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Arkansas v Oklahoma: Restoring the Notion of Partnership Under the Clean Water Act

Katheryn Kim Frierson†

The long history of interstate water pollution disputes traces the steady rise of federal regulatory power in the area of environmental policy, culminating in the passage of the Clean Water Act Amendments of 1972.1 Arkansas v Oklahoma2 is the third and latest Supreme Court decision involving interstate water pollution since the passage of the 1972 amendments. By all accounts, Arkansas is wholly consistent with the Court’s prior decisions. In Milwaukee v Illinois3 and International Paper Co. v Ouellette,4 the Court held that the Clean Water Act (“CWA”) preempted all traditional common law and state law remedies.6 Consequently, states lost much of their traditional authority to direct water pollution policies. Despite the claim that the CWA intended “a regulatory ‘partnership’ between the Federal Government and the source State”,6 Milwaukee and International Paper placed states in a subordinate position to the federal govern-

† B.A. 1994, Williams College; J.D. Candidate 1998, University of Chicago.
5 Milwaukee, 451 US at 316-17 (preempting traditional common law remedies); International Paper, 479 US at 498-99 (preempting state law remedies).
6 International Paper, 479 US at 490.
ment. Most commentaries conclude that Arkansas simply confirms the subordinate status of the states first established by Milwaukee and International Paper.

On the contrary, Arkansas restores a balanced notion of partnership between states and the federal government under the CWA. The Arkansas Court found the preemption framework inappropriate for adjudicating interstate water pollution disputes arising under the CWA. Furthermore, the Court held that judicial review of the EPA's actions in resolving interstate disputes should be governed by the standard of reasonable deference announced in Chevron, U.S.A., Inc. v Natural Resources Defense Council. Arkansas's departure from the traditional preemption analysis, together with its holding under Chevron, helps restore the sense of shared power between the states and the EPA intended by the spirit of cooperative federalism embodied in the CWA. Arkansas provides a framework in which states may participate as equal partners with the federal government in administering water pollution policy.

This Comment examines the way in which Arkansas recasts the relationship between the states and the EPA under the CWA. Part I provides the background for Arkansas by discussing relevant portions of the CWA and the ways in which prior decisions interpreted the statute in interstate water pollution disputes. Part II argues that Arkansas significantly restricts the scope of past preemption cases. Part III explores Arkansas's application of Chevron and concludes that Arkansas's Chevron holding is not

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9 503 US at 106.
equivalent to the traditional preemption analysis in subordinating the states. Finally, Part IV illustrates the important differences between the implications of Arkansas's Chevron analysis and the traditional preemption analysis, and concludes that Arkansas provides room for the restoration of the cooperative federalism central to the CWA's original framework.

I. BACKGROUND

The CWA, by setting effluent limitations and water quality standards, and by overseeing water pollution permit programs, seeks to restore and maintain the integrity of the Nation's waters. State participation and cooperation are crucial to achieving that goal. Early case law interpreting the scope of the CWA concluded that the provision fully preempted all traditional common law remedies for interstate water pollution. Under the CWA, the EPA applies federal law in resolving interstate water pollution disputes.

A. The Structure of the Clean Water Act

Initially, Congress refrained from regulating water pollution because it viewed the subject as one traditionally reserved to the authority of the states. In the absence of federal law, states and citizens sought relief from interstate water pollution under both federal and state common law theories of nuisance. Over the years, Congress reconsidered its stance toward water pollution in the face of deteriorating environmental conditions and continued conflict between states. In 1972, Congress passed the Clean Water Act Amendments of 1972, the most comprehensive water pollution measure to date.

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13 See New Jersey v New York City, 283 US 473 (1931) (state common law theory); New York v New Jersey, 256 US 296 (1921) (same); Georgia v Tennessee Copper Co., 237 US 474 (1914) (same); Missouri v Illinois, 200 US 496 (1906) (same); Illinois v Milwaukee, 406 US 91 (1972) (federal law theory).
15 Pub L No 92-500, 86 Stat 816, codified at 33 USC § 1251 et seq (1994); Milwaukee, 451 US at 317-18 (1981) (citing legislative history calling the CWA “the most comprehensive and far reaching water pollution bill... ever drafted”).
The Amendments sought to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”\(^{16}\) The law established three mechanisms to achieve this overall objective: effluent limitations,\(^ {17}\) water quality standards,\(^ {18}\) and a national pollution permit program.\(^ {19}\)

Effluent limitations, promulgated by the EPA, establish the “quantities, rates, and concentrations of chemical, physical, biological, and other constituents”\(^ {20}\) tolerated in any point-source discharge.\(^ {21}\) Water quality standards supplement the effluent limitations.\(^ {22}\) They set forth the criteria for maintaining a desired standard of water quality for an entire body of water in order that “numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.”\(^ {23}\) Water quality standards are generally the responsibility of the states, which set their own standards for waters within their boundaries, subject to approval by the EPA.\(^ {24}\)

The CWA also provides for the enforcement of both effluent limitations and water quality standards through a permit program called the National Pollution Discharge Elimination System (“NPDES”).\(^ {25}\) Under the NPDES program, parties wishing to discharge pollutants into U.S. waters must obtain a permit.\(^ {26}\) The permit requires compliance with the effluent limitations and water quality standards of the state in which the discharges take place.\(^ {27}\)

As an alternative to the federal NPDES permit system, the CWA authorizes individual states to establish and enforce their own permit programs.\(^ {28}\) The states may set individual effluent

\(^{16}\) 86 Stat at 816, codified at 33 USC § 1251(a).

