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# A Syncopated *Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes

Mark Seidenfeld\*

*Although traditionally courts have had primary and ultimate authority for interpreting statutes, the Supreme Court established a two-step review process that is much more deferential to a government agency's interpretation. Under the "Chevron two-step," a court determines whether the statute is silent or ambiguous with respect to the issue decided by the agency; if so, the court defers to the agency's interpretation unless it is unreasonable. The first step, which looks to whether the statute is silent or ambiguous, proves determinative in most cases; courts infrequently conclude at step two that agencies' interpretations are unreasonable.*

*Professor Seidenfeld argues that the current application of Chevron fails to accord with public policy. He contends that the pluralistic democracy model, which implicitly undergirds Chevron, is flawed, and he offers deliberative democracy as a more satisfactory conception of bureaucratic government. Professor Seidenfeld asserts that deliberative democracy suggests a modification of Chevron which would place the emphasis on the second rather than the first Chevron step, thereby forcing agencies to explain why their interpretations are good policy in light of the purposes and concerns underlying the statutory scheme. Thus, Professor Seidenfeld advocates a "syncopated Chevron" as an improved approach to reviewing agencies' interpretations of the statutes they administer.*

A decade has now passed since the Supreme Court decided *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>1</sup> *Chevron* established a two-step approach for judicial review of agencies' interpretations of statutes they administer: First, the reviewing court determines whether the statute is silent or ambiguous with respect to the precise question decided by the agency.<sup>2</sup> Second, if the court finds that the statute is silent or ambiguous, it defers to the agency interpretation unless that

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1. 467 U.S. 837 (1984).

2. *Id.* at 842.

interpretation is wholly unreasonable.<sup>3</sup> The *Chevron* "two-step"<sup>4</sup> has revolutionized judicial review of agency statutory interpretation.<sup>5</sup> In applying *Chevron*, courts have emphasized the step-one inquiry—determining whether a statute has spoken to the precise question.<sup>6</sup> At step two, few courts have applied exacting scrutiny in assessing the reasonableness of an agency interpretation.<sup>7</sup>

Scholars have written a plethora of articles about the significance of *Chevron* for administrative law.<sup>8</sup> Some have addressed the pragmatics of

3. *Id.* at 843-44.

4. Apparently, Judge Kenneth Starr coined the phrase "*Chevron* two-step." See Panel Discussion, *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 360 (1987) (comments of Judge Kenneth Starr) ("Thus was born—or 're-announced,' for those who believe that *Chevron* signaled no change whatsoever in the way we go about our business—the '*Chevron* two-step.'"); see also Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 287-88 (1986) (describing the "Supreme Court's Two-Step Framework").

5. The Supreme Court has applied *Chevron* in about only one-third of the cases in which the Court has addressed agency interpretations of statutes. See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 982 (1992) (reporting an empirical study of Supreme Court cases dealing with deference to administrative interpretations demonstrating that from 1984 to 1990 one-third applied the *Chevron* framework, and from 1987 to 1990 one-half applied the framework). Although this has led some commentators to question whether *Chevron* represents the revolution in administrative law that many have proclaimed, *id.* at 980; see also Gary J. Edles, *Has Steelworkers Burst Chevron's Bubble? Some Practical Implications of Judicial Deference*, 10 REV. LITIG. 695, 700 (1991) (discussing the Court's retreat from *Chevron* deference); Russel L. Weaver, *Some Realism About Chevron*, 58 MO. L. REV. 129, 129-31 (1993) (asserting that "*Chevron*'s importance has been exaggerated"), the lower courts' consistent application probably has a greater day-to-day impact on the administrative operation of the state, see KENNETH C. DAVIS & RICHARD J. PIERCE, JR., 1 ADMINISTRATIVE LAW TREATISE § 3.2, at 110 (3d ed. 1994) ("*Chevron* is one of the most important decisions in the history of administrative law. It has been cited and applied in over 1,000 cases in the last decade."). Hence, I adhere to the view that *Chevron* marked a major change in administrative law. This is supported by empirical data concerning the effect of *Chevron* on outcomes in cases involving lower court review of agency decisions. See Linda R. Cohen & Matthew L. Spitzer, *Solving the Chevron Puzzle*, LAW & CONTEMP. PROBS., Spring 1994, at 65, 105 (noting that *Chevron* signaled to lower courts the Supreme Court's desire to allow greater agency discretion and that data from as recently as 1990 suggests that the Court has not called for an adjustment in the greater level of agency discretion called for by *Chevron*); Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1029-36 (presenting "strong evidence" that, at least initially, *Chevron* increased affirmances, reduced reversals, and reduced substantive law remands of agency interpretations by appellate courts).

6. *E.g.*, *Almero v. INS*, 18 F.3d 757, 763 (9th Cir. 1994); *American Dental Ass'n v. Shalala*, 3 F.3d 445, 446-48 (D.C. Cir. 1993); see Gregory G. Garre, *CERCLA, Natural Resource Damage Assessments, and the D.C. Circuit's Review of Agency Statutory Interpretations Under Chevron*, 58 GEO. WASH. L. REV. 932, 953 (1990) ("*Chevron* step one . . . has become the 'primary battleground' on which challenges to agency statutory interpretations are fought."); Merrill, *supra* note 5, at 990 ("In short, under the two-step *Chevron* framework, everything turns on the theory of judicial interpretation adopted at step one.").

7. See *infra* notes 70-72 and accompanying text; cf. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 406 (1992) (noting that courts rarely determine that an agency's interpretation of legislative history is unreasonable).

8. *E.g.*, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989) (arguing that *Chevron* makes "fundamental alterations . . .

how the *Chevron* doctrine does or should operate: At what level of generality does a court probe when determining whether a statute is ambiguous?<sup>9</sup> What tools of statutory interpretation may the court use in making this determination?<sup>10</sup> How aggressively does *Chevron* allow a reviewing court to question the reasonableness of the agency interpretation if the statute is ambiguous?<sup>11</sup> To which issues of statutory interpretation should courts apply *Chevron*?<sup>12</sup> Others have addressed more theoretical concerns such as the justification for judicial deference to the executive branch's interpretation of statutes—a matter traditionally believed to fall within the

in our constitutional conception of the administrative state"); Merrill, *supra* note 5, at 980-93 (arguing that the Supreme Court has not consistently applied the *Chevron* framework); Panel Discussion, *supra* note 4, at 300-01 (comments of Judge Kenneth Starr) (arguing that "*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"); Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 301-13 (1988) (detailing the dramatic effect of *Chevron* on the courts); Schuck & Elliot, *supra* note 5, at 1029-41 (reporting an empirical study indicating that *Chevron* had a significant effect on the outcomes of appellate court reviews of agency interpretations, although noting that this effect has since weakened).

9. See, e.g., Edles, *supra* note 5, at 711 ("[A]t times, even the staunchest advocates of a strong reading of *Chevron* must go behind the words of a statute to discern congressional purpose."); Panel Discussion, *Developments in Judicial Review with Emphasis on the Concepts of Standing and Deference to the Agency*, 4 ADMIN. L.J. 113, 124-25 (1990) (comments of Judge Stephen Williams) (interpreting *Chevron* as allowing a court to consider legislative history and "congressional assertions of policy values" in deciding whether Congress has addressed the issue in question); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2091-93 (1990) (arguing that the Supreme Court does not allow ambiguity to trigger judicial deference when the agency interpretation conflicts with legislative instructions).

10. See, e.g., Edles, *supra* note 5, at 711; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515, 521; Sunstein, *supra* note 9, at 2105-19 (all discussing the use of traditional interpretation tools after *Chevron*). This inquiry stems from the Supreme Court's opinion in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), in which Justice Stevens explicitly "[e]mploy[ed] traditional tools of statutory construction" to overrule an Attorney General interpretation of a provision of the Immigration and Nationalization Act. *Id.* at 446. Justice Scalia wrote separately to object that the use of traditional tools to determine statutory meaning prior to invoking deference would eviscerate *Chevron*. *Id.* at 453-55 (Scalia, J., concurring).

11. See, e.g., Panel Discussion, *supra* note 9, at 124 (comments of Judge Stephen Williams) (arguing that *Chevron* does not transfer the duty of statutory construction from the courts to the agencies); Sunstein, *supra* note 9, at 2104-05 (arguing that agencies have latitude, not license, when interpreting statutes). For the most thorough judicial exploration of this issue, see *Continental Air Lines, Inc. v. Department of Transp.*, 843 F.2d 1444, 1452 (D.C. Cir. 1988) (concluding that "[r]easonableness" in this context means "... the compatibility of the agency's interpretation with the policy goals ... or objectives of Congress").

12. See, e.g., Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and Courts?*, 7 YALE J. ON REG. 1, 3-5 (1990) (questioning whether and when courts should defer to agency interpretations made in informal formats); Michael Herz, *Deference Running Riot: Separating Interpreting and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 232-33 (1992) (asserting that courts should defer to an agency's interpretation only when the agency decision involves delegated lawmaking rather than interpreting congressional meaning); Sunstein, *supra* note 9, at 2093-2104 (discussing the propriety of *Chevron* deference in various situations, including when the interpretation is not part of a legislative rule format, when it involves law-applying rather than law-declaring, and when it involves issues of agency jurisdiction).

judiciary's unique province.<sup>13</sup> How does *Chevron* accord with our present understandings of separation of powers?<sup>14</sup>

This Article approaches *Chevron* by trying to place the decision within the panoply of political theories that have appeared over the past century to justify the vast discretion granted to administrative agencies.<sup>15</sup> It suggests that *Chevron* represents the judiciary's clearest departure from traditional theories that view the administrative state as a means of implementing the legislature's will. It demonstrates that *Chevron* is best understood from the perspective that sees agencies as an expedient means of reaching a political equilibrium or compromise on controversial regulatory issues—that is, a “pluralistic” view of agency decisionmaking.<sup>16</sup> The

13. See, e.g., Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for Chevron* U.S.A. v. Natural Resources Defense Council, 1991 WIS. L. REV. 1275, 1289 (contending that *Chevron* is justified by the principle of judicial self-restraint); Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481, 486 (1990) (explaining that *Chevron* is justified by the agency's superior political accountability); Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1254 (1989) [hereinafter Pierce, *The Role of the Judiciary*] (claiming that *Chevron* is justified as a means of strengthening congressional oversight of agency decisionmaking); Scalia, *supra* note 10, at 516 (asserting that *Chevron* is justified by implicit congressional intent about who should fill statutory gaps).

14. See, e.g., Farina, *supra* note 8, at 514-16, 525-26 (arguing that *Chevron* undermines the separation of powers in favor of the executive branch); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 182-84 (1994) (arguing that a very deferential application of *Chevron*, such as that used by the Court in *Rust*, results in the President having unchecked lawmaking power); Scalia, *supra* note 10, at 514-16 (disagreeing with a separation of powers justification for *Chevron*); see also Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 983-86 (1988) (discussing, with passing reference to *Chevron*, judicial deference to agency interpretations of statutes); Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 22-31 (1983) (reviewing pre-*Chevron* judicial deference to agency interpretations).

15. For descriptions of these theories—often accompanied by critiques and analyses of their implications—see generally Christopher Edley, Jr., *The Governance Crisis, Legal Theory, and Political Ideology*, 1991 DUKE L.J. 561, 579-95 (discussing the influence of various political theories on administrative law theory); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1277 (1984) (asserting that the administrative bureaucracy is nondemocratic); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1516-41 (1992) (touting civic republicanism as a theoretical justification for agency decisionmaking); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1802-05 (1975) (concluding that the “emerging interest representation” model fails to justify agency power); Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567, 626 (1992) (chastising the neoclassical model's formality and “all-or-nothing” approach with regard to judicial oversight and recommending a return to the traditional model of administrative law).

16. Pluralistic democracy, or the interest group model of politics, traces its lineage to the political theories of Robert Dahl and David Truman. See, e.g., ROBERT A. DAHL, *PLURALISTIC DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT* 23-24 (1967); DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* 512-16 (1951) (both remarking on the influence of unorganized interest groups on the more powerful, organized interest groups). The pluralistic theory I refer to in this Article is a variant that sees interest group politics as a competition for government-provided benefits to satisfy private desires. See ANTHONY DOWNS, *AN ECONOMIC*

Article then relies on critiques of the pluralistic perspective to argue that the *Chevron* doctrine, as presently applied, fails to accord with public policy. Finally, the Article applies a different political model of agency decisionmaking, a model that views agencies as a means of fostering public deliberation about government policy choices, and suggests a pragmatic modification of the *Chevron* two-step. The proposed modification downplays the first beat of the *Chevron* two-step and emphasizes the second beat by requiring reviewing courts to scrutinize more carefully the reasonableness of agencies' statutory interpretation. In other words, this Article advocates a "syncopated *Chevron*."

