quoting 42 U.S.C. § 7479(3) (2004)) (alterations in original).
190. Id. at 999.
191. Id. at 999-1000.
192. Id. at 1000.
193. Id.
194. Id. (formatting in original).
195. Id.
196. Id. The degree of deference afforded agency interpretations is discussed supra at notes 90-137 and accompanying text.
Justice Ginsburg next focuses on two key terms which the majority cites as the rationale for the basis of the interpretation proffered by the EPA. Focusing first on the statutory definition of BACT, Justice Ginsburg notes that it “requires selection of an emission control technology” that will result in the “maximum” reduction of pollution “achievable.” The majority then turns to a discussion of the particular interpretation proffered by the EPA. In interpreting the CAA to provide the authority to review state BACT determinations for reasonableness, the EPA argues that there is embodied with the terms “maximum” and “achievable” an implicit requirement that BACT determinations be reasonable. The next logical question, that of what agency or authority should properly determine the reasonableness of those determinations, is answered by the EPA by way of reference to the policy goals that Congress intended to achieve with the enactment of the PSD program. Not surprisingly, the EPA cites itself as the agency Congress properly intended to fulfill that role.

The majority ultimately finds EPA’s interpretation of the CAA to

197. *Id.* at 1000. The majority cites the terms “maximum” and “achievable” as terms reasonably interpreted to provide discretion to EPA such that EPA can determine the substantive reasonableness of a permitting authority’s BACT determination. *Id.* (citing 42 U.S.C. § 7479(3) (2004)).

198. *Id.* at 1002. The majority also notes the requirement that such a determination be made after balancing the “energy, environmental, and economic impacts, and other costs.” *Id.* (quoting 42 U.S.C. § 7479(3) (2004)). Such balancing arguably requires a degree of discretion be exercised by the authority performing the balancing, and it is at least theoretically possible that the agency engaged in the balancing will make a balance determination that is not reasonable. *Id.* Even so, the Court is bound to operate on the presumption that State agencies act in good faith when making discretionary determinations of this type. See *Alden v. Maine*, discussed *supra* at notes 60-68 and accompanying text.

199. *Id.* at 1000. “EPA stresses Congress’ reason for enacting the PSD program – to prevent significant deterioration of air quality in clean air states within a State and neighboring States.” *Id.* EPA further argues that goal will not be realized in the absence of an administrative agency that can supervise the reasonableness of state BACT determinations. *Id.* EPA cites the Congressional Record to note the very real prospect that, absent national standards, States would find themselves competing for industry by constantly providing for lower and more economically feasible PSD permit requirements. *Id.* EPA further argues that its surveillance role is necessary to prevent states from succumbing to “interjurisdictional pressures to which Congress was alert.” *Id.*

200. *Id.*
be persuasive. In so doing, Justice Ginsburg first cites the fact that the statutory interpretation proffered by the EPA is “reflected in interpretive guides” which were published several times by the EPA. The relevance of this point is not to be missed, as the Justice subsequently notes that “particular deference” is normally accorded “to an agency interpretation of longstanding duration.” Particular deference alone, however, is not the standard which the Court applies to the EPA’s interpretation. Citing stronger degrees of deference accorded to the EPA in past decisions, the Court proceeds to analyze whether the EPA’s particular interpretation of the CAA merits Chevron deference. The majority ultimately finds the EPA interpretation not to merit the strong deference afforded by Chevron, but it notes that some level of respect must be accorded to “cogent” interpretations by agencies which are made outside the parameters of formal rulemaking. The majority opinion ultimately concludes that EPA interpretation of the CAA provisions will be accorded that “measure of respect,” though it never clearly states what the practical consequences of such deference include.

201. 124 S. Ct. at 1001.
202. Id. The Court references the guides cited in the Brief for Respondents. See id. at 983 (citing Brief for Respondents at 29-30). Those guides include a 1983 EPA PSD guidance memorandum and a 1993 guidance memorandum. Id. The Court also cites to an EPA publication discussing the procedure for approving PSD permits under Virginia’s SIP. See Approval and Promulgation of Air Quality Implementation Plans; Commonwealth of Virginia--Prevention of Significant Deterioration Program, 63 Fed. Reg. 13795, 13797 (Mar. 23, 1998).
204. Id. The majority appears to believe it appropriate to apply Skidmore deference to the EPA interpretation at issue in this case, noting that the “well-reasoned views of an expert administrator rest on a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” Id., citing Bragdon v. Abbott, 524 U.S. 624, 642, quoting Skidmore, 323 U.S. at 139-40. For a discussion of Skidmore deference, see supra notes 93-98 and accompanying text.
205. Id. at 1001. See supra notes 106-110 and accompanying text for a discussion of Chevron deference.
206. Id. at 1001 (citing Keefeler, 537 U.S. at 371). The distinction between formal and information rulemaking is discussed supra at note 125.
207. Id. at 1001. The dissenting opinion accuses the majority of “applying Chevron de facto” noting that the majority opinion is “chock full of Chevron-type language” and that the weakness of its statutory arguments forces it to “hide behind
2. EPA Interpretation – Minority Approach

It is precisely that ambiguity which appears to inflame the dissenting opinion proffered by Justice Kennedy. He begins his dissent with a recitation of what he believes to be the plain meaning of the relevant CAA provisions. Such meaning, the Justice notes, requires emphasis not on the words “maximum” and “achievable” but on the word “requirement.” Finding the term not to be defined in the statute, Justice Kennedy notes that “other provisions of the act” must be consulted to arrive at a proper meaning. Citing the language of section 7475(a), Justice Kennedy notes that “requirement” is defined in this case as a reference to the “preconstruction requirement” that a “major emitting facility” be subject to a BACT determination. Based on that meaning, Justice Kennedy attacks the majority’s holding that the EPA is invested with “broad oversight” to “ensure that a State’s BACT determination is reasonably moored to the Act’s provisions.” Finding instead that the act invests in the state permitting authority the sole discretion to determine “what constitutes BACT,” Justice Kennedy charges the