\(^{17}\) Id at 844-46, codified at 33 USC § 1311.

\(^{18}\) Id at 846-50, codified at 33 USC § 1313.

\(^{19}\) Id at 880-83, codified at 33 USC § 1342.

\(^{20}\) 33 USC § 1362(11).

\(^{21}\) 33 USC § 1311.

\(^{22}\) 33 USC § 1313.


\(^{24}\) 33 USC §§ 1313(a),(b).

\(^{25}\) 33 USC § 1342.

\(^{26}\) 33 USC §§ 1311(a), 1342(a)(1).

\(^{27}\) 33 USC § 1342(a)(2).

\(^{28}\) See 33 USC § 1342(a),(b). The CWA also includes a citizen suit provision that authorizes citizens to bring an enforcement action against any person who is alleged to be in violation of a CWA effluent limitation or water quality standard. Id at § 1365. The citizen suit provision adds a third leg to CWA's enforcement structure. See David R. Hodas,
limitations and water quality standards as long as they are consistent with federal requirements.\(^{29}\) Furthermore, the CWA, through a provision commonly called the Savings Clause\(^{30}\) explicitly reserves to the states the right to enforce effluent limitations or water quality standards that are more stringent than the national limitations or standards.\(^{31}\)

In states that decline to institute their own program, the EPA administers a federal permit program.\(^{32}\) Although an EPA permit program must satisfy the "same terms, conditions, and requirements" as state permit programs,\(^ {33}\) the EPA has interpreted the CWA broadly, requiring permits that it issues to comply with all "applicable water quality requirements," including the water quality standards of other states affected by the discharge.\(^ {35}\)


After passage of the 1972 Amendments the Court revisited a question it had previously left unanswered: does the CWA preempt traditional federal common law remedies that govern interstate water pollution disputes?\(^ {36}\) In *Milwaukee v Illinois*,\(^ {37}\) the Court answered in the affirmative, explaining that Congress fully

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\(^{29}\) 33 USC § 1342(b).

\(^{30}\) 33 USC § 1370.

\(^{31}\) The Savings Clause provides in relevant part:

Except as expressly provided in this [Act], nothing in this [Act] shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution [with exceptions]; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

\(^{32}\) 33 USC § 1342(a).

\(^{33}\) 33 USC § 1342(a)(3).

\(^{34}\) 33 USC § 1341(b).

\(^{35}\) *Arkansas*, 503 US at 103.

\(^{36}\) In 1972, just months before the passage of the 1972 Amendments, the Court held in *Illinois v Milwaukee*, 406 US 91 (1972), that federal common law continued to govern interstate water pollution disputes. Id at 107. Justice Douglas warned, however, that pending federal legislation will likely preclude such federal common law remedies in the future. Id.

“occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency,” leaving no room for courts to formulate federal standards through the use of common law principles.38

On its face, Milwaukee displaced only federal common law and did not address the issue of whether the CWA also preempts state law. Indeed, the Court took pains to point out that the standard for the preemption of state law was higher than that for the preemption of federal common law, and the holding addressed only the former.39 Nevertheless, the Milwaukee Court suggests in dicta that the CWA may satisfy the higher threshold for the preemption of state law as well. The Court made much of the “comprehensive” nature of the CWA40 and stated that a state can seek relief from interstate water pollution only following the procedural safeguards afforded by the permit process.41

The Court in International Paper Co. v Ouellette42 explicitly confirmed the intuition of the Milwaukee Court that the CWA preempted state law. In International Paper, a citizen’s group comprised of homeowners on the Vermont shores of Lake Champlain brought a state nuisance action against the International

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38 Id at 316-17.
39 Id. A federal statute preempts state law if: 1) Congress defines explicitly the extent to which its enactments preempt state law; 2) federal law regulates conduct in a field that Congress intended the federal government to occupy exclusively; or 3) state law conflicts with federal law and “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” English v General Electric Co., 496 US 72, 78-79 (1990).

In assessing whether a federal statute preempts state law the courts begin with the assumption that the “historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” Milwaukee, 451 US at 316-17, quoting Jones v Rath Ranching Co., 430 US 519, 525 (1977), quoting Rice v Santa Fe Elevator Corp., 331 US 218, 230 (1947). When, on the other hand, the question is whether federal common law is preempted, the initial presumption is that “it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law.” Id at 317.
41 Id at 326. “The statutory scheme established by Congress provides a forum for the pursuit of [interstate water pollution] claims before expert agencies by means of the permit-granting process.” Id. Procedural safeguards include notification by permit-granting authority of states affected by the permit and opportunity for the affected states to participate in a public hearing. 33 USC § 1342(b)(3).
Paper Company ("IP"). IP operated a plant on the New York shores of Lake Champlain and the group claimed that the discharge of effluents from the plant into the lake constituted a continuing nuisance under Vermont law. Relying on the Savings Clause, the plaintiffs argued that the CWA, far from preempting the applicability of state law remedies, explicitly preserved them. Therefore, they reasoned, the discharge of pollutants in one state that injured parties in another state should be actionable under the laws of the affected state.

The Court disagreed and held that the CWA preempted the application of the affected state's law in the interstate context. The Court, echoing the language of Milwaukee, found the CWA "sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." In other words, the comprehensiveness of the CWA met the standard for preemption of state law.

II. Arkansas v Oklahoma Limits the Implication of Past Interstate Water Pollution Cases

Arkansas v Oklahoma is the third interstate water pollution dispute to come before the Supreme Court since the passage of the CWA. The Court held that despite Milwaukee v Illinois and International Paper Co. v Ouellette, the CWA did not prohibit the EPA from conditioning a discharge permit for a facility in one state on compliance with the state water quality standard of a downstream state. The Court also held that the EPA's interpretation of a state's water quality standard ought to receive deference from reviewing courts.