## I. The Significance of *Chevron*

### A. Review of Agencies' Statutory Interpretations Before *Chevron*

*Chevron* dramatically altered how courts review agency interpretations of statutes. Prior to *Chevron*, reviewing courts maintained that the primary and ultimate authority for interpreting statutes resided in the judiciary.<sup>17</sup> Barring explicit congressional assignment of interpretive responsibility to an administrative agency, the role of the agency implementing a regulatory scheme was not to decide definitively "pure questions of law."<sup>18</sup> This is not to say that courts never deferred to agency interpretations; in many

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THEORY OF DEMOCRACY 36-38 (1957) (positing that voting patterns reflect the voter's expectation of utility); DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 12-17 (1991) (addressing the dichotomy of and dynamics between pluralism and republicanism as they relate to political self-interest); GLEN O. ROBINSON, *AMERICAN BUREAUCRACY: PUBLIC CHOICE AND PUBLIC LAW* 19-20 (1991) (stating that modern interest group theory views social welfare as "simply the product of political competition, compromise, and agreement among various segments of the public"); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877-79 (1975) (asserting that legislation is driven by private interest groups who outbid competing interest groups).

17. See Callahan, *supra* note 13, at 1281 (stating that prior to *Chevron*, courts deferred to an agency's interpretation of a statute only if they decided that the particular case warranted deference); Russell L. Weaver, *Chevron: Martin, Anthony, and Format Requirements*, 40 KAN. L. REV. 587, 587-88 (1992) (concluding that prior to *Chevron*, courts usually reached an independent interpretive decision); cf. PETER L. STRAUSS, *AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES* 253-56 (1989) (noting that before *Chevron*, courts used three different rationales to justify deference to agency interpretations which placed the primary and ultimate responsibility for statutory interpretation on the court, but that *Chevron* espoused a fourth rationale based on the assignment of this responsibility to the agency); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 569 (1985) (noting that modern administrative law has deviated from the understanding that courts must independently review all questions of law).

18. Scalia, *supra* note 10, at 516; Sunstein, *supra* note 9, at 2093-94. But cf. Edley, *supra* note 15, at 574-75 (noting that the judicial role of law-declaring often overlaps with the role of law-making, a function that is presumptively the role of the implementing agency).

cases they did.<sup>19</sup> But, as explained in *Skidmore v. Swift & Co.*,<sup>20</sup> judges accorded such deference because

[i]nterpretations . . . [of the agency], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case [depends] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all of those factors which give it power to persuade, if lacking power to control.<sup>21</sup>

Reviewing courts, however, stressed that the decision regarding deference, and the ultimate responsibility for interpreting the statute, remained theirs.<sup>22</sup> In many instances, courts chose to decipher statutes without any attention to, let alone deference to, prior agency interpretations.<sup>23</sup>

This approach to reviewing agency statutory interpretation reflected a tension between two theoretical justifications for the burgeoning administrative state that dominated legal thinking until the late 1960s. The first theoretical model, the formalist or transmission-belt<sup>24</sup> model, posits that administrative agencies expediently implement the will of the legislature.<sup>25</sup>

19. *E.g.*, *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 42-43 (1981); *Batterton v. Francis*, 432 U.S. 416, 432 (1977); *Udall v. Tallman*, 380 U.S. 1, 23 (1965); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 146 (1940).

20. 323 U.S. 134 (1944).

21. *Id.* at 140. Technically, *Skidmore* addressed the deference that should be given to an agency's application of a statute when the court, rather than the agency, was authorized to adjudicate the claim in the first instance. *See id.* at 137-38 (explaining that with regard to the Fair Labor Standards Act, although Congress placed the responsibility of factfinding on the courts, the courts nevertheless should place due emphasis on the findings of the Administrator). But the courts have applied the *Skidmore* standard in reviewing agency interpretations of statutes because, as in *Skidmore*, judges believed they retained the ultimate decisionmaking authority. *See, e.g.*, *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 120 (1980) (citing *Skidmore* for its decision not to follow CPSC's interpretation); *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980) (stating that an agency's statutory interpretation is entitled to deference so long as it is "reasoned and supportable"); *SEC v. Sloan*, 436 U.S. 103, 117-18 (1978) (refusing to follow SEC's interpretation because it was inconsistent with the commission's statutory mandate).

22. *See* Anthony, *supra* note 12, at 3 & n.4 (reasoning that under *Skidmore* a "court should give respectful consideration to the agency's construction, but may reject it, even if it seems a reasonable one"); *cf.* Monaghan, *supra* note 14, at 27-28 (contending that giving deference to agency interpretations of statutes is not inconsistent with the principle that courts retain the ultimate authority to state what the law is).

23. *See, e.g.*, *United States v. Swank*, 451 U.S. 571, 591 (1981) (White, J., dissenting) (accusing the Court of ignoring the IRS Commissioner's reasonable and consistent interpretation of the Internal Revenue Code); *Morton v. Ruiz*, 415 U.S. 199, 236-37 (1974) (declining to defer to a Bureau of Indian Affairs (BIA) rule because it was inconsistent with other BIA practices).

24. Richard Stewart coined the term "transmission-belt" model. Stewart, *supra* note 15, at 1675.

25. *See, e.g.*, A.A. Berle, Jr., *The Expansion of American Administrative Law*, 30 HARV. L. REV. 430, 431 (1917) ("[A]dministrative law is the law applicable to the transmission of the will of the state, from its source to the point of its application.").

To overcome constitutional problems that arise from the possibility that nonelected agency heads will make political choices, this model presumes that Congress makes the hard political choices when it enacts legislation.<sup>26</sup> It further presumes that specialized agencies more efficiently implement those choices than can the President enforcing statutory provisions via full-fledged judicial proceedings.<sup>27</sup> Agencies with power to translate legislative policy into rules that govern particular situations, to find facts in particular cases, and to apply the rules to the facts with some cognizance of the exigencies of the precise situation provide an apparatus for implementing the legislative will flexibly and effectively. But this model demands that the outcome of a controversy before an agency follow directly from the statutory policy; the agency's job is to find the facts and apply the law to the particular situation, reaching a result determined by the circumstances and Congress's expressed policy.<sup>28</sup>

The formalist model of administrative agencies leaves little leeway for agency discretion when interpreting statutes.<sup>29</sup> It assumes that the agency should not create policy, but rather implement the policy choices made by the legislature.<sup>30</sup> Those legislative choices are communicated by statutes, which therefore play an indispensable role in limiting agency action.<sup>31</sup> The judiciary ensures that the agency does not overstep its statutory boundaries and implement policies different from those the legislature expressed in the statute.<sup>32</sup> Thus, fundamental to the transmission-belt model is an understanding that courts are to interpret statutes *de novo*, both to undergird the constitutionally infirm position of agencies and to guard against agencies engaging in political decisionmaking. This model does not countenance any deference to agency interpretations.

By the time of the New Deal, a second theoretical justification for administrative agencies had arisen. This model, the expertise model,

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26. Stewart, *supra* note 15, at 1675.

27. See Berle, *supra* note 25, at 439 ("But there arise problems which require particular and expert handling. . . . Accordingly we conduct a *special* administrative body . . . and charge this body with the duty of investigating the problem and of laying down the rule which will reach the given result." (emphasis in original)).

28. For a more detailed description of the formalist model, see Frug, *supra* note 15, at 1297-99; Seidenfeld, *supra* note 15, at 1516-18; Stewart, *supra* note 15, at 1672-76.

29. See Stewart, *supra* note 15, at 1673 (stating that under the formalist model, "[t]he requirement that agencies conform to specific legislative directives not only legitimates administrative action by reference to a higher authority, but also curbs officials' exploitation of the governmental apparatus to give vent to private prejudice or passion").

30. See, e.g., *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 394 (1894) ("[The Texas Railroad Commission] is merely an administrative body created by the state for carrying into effect the will of the state, as expressed by its legislation.").

31. See Stewart, *supra* note 15, at 1673 (describing the formalist view that agencies must conform to legislative directives in order to control misuses of the system by agency officials).

32. Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 577 (1985); Stewart, *supra* note 15, at 1674-76.



emphasizes the experience and technical knowledge of agencies and their staffs.<sup>33</sup> In the ever-increasing complexity of the era, many theorists argued that Congress could not fully understand, let alone resolve, all the policy issues the federal government must address.<sup>34</sup> Congress's role was to identify problems needing regulatory solutions and to establish agencies to address those problems.<sup>35</sup> Agencies would solve these problems using the professional knowledge of their staffs and their experience in dealing repeatedly with similar issues arising within a specialized regulatory area.<sup>36</sup>

The expertise model of agencies attempts to avoid the constitutional infirmity of nonelected agencies making policy by characterizing agency decisions as technical and therefore value-neutral.<sup>37</sup> This model admits that agencies have broad discretion to make regulatory policy; agency decisions are not usually dictated by simply applying statutory mandates to the circumstances of a particular situation.<sup>38</sup> Nonetheless, the model

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33. See MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 51 (1955) (recounting the views of Joseph Eastman who considered agencies the proper source of broad power due to their expertise and experience); JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 23-24 (1938) (emphasizing the need for expertise in the administrative state); Daniel J. Gifford, *The New Deal Regulatory Model: A History of Criticisms and Refinements*, 68 MINN. L. REV. 299, 306-07 (1983) (describing the New-Deal-era view that advised deference to agencies' expertise).

34. See LANDIS, *supra* note 33, at 24 (contending that efficiency in regulation is best served by the creation of more agencies); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 440 (1987) (noting that the perception of the inadequacy of the institutional framework led to grants of authority to regulatory agencies); cf. Gifford, *supra* note 33, at 306 (noting that informational scarcity and lack of expertise outside of regulatory agencies provided "major justification[s] for conferring broad discretionary powers on regulatory agencies"). In addition, architects of the New Deal espoused a healthy distrust of the political processes that characterized legislative decisionmaking as a means of solving regulatory problems. The New Deal model thus called for agencies to be relatively independent of immediate political influence. See JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 59-60 (1978) (reviewing Progressive- and New-Deal-era rationales for granting agencies independence from the political process); LANDIS, *supra* note 33, at 113-14 (contrasting examples of good and bad results from politically independent agencies).

35. The New Deal model envisions the possibility of an enabling act that provides bounds on the scope of agency discretion. See LANDIS, *supra* note 33, at 52-60 (citing areas in which statutory limitations would be appropriate). For many areas of regulation, however, the New Deal model counsels that the enabling act merely authorizes the agency to regulate an industry or area of the economy under a broad "public interest" standard. See MARTIN SHAPIRO, *WHO GUARDS THE GUARDIANS?* 38 (1988) (noting that New Deal advocates argued that agencies must be free to serve the greatest good of the greatest number).

36. LANDIS, *supra* note 33, at 23-24.

37. See M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 277-80 (1967) (referring to the view that agencies are machine-like interpreters and appliers of statutes); Philip J. Harter, *Executive Oversight of Rulemaking: The President Is No Stranger*, 36 AM. U. L. REV. 557, 559 (1987) (noting that the expertise model required the insulation of experts from "political contamination").

38. See Seidenfeld, *supra* note 15, at 1519, 1518-19 (observing that the expertise model relied on the "professional spirit" of the regulators to deter them from setting unwise policy).

posits that agency decisions are not political because if everyone had the same knowledge and experience as the agency, all would agree that the agency's solution was best for the public interest.<sup>39</sup> In other words, although agencies may set regulatory policy, they do not make controversial, value-laden choices, but rather use their expertise to solve technical problems left to them by Congress.<sup>40</sup>

Thus, the expertise model of administrative agencies frequently called upon courts to defer to agency decisions. With respect to statutory interpretation, this model would have had courts defer to agency implementation of vaguely worded statutes instructing the agency to further the public interest.<sup>41</sup> But the expertise model preserved a role for the courts to ensure that agencies did not overstep their jurisdictions or address issues beyond those Congress intended them to address.<sup>42</sup> Hence, the expertise model did not envision judicial deference to agencies' interpretations of statutes when the issue involved the parsing of statutory language or legislative history rather than the implementation of broadly worded language in a technical regulatory regime. This judicial role was reflected in the courts' maintenance of the ultimate responsibility to interpret statutes and their propensity to defer based on the persuasiveness of the agency's position in light of its greater expertise.<sup>43</sup>

Following World War II, the legal process school<sup>44</sup> suggested a jurisprudence that alleviated the tension between the formalist and realist theories underlying pre-war models of the administrative state.<sup>45</sup> The legal process theory looked to the comparative abilities of the various

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39. *Id.* at 1519 (justifying discretionary decisions under the expertise model as executing the "will of the people").