Chevron's vocabulary.” Id. at 1018 (Kennedy, J., dissenting).
208. Id. (Kennedy, J., dissenting). “In applying Chevron de facto under these circumstances . . . the majority undermines the well-established distinction our precedents have drawn between Chevron and less deferential forms of review.” Id.
209. Id. at 1010 (Kennedy, J., dissenting). Citing the dictionary definition of “determine,” the dissent finds the language of the CAA to vest the determination of BACT in the state permitting authority alone. Id. (Kennedy, J., dissenting) It further accuses the majority or reading the words “maximum” and “achievable” out of context, violating the “cardinal rule that a statute is to be read as a whole.” Id. (Kennedy, J., dissenting) (quoting King v. St. Vincent Hosp., 502 U.S. 215, 221 (1991)).
210. Id.
211. Id. (Kennedy, J., dissenting).
212. Id. (Kennedy, J. dissenting).
213. Id. (Kennedy, J. dissenting).
214. Id. (Kennedy, J., dissenting). Justice Kennedy notes that “the statute does not direct the State to find as BACT the technology that results in the maximum reduction of a pollutant achievable for a facility in the abstract.” Id. (internal citations omitted). The statute requires state agencies to consider a “set of contextual” factors including “energy, environmental, and economic impacts and other costs.” Id. (Kennedy, J., dissenting) (quoting 42 U.S.C. § 7479(3) (2004)). The Justice further notes that “[i]t is clear that the CAA commits BACT determinations to the discretion of the relevant permitting authorities.” Id.
majority with violating the “cardinal rule” of statutory interpretation by reading the terms “maximum” and “achievable” out of context.215 Finding the only “requirement” of §§113(a)(5) and 167 to be the inclusion of some BACT determination, the Dissent posits that EPA has no enforcement authority beyond ensuring that such a determination is included in the body of the applicable permit.216 Substantive review of the steps taken by the State agency to arrive at its BACT determination is not within the scope of authority granted to the EPA and cannot be read from provisions cited by EPA or the majority.217 The only appropriate method for challenging the BACT determinations of State agencies is recourse to the judicial review procedures available within the given state.218

Returning to the larger principles surrounding the proper construction of the statutory text, Justice Kennedy notes that Congress has demonstrated the ability to grant supervisory authority to administrative agencies, including the EPA, in unambiguous terms.219 Since it is not unreasonable to expect Congress to be capable of exercising that ability in this instance, the presence of an ambiguity, as perceived by the majority and EPA, does not point to a Congressional intent to empower the EPA to determine the reasonableness of state BACT determinations.220 In fact, it leads the

(Kennedy, J., dissenting).

215. Id. at 1011 (Kennedy, J., dissenting). Here Justice Kennedy cites the cardinal rule that a statute is to “be read as a whole.” Id. (Kennedy, J., dissenting) (quoting 503 U.S. at 221 (1991)). The majority responds to this charge by noting that it is also a “cardinal” principal that a statute ought to be “so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant.” Id. at 1002 n.13 (quoting TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001)). The majority further notes that the dissent’s view does not make state agency BACT determinations conclusive, because they are still subject to judicial review. Id.

216. Id. at 1011 (Kennedy, J., dissenting).

217. Id. (Kennedy, J., dissenting). Noting that the relevant statutory sections “can supply no separate basis for EPA to exercise a supervisory role over a State’s discretionary decision.” Id. (Kennedy, J., dissenting).

218. Id. (Kennedy, J., dissenting). “Unless an objecting party, including EPA, prevails on judicial review, the determinations are conclusive.” Id. (Kennedy, J., dissenting).

219. Id. at 1012 (Kennedy, J., dissenting).

220. Id. (Kennedy, J., dissenting). Justice Kennedy notes that Congress has previously established federal oversight roles in “unambiguous language.” Id.
dissent to conclude that Congress never intended to place such authority in the EPA’s hands.\textsuperscript{221}

Justice Kennedy next turns to the policy rationale that the EPA cites to justify the need for upholding its interpretation of the CAA.\textsuperscript{222} Ignoring the potential merits of EPA’s argument that there will be a “race to the bottom” in environmental standards absent EPA oversight of BACT determinations, the dissent notes that the EPA’s concern directly conflicts with CAA’s “clear mandate that States bear the primary role in controlling pollution.”\textsuperscript{223} It further finds the presumption by EPA and the majority that “state agencies are not to be trusted” to be “unwarranted.”\textsuperscript{224} After concluding that the majority and the EPA incorrectly interpreted the provisions of the PSD portion of the CAA,\textsuperscript{225} Justice Kennedy notes the particular manner in which ADEC properly fulfilled what the Dissent views as its requisite CAA obligations.\textsuperscript{226}

The dissent takes issue not only with the validity of EPA and the majority’s statutory interpretation, but also with the degree of deference afforded by the majority to EPA’s interpretation of the

\textsuperscript{221}Id. at 1012 (Kennedy, J., dissenting).

\textsuperscript{222}Id. (Kennedy, J., dissenting).

\textsuperscript{223}Id. (Kennedy, J., dissenting) (citing HR Rep No. 90-254 choosing not to dictate a federal response to balancing sometimes conflicting goals at the expense of maximum flexibility and state discretion).

\textsuperscript{224}Id. (Kennedy, J., dissenting). It was unwarranted because EPA itself said so. Id. (Kennedy, J., dissenting). Also, it runs contrary to the presumption established in \textit{Alden v. Maine} that states act in good faith. 527 U.S. at 755.

\textsuperscript{225}Id. at 1012 (Kennedy, J., dissenting). “As a result, EPA has no statutory basis to invoke the enforcement authority of §§ 113(a)(5) and 167.” Id. (Kennedy, J., dissenting).

\textsuperscript{226}Id. at 1011 (Kennedy, J., dissenting). The dissent notes that ADEC “recognized it was required to make a BACT determination” and responded by “provid[ing] a detailed accounting of the process” by which it “weigh[ed] the list of statutory factors, stud[ied] all other relevant considerations, and decide[ed] the technology that [could] best reduce pollution within practical constraints . . . .” Id. (Kennedy, J., dissenting).
While the majority opinion notes that *Chevron* deference, the strongest form of deference available, is not available to the EPA in this instance, it ultimately gives “EPA the very . . . deference . . . it says should be denied.” Justice Kennedy notes that the majority was correct in determining that *Chevron* deference was not applicable to this case, pointing out one additional reason why such deference should not be applied: “[t]he statute is not in any way ambiguous.” Noting that the majority’s “actions . . . speak louder than words,” the dissent alleges that its opinion is “chock full of *Chevron*-like language” and ultimately gives *Chevron* deference “de facto.” The dissent finds much gravity in this result, arguing that it diminishes the clarity of the line between the proper application of *Chevron* deference and the application of “less deferential forms of judicial review.” Absent a clear delineation of when strong deference should and should not be applied, the dissent fears that other administrative agencies will employ similar authority and “relegat[e] States to the role of mere provinces or political corporations, instead of coequal sovereigns entitled to the same dignity and respect.” Such consequences could ultimately result in the eradication of a functional system of cooperative federalism, a risk the dissent is not willing to take. For that reason, the dissent finds the statutory interpretation proffered by ADEC to be persuasive and appropriate for determining the scope of EPA authority.