Arkansas significantly limits the implication of past interstate water pollution decisions. Although the preemption doctrine in Milwaukee and International Paper could have easily resolved the dispute in Arkansas, the Court chose not to expand the doc-

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43 479 US at 484.
44 Id at 483-84.
45 Id at 485.
46 Id.
49 Id at 494-97. See note 37.
50 503 US 91 (1992)
51 Id at 106-07.
52 Id at 110.
trine to cover instances where one state's water quality standard conflicted with that of another state.

A. Arkansas v Oklahoma

In 1985, the city of Fayetteville, Arkansas sought an NPDES permit for the city's new sewage treatment plant. In the absence of a state NPDES program, the EPA was the permit-issuing agency in Arkansas. The EPA granted the Fayetteville facility a permit authorizing it to discharge its effluents into a tributary of the Illinois River that flowed out of Arkansas into Oklahoma.

Oklahoma objected to the permit on grounds that the discharges would violate Oklahoma's water quality standard adopted pursuant to the CWA. In pertinent part, Oklahoma's water quality standard provided that "no degradation [of water quality] shall be allowed" in the upper Illinois River, including the portion of the river immediately downstream from the state line. In an administrative proceeding, the EPA's Chief Judicial Officer ruled that the CWA "requires an NPDES permit to impose any effluent limitations necessary to comply with applicable state water quality standards," including the water quality standards of a downstream state such as Oklahoma. However, the judge held that the Fayetteville permit should be upheld if evidence shows no "actual detectable violation" of Oklahoma's standards. The phrase "no degradation" was interpreted to mean "no detectable violation." Finding no detectable violation of the Oklahoma standard on the evidence, the judge upheld the Fayetteville permit.

On appeal, the Tenth Circuit overturned the Agency's ruling, relying upon a novel theory not advanced by any party to the case. Finding that the portion of the Illinois River subject to the Oklahoma "no degradation" standard was already in violation

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53 Id at 95.
54 503 US at 95.
55 Id.
56 Id.
58 Id at 96-97, quoting Opinion of EPA Chief Judicial Officer, reprinted in App to Pet for Cert in No 90-1262 at 116a-117a.
59 Id at 97.
60 Id.
61 EPA v Oklahoma, 908 F2d 595 (10th Cir 1990). See Arkansas, 503 US at 98 (describing the Tenth Circuit's decision as important and novel).
of the standard, the court ruled that a permit allowing any additional discharge into such a degraded river constituted a per se violation of the Oklahoma water quality standard.62

The Supreme Court reversed the decision of the Tenth Circuit.63 The Court indicated that it could have overturned the decision on the grounds that neither the text of the CWA nor the text of the Oklahoma standard supported the appellate court’s interpretation of the term “no degradation.”64 Nevertheless, the Court chose to reject the Tenth Circuit’s holding “for a more fundamental reason—namely, that the Court of Appeals exceeded the legitimate scope of judicial review of an agency adjudication.”65

The Court held that the EPA’s decision to allow the Fayetteville permit only on the condition that there be no “detectable violation” of the Oklahoma standard was a legitimate exercise of agency power requiring deference by the reviewing court. The Court found that EPA regulations, consistent with the general principles of the CWA, required all EPA-issued permits to comply with the applicable water quality standards of affected states.66 In doing so, the EPA regulation effectively “incorporate[d] into federal law those state-law standards the Agency reasonably determine[d] to be ‘applicable.”67 Once incorporated, the state standards became part of the federal law of water pollution control and, in accordance with Chevron, U.S.A., Inc. v National Resources Defense Council,68 the “EPA’s reasonable, consistently held interpretation of those standards [was] entitled to substantial deference.”69 Consequently, because the EPA’s interpretation of the Oklahoma standard was wholly reasonable and consistent with the statute,70 the Court concluded that neither the Tenth Circuit nor the state of Oklahoma could substitute

62 503 US at 98.
63 Id.
64 Id at 109 (“[T]he Court of Appeals read [Oklahoma’s] standards as containing the same categorical ban on new discharges that the court had found in the [CWA] itself... [W]e do not believe the text of the Oklahoma standards supports the court’s reading... ”).
66 Id.
65 503 US at 104-05 (referring to 40 CFR § 122.4(d) (1991), an EPA regulation that requires NPDES permits to comply “with all applicable water quality requirements of all affected states.”).
67 Id at 110.
69 503 US at 110.
70 Id at 111.
their own interpretations of the standard, thus making the Fayetteville permit valid.\textsuperscript{71}

B. Arkansas v Oklahoma Narrows the Scope of the Preemption Analysis of Past Interstate Water Pollution Decisions

\textit{International Paper} appears to hold that the CWA prohibits the application of all state laws in the interstate water pollution context.\textsuperscript{72} The CWA fully occupies the field of interstate water pollution, imposing a carefully constructed balance of power between the source state, the down-stream state, and the EPA.\textsuperscript{73} The application of one state's law to discharges occurring in another state would disrupt the balance, and, therefore, should be preempted.\textsuperscript{74}