40. *See id.*; Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 823 (1990) (both asserting that the expertise model sees agency decisions as technical assessments based on superior information and expertise).

41. ALFRED C. AMAN, JR., *ADMINISTRATIVE LAW IN A GLOBAL ERA* 15 (1992) (observing that the use of broad delegation clauses fostered regulatory experimentation).

42. *Id.* at 17 (noting that despite deferential judicial review of agency power after the New Deal, courts would not affirm agency decisions if no legal basis existed for the action).

43. As Judge Wald noted, "The common wisdom [of courts before *Chevron* was] that on matters of statutory interpretation, courts generally had the last word." Transcript, *The Contribution of the D.C. Circuit to Administrative Law*, 40 ADMIN. L. REV. 507, 529 (1988) [hereinafter *Contribution of D.C. Circuit*] (comments of Patricia M. Wald at the Section of Administrative Law Fall Meeting in October, 1987).

44. *See* Werhan, *supra* note 15, at 576 ("This 'Theoretical Watershed' has come to be known as the legal process school of jurisprudence, named for the leading text by Harvard law professors Henry Hart and Albert Sacks . . ." (citation omitted)). *See generally* HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tentative ed. 1958).

45. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 695 (1987) (listing the assumptions underlying legal process jurisprudence); Werhan, *supra* note 15, at 576-77 (explaining the appeal of the legal process theory's promise of enlightened, but measured, functionalism).

institutions of government in order to allocate decisionmaking authority.<sup>46</sup> In addition, the theory stressed that "duly established procedures" were crucial to the legitimacy of government decisions.<sup>47</sup> In the administrative law arena, the legal process approach provided the underpinnings for the federal Administrative Procedure Act (APA)<sup>48</sup> and defined the "traditional" model of agency decisionmaking, which dominated this arena until the 1970s.<sup>49</sup>

The traditional model of administrative law is an amalgam of the formalistic and expertise models.<sup>50</sup> On the one hand, the traditional model characterized policysetting via rulemaking as legislative in nature and joined the expertise model's call for minimal legislative-type procedures and deferential judicial review.<sup>51</sup> On the other hand, the traditional model characterizes factfinding within agency adjudication as judicial in nature and generally envisions the transmission-belt model's formal judicial-type procedures and close judicial supervision of adjudicatory decisionmaking.<sup>52</sup>

Under the traditional model, an electorally accountable Congress is the appropriate body to formulate the basic public purposes undergirding the

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46. See Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REF. 561, 595, 594-98 (1988) (arguing that legislatures should deal with substantive issues involving values, preferences, and ends; courts should engage in "reasoned elaboration" of legislative policies; and administrative agencies should implement legislative mandates according to their expertise); Werhan, *supra* note 15, at 577 (noting that legal process thinking counsels decisionmakers to play to their strengths and to avoid their areas of weakness).

47. According to the leading exponents of the legal process school, "decisions which are the duly arrived at result of duly established procedures . . . 'ought' to be accepted as binding upon the whole society." HART & SACKS, *supra* note 44, at 4-5.

48. Administrative Procedure Act, 5 U.S.C. §§ 500-576 (1988) (original version at ch. 324, 60 Stat. 237 (1946)).

49. See William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 710 (1991) (observing that the tension-beset legal process tradition survived essentially unchanged until the 1970s); Werhan, *supra* note 15, at 577, 582 (citing the APA as the most authoritative embrace of the traditional model of administrative law and maintaining that the legal process theory's assumptions supported the core components of the traditional model); see also Thomas O. Sargentich, *Teaching Administrative Law in the Twenty-First Century*, 1 WIDENER J. PUB. L. 147, 155-56 (1992) (noting that the APA became a vehicle for compromise, between the formalist and legal realist visions of the administrative state, that hinged on process-oriented limitations on administrators).

50. See Eskridge & Peller, *supra* note 49, at 710 (discussing the internal tension in the legal process theory's methods and goals); Werhan, *supra* note 15, at 579 (noting that legal process theorists did not believe that the expertise model alone could support the legitimacy of agency authority).

51. See Werhan, *supra* note 15, at 579 (observing that the traditional theory counsels courts to avoid policymaking functions).

52. These characterizations molded the structure of the federal APA, which attempts to graft quasi-judicial procedures onto agencies with broad policysetting functions. See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1265-66 (1986) (explaining that the APA places little constraint on rulemaking power but provides an elaborate adjudicative structure).

statutes it adopts.<sup>53</sup> In administering a statute, the agency, acting pursuant to statutory authority and using appropriate procedures, is to devise policies rationally aimed to achieve the statutory purpose.<sup>54</sup> Although this left room for agency discretion, agency policy choices are to be driven by application of their expertise to the task of best furthering the public purposes of the statute.<sup>55</sup> Born as a mixture of two models that envisioned no role for politics in agency decisionmaking, the traditional model does not see agency policymaking as a predominantly political endeavor.<sup>56</sup>

With respect to statutory interpretation, the traditional model supports *Skidmore* deference. On issues of law, the legal process school posits that courts must retain ultimate authority to ensure that the agency acts consistently with the purposes of the authorizing statute.<sup>57</sup> But for questions of law whose answers might be informed by technical expertise or day-to-day experience administering the statute, the legal process approach views agencies as the proper forum for resolution.<sup>58</sup> Hence, the legal process school fell victim to the tension inherent in *Skidmore*, which counseled deference to agency interpretations when appropriate even as it reinforced the notion that courts remain the final arbiters of the statutory meaning.

Perhaps for this reason, the APA doctrine governing statutory interpretation prior to *Chevron* is best described as schizophrenic.<sup>59</sup> Judges

53. See HART & SACKS, *supra* note 44, at 721 (arguing that only the generally accountable legislature "has the toughness and resiliency to hammer out solutions [to major policy dilemmas] which will command acceptance"); Eskridge & Frickey, *supra* note 45, at 697 (describing Hart & Sacks's legislative legitimacy as implicitly based on interested participation in the legislative process); Peller, *supra* note 46, at 600 (noting that for legal process theorists, "the legislature's democratic character . . . made it appropriate as the final arbiter of substantive decision making"); Werhan, *supra* note 15, at 577 (contending that, in a representative system, Congress is well positioned to formulate public policy).

54. Werhan, *supra* note 15, at 580.

55. See Linda R. Hirshman, *Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 NW. U. L. REV. 646, 656 (1988) ("Traditional administrative theory assumed that the application of neutral expertise in administrative regulation would achieve socially desirable ends better than would an imperfect market.").

56. See Werhan, *supra* note 15, at 569-70 ("The traditional model takes seriously the conception of administrative agency as 'agent,' whose 'authority' is limited to acts done in accordance with the 'consent' of Congress, as manifested in the enabling act.").

57. *Id.* at 580.

58. See *id.* at 576-77 ("In some circumstances, legal process theorists argued, one such reasonable legislative decision would be to delegate authority to administrative agencies. . . . This rather casual, functional approval of delegation retained . . . faith in the expertise of administrators to achieve the public-policy agenda set by Congress.").

59. Examples of cases in which the courts paid little heed to agency interpretation of authorizing statutes include: *Barlow v. Collins*, 397 U.S. 159, 166 (1970) ("[S]ince the only or principle dispute relates to the meaning of the statutory term, the controversy must ultimately be resolved [not by the agency], but by judicial application of canons of statutory construction."); *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322, 325-26 (1951) (rejecting the claim that the NLRB decision is not subject to judicial review); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 492-93 (1947) (characterizing the issue of whether foremen are "employees" under the NLRA as a "naked question of law" and refusing

who believed agencies to be merely expedient means of implementing congressional intent tended to ignore agency statutory interpretations, while those who subscribed to the expertise model were apt to apply *Skidmore* deference, asserting that agencies' experience and technical knowledge of their regulatory areas lent persuasiveness to agency interpretations.<sup>60</sup>

### B. *The Chevron Doctrine and Its Political-Theory Underpinnings*

In *Chevron*, the Supreme Court held that when a court reviews an agency's interpretation of a statute, it must engage in a limited two-step process: First, the court must ask whether "Congress has directly spoken to the precise question at issue. . . . [T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."<sup>61</sup> Second, if the court determines that "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."<sup>62</sup> The court must affirm any "reasonable interpretation made by the . . . agency."<sup>63</sup>

Since the Court decided *Chevron*, lower courts have applied its dictates with unusual consistency and often with an almost alarming rigor.<sup>64</sup> To the extent that *Chevron* has generated dissension among lower courts, the dispute primarily concerns the vigor with which judges inquire,

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to adhere to the NLRB's prior decisions). Examples of cases in which courts deferred to agency interpretations include: *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (acknowledging the need to defer to agencies' interpretations of statutes); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944) (noting the limited rule of the judiciary once the agency has administered the statute and deferring to the NLRB regarding whether newsboys are "employees" under the NLRA).

60. Commentators have often remarked that prior to *Chevron*, the level of deference courts paid to agency interpretations of statutes was inconsistent. *E.g.*, Anthony, *supra* note 12, at 6; Jerome Nelson, *The Chevron Deference Rule and Judicial Review of FERC Orders*, 9 ENERGY L.J. 59, 60 (1988); *see also, e.g.*, RICHARD J. PIERCE, JR., ET AL., ADMINISTRATIVE LAW AND PROCESS § 7.4, at 348-49 (2d ed. 1992) (noting that prior to 1984, "the Supreme Court maintained two inconsistent lines of cases that purported to instruct courts concerning the proper judicial role in reviewing agency interpretations of agency-administered statutes").

61. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

62. *Id.* at 843.

63. *Id.* at 844.

64. *See* Anthony, *supra* note 12, at 3; *see also* Schuck & Elliot, *supra* note 5, at 1032 (finding that *Chevron* significantly altered the percentage of cases in which lower courts reversed agencies on issues of substantive law); *cf. Contribution of D.C. Circuit, supra* note 43, at 529-30 (stating that the D.C. Circuit is moving to a more balanced approach to reviewing agency interpretations of statutes after an initial period of applying "a fairly rigid approach to [*Chevron*]"); Pierce, *supra* note 8, at 302 (observing that some courts have adopted a "weak" reading of *Chevron*). *But cf.* Russell L. Weaver & Thomas A. Schweitzer, *Deference to Agency Interpretation of Regulations: A Post-Chevron Assessment*, 22 MEM. ST. U. L. REV. 411, 445-46 (1992) (noting that lower courts often do not defer to an agency reading of a statute it administers when the agency has interpreted the statute inconsistently in the past).

at step one, whether a statute has resolved the question addressed by the agency.<sup>65</sup> Some judges read *Chevron* as a strong signal from the Supreme Court that courts should not interfere with agency interpretations unless all would agree that the statute clearly evidences a contrary meaning on the precise question before the agency.<sup>66</sup> These deferential courts generally find statutes silent or ambiguous at step one of the *Chevron* analysis and tend to affirm agency interpretations at step two.<sup>67</sup> Other judges read the Supreme Court's message in *Chevron* as a more limited suggestion that courts may overturn an agency interpretation, but only if the court itself is certain about congressional intent regarding the meaning of the statute.<sup>68</sup> These active courts tend to resolve more cases by finding statutes clear at step one of the *Chevron* analysis and less frequently reach step two.<sup>69</sup>

65. See Panel Discussion, *supra* note 4, at 367 (comments of Cass R. Sunstein) (asserting that the weak reading of *Chevron* recognizes "a large area in which Congress has 'directly addressed precise questions . . .,'" while under the strong reading, "generally there will be ambiguity" (quoting *Chevron*, 467 U.S. at 842)).

66. See, e.g., *Massachusetts Dep't of Educ. v. United States Dep't of Educ.*, 837 F.2d 536, 541 (1st Cir. 1988) ("Ordinarily . . . an agency's interpretation will carry the day, unless it is determined to be clearly erroneous or inconsistent with the statutory plan."); see also Cohen & Spitzer, *supra* note 5, at 105 (showing that lower courts appear to have gotten the Supreme Court's message that they are to leave agencies greater discretion in interpreting their authorizing statutes).

67. E.g., *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 134 (1985); *Railway Labor Executives' Ass'n v. ICC*, 914 F.2d 276, 280-81 (D.C. Cir. 1990), *cert. denied*, 499 U.S. 959 (1991); *Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 210-11 (4th Cir. 1990); *National Grain & Feed Ass'n v. OSHA*, 866 F.2d 717, 733 (5th Cir. 1989).