227. *Id.* at 1018 (Kennedy, J., dissenting).
228. *Id.* at 1001 (Kennedy, J., dissenting). Kennedy also notes that the EPA’s “interpretation in this case, presented in internal guidance memoranda . . . does not qualify for the dispositive force described in *Chevron.*” *Id.* (Kennedy, J., dissenting) (referencing *Christensen*, 529 U.S. at 587 (2000)). For a discussion of *Christensen*, see *supra* notes 118-124 and accompanying text.
229. *Id.* at 1018 (Kennedy, J., dissenting).
230. *Id.* (Kennedy, J., dissenting).
231. *Id.* (Kennedy, J., dissenting).
232. *Id.* (Kennedy, J., dissenting).
233. *Id.* (Kennedy, J., dissenting).
234. *Id.* (Kennedy, J., dissenting) (citing *Hodel v. Virginia Mining*, 452 U.S. 264 (1981)). The dissent notes that “federal agencies cannot consign States to the ministerial tasks of information gathering and making initial recommendations, while reserving to themselves the authority to make final judgments under the guise of surveillance and oversight.” *Id.* (Kennedy, J., dissenting).
235. *Id.* at 1016 (Kennedy, J., dissenting). "ADEC, unlike the majority,
Unfortunately for the dissent, that is exactly the interpretation that the majority chooses to dismiss.\textsuperscript{236}

3. ADEC Interpretation

In arguing that the EPA exceeded the scope of its authority in determining the reasonableness of its BACT determination, ADEC “assailed” the EPA’s statutory interpretation “on several grounds.”\textsuperscript{237} First, ADEC proffers the argument that the “statutory definition of BACT” places authority to determine BACT in the State permitting agency alone.\textsuperscript{238} As such, ADEC argues that EPA’s authority is properly restricted to ensuring that a PSD permit contain a BACT determination and not to a review of the substance of such a determination.\textsuperscript{239} Justice Ginsburg responds first by noting that state agencies are “no doubt” in the best position to “adjust for local differences” in making BACT determinations that take into account the relevant economic and environmental concerns that such determinations must balance.\textsuperscript{240} Even so, the majority notes that the language of the statute does not imply that there “can be no unreasonable determinations.”\textsuperscript{241} Finding there to be a crucial distinction between the provisions of the statute and the interpretation proffered by ADEC, the Court notes that EPA “claims no prerogative to designate the correct BACT” and only claims “the authority to guard against unreasonable determinations.”\textsuperscript{242} Responding to ADEC’s interpretation, the majority finds that Congress granted “sweeping” recognition that the Act’s explicit provision for a preauthorization process underscores the need for finality in state permitting decisions, making implausible an interpretation of the statute that would allow a \textit{post hoc} veto procedure . . . .” \textit{Id.} (Kennedy, J., dissenting).

\textsuperscript{236} Id. at 1003. “ADEC’s argument overlooks the obvious difference between a statutory \textit{requirement} . . . and a statutory \textit{authorization}.” \textit{Id.} (emphasis in original).

\textsuperscript{237} Id. at 1001.

\textsuperscript{238} Id.

\textsuperscript{239} Id. at 999.

\textsuperscript{240} Id. at 1001. The Court lists adjustment for “local differences in raw materials or plant configurations” as considerations which might make “a technology ‘unavailable’ in a particular area.” \textit{Id.}

\textsuperscript{241} Id.

\textsuperscript{242} Id.
authority to the EPA to enforce the provisions and requirements of the CAA and its PSD program. Finding that Congress had expressly created an “expansive surveillance role” for EPA in other CAA provisions, the majority sees no basis for finding an implicit intent of Congress to preclude the EPA from taking steps to determine the substantive validity of a State’s BACT determination. The Court further dismisses as absurd the idea that Congress intended only for the EPA to insure that state permitting authorities utter the magic word “BACT” when issuing their PSD permits. Directly refuting the first argument advanced by ADEC, Justice Ginsburg concludes that EPA’s role in determining the reasonableness of state agency BACT determinations is “consistent” with Congressional intent to place the primary burden and responsibility of CAA enforcement on the states.

ADEC next advances the argument that the presence of language expressly requiring EPA approval of a permitting authority’s BACT determination in certain circumstances demands that the Court find EPA’s interpretation in this instance to be unwarranted. ADEC argues that the absence of such express language in this provision of the CAA is an indication that Congress did not intend to grant EPA the power to review state agency BACT determinations for reasonableness. Justice Ginsburg dismisses ADEC’s second argument, pointing to its misunderstanding of the “difference between a statutory requirement . . . and a statutory authorization.”

243. Id. at 1002-03.
244. Id.
245. Id. at 1003.
246. Id.
247. Id. The Court notes that EPA’s interpretation of the act still provides state agencies “considerable leeway” in the administration of their PSD programs. Id. EPA will only be authorized to intervene for the purpose of ensuring that statutory requirements have been met, and such action will be permitted only when the BACT determination of a state agency is not based on a “reasoned analysis.” Id.
248. Id.
249. Id.
250. Id. (citing 42 U.S.C. § 7475(a)(8) as a requirement and comparing to sections 113(a) and 167 which the Court believes are authorizations) (emphasis in original). The Justice also notes that a requirement would demand that the EPA intervene every time regardless of reasonableness, while an authorization sensibly grants EPA power to intervene only when state determinations are arbitrary. Id.
The majority notes that Congress sensibly provided EPA with the authorization, and not the requirement, of acting where a "state permitting authority has determined BACT arbitrarily." 251

Finally, ADEC argues that even if the CAA can be read to require state agencies to present a reasoned basis for their BACT determinations, any such requirement ought to "be enforced only through state administrative and judicial processes." 252 Placing the power of review in state judicial entities, ADEC argues, would ensure the development of an "adequate factual record," "promote certainty," and properly shift the burden of proving unreasonableness onto the EPA. 253 In rejecting this final argument, the majority first notes that Congress was unlikely to have intended to limit a federal agency to the bounds of state court when challenging state agency action which it determines to be a violation of federal law. 254 The majority also notes that EPA's determination that it is not required to take "recourse to state processes before stopping a facility's construction" is a "rational interpretation" of CAA and therefore permissible. 255 Justice Ginsburg next focuses on the practical concerns raised by ADEC to bolster its challenge of the interpretation proffered by the EPA. 256

The majority dismisses the concern raised by ADEC regarding the danger of producing inadequate factual records absent the use of state administrative and judicial process, noting that no such outcome occurred in this particular instance. 257 As to ADEC's concern with which party bears the burden of proof, Justice Ginsburg notes that Congress nowhere provided that the "allocation of proof burdens would differ depending upon which enforcement route EPA

251. Id.
252. Id. at 1003-04.
253. Id. at 1004.
254. Id. "It would be unusual, to say the least, for Congress to remit a federal agency enforcing federal law solely to state court. We decline to read such an uncommon regime into the Act's silence." Id.
255. Id.
256. Id.
257. Id. In this particular case, the majority notes that the Ninth Circuit ordered EPA to submit a complete administrative record and that "all parties effectively agreed that the record as it stood was adequate to resolve the issues on appeal." Id. (quoting Alaska, 298 F.3d at 818).
selected." Further, the Court's "analysis would have taken the same path" had the suit been filed initially in state court. Finally, the majority rejects ADEC's concern that, absent state courts acting as the "exclusive judicial arbiters," the EPA could invalidate a facially valid BACT determination any time after a permit has been issued. The Court ultimately concludes that EPA would not indulge in that type of conduct as long as federal courts sit to review its actions. After determining that the EPA correctly interpreted the scope of its authority under the provisions of the CAA, Justice Ginsburg addressed the question of whether the agency's exercise of that authority was arbitrary or capricious.