Arkansas, however, narrows significantly the scope of the preemption doctrine announced in \textit{International Paper}. The Arkansas Court found the past preemption analysis inapplicable to interstate water disputes arising out of the issuance of an NPDES permit.\textsuperscript{75} Specifically, the preemption doctrine does not prohibit the EPA from conditioning a permit issued in one state on compliance with the water quality standards of a downstream state.\textsuperscript{76} The Court justified this departure on the facts of the case. According to the Court, \textit{International Paper} is inapplicable because it deals with a state-issued permit whereas Arkansas involves an EPA-issued permit.\textsuperscript{77} The distinction is significant because the EPA, by its own regulations, requires compliance with water quality standards of affected states in all EPA-issued permits.\textsuperscript{78} The preemption doctrine is inappropriate because federal law itself, in the form of an agency regulation, incorporates the state standards into the body of federal water pollution law and makes them applicable in the interstate context.\textsuperscript{79}

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\textsuperscript{71} Id at 112.
\textsuperscript{72} Indeed, the state of Arkansas argued before the Court that \textit{International Paper} had fully resolved any questions about the status of a state water quality standard in the context of an interstate water pollution dispute. \textit{Brief of Petitioners}, 1991 WL 521577, *17, \textit{Arkansas}, 503 US 91 ("Arkansas Brief").
\textsuperscript{73} Id at *17.
\textsuperscript{74} Id at *19.
\textsuperscript{75} 503 US at 101.
\textsuperscript{76} Id at 103.
\textsuperscript{77} Id at 103.
\textsuperscript{78} Id at 103. See note 64 and accompanying text.
\textsuperscript{79} 503 US at 110. Thus, the Court also rejected a necessary corollary to Arkansas's argument: the EPA was prohibited from applying the water quality standards of one state
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However, the Court’s concern with the relevant facts does not fully explain its departure from the preemption analysis of *International Paper*. The EPA offered a “fully sufficient alternative basis” for overturning the Tenth Circuit on traditional preemption grounds, a basis the Court chose to ignore. The EPA acknowledged that its own regulations required all permits to comply with the water quality standards of affected states. Nevertheless, it argued that it did not base its decision to grant the Fayetteville permit upon an interpretation of the Oklahoma standard. Rather, the EPA’s decision to allow the Fayetteville discharge absent a “detectable violation” of the Oklahoma standard was a threshold determination of whether, as a matter of federal law, an issue of compliance existed in the first place. The CWA provides that a permitting agency “shall condition such license or permit in such a manner as may be necessary to insure compliance with applicable water quality requirements.” The ruling that the violation of a state standard must first be “detectable” was not an interpretation of the Oklahoma standard, but rather an “intensely practical” determination that Oklahoma’s standard was not “applicable” for purposes of the CWA until the violation was detectable. This threshold requirement was legitimate, even though it contradicted the plain meaning of the Oklahoma standard, because federal law preempts all supplementary state law.

The Court did not address the EPA’s argument despite the fact that it offered a resolution consistent with prior interstate water pollution cases. By overlooking the EPA’s argument, the

to a permit issued in another state. *Arkansas Brief*, 1991 WL 521577 at *11 (cited in note 72). Reserving the question of whether or not the CWA itself mandated compliance with the water quality standards of an affected state, the Court found the EPA initiative to account for such standards to be a permissible exercise of its authority. *Arkansas*, 503 US at 105.

Thus, *Arkansas* leaves open two further questions: First, if it is reasonable for EPA to require compliance with the water quality standards of affected states, is it reasonable for the EPA to ignore the standards in issuing a permit in an upstream state? Second, as *Arkansas* seems to suggest, does the preemption analysis of *International Paper* continue to govern state-issued permits in the context of an interstate water pollution dispute? 

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81 Id at *17-18.
82 Id at *18, *39 n 21.
83 33 USC § 1341(a)(2).
86 See *Arkansas*, 503 US at 110. The Court at first appeared to address this argument when it stated that the EPA regulation “effectively incorporates into federal law those state-law standards the Agency reasonably determines to be ‘applicable.’” Id. How-
Arkansas decision signals a concern with the traditional preemption doctrine that may be more fundamental than the narrow concern for factual distinctions. Arguably, the Court may be searching for an alternative to the traditional preemption analysis applied to interstate water pollution disputes.

III. PAST PREEMPTION DECISIONS AND ARKANSAS V OKLAHOMA'S HOLDING UNDER CHEVRON DO NOT HAVE THE SAME EFFECT

Chevron, U.S.A., Inc. v National Resources Defense Council\(^8\) holds that courts must give deference to an agency's reasonable interpretation of an ambiguous statute that the agency implements.\(^9\) Contrary to the conclusion of many commentators, the Supreme Court in Arkansas v Oklahoma intended the Chevron doctrine to govern only the relationship between the courts and the EPA in interstate water disputes. The ruling was not intended to subordinate the states to the EPA in the same way as the preemption analysis of past water pollution decisions did.

A. The Chevron Doctrine

Chevron involved a controversy over an EPA regulation that defined an ambiguous term in the Clean Air Act.\(^9\) The issue before the Court was whether and to what extent a reviewing court had to defer to an agency interpretation of a statute which Congress had authorized the agency to implement.\(^9\)

The Chevron Court articulated a two-step process for determining when a court should defer to an agency interpretation.\(^9\)

\(^9\) Id at 843.
\(^9\) Id at 841-42.
\(^9\) Id.
\(^9\) Id at 842-43. The Chevron two-step inquiry appears, on its face, to contradict the explicit provisions of the Administrative Procedure Act ("APA"), which states: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions . . . ." 5 USC §706 (1994). While the exact nature of the relationship between Chevron and the APA was
First, a reviewing court must determine whether Congress explicitly authorizes or forecloses the agency's interpretation. If Congress's intent is clear, either in the statutory language, structure, or history, the reviewing court must follow Congress's intent. If, on the other hand, the statute is ambiguous, the only appropriate inquiry for the reviewing court is whether the agency's interpretation is "based on a permissible construction of the statute." At this point, the reviewing court may only examine whether the agency interpretation is reasonable.