68. For example, see *Middle S. Energy, Inc. v. FERC*, 747 F.2d 763 (D.C. Cir. 1984), *cert. dismissed*, 473 U.S. 930 (1985). Judge Bork, writing for the Court of Appeals, was faced with interpreting the term "such new schedules" as used in the Federal Power Act. *Id.* at 768-69. The court struck down the Federal Regulatory Energy Commission's (FERC) interpretation of this language without mentioning *Chevron*. Judge Ginzburg in dissent retorted that the statute, as interpreted by the FERC, "serves the general intent of Congress. . . . If the legislative history does not instruct otherwise, FERC's current interpretation merits deferential judicial consideration." *Id.* at 774 (citing *Chevron*).

69. See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448-50 (1987) (holding that the INS's interpretation of the deportation clause of the Immigration and Nationality Act transgressed clear congressional intent); *Productions Workers Union v. NLRB*, 793 F.2d 323, 328 (D.C. Cir. 1986) (finding that NLRB's interpretation of the "secondary boycott" provision of the NLRA was inconsistent with Congress's intent). The dissension regarding the vigor that courts should use in their step-one inquiry is related to a controversy about the extent courts should use legislative history and background norms—such as canons of statutory construction—in determining whether a statute is silent or ambiguous under *Chevron*. See Edles, *supra* note 5, at 711 (noting that judges are split regarding whether legislative intent should be considered in a *Chevron* analysis when the language of a statute is unclear); Thomas O. Sargentich, *The Scope of Judicial Review of Issues of Law: Chevron Revisited*, 6 ADMIN. L.J. AM. U. 277, 286 (1992) (discussing the judicial division regarding what materials should be considered in determining congressional intent). Compare Rust v. Sullivan, 500 U.S. 173, 184 (1991) (using a pure textual approach at step one) with *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 609-14 (1991) (considering language, legislative history, structure, and policy of the National Labor Relations Act at step one). Generally, courts that take an active role in determining the meaning of a statute at step one are more willing to rely on all the traditional tools of statutory construction. See Denise W. DeFranco, *Chevron and Canons of Statutory Construction*, 58 GEO. WASH. L. REV.

Regardless of whether a reviewing court is deferential or active, once it reaches step two it rarely reverses an agency interpretation as unreasonable.<sup>70</sup> As Judge Stephen Williams suggests, an agency interpretation fails the reasonableness test "[o]nly when it would flunk the laugh test at the Kennedy School of Public Policy."<sup>71</sup> Less glib judges have explained that an agency interpretation is unreasonable under *Chevron's* step two only if it actually frustrates the policies that Congress was seeking to effectuate.<sup>72</sup> So long as the interpretation furthers some statutory goal, a reviewing court has no business reversing the agency determination, even when the court believes that the agency interpretation reflects an unjustified balance of competing interests.<sup>73</sup>

The deferential courts' strong reading of *Chevron* essentially transfers the primary responsibility for interpreting regulatory statutes from the courts to the agency authorized to administer the statute.<sup>74</sup> Except in

829, 831 (1990) (discussing the D.C. Circuit's active use of statutory construction under *Chevron*); Merrill, *supra* note 5, at 991 (noting that as judges consider a statute's plain meaning, rather than its text, they are more likely to consider legislative intent). But see Scalia, *supra* note 10, at 521 (arguing that most statutes can be declared unambiguous from the text alone). This controversy is part of a greater debate about the extent to which courts should use legislative history and nontextual sources to divine congressional intent or, even more loosely, legislative purpose rather than taking a literal approach to interpreting statutes. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624 (1990) (discussing Justice Scalia's desire to eliminate all considerations of legislative history in statutory interpretation); Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 256 (1992) (noting the Supreme Court's differing views regarding textualism and interpretationism); Merrill, *supra* note 5, at 990-91 (discussing the Supreme Court's recent revival of pure textual interpretations of statutes); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 281 & n.16 (1990) (describing the controversy at the Supreme Court over the use of legislative history when construing statutes); see also *infra* notes 192-94 and accompanying text.

70. See Slawson, *supra* note 7, at 406 ("Under *Chevron*, the only way a reviewing court can revise an agency decision resting on legislative history is to determine that the agency's interpretation . . . was unreasonable. For obvious reasons, this can rarely be done." (footnote omitted)); see also *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131-32 (1985) (refusing to override an agency's interpretation of the Clean Water Act even though such interpretation may seem unreasonable "[o]n a purely linguistic level").

71. Panel Discussion, *supra* note 9, at 124 (comments of Judge Stephen Williams).

72. *E.g.*, *Continental Air Lines, Inc. v. Department of Transp.*, 843 F.2d 1444, 1453 (D.C. Cir. 1988) (Starr, J.); Silberman, *supra* note 40, at 827. Both judges Starr and Silberman clearly manifest disapproval of courts involving themselves in the debate about policy, which often underlies the agency's interpretive choice. See, *e.g.*, *Continental Air Lines*, 843 F.2d at 1451 (Starr, J.) ("To do so . . . portends a judicial supplanting of a key actor in the drama, namely the agency itself, present on stage at Congress' express direction."); Silberman, *supra* note 40, at 827 ("[S]triking down an agency interpretation . . . can all too often conceal judicial allegiance to one side of what was a congressional compromise or dislike for the policy implications of the executive's actions.").

73. See Silberman, *supra* note 40, at 828 ("If the agency [considered and weighed the factors Congress wished the agency to bring to bear on its decision], that the court would have struck the balance somewhat differently cannot be grounds to overturn the agency's action.").

74. See *Contribution of D.C. Circuit*, *supra* note 43, at 529 (noting that after *Chevron*, courts defer to agencies in a wide array of situations); see also *supra* note 17.

those relatively rare instances in which Congress considered and provided an answer to the precise point at issue, the agency is presumed to have the authority to interpret the statute by formulating policy and filling "any gap left, implicitly or explicitly, by Congress."<sup>75</sup> Even under the weaker reading by active courts, *Chevron* counsels that courts share a significant responsibility for statutory interpretation with agencies. Moreover, *Chevron* implicitly justifies this transfer of responsibility largely on the theory that agencies are more politically accountable than courts.<sup>76</sup> By this shift of responsibility, however, *Chevron* deviates from both the transmission-belt and expertise models' principle that an agency's role is not to resolve controversial political disputes, especially not via statutory interpretation. Instead, *Chevron* comports with a more recent model of administrative authority that derives from the political theory of pluralistic democracy.

The pluralistic theory views the democratic process as a competition between various interest groups for government-provided benefits.<sup>77</sup> Supporters of the pluralist theory argue that the political arena operates like

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75. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

76. *See, e.g., id.* at 865, 865-66 ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . ."). *Chevron* recognizes that in many instances, statutory interpretation involves choosing between competing policies rather than divining true congressional intent. *See Pierce*, *supra* note 8, at 305-07 (noting that judicial interpretation often involves the resolution of a policy dispute); Silberman, *supra* note 40, at 823 (arguing that judicial interpretation "implicates and sometimes squarely involves policy making"). It implicitly relies on the belief that American notions of democracy require that such a choice be made by politically accountable institutions rather than the politically insulated judiciary. *See* Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366, 371-72 (1984) (noting that the political branches of government are more flexible, have access to a greater scope of informational resources, and are more attuned to the desires of the voting public than the judicial branch); Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 504-13 (1985) (arguing that political decisions should be made by politically accountable branches of the government); *cf.* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 389-90 (1986) (detailing the difficulty courts have in reviewing complex, politically driven agency decisions). *Chevron's* conclusion that courts should play a less active role in interpreting statutes is thus consistent with a trend toward an increasing reliance on political accountability rather than apolitical agency expertise to justify agency discretion. *See* Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 183 (1986) (noting the dichotomy between those who see administrative agencies' role as the application of expertise and those who view their role as political).

77. *See* FARBER & FRICKEY, *supra* note 16, at 20-24 (noting that many economists view legislation as the product of special interest group politics); EARL LATHAM, *THE GROUP BASIS OF POLITICS* 35-36 (1952) (arguing that a government's job is to referee the struggle for benefits between various groups); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 4-6 (1971) (arguing that industry is consistently seeking to use the coercive powers of the state to control entry into markets); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 32 (1985) (discussing the pluralist belief that politics is a process of conflict among groups with differing social interests).



a market in which votes are the currency that interest groups spend to procure the government benefits they seek.<sup>78</sup> Deal-making mechanisms such as vote-trading and log-rolling allow the legislature to reach the equivalent of economic equilibrium in which government allocates benefits to interest groups in proportion to the number of voters who share a group's values and the intensity with which the voters hold these values.<sup>79</sup> Advocates of pluralistic democracy thus herald it as the preferred means of maximizing the political satisfaction of an electorate posited to have needs and desires that are exogenous to the political process.<sup>80</sup>

Unfortunately for advocates of pluralistic democracy, Congress is not very efficient at generating the interest group deals that drive the pluralist model.<sup>81</sup> The magnitude of the entire federal regulatory agenda, coupled with the size of Congress and the need to get a majority of two houses and the signature of the President, prevents otherwise politically justified deals from becoming law.<sup>82</sup> In addition, the committee system reinforces congressional inertia that bogs down most legislation.<sup>83</sup> Committees serve a gate-keeping function that can kill legislation that might otherwise become law were the committee to allow the bill to reach the floor.<sup>84</sup> When all

78. E.g., FARBER & FRICKEY, *supra* note 16, at 22-23; Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 214 (1976); Stigler, *supra* note 77, at 10-13.

79. See Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government Law*, 80 VA. L. REV. 625, 635-36 (1994) (defining "log-rolling" and explaining how it allows legislatures to take into account the intensity of its members' interest in legislation).

80. See Seidenfeld, *supra* note 15, at 1521 & n.47; Sunstein, *supra* note 77, at 32-33 (both describing the pluralist model as the best means of satisfying the diverse preferences of the citizenry).

81. See Seidenfeld, *supra* note 15, at 1521 (suggesting that the diversity of issues constituents want addressed and the rate at which those issues change dictate that the inefficient legislative process is not able to keep up); see also Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1, 33 ("[I]nterest group theories cannot explain institutional structures such as the system of checks and balances, which actually hinder Congress's provision of interest group demands.").

82. See Richard J. Pierce, Jr., *Political Accountability and Delegated Power*, 36 AM. U.L. REV. 391, 405-06 (1987) (noting that congressional bureaucracy often leads to irresponsible legislative action); Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U.L. REV. 323, 331 (1987) (noting that the demands on Congress's agenda exceed its capacity to make decisions).

83. See STEVEN S. SMITH & CHRISTOPHER J. DEERING, *COMMITTEES IN CONGRESS* 226 (2d ed. 1990) (indicating that the committee system can complicate the task of party leaders seeking quick legislative action); Daniel B. Rodriguez, *Management, Control, and the Dilemmas of Presidential Leadership in the Modern Administrative State*, 43 DUKE L.J. 1180, 1188 (1994) (remarking that legislative change is difficult because committees act as "gatekeepers" that prevent proposals from reaching the floor).

84. See WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 373 (1988); Kenneth A. Schepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85, 86 (1987) (both noting that committees can use their gate-keeping function during earlier legislative stages to affect the voting power of other members on the floor); cf. KAY L. SCHLOZMAN & JOHN T. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* 314-15, 395-96, 398 (1986) (noting that organized interest groups are especially effective at blocking government action); STRAUSS, *supra*

is said and done, the number of constituencies that must agree to the passage of any proposed bill ensures that few, other than the most avidly and universally supported, ever find their way into the United States Code.<sup>85</sup> Congress simply cannot generate enough legislation to satisfy the demands of interest groups.<sup>86</sup>

A pluralistic theory of the administrative state favors policy-setting by agencies in order to provide greater regulatory benefits.<sup>87</sup> Under this theory, Congress is free to delegate the task of formulating and adopting regulatory schemes to agencies, which are relatively free from the cumbersome constraints of separation of powers and an archaic committee system.<sup>88</sup> So long as Congress maintains sufficient influence over an agency to ensure that regulations remain true to the interests of the enacting coalition—either by the terms of the initial authorizing legislation, by direct oversight of agency decisions via statutory amendment or through budget constraints, or by a system of administrative procedures and “fire alarms”<sup>89</sup>—it pays for the legislature to set in motion the administrative regulatory apparatus.<sup>90</sup> According to the pluralistic democracy model,

note 17, at 54 (“Even seemingly popular proposals for legislation are often defeated [in committee] by powerful members.”).