D. EPA Behavior: Arbitrary or Capricious?

1. Majority Opinion

The Court's review of EPA's behavior under the arbitrary and capricious standard arose from ADEC's claim that, even if the EPA properly interpreted the scope of its authority under the CAA provisions, its exercise of that authority was inappropriate in this particular case. The majority ultimately rejects ADEC's...
contention, finding the EPA to have reasonably determined ADEC’s BACT was not based on sufficient evidence. In so holding, Justice Ginsburg first cites the provisions of the Administrative Procedure Act for the relevant standard of review. Determining that EPA’s actions are impermissible only if they are arbitrary or capricious, the Court turns to an analysis of the particular actions taken by EPA in this case.

While the majority concedes that EPA’s orders to ADEC were “skeletal” and lacking in “ideal clarity,” it finds that a reading of those orders with the letters and other documents exchanged between EPA and ADEC provides a sufficient foundation for EPA’s ultimate conclusion as to the reasonableness of ADEC’s BACT determination. The Court specifically identifies ADEC’s sudden and inexplicable decision to change its BACT requirement after protests from Cominco as one of the primary justifications for EPA’s finding of unreasonableness. Having initially concluded that SCR

pleading before the Ninth Circuit. Even so, Justice Ginsburg notes that it is addressed in the majority’s analysis of the larger question of the scope of EPA’s supervisorial authority. “Treating the case-specific issue as embraced within the sole question presented, we are satisfied that EPA did not act arbitrarily . . . .”

264. Id. “[W]e are satisfied that EPA did not act arbitrarily in finding that ADEC furnished no tenable accounting for its determination that LowNOx was BACT for MG-17.” Id.

265. Id. Noting that the CAA itself does not “specify a standard . . . in this instance,” Justice Ginsburg cites 5 U.S.C. § 706(2)(a) as the default standard that should be applied. Id.

266. Id. The arbitrary or capricious standard requires the Court to ask “whether the Agency’s actions was ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.’” Id. (quoting 5 U.S.C. § 706(2)(A) (2004)). Justice Ginsburg further notes that that an agency’s decision should not be disturbed when the process by which that decision was arrived at can be reasonably discerned. Id. (quoting Bowman, 419 U.S. at 286).

267. Id. at 1006.

268. Id. at 1006-07. After citing the less than ideal character of EPA’s three orders, the Court concludes that a reading of all of the documents together “adequately ground[s] the determination that ADEC’s acceptance of Low NOx for MG-17 was unreasonable given the facts ADEC found.” Id.

269. Id. at 1007. The Court notes that ADEC applied EPA’s suggested “top-down” methodology in making its initial BACT determination for Cominco’s new generator. Id. (quoting App. 65). See supra note 148 and accompanying text for a discussion of the procedural steps in making a “top-down” BACT determination.
technology was technically and economically feasible for Cominco,\textsuperscript{270} it is not clear what information guided ADEC’s ultimate decision to approve a cheaper and less effective pollution control technology.\textsuperscript{271} Such ambiguity raises suspicions of impropriety in light of Cominco’s flat refusal to provide any evidence that SCR technology would not be economically feasible.\textsuperscript{272} With no “record evidence” to suggest that requiring SCR would negatively impact Cominco’s “operation[s] or competitiveness,”\textsuperscript{273} the Court found

Using the “top-down” approach, ADEC initially concluded that SCR was both “technically and economically feasible.” \textit{Id.} at 1007 (quoting App 65). Less than a month later, ADEC changed its BACT determination to require LowNOX after Cominco suggested that fitting all of its generators with that technology would “reduce aggregate emissions.” \textit{Id.} ADEC ultimately abandoned its reduced aggregate rationale for its switch of BACT technologies, relying instead on the conclusion that SCR was too expensive. \textit{Id.} EPA concluded that switch had “no factual basis in the record.” \textit{Id.} The Court determined that absent any factual basis for that switch, ADEC could not be said to have acted reasonably in selecting Low NOx as BACT for the Cominco generator. \textit{Id.}

\textsuperscript{270} \textit{Id.} at 1007.

\textsuperscript{271} \textit{Id.} at 1007. “We do not see how ADEC, having acknowledged that no determination ’[could] be made as to the impact of [SCR’s] cost on the operation and competitiveness of the [mine], . . . could simultaneously proffer threats to the mine’s operations operation or competitiveness as reasons for declaring SCR economically infeasible.” \textit{Id.}

\textsuperscript{272} \textit{Id.} “Cominco had declined to provide the relevant financial data, disputing the need for such information and citing ‘confidentiality’ concerns.” \textit{Id.} “ADEC’s basis for selecting Low NOx thus reduces to a readiness ’[t]o support Cominco’s Red Dog Mine Production Rate Increase Project, and its contributions to the region.’” \textit{Id.} at 1008. That justification fails to meet even ADEC’s own standard of requiring a “source-specific . . . economic impact[t] which demonstrate[s] [SCR] to be inappropriate as BACT.” \textit{Id.} The first indication of unreasonable action on the part ADEC is cited as the direct contradiction between ADEC’s determination that SCR was too costly and its initial calculation of the actual costs of requiring SCR for Cominco’s new generator. \textit{Id.} ADEC initially determined that the per-ton cost of SCR would be around $2,279. \textit{Id.} That number was “‘well within what ADEC and EPA consider to be economically feasible.’” \textit{Id.} (citing App at 138). Even so, after protests from Cominco, ADEC decided that cost was not something that the mine could reasonably bear. \textit{Id.} EPA also found ADEC’s comparison of Cominco to a rural utility to be untenable, since no evidence was presented to suggest that an “incremental[ ]” increase in the cost of zinc concentrates would be remotely similar to the need of a rural non-profit utility to “pass costs on to a small base of individual consumers.” \textit{Id.} (quoting Brief for Respondents 49).

\textsuperscript{273} \textit{Id.} at 1007.
ample justification for EPA’s issuance of stop orders premised on the unreasonableness of ADEC’s BACT determination. In finding that the EPA did not exceed the scope of its authority or act arbitrarily in determining ADEC’s BACT selection to be unreasonable, the majority rejects ADEC’s aggregate emission rationale and concludes by clarifying the options still available to ADEC in light of its holding.