The *Chevron* holding is deceptively simple. One author has summarized it well: "Courts must defer to agency interpretations if and when Congress has told them to do so," and when the statute is ambiguous, the presumption is that Congress intended to delegate interpretive authority to the agency. The principle, however, is question-begging. *Chevron* provides little guidance as to which ambiguities are relevant, how much ambiguity is necessary to trigger judicial deference, and how broad the agency's interpretive powers are once the court determines that Congress delegated such powers. In order to make sense of *Chevron*, one needs an underlying rationale or theory of deference.

In the aftermath of *Chevron*, commentators generally discern three distinct theories of deference. The first is a theory based on an assessment of comparative institutional advantage. This view characterizes *Chevron* as reflecting a belief that resolutions of statutory ambiguity often require an inquiry into questions of policy. Questions of policy, however, are best addressed by agencies, because of their flexibility, expertise, and political ac-

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not made explicit by the Court, it is certainly clear that the APA does not foreclose the possibility of substantive statutes displacing the APA and granting law-interpreting power to the agency. See Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum L Rev 2071, 2086 (1990).

92 467 US at 842.
93 Id at 842-43.
94 Id at 843.
95 Id.
96 See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L J 969, 980 (1992) ("Judicial understanding that informs the deference question is probably more confused today than it has ever been.").
97 Sunstein, 90 Colum L Rev at 2084, 2086-88 (cited in note 91).
100 See, for example, Sunstein, 90 Colum L Rev at 2086 (cited in note 91).
101 Id.
countability. Thus, under the comparative advantage rationale, *Chevron* deference is proper only in instances where the resolution of an ambiguity requires expert and deliberative policymaking. The second rationale relies on the separation of powers principle: *Chevron* is a means of assuring that the courts serve primarily as a check against the abuse of agency power. Like the notion of comparative institutional advantage, the separation of powers rationale also begins with the premise that the resolution of ambiguities in statutory law often involves policy questions. Here, however, deference to agency interpretation is proper, not because an agency is better suited to making policy decisions, but because the principle of separation of powers demands that courts not interfere with the policymaking powers of a coordinate branch of the government. Reviewing courts may legitimately interfere with an agency decision only when compelling evidence of error or arbitrariness is present.

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102 Id at 2087, 2096-97. The notion that *Chevron* promotes expert policy making with democratic accountability also finds resonance in the separation of powers rationale advocated by Kenneth Starr and others. See notes 102-05 and accompanying text.

103 *Chevron* recognizes this theory: "[T]he [EPA's] interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." 467 US at 865 (footnotes omitted). See also *Massachusetts v Morash*, 490 US 107, 116 (1989) (deference given to an agency interpretation of technical terms). On the other hand, courts should not defer to agency interpretation when the comparative institutional advantage of agencies over courts is not so apparent. See, for example, *Bowen v Georgetown University Hospital*, 488 US 204, 212 (1988) ("We have never applied *Chevron* to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice."); *Securities Industries Assn v Board of Governors of the Federal Reserve System*, 468 US 137, 143 (1984) ("Post hoc rationalizations by counsel for agency action are entitled to little deference."); *United States v Western Electric Co.*, 900 F2d 283, 297 (DC Cir 1990) (applying lesser standard of deference to interpretation of Justice Department in civil or criminal case); *Kelley v EPA*, 15 F3d 1100, 1108 (DC Cir 1994) ("Where Congress . . . gives the agency authority only to bring the question to a federal court as the 'prosecutor,' deference to the agency's interpretation is inappropriate.").

104 See, for example, Starr, 3 Yale J Reg at 300-01 (cited in note 99) (". . . *Chevron* strongly suggests that courts should see themselves not as supervisors of agencies, but more as a check or bulwark against abuses of agency power.").

105 Id at 294-95 (". . . a statute often represents a compromise or accommodation between two or more conflicting policies.").

106 Id at 307-12.

107 *Independent Bankers Assn v Marine Midland Bank*, 757 F2d 453, 461 (2d Cir 1985). See also *Texas v United States*, 756 F2d 419, 421 (5th Cir 1985) (agency interpretation deserved deference even where the interpretation of the court was perhaps more in line with legislative intent); *Missouri Public Service Commission v ICC*, 763 F2d 1014, 1017 (8th Cir 1985) (only inquiry for the court is whether agency interpretation was sufficiently reasonable); *Sudomir v McMahon*, 767 F2d 1456, 1459 (9th Cir 1985) (reason-
The third theory views *Chevron* as a bright-line default rule of statutory interpretation.\(^\text{108}\) Under this rationale, courts presume that any statutory ambiguity indicates congressional intent to leave the matter to the implementing agency. The courts' presumption creates a clear rule against which Congress can legislate.\(^\text{109}\) Congress is on notice that courts will interpret ambiguity as a delegation of interpretive powers to relevant agencies. This rationale justifies a very broad reading of *Chevron*, making irrelevant any concerns about which branch should resolve which ambiguities.\(^\text{110}\) The only necessary criterion for triggering judicial deference is the identification of a clear ambiguity in the statute.\(^\text{111}\)

B. *Arkansas v Oklahoma*'s *Chevron* Holding Governs Only the Relationship between the EPA and the Courts, Not the Relationship between the EPA and the States

*Chevron* explicitly governs only the relationship between federal agencies and the courts.\(^\text{112}\) The rationales that underlie the doctrine explain when and why interpretive actions of federal agencies deserve deference from reviewing courts. They do not implicate the division of power between states and federal agen-

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\(^{109}\) Justice Scalia has written:

> In the vast majority of cases I expect that Congress neither (1) intended a single result, nor (2) meant to confer discretion upon the agency, but rather (3) didn't think about the matter at all. If I am correct in that, then any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate. If that is the principal function to be served, Chevron is unquestionably better than what preceded it. Congress now knows that the ambiguities it creates . . . will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known. The legislative process becomes less of a sporting event when those supporting and opposing a particular disposition do not have to gamble upon whether . . . the ultimate answer will be provided by the courts or rather by [an agency].