85. See Peter L. Kahn, *The Politics of Unregulation: Public Choice and Limits on Government*, 75 CORNELL L. REV. 280, 288-90 (1990) (suggesting that legislation may be prevented by influential groups acting to kill unfavorable legislation); David Schnapf, *State Hazardous Waste Programs Under the Federal Resource Conservation and Recovery Act*, 12 ENVTL. L. 679, 708 (1982) (complaining that it is difficult to get environmental legislation passed because of the competing interest groups).

86. See Pierce, *supra* note 82, at 404 (noting that Congress is too inefficient to make thousands of decisions annually); Stewart, *supra* note 82, at 331 (arguing that Congress’s 16th-century legislative procedure is incapable of making enough decisions to satisfy 20th-century interest groups); Peter Woll, *Introduction to PUBLIC ADMINISTRATION AND POLICY: SELECTED ESSAYS* 1, 8-9, 11-12 (Peter Woll ed., 1966) (contending that it is “impossible” for the President and Congress to tend to all legislative concerns given informational and temporal constraints); cf. Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 56-58 (1982) (arguing that legislators delegate the law-making function to agencies in order to maximize public-sector production of private goods).

87. See Seidenfeld, *supra* note 15, at 1523 (asserting that agency policymaking is justified under pluralistic theory because it is effective at meeting the demands of interest groups).

88. See SMITH & DEERING, *supra* note 83, at 226 (contending that a more elastic system is needed in order to efficiently deal with the rapidly changing issues of the day).

89. Procedural controls may work by giving interest groups within the enacting coalition an informational advantage. See Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 256-60 (1987) (noting that procedural constraints allow interest groups more opportunities to respond to agency decisions). Alternatively, procedural controls can stack the deck in favor of administrative decisions that benefit these interest groups. *Id.* at 261-63. Fire-alarm systems operate by threatening congressional intervention to benefit the groups in the coalition if events signal that the agency will not favor such groups. *Id.* at 274. Both procedural controls and fire alarms can overcome pluralist concerns about legislative inefficiency because they induce agency decisionmaking that satisfies the interests of the coalition that put together the legislative deal without direct congressional intervention.

90. See Rodriguez, *supra* note 83, at 1187 (asserting that Congress delegates authority to agencies because it fears tying itself to a precise piece of legislation and it prefers to allow flexibility through agencies). For a discussion of various positive political theory explanations for why legislators might

agencies should make political choices that satisfy the demands of the interest groups that make up the constituency of the directly accountable branches of government—Congress and the President.<sup>91</sup>

This is the precise role that the *Chevron* Court sees agencies playing. *Chevron* involved a change in the Environmental Protection Agency's (EPA) interpretation of the term "stationary source" that was seemingly prompted by the replacement of the environmentally sensitive administration of President Jimmy Carter with the business-oriented administration of President Ronald Reagan.<sup>92</sup> The Court explicitly recognized an incumbent administration's policies as a legitimate factor that might influence an agency to alter its interpretation of such a statutory term.<sup>93</sup>

In applying *Chevron*, most lower courts have remained true to its pluralistic vision. Judges presume that Congress authorized agencies to resolve the controversial political issues that arise out of statutory interpretation.<sup>94</sup> Only if the reviewing court is convinced that Congress gave a clear answer contrary to that given by the agency may the court reverse the agency's interpretation at step one of *Chevron*.<sup>95</sup> At step two, courts almost never overturn agency interpretations as unreasonable.<sup>96</sup> In essence, a court will overturn an agency interpretation only if the court believes that the agency violated a political deal struck by Congress. When a court determines that Congress has struck no particular bargain, it leaves the political deal-making to the agency and trusts the political process to constrain the agency from interpretations at odds with popular sentiments and values.<sup>97</sup> Hence, *Chevron* presumes that once a reviewing court

find it in their self-interest to delegate regulatory discretion to administrative agencies, see Rodriguez, *supra* note 81, at 74-77.

91. Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95-96 (1985); Seidenfeld, *supra* note 15, at 1522-24.

92. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 857-58 (1984) (observing that, when the new administration took office in 1981, EPA re-evaluated the definition of "source").

93. *Id.* at 865.

94. See, e.g., *Arkansas State Bank Comm'r v. RTC*, 911 F.2d 161, 173 (8th Cir. 1990) (noting that Congress may have desired RTC to strike a balance between competing interests as situations warranted); *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 270, 291 (D.C. Cir. 1988) (stating that Congress wanted EPA to choose between conflicting goals), *cert. denied*, 490 U.S. 1106 (1989).

95. *General Motors Corp. v. National Highway Traffic Safety Admin.*, 898 F.2d 165, 170 (D.C. Cir. 1990); *Hazardous Waste Treatment Council*, 861 F.2d at 274; see also *Wagner Seed Co. v. Bush*, 946 F.2d 918, 924-25 (D.C. Cir. 1991) (noting that "language need not be pellucid without the aid of a special lens," but a canon of interpretation is not sufficient to "supply a precise meaning to an otherwise ambiguous text"), *cert. denied*, 112 S. Ct. 1584 (1992).

96. See, e.g., *United States v. Sbimer*, 367 U.S. 374, 382-83 (1961) (contending that as long as a policy choice is reasonable in that it is not prohibited by Congress, a court will not overturn it, even though the court may feel another course would be better); see also *supra* notes 70-72 and accompanying text; cf. *Garre*, *supra* note 6, at 953 ("[S]tep one . . . has become the 'primary battleground' on which challenges to agency statutory interpretations are fought.").

97. Some versions of pluralistic democracy reserve a greater role for courts to correct imperfections in the political process. See Stewart, *supra* note 15, at 1712 (asserting that judicial review should

deems a statute ambiguous, resolution of its meaning is a political endeavor best left to the agency, subject only to superficial judicial review.<sup>98</sup>

The recent controversial Supreme Court decision in *Rust v. Sullivan*<sup>99</sup> illustrates how *Chevron* embodies this pluralistic understanding of the role of agencies. *Rust* involved regulations adopted by the Secretary of the Department of Health and Human Services (HHS) that interpreted and implemented Section 1008 of the Public Health Service Act.<sup>100</sup> Section 1008 provides that "[n]one of the funds appropriated [for family planning projects] shall be used in programs where abortion is a method of family planning."<sup>101</sup> This provision was part of the original Title X of the Act, enacted in 1970.<sup>102</sup> For seventeen years following Title X's enactment, HHS had permitted Title X projects to provide information about abortion and to refer pregnant clients who wished to have an abortion to facilities where the procedure could be performed.<sup>103</sup>

In July of 1987, President Reagan personally announced that HHS would soon propose new regulations clarifying the statutory prohibition on the use of Title X funds in programs that engage in abortion-related activities.<sup>104</sup> This announcement culminated a six-year debate about whether HHS could legally adopt such restrictions on abortion referrals.<sup>105</sup> Although Reagan had consistently taken an anti-abortion stand,

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focus on assuring fair representation for all affected interests); see also JOHN H. ELY, *DEMOCRACY AND DISTRUST* 76-77 (1980) (arguing that the judiciary's role in constitutional law is to ensure an open political process and correct for biases in the political market). Those versions more consistent with *Chevron*'s hands-off approach to review, however, see agency procedures as part of the deal struck by Congress with interest groups. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978) ("[T]his Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of agencies to which Congress had confided the responsibility for substantive judgments."); McCubbins et al., *supra* note 89, at 274 (arguing that interest groups achieve political representation through Congress's drafting of administrative procedures).

98. In addition to allowing an agency to appease special interest groups, *Chevron* deference also affords an agency greater leeway to interpret statutes according to the agency's idiosyncratic notion of the public interest. But this still may be preferable to leaving interpretations to reflect judges' idiosyncratic views of the public interest because the political branches provide a greater check on runaway agencies than on runaway courts. See Seidenfeld, *supra* note 15, at 1550-51 (contending that courts are insulated from the "political pulse of the people" while agencies are subject to the review of Congress and the President).

99. 500 U.S. 173 (1991).

100. 42 U.S.C. §§ 201-300aaa (1988).

101. *Id.* § 300a-6.

102. Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, § 1008, 84 Stat. 1504, 1508 (1970) (codified as amended at 42 U.S.C. § 300a-6 (1988)).

103. HHS Regulations Regarding Statutory Prohibition on Use of Appropriated Funds in Programs Where Abortion Is a Method of Family Planning, 53 Fed. Reg. 2922, 2923 (1988) [hereinafter *Abortion Counseling Regulations*].

104. *Id.* at 2922.

105. Spencer Rich, *Reagan to Tighten Family-Planning Aid Rules*, WASH. POST, July 30, 1987, at A9.

the unusual step of a presidential announcement of the proposed regulations and the timing of the announcement—occurring six-and-a-half years into the Reagan presidency, just as the religious right had begun to express concern about the Administration's would-be presidential candidate, then Vice President Bush<sup>106</sup>—suggests that the regulations were aimed at appeasing the religious right. As such, they appeared motivated in great part by interest group politics.

The final regulations adopted by HHS, commonly dubbed the "gag rule,"<sup>107</sup> prohibited federally funded family-planning projects from encouraging, promoting, or advocating abortion as a method of family planning.<sup>108</sup> More particularly, the regulations barred Title X projects from counseling pregnant clients about abortion or referring them for abortion as a method of family planning.<sup>109</sup> Instead, Title X projects had to refer every pregnant client "for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child."<sup>110</sup> This list could neither be weighted in favor of health-care providers that perform abortions, nor could it include health-care centers that provided abortions as their principal business.<sup>111</sup> The lists also had to include available providers who did not offer abortions and could not "steer" clients to providers who perform abortions as a method of family planning.<sup>112</sup>

Although *Rust* is best known for its constitutional assessment of the regulations,<sup>113</sup> for purposes of this Article its more significant discussion

106. See Thomas B. Edsall, *Will Feuds Sink the GOP?*, WASH. POST, June 3, 1987, at A19 (discussing the conflict between the Bush forces and the religious right's intent on gaining power in the GOP). One direct manifestation of this concern was the candidacy of the popular conservative evangelist, Pat Robertson. See Samuel G. Freedman, *Back in the Spotlight, Falwell Retains Long-Held Goals for God and Country*, N.Y. TIMES, June 4, 1987, at A18 (referencing political scientists who contend that Robertson's presidential candidacy was proof of the changes the Moral Majority hoped to create). Political pundits began to take seriously the Reverend Robertson's intention to compete with George Bush for the Republican presidential nomination just prior to President Reagan's announcement of the forthcoming proposed regulations. See Wayne King, *Robertson Bid Relying on Caucuses and Fervor*, N.Y. TIMES, July 7, 1987, at A12 (noting that recent polls and outcomes in the Michigan caucuses indicated to analysts that the "Christian vote" could "have an impact in caucus situations").

107. See Eric Pianin, *White House Circulates Memo in Move to Retain Ban on Abortion Counseling*, WASH. POST, Nov. 6, 1991, at A7 (announcing that the House is to vote on a bill with language prohibiting expenditure of funds to enforce "what critics call the 'gag rule'").

108. 42 C.F.R. § 59.10 (1993), *suspended by* Presidential Memorandum, The Title X "Gag Rule," 58 Fed. Reg. 7455 (1993).

109. *Id.* § 59.8(a)(1).

110. *Id.* § 59.8(a)(2).

111. *Id.* § 59.8(a)(3).

112. *Id.* § 59.8(a)(3).

113. See generally Scott E. Johnson, Comment, *Rust v. Sullivan: The Supreme Court Upholds the Title X Abortion-Counseling Gag Rule*, 94 W. VA. L. REV. 209, 220-30 (1991) (recounting and analyzing the Supreme Court's treatment of the First Amendment challenge to the new Title X regulations).

addresses a challenge to HHS's interpretation of Section 1008, on which the Department explicitly relied to justify its regulations.<sup>114</sup> Despite the blatantly political impetus for the agency's new regulations, the Court applied the deferential *Chevron* doctrine to affirm the agency's revised interpretation of Section 1008.<sup>115</sup>

Applying *Chevron*'s first step, the Court determined that the language of the proviso was ambiguous and noted that Section 1008 of the Act was silent with respect to the particular questions raised by the regulations.<sup>116</sup> The Court then turned to the second step of *Chevron* and looked to the legislative history of the Act, which gave no indication of Congress's intent regarding the bounds of permissible abortion counseling and referral by Title X programs.<sup>117</sup> Finding both the statutory language and legislative history unenlightening, the Court emphasized that under *Chevron*, it was required to defer to the agency.<sup>118</sup> Finally, it concluded that the agency justified the change in its interpretation of the statute because the Secretary "determined that the new regulations are more in keeping with the original intent of the statute, are justified by client experience under the prior policy, and are supported by a shift in attitude against the 'elimination of unborn children by abortion.'"<sup>119</sup> Thus, not only did the Court allow the agency to engage in regulation aimed primarily at appeasing a special interest group, but it also explicitly accepted the agency's assertion that political attitudes had changed as a valid justification for the agency action.