2. Minority Opinion

Starting with the premise that EPA’s interpretation of the CAA statute improperly created supervisory authority that was not intended by Congress, Justice Kennedy’s dissenting opinion

274. Id. at 1008. “EPA validly issued stop orders because ADEC’s BACT designation simply did not qualify as reasonable in light of the statutory guides.” Id.

275. Id. at 1009-10. ADEC also attempted to justify its selection of LowNOx on the grounds that a lower “aggregate” emission could be achieved by requiring Cominco to install that technology on all of its generators. Id. at 1008. The Court dismisses that justification altogether, finding that State’s may only “treat emissions from several pollutant sources as falling under one ‘bubble’” if all of the sources are “part of the permit action.” Id. (quoting Brief for Petitioner 111, 199). Since MG-17 was the only generator that was part of the permit action, ADEC could not justify its selection of LowNOx over SCR solely on the attainment of a lower aggregate emission. Id. at 1009.

276. Id. The Court notes that nothing prevents ADEC from supplementing the record with evidence supporting a finding that SCR is not economically feasible for Cominco, and it suggests that EPA would allow ADEC’s BACT determination to stand if such evidence were brought forward. Id. (“EPA repeatedly commented that it was open to ADEC to prepare ‘an appropriate record’ supporting its selection of Low NOx as BACT.”) Id. Justice Kennedy’s dissent charges the majority with creating a “Zeno’s paradox” for state agencies by which they must create endless layers of procedure without ever enjoying the certainty of knowing those procedures will survive the close scrutiny of EPA review. Id. at 1016-17 (Kennedy, J., dissenting). Such a state of affairs, the dissent argues, creates the possibility that State permitting agencies will fail to achieve the ultimate goal of issuing a permit. Id. at 1016-17 (Kennedy, J., dissenting.) Justice Ginsburg cites the failure of the dissent to present any instances in which the EPA has “indulged in...[the] piling of process upon process,” and dismisses its fears as lacking any basis in reality. Id. at 1009 n.21.

277. Id. at 1012 (Kennedy, J., dissenting). “As a result, EPA has no statutory basis to invoke the enforcement authority of §§ 113(a)(5) and 167.” Id. (Kennedy, J., dissenting).
disputes the majority's conclusion that EPA's behavior was not a violation of the arbitrary or capricious standard of administrative review. Justice Kennedy begins his dissent by noting that the CAA itself contains protections against "arbitrary and capricious BACT determinations" by state permitting agencies. Because the dissent believes that EPA improperly interpreted the CAA provisions, it starts with the premise that EPA's exercise of authority was arbitrary and capricious from the outset. As such, Justice Kennedy focuses on the administrative procedures that were already available to the EPA and its failure to follow those procedures when challenging ADEC's BACT determination. Rejecting EPA's argument that it should not be forced to challenge ADEC's determination in a state court, the dissent notes the impropriety of "allow[ing] a federal agency to take unilateral action to set aside a State's administrative decision." The dissent further notes that the CAA requires states to create an administrative process whereby interested persons can submit comments. Included within the definition of "interested persons," Congress explicitly lists the

278. See id. at 1017 (Kennedy, J., dissenting) ("EPA did not participate in the administrative process, but waited until after the record was closed to intervene by issuing an order setting aside the BACT determination").

279. Id. at 1012 (Kennedy, J., dissenting). "Before EPA approves a State's PSD permit program that allows a state agency to make BACT determinations, EPA must be satisfied that the State provides 'an opportunity for state judicial review.' Id. at 1013 (Kennedy, J., dissenting) (quoting 61 Fed. Ref. 1882 (1996)). The Justice also cites the CAA requirement that a State "must allow 'all interested persons,' including 'representatives of the [EPA] Administrator,' to submit comments on...‘control technology requirements.'” Id. (quoting 42 U.S.C. § 7475(a)(2) (2004)).

280. See id. at 1010-12 (Kennedy, J., dissenting).

281. See id. at 1013 (Kennedy, J., dissenting).

282. Id. at 1013-14 (Kennedy, J., dissenting). The CAA provides in relevant part that "[A]ny person who participated in the comment process can pursue an administrative appeal of the State's decision, followed ... by judicial review in state courts.” Id. at 1013 (Kennedy, J., dissenting).

283. See id. at 1004 (Kennedy, J., dissenting) (agreeing with the EPA that a federal agency should not be limited to bringing actions in state courts).

284. Id. at 1013 (Kennedy, J., dissenting).

285. Id. at 1013 (Kennedy, J., dissenting) (citing 42 U.S.C. § 7475(a)(2) (2004)).
EPA. Since the EPA itself requires that states establish procedures for state judicial review of PSD decisions, "it follows that EPA . . . cannot evade . . . state process by a mere stroke of the pen under the agency's letterhead." Further, the responsibility of "ferret[ing] out arbitrary and capricious conduct by state agencies" properly rests in state courts and not the EPA. Dismissing the majority's belief that, absent EPA review, no oversight authority of state BACT determinations would exist, Justice Kennedy addresses ADEC's concern that EPA's conduct improperly shifts the burden of proof.

In the eyes of the dissent, the majority's holding will require state agencies to prove that the EPA acted arbitrarily in issuing a stop order for what it determines to be an unreasonable BACT selection. Such a requirement essentially shifts the "burden of pleading and of initiating litigation from EPA to the State." While the majority attempts to alleviate concerns raised by the potential implications of a shifted proof burden, Justice Kennedy finds

286. *Id.* (Kennedy, J., dissenting); see also Alaska Stat. § 46.14.990(20) (2002) (defining "person" to include "an agency of the United States").

287. *Id.* at 1013 (Kennedy, J., dissenting).

288. *Id.* (Kennedy, J., dissenting). Indicating that the CAA does not give the EPA authority to have a "roving commission" to locate and eliminate arbitrary state determinations. *Id.* (Kennedy, J., dissenting). See *Idaho*, 521 U.S. at 276 ("elaboration of administrative law . . . is one of the primary responsibilities of the state judiciary").

289. *Id.* at 1014 (Kennedy, J., dissenting). Justice Kennedy cites the fact that EPA was not able to identify a single state which did not have a law requiring that its agencies act rationally. *Id.* (Kennedy, J., dissenting). Further, the existence of the state courts to review state agency BACT determinations eliminates the oversight role which EPA alleges is required to achieve the ultimate policy goals of the CAA. *Id.* (Kennedy, J., dissenting).

290. *Id.* (Kennedy, J., dissenting).

291. *Id.* (Kennedy, J., dissenting). "[C]ourts reviewing EPA's order must ask not simply whether EPA acted arbitrarily but the convoluted question whether EPA acted arbitrarily in finding the State acted arbitrarily." *Id.* (Kennedy, J., dissenting).