Id.\(^\text{110}\)

\(^{110}\) Id at 517-21.

\(^{111}\) Thus, Scalia dispenses with considering both whether an agency interpretation is a consistent and longstanding one, Id at 517, and the manner and context in which the agency arrived at its interpretation. Id at 519.

\(^{112}\) *Chevron* settled the specific conflict between the belief that only the courts “declared what the law is” and the need for flexible, rulemaking bodies to administer the increasingly complex and unspecifiable regulations of the modern legislative era. See Sunstein, 90 Colum L Rev at 2078-85 (cited in note 89).
cies in interpreting state laws subject to agency approval. Some commentators, however, suggest that Arkansas’s Chevron holding has implications for the EPA-state relationship as well.⁵¹³ Many assume that if the reviewing court must grant deference to an EPA interpretation of a state water quality standard, then the state that promulgated the standard must also defer to the EPA interpretation.⁵¹⁴

Arkansas’s Chevron analysis, however, does not address the relative authority of the EPA and states in interpreting the state water quality standards. The commentators assume that the Arkansas Court faced the following two questions: (1) Who, between the court and the EPA, has the primary responsibility to interpret the state standards; and (2) who, between the EPA and the state, has the primary responsibility for interpreting the state standards?⁵¹⁵ The Arkansas Court, however, never faced the second question because the state of Oklahoma did not disagree with the EPA’s interpretation of its water quality standards.⁵¹⁶ Because the Court did not face a conflict between the EPA and a state, Arkansas’s Chevron holding cannot be understood to resolve the issue of the EPA-state relationship in interpreting the state water quality standards.

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⁵¹³ See, for example, Note, The Ever-Changing Balance of Power in Interstate Water Pollution: Do Affected States Have Anything to Say after Arkansas v. Oklahoma?, 50 Wash & Lee L Rev 1341, 1343 (1993) (Arkansas’s holding that the lower court must defer to EPA’s interpretation is read to mean that the EPA was granted power to “interpret a state’s water quality standards even though such interpretation is inconsistent with the state’s own determination.”).

⁵¹⁴ See, for example, Note, The Impact of Arkansas v. Oklahoma on the NPDES Process under the Clean Water Act, 23 Envir L 273, 291 (1993) (concluding that Arkansas subordinates affected downstream states to the EPA); Note, Arkansas v. Oklahoma: Downstream States Left Without a Paddle, 9 J Nat Resources & Envir L 189 (1994) (“The importance of [Arkansas] lies in the Supreme Court’s determination of the hierarchy of the various states and federal interests involved in water quality disputes”); Comment, The States Square Off in Arkansas v. Oklahoma—and the Winner Is . . . the EPA, 70 Denv U L 557, 565 (1993) (Arkansas suggests that the EPA is free to ignore, in its incorporation of a state standard, any underlying concerns that the state had in implementing the standards in the first place); Note, 50 Wash & Lee L Rev at 1343 (cited in note 111) (Arkansas granted the EPA power to interpret a state’s water quality standards even though such an interpretation is inconsistent with the state’s own determination, thus leaving the affected state with little, if any, say in the interstate water pollution conflict.).

⁵¹⁵ See note 114.

⁵¹⁶ Arkansas, 503 US at 109. Oklahoma and the EPA only disputed the factual issue of whether or not the Fayetteville facility will affect a “detectable violation” of the standard. Disagreement over a factual determination is not governed by Chevron but rather by the Administrative Procedure Act. 5 USC § 551 et seq (1994). Oklahoma did, however, adopt the Tenth Circuit’s interpretation for purposes of arguing before the Supreme Court. Brief of Respondents, 1991 WL 521581, *16, Arkansas, 503 US 91.
Furthermore, if the Court intended the *Chevron* rationale to address the EPA-state relationship, then *Arkansas* would represent an unprecedented expansion of the *Chevron* doctrine. Although expansions and retreats in the Court's understanding of the *Chevron* doctrine are not unusual, *Arkansas* presents an unlikely candidate for an important *Chevron* decision. The quiet unanimity of the opinion supports the belief that *Arkansas*’s *Chevron* holding is nothing more than a routine decision about the relationship between the court and a federal agency.

IV. *Arkansas v Oklahoma* Restores Cooperative Federalism Intended by the Clean Water Act

The Clean Water Act promotes cooperative federalism. Under the CWA, states and the federal government work together as partners in implementing and enforcing water quality standards. The preemption analysis of past water pollution decisions threatened to effectively deny partnership status to the states. *Arkansas v Oklahoma*, however, offers the EPA and states an opportunity to restore the proper balance of power between them.