## II. A Critical Evaluation of the *Chevron* Two-Step

*Chevron*, as applied by the more deferential judges, implements the pluralistic vision of the administrative state in its full glory. More active judges have attempted to preserve a greater judicial role when applying *Chevron* by attempting to find clarity in even blurry statutory

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114. See Abortion Counseling Regulations, *supra* note 103, at 2922-46.

115. *Rust v. Sullivan*, 500 U.S. 173, 187 (1991).

116. *Id.* at 184 (noting that the language of the Act simply "does not speak directly to the issues of counseling, referral, advocacy, or program integrity").

117. The Supreme Court agreed with every other court that examined the legislative history that the history was ambiguous with respect to Congress's intent about the Act's abortion counseling, referrals, and advocacy provisions. *Id.* at 185 (citing *Massachusetts v. Secretary of Health & Human Servs.*, 899 F.2d 53, 62 (1st Cir. 1990), *vacated sub nom. Sullivan v. Massachusetts*, 500 U.S. 949 (1991); *Planned Parenthood Federation of Am. v. Sullivan*, 913 F.2d 1492, 1497 (10th Cir. 1990), *vacated*, 500 U.S. 949 (1991); *New York v. Sullivan*, 889 F.2d 401, 407 (2d Cir. 1989), *aff'd*, 500 U.S. 173 (1991)). In addition to being ambiguous, the legislative history is anachronistic because the proviso was enacted prior to the Supreme Court's recognition of a woman's right to an abortion in *Roe v. Wade*, 410 U.S. 113 (1973). Discussion of the proviso thus reflected an understanding about government's role in restricting abortion that *Roe* rendered illegitimate shortly after Title X took effect.

118. *Rust*, 500 U.S. at 187.

119. *Id.* (quoting Abortion Counseling Regulations, *supra* note 103, at 2944).

provisions.<sup>120</sup> Neither the deferential nor the active approach,<sup>121</sup> however, provides a prudent method for judicial review of agencies' interpretations of statutes.

### A. *A Critique of the Deferential Application of Chevron*

The problems with the deferential approach to applying *Chevron* stem from difficulties with its pluralistic underpinnings. On the one hand, the pluralistic model of the administrative state is overly optimistic about the ability of political markets to achieve the optimal equilibrium of government-provided benefits.<sup>122</sup> On the other hand, the pluralistic model is too pessimistic in assuming that the political community can never transcend individual self-interest to construct some consensus about the public good.<sup>123</sup> Pluralism thus limits the possible political outcomes to an impoverished set that excludes government action aimed at fostering a politically defined public interest.

1. *Failures of the pluralistic political market.*—Public choice theory reveals that the political marketplace that pluralists envision is woefully imperfect. The economics of political organization push the pluralistic process to favor values held very strongly by a few individuals and to disfavor values held in moderation by many individuals.<sup>124</sup> Educating citizens who share diffused values, coordinating their political responses, and monitoring them to avoid free riders may entail great costs to each

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120. See Pierce, *supra* note 8, at 307 (noting that courts resolve conflicts involving the meaning of statutory provisions through statutory interpretation, even when a search for congressional intent is futile).

121. The approaches to applying *Chevron* that I call "deferential" and "active," others have labeled as the "strong" and "weak" readings of *Chevron*. E.g., Pierce, *supra* note 8, at 302; Panel Discussion, *supra* note 4, at 367 (comments of Cass Sunstein).

122. See ROBINSON, *supra* note 16, at 22 (noting that interest groups face a "prisoners' dilemma" that results in their seeking regulatory benefits despite the fact that by doing so, interest groups bear greater costs than the benefits they receive); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1545-46 (1988) (arguing against reliance on the majoritarian political process to achieve sought-after benefits).

123. See Seidenfeld, *supra* note 15, at 1534 ("Not only may regulation correct imperfections in the market's ordering of private preference, it may also legitimately embody the community's collective desires."); see also ROBERT P. WOLFF, *THE POVERTY OF LIBERALISM* 190-93 (1968) (demonstrating that there can be a public interest other than a summation of private interests); Sunstein, *supra* note 122, at 1545 (arguing that pluralistic theory cannot justify, among other things, prohibitions on discrimination or certain environmental measures, broadcasting regulations, or welfare expenditures because they may reflect private interests rather than aggregate societal preferences).

124. FARBER & FRICKEY, *supra* note 16, at 23; MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 48 (1965); see also WILLIAM GREIDER, *WHO WILL TELL THE PEOPLE: THE BETRAYAL OF AMERICAN DEMOCRACY* 108-09 (1992) (lamenting that under the pluralist understanding of government, "the New Deal has been stood on its head and now the weak and unorganized segments of society are the principal victims").

citizen in the group.<sup>125</sup> An individual will not participate in the organization if these costs exceed the value he attaches to the favorable political outcome the organization can secure.<sup>126</sup> These per capita costs of organizing decrease as the size of the group decreases, and the per capita benefits of organizing increase as the importance of the outcome to group members increases.<sup>127</sup> Thus, left unchecked, pluralistic politics tend to encourage regulators to generate "monopoly rents" for focused special interest groups even if the cost to the rest of society far exceeds the total social benefit that these groups derive.<sup>128</sup>

In addition, the ability of a group to deliver votes depends on the wealth of the group's supporters and their control over the institutions of power such as the media and local political organizations. Political outcomes thus tend to reflect more than the number of individuals who desire the outcome and the intensity with which they desire it; outcomes also depend on the class and background of those who desire the result.<sup>129</sup> The propensity of free, pluralistic markets to generate monopoly

125. See Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 372-73 (1983) (discussing the large expenditures required to assert political pressure); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 36 (1991) (noting that because influencing the political process requires time and money, groups may "refuse to incur those petitioning costs"); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 231 (1986) (observing that free-rider problems prevent the dissemination of information about legislative issues to the public, resulting in the passage of special interest legislation); Stigler, *supra* note 77, at 11-12 (stating that a voter's expenditure to educate herself on the issues and to express preferences will be determined by the expected costs and returns and that such costs are higher in the political arena than in the private marketplace).

126. Elhauge, *supra* note 125, at 36.

127. See OLSON, *supra* note 124, at 22-23 ("An individual will get some share of the total gain to the group, a share that depends upon the number in the group and upon how much the individual will benefit from that good in relation to the others in the group."); Elhauge, *supra* note 125, at 36-39 (discussing the fact that large groups with diffuse interests face greater "collective action obstacles" than smaller groups with more concentrated interests).

128. For a description of monopoly rents and discussion of the problems they create, see JAMES Q. WILSON, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 357, 369 (James Q. Wilson ed., 1980) (warning that whenever a prospective policy offers concentrated benefits with widely distributed costs, absent the presence of a watchdog organization, industries expecting to benefit from the policy will form lobbies to secure "subsidies and regulations that, in effect, spare them the full rigors of economic competition"); James M. Buchanan, *Rent Seeking and Profit Seeking*, in *TOWARD A THEORY OF THE RENT-SEEKING SOCIETY* 3, 8-9 (James M. Buchanan et al. eds., 1980) (stating that government piecemeal regulation encourages attempts to capture monopoly rents that in turn produce social waste); Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291, 301-02 (1974) (arguing that monopoly rent seeking can result in a "vicious circle" in which market inequalities created by government regulations can create a political consensus to intervene further in the market, which invites increased rent seeking, until "the market fails to perform its allocative function to any satisfactory degree"); Gordon Tullock, *Rent Seeking as a Negative-Sum Game*, in *TOWARD A THEORY OF THE RENT-SEEKING SOCIETY*, *supra*, at 24-30 (discussing the costs imposed by rent seeking).

129. See ROBERT A. DAHL, *A PREFACE TO ECONOMIC DEMOCRACY* 53-55 (1985) (describing the ways in which unequal ownership and control of economic enterprises can lead to political inequality).



rents and to favor the wealthy and powerful translates into a bias against the mainstream citizenry who share widely held but not deeply felt values and especially into a bias against the poor and under-represented.<sup>130</sup>

Because of *Chevron's* implicit faith in pluralistic politics, it fails to correct these imperfections in the political processes. By focusing the judicial inquiry on the express language of the statute that speaks to the precise question raised by the agency interpretation, a strict application of *Chevron* would result in a reviewing court's finding that most statutes are either ambiguous or silent.<sup>131</sup> The court would then be constrained to affirm an agency decision so long as the agency gave some nonludicrous explanation for its decision, regardless of whether that explanation is well reasoned or justified in terms of the public interest.<sup>132</sup> Consequently, the *Chevron* doctrine entirely fails to check political deal-making that results in statutory interpretations aimed at appeasing strong interest groups,<sup>133</sup> which on the whole redounds to the detriment of society's less affluent citizens.<sup>134</sup>

130. The same bias pervades economic markets. It is *expected*, however, that money will influence economic markets, but money's influence on the political process would, I think, undermine most citizens' sense of justice and democracy. Cf. Lucian A. Bebchuk, *In Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?*, 8 HOFSTRA L. REV. 671, 677-84 (1980) (arguing that an economic approach to balancing competing interests prevents proper dispensation of justice due to its bias against the poor); Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227, 240-42 (1980) (objecting to the use of the wealth maximization principle because of its incoherence and its moral objectionability). The influence of wealth, power, and "leisure time" on politics would be acceptable only if one assumes that their unequal distribution does not "excessively" affect the propensity of a group to expend time and money to influence political outcomes. See Elhauge, *supra* note 125, at 36 ("[I]f one assumes that skewed distributions of leisure time and money do not excessively distort a group's willingness to expend time and money, then such a willingness could be taken as an appropriate proxy for the degree of a group's interest.").

131. As Judge Buckley aptly stated: "[S]ome will find ambiguity even in a 'No Smoking' sign . . . ." *UAW v. General Dynamics Land Sys. Div.*, 815 F.2d 1570, 1575 (D.C. Cir.) (Buckley, J.), *cert. denied*, 484 U.S. 976 (1987); see also Merrill, *supra* note 5, at 990-91 (arguing that a strict application of *Chevron* would "mark a major shift of interpretive power toward the executive branch" and require great judicial deference because of the rare likelihood that Congress had considered the issue being litigated); Panel Discussion, *supra* note 9, at 126 (comments of Judge Stephen Williams) (asserting that *Chevron* turns "everything over to an agency unless Congress has spoken to the issue unambiguously or the agency has taken leave of its senses").

132. See *supra* note 72 and accompanying text.

133. The deferential *Chevron* framework deems illegitimate the reliance of judges on overriding goals they glean from a statute, as such reliance fails to respect the legislative compromises between various competing factions. See Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, LAW & CONTEMP. PROBS., Autumn 1991, at 249, 291 (noting that courts must defer to agencies in order to avoid tearing apart legislative compromise). Thus, the supporters of the deferential approach explicitly reject the notion that the courts' interpretive function is to limit monopoly rents that would otherwise be generated by legislative deal-making. See Macey, *supra* note 125, at 226 (explaining the "legislation-as-contract" method of statutory interpretation as a deferential approach that explicitly seeks to enforce the terms of deals between interest groups and the legislature).

134. See *supra* notes 129-30 and accompanying text.

*Rust v. Sullivan* is again illustrative. Considered from the pluralistic perspective, the fact that the gag rule was motivated primarily by interest group politics renders it praiseworthy. Unfortunately, however, the outcome was not the stable political equilibrium for which pluralistic democracy strives; instead, the regulations were immediately assailed as out of touch with the values of mainstream America.<sup>135</sup> In fact, the regulations were so inconsistent with mainstream values that Congress, a body noted for its inertia and inability to act expediently on all but the most pressing problems,<sup>136</sup> quickly passed a bill overruling the regulations.<sup>137</sup> Despite this strong reaction, President Bush vetoed the bill.<sup>138</sup> Only the election of President Clinton and a quick "Presidential Memorandum" managed to suspend the operation of these regulations.<sup>139</sup>

One might argue that the ultimate outcome in *Rust* demonstrates that the political system works to achieve the ultimate political equilibrium. I am not so sanguine. The presidential election hinged primarily on economic issues.<sup>140</sup> Although abortion was a significant campaign issue,<sup>141</sup>

135. See, e.g., John H. Chafee, *Congress Should Remedy the Court's Decision: Withholding Information from Low-Income Pregnant Women Is Wrong*, WASH. POST, June 7, 1991, at A23; Adam Clymer, *Politicians Take Up the Domestic Issues: Polls Suggest Why*, N.Y. TIMES, Sept. 15, 1991, at E5 (noting that the public opposes the gag rule "by a whopping 71 to 23 percent margin"); Renu Sehgal, *Abortion Advice OK'd in House Spending Bill*, BOSTON GLOBE, June 27, 1991, at C1 (quoting the president of Planned Parenthood as saying the vote reflects the "simple political reality that the great majority of American society finds the gag rule intolerable").

136. Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 836 (1994) (commenting that legislative inertia is inherent in the political process and "severely limits Congress's ability to bring outdated statutes in line with the times").

137. H.R. 2707, 102d Cong., 1st Sess. (1991); Philip J. Hilts, *Abortion Counseling Ban Is Rejected by Senate, 72-25*, N.Y. TIMES, Nov. 8, 1991, at B8; see also Greene, *supra* note 14, at 182-84 (describing presidential and congressional reactions to *Rust*, and concluding that the entire episode demonstrates how current legal doctrine has granted the executive branch extraordinary lawmaking power).

138. Adam Clymer, *President Vetoes Bill on Abortion: Override Bid Fails*, N.Y. TIMES, Nov. 20, 1991, at A1. Even President Bush seemed to recognize that the Reagan administration had miscalculated the public reaction to the gag rule. In response to widespread concern about the rule's implication for the doctor-patient relationship, he directed the Secretary of HHS to allow doctors in Title X programs to discuss abortion with their patients. *National Family Planning & Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 230 (D.C. Cir. 1992). This directive, however, was overturned by the D.C. Circuit as an amendment of the rule made without proper notice and comment procedures. *Id.* at 241-42.

139. Presidential Memorandum, *The Title X "Gag Rule,"* 58 Fed. Reg. 7455 (1993).

140. Bill McAllister, *Presidential Race Looks Tougher as Bush Vows Upset, Clinton Rallies Labor, Perot Set to Stump*, WASH. POST, Oct. 25, 1992, at A1.

141. Ruth Marcus, *On Support for Choice and Limits, Bush-Clinton Contrasts Are Sharp*, WASH. POST, Aug. 16, 1992, at A21. But see Timothy M. Phelps, *Campaign '92 High Court Campaign Issue That Wasn't the Supreme Court's Future: Shhhhhh, It's a Secret*, NEWSDAY, Oct. 30, 1992, at 17 (recognizing that while the presidential election had the potential of either consolidating an ultra-conservative majority or liberalizing the Court with respect to abortion rights, neither presidential candidate made this topic an election issue).

voter attention focused primarily on the implications of future Supreme Court appointments for the continued viability of *Roe v. Wade*,<sup>142</sup> there is no evidence indicating that the gag rule played more than a tangential role in President Clinton's election. In short, the reversal of these politically unpopular regulations was serendipitous and not the result of a political process that necessarily protects against such unpopular outcomes.<sup>143</sup>

The outcome of the Title X regulations also illustrates how the political aspects of the administrative process are likely to disfavor the poor and politically disenfranchised. Although these regulations raised the ire of many pro-choice citizens, they affected directly only those dependent on federally subsidized family planning and health care. Women with personal primary-care physicians do not need the information and referrals from Title X projects; they can get that information from their own doctors. But women who fall outside the private health-care system—single women who are not regularly employed or unmarried women whose spouses are also not regularly employed, in short, women who form much of the permanent underclass in American society—have no alternatives to subsidized family planning and health programs. These were the citizens for whom the change in policy threatened loss of choice and delay in obtaining pre-natal and abortion services which in turn greatly increase the health risks associated with pregnancy.<sup>144</sup>

2. *Pluralism's failure to seek consensus on government policy.*—Pluralistic democracy also limits political outcomes to an impoverished set of bargains struck by interest groups seeking to maximize satisfaction of their *ex ante* political desires. It is a politics of coalition-building and deal-making in which the overall satisfaction of the political community and the

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142. 410 U.S. 113 (1973); see Tony Mauro, *Direction of Court Key Issue for Voters*, USA TODAY, June 9, 1992, at 8A (noting that although Supreme Court Justices rarely loom as a campaign issue, the possible impact of a substantial number of new Justices on key areas such as abortion rights presents a major issue for pre-election debate).

143. Judging from the reaction to President Clinton's memorandum suspending the gag rule, the rules were not a pressing issue among any major segment of the polity. See Amy Goldstein & Richard Morin, *Clinton Cancels Abortion Restrictions of Reagan-Bush Era*, WASH. POST, Jan. 23, 1993, at A1 (quoting anti-abortion protestors' lack of concern for the repeal of the gag rule in comparison to other abortion restrictions that were lifted by President Clinton).

144. See Janet Benshoof, *Planned Parenthood v. Casey: The Impact of the New Undue Burden Standard on Reproductive Health Care*, 269 JAMA 2249, 2249, 2254 (1993) (noting the effect of abortion restrictions, including the health risks posed by delayed abortions, disproportionately affects "young, poor, minority, and rural women"); Christine L. Young et al., *Psychosocial Concerns of Women Who Delay Prenatal Care*, 71 FAMILIES IN SOC'Y: J. CONTEMP. HUM. SERVICES, 408, 408-09 (1990) (describing the risks posed by delayed prenatal care and noting that such risks are particularly great for poor, minority women).

wisdom of the political outcome do not inatter.<sup>145</sup> As such, pluralistic democracy tends to preclude outcomes that reflect consensus among different groups willing to listen open-mindedly and empathetically to others within the political community.<sup>146</sup> This limitation bodes ill for administrative policy, because agencies pursuing purely political ends often ignore approaches that in the long run might better serve the interests of all members of society.<sup>147</sup>

Returning to *Rust*, a careful reading of HHS's explanation indicates that the agency considered Section 1008 of Title X as embodying two purposes. First, HHS explicitly read Section 1008 to mean that federal funds were not to be used by programs that intentionally encourage abortions as a method of family planning.<sup>148</sup> Second, and more controversially, the agency implicitly treated the statute and legislative history as aimed at preventing Title X programs from operating in any manner that would increase the likelihood that a pregnant client would choose an abortion.<sup>149</sup> Neither purpose, however, automatically justified the ban on nondirective abortion counseling. More importantly, HHS never justified its adoption of the more speculative second purpose. Faced with an ambiguous statute, the agency merely asserted that its reading was more

145. See Glicksman & Schroeder, *supra* note 133, at 305 (describing the legislative process as congressional "dealmaking," resulting in ambiguous policies and purposes that hinder judicial interpretation).

146. See Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1507, 1507-08 (1988) (describing a premise of pluralism as "deep mistrust of people's capacities to communicate *persuasively* to one another their diverse normative experiences . . . that move each other's views on disputed normative issues towards felt (not merely strategic) agreement without deception, coercion or other manipulation" (emphasis in original)); Sunstein, *supra* note 122, at 1554-55 (noting that, unlike republicanism, pluralism treats "the notion of a common good [as] . . . alternatively mystical or tyrannical"); cf. MICHAEL J. PERRY, *MORALITY, POLITICS AND LAW* 58 (1988) ("Liberal epistemology holds that one cannot resolve such differences rationally [*e.g.*, through discourse].").

147. For example, pluralistic theory cannot justify government redistribution of wealth to those with less overall economic and political power. Incorporating some notion of public good as the goal of government action, however, allows for such redistribution. See ROBINSON, *supra* note 16, at 31 (arguing that the "public goods theory" can be used to justify wealth redistribution); James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1545 (1990) ("Moreover, when parties to the consensus insist that the government afford all citizens equal concern and respect, they generally seem to mean that the government, when it sets about distributing scarce resources, should accord each person equal status as a human being precisely because each person is, equally, a potential creator of his or her own valid good and because each heterogenous person's self-defined good is equally worthy of governmental attention and protection.").

148. Abortion Counseling Regulations, *supra* note 103, at 2922 (quoting the conference report on Title X, which stated that "[i]t is . . . the intent of both Houses that the funds authorized be used only to support *preventive* family planning" (emphasis in original) (quoting H.R. CONF. REP. NO. 1667, 91st Cong., 2d Sess. 8-9 (1970), reprinted in 1970 U.S.C.A.N. 5080, 5081)).

149. For example, in explaining its decision to adopt regulations amending the previous guidelines, HHS asserted that the policy behind § 1008 "is that abortion is not to be encouraged or promoted in any way." Abortion Counseling Regulations, *supra* note 103, at 2923 (emphasis added).

consistent with congressional intent and failed to consider open-mindedly the policy implications of the gag rule's discouragement of abortion.<sup>150</sup>

HHS reported no data indicating that nondirective counseling resulted in any increase in the costs of Title X programs. Perhaps abortion-related information is easily incorporated into the general information regarding prenatal care given to pregnant women who seek the aid of federally subsidized family-planning centers, so that the provision of such information would not increase program costs. If so, then nondirective counseling would not conflict with the statutory purpose of preventing the intentional use of federal funds to encourage abortion. Similarly, HHS had no factual basis for concluding that nondirective counseling would necessarily result in an increase in abortions. Neutral provision of information might be just as likely to discourage as to encourage a pregnant woman to seek an abortion.<sup>151</sup> Moreover, if neutral provision of information did increase the number of women electing abortion, that would merely reflect the choices of a more informed clientele, and would not indicate that the program itself had encouraged these choices.

Perhaps the most disconcerting aspect of HHS's decision was the Department's abdication of its responsibility for assessing the policy implications of the regulations. Opponents of the proposed regulations expressed concern that the rules would delay the abortion procedure for clients who ultimately decide to terminate their pregnancy.<sup>152</sup> Critics asserted that delays can significantly increase the health risks associated with abortion.<sup>153</sup> Certainly it is not the goal of any interest group merely to delay abortions until a point in the pregnancy when they are less safe. Yet, in response to this concern, the Department merely contended that Section 1008 prohibited it from taking any other position, for to do so would constitute the illegal facilitation of abortion.<sup>154</sup> Thus, instead of

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150. See *Rust v. Sullivan*, 500 U.S. 173, 187 (1991) (noting that the Secretary of HHS "determined that the new regulations are more in keeping with the original intent of the statute, are justified by client experience under the prior policy, and are supported by a shift in attitude against 'the elimination of unborn children by abortion'" (quoting Abortion Counseling Regulations, *supra* note 103, at 2944)).

151. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2841 (1992) (noting that providing women with information enhances decisionmaking).

152. Abortion Counseling Regulations, *supra* note 103, at 2936.

153. *Id.*; Catherine G. Schmidt, *Where Privacy Fails: Equal Protection and the Abortion Rights of Minors*, 68 N.Y.U. L. REV. 597, 605 (1993).

154. Abortion Counseling Regulations, *supra* note 103, at 2938. HHS also stated that in some instances delay is beneficial because it allows the client "sufficient time for reflection prior to making an informed decision." *Id.* This response, in addition to failing to address concerns about health risks, ignores the reality that delay at a point when the pregnant woman does not have information about the abortion option is not likely to result in meaningful reflection and an informed decision. HHS's statement also ignores the fact that most women agonize about the abortion decision without needing any additional delays provided by bans on Title X programs providing information.

guiding its interpretation by the concerns of the polity and its expert evaluation of those concerns, HHS relied on its politically pre-ordained reading of the statute to avoid addressing the policy concerns of pro-choice comments in the rule-making proceeding.

HHS's justification for the gag rule did address one policy concern. The Department noted that its previous policy had led to abuses, which prompted some women who regretted their abortion decisions to charge that Title X programs had encouraged or even coerced them to terminate their pregnancies.<sup>155</sup> Stories of such abuses do indicate a tension between the manner in which HHS had previously implemented Title X and the accepted first purpose of Section 1008. But HHS did not explain why it could not relieve this tension by trying to cure the abuses without ignoring the concerns of pro-choice groups. In other words, HHS addressed only the concerns that were expressed by the interest group that the new rules were intended to serve and claimed that its hands were tied with regard to any other concerns. Yet, the Supreme Court's extremely deferential approach to the reasonableness step of the *Chevron* doctrine lauded the agency for its explanation that "prior policy failed to implement properly the statute."<sup>156</sup> Such an explanation merely justifies an inquiry into new rules and does not justify the wholesale revisions adopted by HHS. In essence, the deferential approach to the *Chevron* doctrine encouraged the agency to perform an incomplete and one-sided policy analysis rather than genuinely to try to reconcile the statute with the concerns of the affected public.<sup>157</sup>

### B. Problems with the Active Approach to Chevron

Unfortunately, the active approach to *Chevron* does not alleviate the problems of the deferential approach without creating problems of its own. Under the active approach, courts view their role as one of resolving ambiguities to the extent possible before reaching the deferential second

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155. *Id.* at 2923-25. HHS cited particular examples of Title X providers failing to give any balanced discussion of options and characterizing the fetus as "a lump of tissue," "fetal tissue," or "uterine contents." It noted that several women subjected to such treatment had commented that "they were given no counseling at the time they made their decision to abort as to the remorse and guilt they might later feel." *Id.* at 2924.