292. *Id.* (Kennedy, J., dissenting).

293. *Id.* at 1005 n.17. One of ADEC's primary concerns with contesting the EPA's issuance of a stop order centered on the allocation of the applicable burden of proof in such an instance. *Id.* ADEC argued that allowing the EPA to issue a stop order shifted the burden on to ADEC to prove that its decision was reasonable. *Id.* If the EPA were forced to challenge ADEC's action in state court, prior to the issuance of an order, the EPA would carry the burden of proving that ADEC had acted in an arbitrary or capricious manner. *Id.*
“little authority” to support its reasoning. The complex and unusual division of proof burdens which assign one party the burden of pleading while assigning the other party the burden of production and persuasion is rejected by the dissent as impractical. Further, the complexity of that burden allocation is likely to encourage EPA to avoid participating in State administrative process altogether. Justice Kennedy notes that, under the majority’s holding, the EPA needs simply to “issue a unilateral order invalidating...[a] State’s BACT determination” to place all of the relevant burdens on the State. The ease with which that burden is shifted provides no incentive for administrative agencies to subject themselves to state administrative processes, and raises the larger constitutional concern that such agencies will issue a unilateral order after a state court has found no error or abuse of discretion.

Addressing the constitutional concerns raised by ADEC in its challenge to the EPA’s action, Justice Kennedy argues that allowing EPA to issue “its own orders nullifying” a “state court’s ruling” improperly alters the balance of power between State and federal governments as well as the executive and judicial branches. The dissenting opinion notes that an analogous grant of power to review federal court decisions would be a clear constitutional

294. Id. at 1014 (Kennedy, J., dissenting). Noting that the authority cited by Justice Ginsburg is unrelated to the issues in this case. Id. (Kennedy, J., dissenting). Justice Kennedy further notes that the very authority cited by Justice Ginsburg “instructs” that the entity having the burden of pleading will also bear the burden of persuasion and production. Id. (Kennedy, J., dissenting).

295. Id. (Kennedy, J., dissenting).

296. Id. (Kennedy, J., dissenting). “EPA is most unlikely to follow the procedure, prescribed by federal law, or participating in the State’s administrative process and seeking judicial review in state courts.” Id. (Kennedy, J., dissenting).

297. Id. at 1014-15 (Kennedy, J., dissenting). Justice Kennedy notes that loophole created by the Majority “demonstrate[s] the inconsistency between its approach and the statutory scheme.” Id. (Kennedy, J., dissenting).

298. Id. at 1015 (Kennedy, J., dissenting). Citing as a “serious flaw” the possibility that the EPA could unilaterally invalidate an Alaska state court’s determination that ADEC’s BACT determination was lawful and not an abuse of its discretion. Id. (Kennedy, J., dissenting).

299. See id. at 1003-06 (Kennedy, J., dissenting).

300. Id. at 1015 (Kennedy, J., dissenting). Noting the new power allocation to be a sign of the “implausibility of the majority’s reasoning.” Id. (Kennedy, J., dissenting).
violation, and a direct assault to the integrity of “judicial independence.” Such a drastic change in the balance of federal power should only be effected “upon a clear instruction from Congress” and Justice Kennedy finds no such instruction here. In fact, the dissent finds that the majority’s holding precludes state agencies from continuing to represent themselves as the “real governing body” in the enforcement of CAA provisions. Justice Kennedy finds that result to represent a giant “step backward” in achieving Congress’s intent to “grant States a significant stake in developing and enforcing national environmental objectives.”

Continuing his criticism of EPA’s unilateral power to invalidate a state’s BACT determination, Justice Kennedy notes that nothing exists to prevent the EPA from setting aside that determination “months, or even years,” after it has been made. Citing the “reliance and expectation interests” potentially at stake when a party

301. Id. (Kennedy, J., dissenting). Noting that a federal agency exercising “analogous power to review the decision of federal courts” would be in violation of the rule that the “judgments of Article III courts cannot be revised by the Executive or Legislative Branches.” Id. (Kennedy, J., dissenting).

302. Id. (Kennedy, J., dissenting). “Judges cannot, without sacrificing the autonomy of their office, put onto the scales of justice some predictive judgment about the probability that an administrator might reverse their rulings.” Id. (Kennedy, J., dissenting).

303. Id. (Kennedy, J., dissenting). “If state courts must live with the insult that their judgments can be revised by a federal agency, the Court should at least insist upon a clear instruction from Congress. That directive cannot be found here.” Id. (Kennedy, J., dissenting). Justice Kennedy also points to case law holding that an alteration of the balance of power between State and Federal governments requires that Congress make its intent to do so “unmistakably clear in the language of the statute.” Id. at 1016 (Kennedy, J., dissenting) (quoting Gregory v. Ashcroft, 501 U.S. 452, 460).

304. Id. at 1015 (Kennedy, J., dissenting).

305. Id. at 1017 (Kennedy, J., dissenting).

306. Id. (Kennedy, J., dissenting). Justice Kennedy notes that the majority would not have approved an EPA interpretation of the CAA which required that all BACT permits be submitted to the agency for review. Id. (Kennedy, J., dissenting). In so doing, the “basic structure of the BACT provisions” would be undercut. Id. (Kennedy, J., dissenting). Even so, Justice Kennedy argues, the majority opinion will produce that exact result in practice, “displac[ing] state agencies” and “degrad[ing]” their role in CAA enforcement. Id. (Kennedy, J., dissenting).

307. Id. at 1016 (Kennedy, J., dissenting).
cannot depend upon the certainty of a facially valid permit, the dissent finds that Congress could not have “intended” the resulting uncertainty of the majority’s interpretation. While the majority expressed confidence that the EPA would be unable to inequitably upset reliance and expectation interests when federal courts exist to supervise its actions, the dissent warns state agencies to rely on that assurance “at their own risk.” Believing that adequate enforcement powers demand investing the EPA with the power to act at any time, the dissent finds ADEC’s certainty concerns to be persuasive and concludes its opinion by criticizing the additional options which the majority suggests are available to ADEC after its holding.

V. IMPACT

The long term impact of the Court’s decision in Alaska remains to be seen. While the decision has the potential to broadly affect the manner in which federal agencies ensure state compliance with

308. Id. (Kennedy, J., dissenting) (citing 42 U.S.C. § 7475(a)(8) to show that when Congress provides for EPA involvement, it “directs the agency to act sooner rather than later”).