A. The Clean Water Act Is a Model of Cooperative Federalism

Congress intended the CWA to be a model of cooperative federalism. Cooperative federalism is intended to preserve state autonomy and responsibility, while providing a level of uniformity through nationally mandated minimum standards. Studies indicate that the accommodation of some measure of state autonomy with federal supervision results in better...
environmental policies and better enforcement of those policies.\textsuperscript{122}

Typically, a statute based on the model of cooperative federalism authorizes federal agencies to set minimum national standards and makes states responsible for implementing those standards.\textsuperscript{123} A federal agency maintains supervisory authority, but states have the primary responsibility to administer and enforce the statute within their borders.\textsuperscript{124} Furthermore, states typically have the authority to implement more stringent standards than the national standards.\textsuperscript{125} The ability to set more stringent standards, coupled with the ability to take part in the actual administration of the program, provide important freedom for states to tailor general environmental policies to their specific circumstances, needs, and goals.\textsuperscript{126}

Within the CWA, the elements of cooperative federalism are easy to identify.\textsuperscript{127} The key to the cooperative federalism structure of the CWA is the Savings Clause.\textsuperscript{128} The Savings Clause guarantees states the authority to set their own water quality standards as long as they do not fall below the minimum standards set by the EPA.\textsuperscript{129} Consistent with the cooperative federalism goals of the CWA, the Savings Clause allows states to tailor water quality standards to fit their particular circumstances and long-term goals, thereby providing a greater incentive to cooperate and participate in the administration of the CWA.\textsuperscript{130}

\textsuperscript{122}See Percival, 54 Md L Rev at 1174-75 (cited in note 120) (cooperative federalism models successfully take advantage of the expertise, information, and political support of state officials necessary to make environmental policies work). See also Dwyer, 54 Md L Rev at 1224 (cited in note 121) (the autonomy afforded to states by cooperative federalism also fosters greater enthusiasm and willingness to experiment with new policies).

\textsuperscript{123}Aside from the CWA, the Clean Air Act, 42 USC § 7401 et seq (1994), and the Safe Drinking Water Act, 42 USC § 300f et seq (1994), are also premised on the cooperative federalism model. See Percival, 54 Md L Rev at 1174 (cited in note 120).

\textsuperscript{124}Percival, 54 Md L Rev at 1175 (cited in note 120).

\textsuperscript{125}Id.

\textsuperscript{126}Id.

\textsuperscript{127}See discussion in Part I.A about the structure of the CWA.

\textsuperscript{128}33 USC § 1370. See Part IV.A.

\textsuperscript{129}Id. See also Illinois v Milwaukee, 731 F2d 403, 413 (7th Cir 1984) (holding that Savings Clause expressly preserves a State's right to adopt and enforce rules that are more stringent than federal standards).

\textsuperscript{130}See note 122.
B. The Traditional Preemption Analysis Jeopardizes the Cooperative Federalism of the Clean Water Act

The traditional preemption analysis, relied upon in Milwaukee v Illinois131 and International Paper Co. v Ouellette,132 jeopardizes the cooperative federalism of the CWA. Specifically, the preemption analysis threatens to unnecessarily constrain the scope of the Savings Clause. Milwaukee suggests, and International Paper confirms, that the Savings Clause authorizes a state to impose more stringent limitations only on pollution originating within the state.133 In interstate water pollution disputes, the CWA preempts all state laws, including state water quality standards.134

For many states that share waterways with other states, preempting the Savings Clause for purposes of interstate water pollution disputes renders their water quality laws ineffective. The state of Oklahoma may choose to set higher standards for waters within its borders, but without any means of controlling the discharges flowing from states with lower standards, it cannot maintain its desired standard of water quality.135 Other provisions of the CWA provide some safeguards for states desiring to maintain a higher level of water quality. Before the EPA or an approved state issues a permit, both must notify all affected states and grant them an opportunity to voice their objections in an administrative hearing.136 If the EPA or the permit-issuing

133 Milwaukee, 451 US at 328 ("... States may adopt more stringent limitations through state administrative processes ... and apply them to in-state dischargers."); International Paper, 479 US at 493 ([The Savings Clause] arguably limits the effect of the clause to discharges flowing directly into a State's own waters, i.e. discharges from within the State. The savings clause, then, does not preclude pre-emption of the law of an affected State.").
134 International Paper, 479 US at 494 ("Because we do not believe Congress intended to undermine this carefully drawn statute through a general savings clause, we conclude that the CWA precludes a court from applying the law of an affected State against an out-of-state source." (citations omitted)).
135 An upstream state may argue that downstream states such as Oklahoma, in setting its water quality standards, should account for the possibility of discharges from states with lower standards and adjust their standards accordingly. The argument, however, would require setting greater limitations on discharges from within the state than would be necessary for the same water quality level if Oklahoma did not take into account the out-of-state discharges. The higher standard would likely cause greater burdens on industry and business than Oklahoma felt was appropriate when it first formulated its policy. Thus, the state would have to forego its desired level of water quality.
136 33 USC §§ 1341(a)(2), 1342(b)(3).
state rejects the recommendations of the affected state, both
must inform the affected states of the reasons for denial.\textsuperscript{137} However, as the \textit{International Paper} Court made clear, the affected
states “occupy a subordinate position” in the federal regulatory
program.\textsuperscript{138} Procedural safeguards do not guarantee that the
permit-issuing authority will consider the higher water quality
standards of an affected state.\textsuperscript{139} Under the preemption frame-
work of \textit{International Paper}, the vitality of the Savings Clause
and, consequently, the principle of cooperative federalism upon
which the CWA was modeled, depend upon the willingness of
upstream states to give sufficient weight to downstream con-
cerns.

C. \textit{Arkansas v Oklahoma}'s Rejection of the Traditional
Preemption Analysis and Adoption of the \textit{Chevron} Framework
Promotes Cooperative Federalism

The \textit{Arkansas v Oklahoma} decision holds hope for the resto-
ration of cooperative federalism under the CWA. While affirming
the primacy of federal law and the federal agency in the context
of interstate water pollution disputes,\textsuperscript{140} \textit{Arkansas} does not at
the same time jeopardize CWA's structure of cooperative federal-
ism. The decision allows the EPA and the states to strike the
proper balance between the federal interest in minimizing in-
terstate conflict and the states' interest in maintaining a desired
level of water quality by encouraging cooperation between the
states and the EPA.

\textit{Arkansas} promotes cooperative federalism of the CWA by
avoiding the debilitating implications of \textit{Milwaukee} and \textit{International Paper} for the Savings Clause. By limiting the scope of the
preemption analysis and rendering it inapplicable to the imple-
mentation of state water quality standards,\textsuperscript{141} \textit{Arkansas} pro-
vides a means by which downstream water quality standards can
be enforced against upstream states. \textit{Arkansas} thus gives effect
to the Savings Clause guarantee that states will be free to imple-
ment and enforce higher water quality standards.

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{137}] 33 USC § 1342(b)(5).
\item[\textsuperscript{138}] 479 US at 491.
\item[\textsuperscript{139}] Furthermore, the CWA does not guarantee that an affected state will even be
granted a hearing. See \textit{Costle v Pacific Legal Foundation}, 445 US 198, 220 (1980) (uphold-
ing EPA regulation that limited public hearings for extending NPDES permits).
\item[\textsuperscript{140}] 503 US at 110.
\item[\textsuperscript{141}] Id at 107.
\end{enumerate}
\end{footnotesize}
Furthermore, Arkansas's Chevron holding facilitates a unique dynamic between the states and the EPA by giving greater incentives to both parties to cooperate and share regulatory power. Under Arkansas and Chevron, the EPA retains final authority for interpreting and applying state water quality standards in the interstate context. The EPA's authority will assure that the resolution of interstate water pollution conflicts will be consistent with the overall dictates of the CWA.

However, judicial deference to the EPA's interpretation is conditioned on the interpretation being "permissible." The Arkansas Court did not have the opportunity to address the issue of what sort of interpretation by the EPA of a state water quality standard would satisfy the "permissible" standard. Prior to Arkansas, a decision in the Sixth Circuit addressed a similar question in the context of the Clean Air Act ("CAA"). The CAA, like the CWA, authorizes states to enact individual State Implementation Plans ("SIPs") for the enforcement of national standards as long as they meet federal guidelines. Like the state water quality standards, the EPA interpretation of the SIPs also require deference from the reviewing court. To warrant deference, however, the interpretation must be consistent with the language, intent and understanding of the state SIP drafters. Thus, caselaw suggests that the EPA's discretion is limited when interpreting state regulations. Specifically, the agency must be as faithful as possible to a state's original understanding when applying the standard in the interstate context.

Knowing that it will be bound, more or less, to the original understanding of the state standard, the EPA has a powerful incentive to clarify, at the approval stage, the meaning of a state's standard. Forced to look toward long-term regional im-

142 Id at 110.
144 In assessing whether an interpretation of a state standard by the EPA is reasonable, courts must inquire as to whether the language, structure, and legislative history of the state standard matter, and whether prior interpretations by state officials also matter. The Arkansas Court did not examine the issue fully because the state of Oklahoma did not challenge the interpretation of its water quality standard when the Arkansas permit was issued. 503 US at 109.
145 Navistar International Transportation Corp. v EPA, 858 F2d 282 (6th Cir 1988).
146 Id at 284.
147 Id at 286.
148 Id at 287-88.
149 "More or less," because the interpretation and application of a state standard in the interstate context must also comply with the general dictates of the CWA. See Arkansas, 503 US at 111.
150 The EPA must approve a state water quality standard before the state may imple-
plications, the EPA will find it advantageous to negotiate with states to achieve water quality standards that avoid undue impact on other states.

The states, likewise, will likely cooperate and seek agreement on the meaning of their water quality standards. First, states will wish to avoid the issuance of standards by the EPA in the event of an impasse between themselves and the regulators. Second, because a definitive interpretation of a statute insures predictability and consistency in future interpretations and applications by the EPA, states will realize that they stand to benefit from cooperating with the EPA. Thus, the dynamic that Arkansas's *Chevron* holding sets into motion promotes collaboration between the state and the EPA with a view toward the long-term accord, resulting in a fairer and more rational water pollution policy.

**CONCLUSION**

*Arkansas*'s narrowing of the scope of previous preemption decisions, together with its *Chevron* holding, restores the proper balance between federal and state interests under the Clean Water Act. On the one hand, the Savings Clause and, consequently, the ability of states to control the quality of their own waters, is strengthened through the ability of the EPA to enforce individual water quality standards in the interstate context. On the other hand, the EPA maintains the final authority to enforce such water quality standards in accordance with the overall purpose and structure of the CWA.

More importantly, *Arkansas* gives states and the EPA incentives to come to a shared understanding of the meaning and implementation of the standard in both intrastate and interstate contexts. The scheme will facilitate the formation of a rational regional policy that takes into consideration individual state concerns as well as regional concerns, minimizing subsequent conflicts. *Arkansas*, in breaking from the long tradition of minimizing state authority in this area, represents a renewed commitment by the Court to take the notion of state sovereignty serious-
ly and marks the ascendancy of cooperative federalism as a doctrinally viable alternative to the modern regulatory state.