309. Id. at 1006.

310. Id. at 1016 (Kennedy, J., dissenting). The dissent finds the authority cited by Justice Ginsburg to support her assurance to be weak and wholly unrelated to the issues in this case. Id. (Kennedy, J., dissenting). “The authority [that the majority] cites for this proposition . . . consists of nothing more than a religious exemption case that is far removed from the issues presented here.” Id. (Kennedy, J., dissenting). It then proceeds to list several authorities which grant the U.S. government exemption from statutes of limitation or other temporal restraints for purposes of enforcing a “public right.” Id. (Kennedy, J., dissenting) (quoting United States v. Beebe, 127 U.S. 338, 344 (1888)).

311. Id. at 1016 (Kennedy, J., dissenting). Referring to 42 U.S.C. § 7477 and implying the directive to exercise EPA authority in enforcing CAA provisions “at any point.” Id. (Kennedy, J., dissenting).

312. Id. at 1017 (Kennedy, J., dissenting). Noting that the majority forces state agencies into a Zeno’s paradox in which they will be incapacitated and utterly unable to perform the function for which they were established: the issuance of applicable CAA permits. Id. (Kennedy, J., dissenting). “The majority creates a sort of Zeno’s paradox for state agencies. Because there can always be an additional procedure to ensure that the preceding process was followed, no matter how many steps States take toward the objective, they may never reach it.” Id. (Kennedy, J., dissenting).
federal laws, it is entirely possible that the Court will narrowly read its holding as applicable only to the specific facts at play in this case. Assuming that the Court’s decision is read to be broadly applicable to the triangulated relationship between states, federal statutes, and federal agencies, its impact will likely be felt in the Court’s approach to deference, state autonomy, and the scope of federal agency power.

A. Deference

The Court’s decision in Alaska is significant in the context of administrative law in that it applies what some may consider a new or broader style of Chevron deference. While the majority opinion clearly states that Chevron is not applicable, some legal scholars agree with the dissent that Chevron was applied in Alaska de facto. Regardless of Chevron’s applicability, the Court’s decision embodies a broad form of judicial deference to statutory interpretation by an administrative agency. In relevant part, the decision fuses Chevron’s two step analysis with recent case law according “cogent” interpretations “not [the] products of formal rulemaking” a significant degree of respect.

The practical impact of the Court’s fusion of deference principles may be the application of sweeping deference to any federal agency interpretation which is well reasoned and sufficiently convincing.

313. Id. (Kennedy, J., dissenting). Noting the majority gives the EPA “the very Chevron deference— and more—it says should be denied.” Id. (Kennedy, J., dissenting) (emphasis added). For a discussion of Chevron deference, see supra notes 106-110 and accompanying text.

314. Id. at 1001.

315. Patrick A. Bousquet, Note, Supreme Court Decisions Allows the EPA to Flex Its Muscle And Trump State Permitting Authorities, 11 MO. ENVTL. L. & POL’Y REV., 268, 280 (2004); see also Alaska, 124 S. Ct. at 1018 (Kennedy, J., dissenting).

316. Bousquet, supra note 315, at 280. Some might argue that the deference applied by the Court “ignores traditional limitations on judicial deference to agency interpretations of statutes.” Id. at 268. The deference afforded to the EPA in Alaska is broader than traditional Chevron deference in that it affords dispositive effect to agency opinions regardless of their finality. See Alaska, 124 S. Ct. at 1018 (Kennedy, J., dissenting).

317. Id. at 1001 (quoting Washington State Dep’t of Soc. and Health Servs. v. Keffeler, 537 U.S. 371, 385 (2003)).

318. Various levels of deference can be given by a court reviewing an
The Court’s decision places a previously unobtainable gold standard of judicial deference well within the reach of agency officials seeking deference for products of the administrative process traditionally precluded from hiding under *Chevron’s* veil.\textsuperscript{319} While the degree to which an agency’s interpretation is convincing remains a matter of judicial discretion, it would be entirely reasonable under *Alaska* for an agency administrator to seek *Chevron* style deference for opinion letters or other less formal embodiments of an agency’s interpretive capacity. If the Court were to permit such activity, it would eliminate a substantial degree of judicial oversight from the checks and balances designed to ensure the exercise of federal agency power remains within the scope of its constitutional and congressionally mandated authority.\textsuperscript{320}

### B. Diminishing State Autonomy

In so far as the Court’s holding in *Alaska* grants broad deference to virtually all reasonable products of agency decision-making, it calls into question the autonomy and competence of state agencies who find themselves in conflict with their federal counterparts.\textsuperscript{321} *Alaska* legitimizes federal preemption of the decision-making agency’s statutory interpretation. *See supra* notes 90-137 and accompanying text. Weaker forms of deference, such as *Skidmore*, place very little authoritative weight on agency opinions. *Id.* *Chevron* deference embodies the strongest form of deference, requiring courts to defer to qualifying administrative interpretations regardless of their particular appeal to the judicial palette. *Id.* Once a court determines that an agency opinion merits such strong deference, its analysis is generally concluded. *Id.*

319. Prior to *Alaska*, *Chevron* deference was not available for informal agency action, including opinion letters, interpretive guides, etc. *See supra* note 123 and accompanying text.

320. *See Alaska*, 124 S. Ct. at 1018 (Kennedy, J. dissenting) (noting that the majority’s holding “relegate[s] States to the role of mere provinces or political corporations, instead of coequal sovereigns entitled to the same dignity and respect”).

321. *See Bonnie Bridges, Using Alaska v. EPA to Unmask the Clean Air Act*, 25 ENERGY L.J. 431, 437 (2004). “This decision is important in interpreting not only agency authority, but also in balancing the authority of the state against a federal agency.” *Id.* *see also* Bousquet, 11 MO ENVTL. L. \\& POL’Y REV. at 281 (“[T]his double standard could greatly increase federal agencies’ power and completely vitiate the sovereignty of complimentary state agencies.”).
authority of a state agency, calling into question the future autonomy that such agencies will enjoy. In so doing, the Court implicitly contradicts prior CAA case law affirming the Congressional decision to make maintenance of national air quality standards the primary responsibility of state, not federal, agencies.

The Court's decision raises grave concerns over the wisdom of allowing federal agencies to scrutinize the products of policy decisions based on regional and cultural interests unique to a given state. Such scrutiny may not always produce results sensitive to a region's particular social, political, and economic needs. Further, it raises questions of Constitutional propriety in light of its potential disregard for state sovereignty. Applied in the extreme, the holding in Alaska relegates state agencies to subservient roles in which conflicts between state and federal entities will inevitably be decided in favor of the dominant federal body. As such, its practical effect would be to make state agencies into procedural drones devoid of substantive authority or discretion to determine how a particular federal standard or mandate will be met.

322. See Alaska, 124 S. Ct. at 1018 (Kennedy, J., dissenting).
323. See Train, 421 U.S. at 64 (noting that Congress explicitly "preserved the principle" that "[e]ach State shall have the primary responsibility for assuring air quality within the entire geographic region comprising such State." (internal quotations omitted)).
A federal agency epitomizes the federal government's existence as a centralized power structure, and has no direct ties to the states at all. Therefore, the agency will not have the sensitivity to state interests that Congress does. The agency may be far too willing to sacrifice state concerns on the altar of federal interests and national uniformity.

Id.

325. See Bousquet, supra note 315, at 281 for a discussion of the Tenth Amendment concerns raised by the Court's decision (noting that this Court's holding "indicates that state sovereignty is, indeed, a 'myth.'"); see also Steven G. Gey, The Myth of State Sovereignty, 63 OHIO ST. L.J. 1601 (2002).
326. See Bousquet, supra note 315, at 281 ("even a very narrow interpretation of the holding [in Alaska] . . . concedes that federal agencies may overrule state agency action they deem unreasonable without Congress specifically permitting them to do so.").
C. Expanding the Scope of Federal Agency Power

While Alaska's impact on the larger issues of judicial deference and state autonomy remains speculative, the degree to which it affects the scope of EPA authority can be fairly determined. Prior to the Court's holding in Alaska, it was unclear whether the EPA possessed authority to scrutinize the processes by which state environmental agencies make permit determinations pursuant to their responsibilities under the CAA.\(^{327}\) Some prior CAA interpretations envisioned the EPA's role as one of ensuring the required components were included in permits authorizing new or modified sources of air pollutants.\(^{328}\) Under that interpretation, the EPA would be powerless to attack the substantive process by which a state determines applicable permit requirements have been met.\(^{329}\) The Court's holding in Alaska clearly provides the EPA with a much stronger supervisory authority,\(^{330}\) authorizing it to invalidate the BACT determinations of state environmental agencies whenever the EPA finds them to be unreasonable.\(^{331}\) Such authority, it has been argued, threatens the state with "unbridled federal oversight" in

\(^{327}\) Alaska, 124 S. Ct. at 1000.

\(^{328}\) See id. at 1002. ADEC argues that the language of the CAA restricts the EPA's enforcement role to ensuring that state issued permits "contain a BACT limitation." Id.

\(^{329}\) See id. "Under ADEC's interpretation, EPA properly inquires whether a BACT determination appears in a PSD permit . . . , but not whether that BACT determination 'was made on reasonable grounds properly supported on the record.'" Id. (quoting Approval and Promulgation of Air Quality Implementation Plans; Commonwealth of Virginia--Prevention of Significant Deterioration Program, 63 Fed. Reg. 13795, 13797 (March 23, 1998) (to be codified at 40 C.F.R. pt. 502)).

\(^{330}\) See Bousquet, supra note 315, at 280. There is significant support for the argument that strong enforcement powers are necessary to insure the policy objectives behind the CAA are met. See Paul G. Rogers, The Clean Air Act of 1970, at http://www.epa.gov/history/topics/caa70/11.htm (last viewed December 21, 2004). "[T]he 1970 amendments demonstrated Congress' acknowledgement that air pollution could not be effectively addressed on a regional level." Id. "It will be critical to keep the pressure on [the states] in order to see to it that those who are covered by the statute obey it – or pay the requisite penalties for violations." Id.

\(^{331}\) Alaska, 124 S. Ct. at 1003.
which "any and all state action could be overridden by federal agency mandate." 332

The consequences of granting an expansive interpretation of EPA’s statutory authority reach beyond equipping the EPA with additional CAA enforcement tools. The implications of the Court’s decision extend to other federal agencies sharing enforcement power with the states,333 potentially providing them with authorization to preempt decisions of corresponding state agencies which are not on par with the federal agency’s procedural or policy preferences.334 Moreover, the Court’s holding potentially grants such power to a federal agency with no requirement that Congress expressly provide it.335 As such, federal agencies are arguably given an incentive to interpret ambiguous passages of statutory text to provide them with broad preemption authority. That incentive could reasonably lead to a massive expansion in the scope of executive branch authority,336 an expansion not met with increased oversight from the judicial and legislative branches.337 Further, it may open the door for the emergence of a “super agency,” a federal executive powerhouse with absolute authority in its given field and a phenomenon wrought with serious Constitutional concerns.338

VI. CONCLUSION

The Supreme Court’s holding in Alaska v. EPA has the potential to broadly affect the field of administrative law. While the majority’s

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332. Bousquet, supra note 315, at 279.

333. See Alaska, 124 S. Ct. at 1018 (Kennedy, J., dissenting) (“The CAA is not the only statute that relies on a close and equal partnership between federal and state authorities to accomplish congressional objectives.”).

334. See Bousquet, supra note 215, at 280.

335. See Walthall, supra note 324, at 756. “[A]gencies should not be trusted any more than courts are to conduct the delicate balancing of national and local interests required by our federal system.” Id.

336. Administrative agencies are traditionally considered members of the executive branch.

337. See Alaska, 124 S. Ct. at 1018 (Kennedy, J., dissenting). “This is inconsistent with the assurance Congress gave to regulated entities when it allowed state agencies to decide upon the grant or denial of a permit under the BACT provisions of the CAA.” Id. (Kennedy, J. dissenting).

338. See Bousquet, supra note 315, at 279-80.
opinion equips the EPA with stronger tools for safeguarding the nation’s air quality, it also creates a precedent for expanding the scope of federal agency power. If found to be applicable to a wide array of inter-agency conflict between governmental sovereigns, the Court’s decision significantly diminishes the autonomy of state agencies and allows their federal counterparts to derive broader enforcement powers than those expressly afforded them by Congress.

The history of the Clean Air Act has demonstrated time and again the importance of a strong enforcement authority in achieving the act’s policy goals.339 Allowing the EPA to check unreasonable or arbitrary permit decisions by state environmental agencies safeguards against ground level political and economic corruption within those organizations. Even so, one must find significant credence in the dissent’s concern with the mechanism by which the EPA is permitted to perform that checking function.340 Could the EPA be equally effective challenging arbitrary or unreasonable agency action in state courts? Are state courts qualified to act as impartial decision makers or would they be swayed by economic and political interests particular to their jurisdiction? Does allowing federal agency preemption violate notions of state sovereignty and rebut the presumption that state agencies act in good faith when enforcing federal regulations? The answer to those questions is likely to rest in future case law as the Court is presented with the opportunity to clarify the broader legal consequences of its Alaska holding. Until that clarification occurs, Alaska v. EPA will represent the type of decision where legally suspect means are employed to achieve politically noble ends. In the world of legal precedent, means oriented jurisprudence can have unforeseen and catastrophic legal ramifications. The degree to which the Alaska decision produces such consequences is something only time can tell.

339. See generally Rogers, supra note 330.
340. See Alaska, 124 S. Ct. at 1017 (Kennedy, J., dissenting) (“No matter how much time was spent in consultation and negotiation, a single federal administrator can in the end set all aside by a unilateral order.”).