156. *Rust v. Sullivan*, 500 U.S. 173, 187 (1991).

157. In fact, the agency's decision concludes its discussion of HHS's basis for the rules with the statement: "The Department, accordingly, concludes that there is an adequate basis for this rule since it is reasonable in light of all circumstances." Abortion Counseling Regulations, *supra* note 103, at 2925. The decision then cites *Chevron*. Thus, the message that the Department infers from judicial review under *Chevron* is that it need find only some rational basis for its decision and that it need not concern itself with the wisdom of its interpretation or the policy concerns that its interpretation generates.

step of the *Chevron* doctrine.<sup>158</sup> Thus, when the language of the statutory provision does not provide a clear answer to the precise issue the agency decided, active reviewing courts look at the structure of the statute and its relation to other statutes.<sup>159</sup> Some may also consult announced statutory purposes or scour the legislative history to infer how Congress would have acted had it considered the precise question.<sup>160</sup> In addition, active courts may invoke traditional canons of statutory interpretation to read a single meaning into an otherwise ambiguous statute.<sup>161</sup>

In its extreme form, the active approach to *Chevron* re-establishes the judiciary as the institution primarily responsible for interpreting the law. The reviewing court will first use all the traditional techniques<sup>162</sup> for determining "Congress's will," and if it comes to a clear conclusion about that will as applied to the particular situation, it need never consider the agency's interpretation.<sup>163</sup> The agency interpretation warrants judicial deference only when the nature of the issue leaves the court uncertain about its reading of the statute.

The problems with the active approach to *Chevron* stem from flaws in the transmission-belt and expertise models. As does the transmission-belt model, the active approach thrusts the court into the debate about policy under the guise of ensuring that agencies do not deviate from congressional

158. See *supra* note 69 and accompanying text.

159. *E.g.*, *Posters 'N' Things, Ltd. v. United States*, 114 S. Ct. 1747, 1751 (1994); *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 608-14 (1991); *United States Dep't of Veterans Affairs v. Federal Labor Relations Auth.*, 9 F.3d 123, 126 (D.C. Cir. 1993).

160. *E.g.*, *Contract Courier Servs., Inc. v. Research & Special Programs Admin.*, 924 F.2d 112, 114-15 (7th Cir. 1991); *Defenders of Wildlife, Friends of Animals & Their Environment v. Lujan*, 911 F.2d 117, 124-25 (8th Cir. 1990), *rev'd on other grounds sub nom. Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992); *Public Citizen v. FTC*, 869 F.2d 1541, 1554-55 (D.C. Cir. 1989); *Bresgal v. Brock*, 843 F.2d 1163, 1167-68 (9th Cir. 1987); *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1089 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 913 (1988).

161. See, *e.g.*, *Estate of Thompson v. Commissioner*, 864 F.2d 1128, 1132 (4th Cir. 1989) ("We start our analysis . . . where we properly should, the language of the statute itself."); *Bresgal*, 843 F.2d at 1166 ("In construing a statute . . . the Court looks first to the language of the statute itself, then to its legislative history, and then to the interpretation given to it by its administering agency. At all times, however, the goal is to determine congressional intent." (citation omitted)); *Griffon v. United States Dep't of Health & Human Servs.*, 802 F.2d 146, 152, 152-55 (5th Cir. 1986) ("[T]he canons of retroactive construction themselves provide the artillery for our assault on the walls that hide congressional intent.").

162. See generally CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 112-37 (1990) (describing and criticizing techniques courts use to determine the will of the enacting legislature).

163. *Wassenaar v. Office of Personnel Management*, 21 F.3d 1090, 1096 (Fed. Cir. 1994) (construing the statute without regard to the agency interpretation because inflexible application of the agency reading of the statute could lead to absurd results); *Colorado ex rel. Colorado State Banking Bd. v. RTC*, 926 F.2d 931, 950 (10th Cir. 1991) (Ebel, J., dissenting) (opining that the court should not follow the agency interpretation of the McFadden Act because that interpretation violates canons of statutory interpretation); *American Mining Congress v. EPA*, 824 F.2d 1177, 1185-86 (D.C. Cir. 1987) (rejecting EPA's definition of solid waste under the Resource Conservation and Recovery Act, which had included material reused in an ongoing production process, because one of Congress's purposes in adopting the Act included encouraging recycling).

will or from determining the plain meaning of the statutory text. When, however, an active reviewing court cannot discern a plain meaning or legislative will that sheds light on questions before it, the court simply leaps to the other extreme, completely abandoning its law-declaring role and leaving the agency with unfettered discretion to interpret the statute.<sup>164</sup> Thus, under the active approach, some courts usurp the agency's policy-formulating function while others totally abdicate their responsibility to check unreasoned agency decisionmaking.

1. *Fictitious congressional will and politically unaccountable courts.*—The active approach to *Chevron* stems from the traditional legal notion that courts are responsible for declaring what the law is.<sup>165</sup> Because courts are the least politically responsive branch, however, they must not substitute their political judgments or value choices for those of the legislature when interpreting a statute.<sup>166</sup> Hence, the court must justify its interpretation by explicit reference to the language, structure, and purpose of the statute, as well as to any background norms of which Congress presumably was aware when it enacted the statute.<sup>167</sup> In other words, active courts seek to determine the legislative will embodied in a statute when they interpret it.<sup>168</sup>

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164. The reasons that courts abdicate their law-declaring role are different under the expertise model and under *Chevron*. Under the expertise understanding of agencies, courts naively trust that the agency will determine the best outcome by applying its technical expertise and professional ethic. Although the *Chevron* doctrine does not naively presume that agencies make decisions as would a group of nonpolitical professionals, it blindly relies on agencies' greater political accountability as its basis for trusting agency interpretations of statutes. The bottom line, however, is the same: The courts leave unchecked the influence of a potentially biased political market.

165. This notion can be traced back to the admonition of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), that "[i]t is emphatically the province and duty of the judicial department to say what the law is." However, as Professor Monaghan noted, this notion is not necessarily inconsistent with deferential review of agency statutory interpretation:

The court's task is to fix the boundaries of delegated authority . . . . [T]he judicial role is to specify what the statute cannot mean, and some of what it must mean, but not all that it does mean. In this context, the court is not abdicating its constitutional duty to "say what the law is" by deferring to agency interpretations . . . .

Monaghan, *supra* note 14, at 27-28.

166. See Lino A. Graglia, "Interpreting" the Constitution: Posner on Bork, 44 STAN. L. REV. 1019, 1021 (1992) (noting that judicial activism is wrong because it is equivalent to government by judges who are not subject to electoral control).

167. See Eskridge, *supra* note 69, at 641 ("Given our society's commitment to representative democracy, the legislative background of statutes seems like an acceptable source of context."); Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1, 9-10 (1988) (asserting that all theories of statutory interpretation which fail to give dispositive weight to legislative intent are inconsistent with the principle of legislative supremacy); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 24-27 (1985) (asserting that the legitimacy of lawmaking by federal courts is limited by the principle of electoral accountability, in which public policy is made by elected officials).

168. See Eskridge, *supra* note 69, at 626 ("[T]he Court views its role as implementing the original intent or purpose of the enacting Congress."). Many commentators distinguish between legislative



Unfortunately, legislative will is usually more of a fiction than a fact. It is an artifice that the legal system creates in order to lend coherence to the often fractured product of an unruly legislative process.<sup>169</sup> Congressional adoption of a statute usually requires legislators to build a coalition of interest groups that may have different or even conflicting statutory goals.<sup>170</sup> Hence, the language of a statute may purposely be left vague, and legislative history will often reflect two or more "intent" that may lead to different interpretations within the context of a specific controversy.<sup>171</sup> Such vagueness provides great leeway for a court to find a

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intent with respect to a specific controversy and more general legislative purposes. See, e.g., SUNSTEIN, *supra* note 162, at 127 (differentiating between ascertaining "a general legislative aim or purpose" and "how the enacting legislature wanted the [specific] question to be resolved"); William Popkin, *Foreword: Non-Judicial Statutory Interpretation*, 66 CHI-KENT L. REV. 301, 307 (1990) (discussing the problem of specific statements in legislative history). My notion of legislative will includes both specific intent and general purposes, unless otherwise stated.

169. This artificial nature of "legislative will" provided the focus of significant legal realist criticism. See, e.g., William R. Bishin, *The Law Finders: An Essay in Statutory Interpretation*, 38 S. CAL. L. REV. 1, 14, 17, 14-17 (1965) ("[L]egislative history will represent the position of only a very small portion of the lawmaking body. . . . [T]he lazy judge is likely to take the legislative history as an excuse for foregoing the difficult problems of statutory analysis which it is his responsibility to meet."); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870, 869-70 (1930) ("On this transparent and absurd fiction it ought not be necessary to dwell. . . . A legislature certainly has no intention whatever in connection with words which some two or three men drafted, [a] number rejected, and [many had] differing ideas and beliefs."). The realist skepticism about the existence of any true legislative intent has enjoyed a recent revival. See, e.g., Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) ("Because legislatures comprise many members, they do not have 'intent' or 'designs,' hidden yet discoverable."); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279, 279-80 (1985) (proclaiming that objective interpretivism is not helpful to legal reasoning).

170. See Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI-KENT L. REV. 441, 446-47 (1990) ("Statutes are drafted by multiple persons, often with conflicting objectives."); Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 380-81 (illustrating the compromise involved in the passage of a particular strip-mining law and the resulting ambiguities that stumped the courts).

171. See RONALD DWORKIN, *LAW'S EMPIRE* 320-21 (1986) (lamenting the difficulties of ascertaining "some composite group intention"); Easterbrook, *supra* note 170, at 446-47 (noting that no single objective will be determinable because a statute has multiple drafters); see also Pierce, *supra* note 8, at 313 (contending that when Congress chooses not to resolve a particular policy issue in legislation, an administrative agency can change its interpretation of the law in accordance with the political philosophy of each President). In fact, legislators and their staff members often play a game of inserting comments into the legislative history with the hope of getting courts to adopt their preferred reading, or at least to counter legislators representing other interest groups in the coalition from doing the same. See *Blanchard v. Bergeron*, 489 U.S. 87, 98-100 (1989) (Scalia, J., concurring) (claiming that the cases cited in the legislative history on which the Court relied were probably inserted by a congressional staffer and did not represent the informed intent of Congress); Popkin, *supra* note 168, at 312 ("[T]he secretive and staff-dominated process of creating legislative history might be more amenable to private interest group pressure than the process of writing legislation."); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 376, 376-77 ("Lobbyists maneuver to get their clients' opinions into the mass of legislative materials; judges in turn, may be tempted to use the convenient tool of legislative history as an escape from the hard work of actual judging."); Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read:*

congressional "will" consistent with the judge's personal values and politics.<sup>172</sup> Hence, the active search for an often fictitious congressional will often engenders the court's substituting its values for those promoted by the agency's interpretation.<sup>173</sup>

In some cases, judges may have no better option than to rely on the concept of legislative intent, even if that concept remains hazy and amorphous. Judicial determination of congressional intent, and at a broader level statutory purpose, can provide some guidance to the interpreter about how to apply a statute whose text does not resolve the precise issue before her.<sup>174</sup> And, to some extent, careful use of legislative history to construct congressional will constrains the interpreter from reading her personal preferences into the statute.<sup>175</sup> But, when an agency

*Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 341-42 (1990) (noting the abuses inherent in the planned "colloquy" between congressmen who know that their comments will affect judicial interpretation).

172. I do not mean to suggest that the courts I have labelled "active" seek to impose their own values when interpreting statutes. Rather, I think judges, like most people, are apt to find a clear meaning consistent with their views of how the world should operate, when others with different views would find ambiguity or a different "clear meaning."

173. See Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (likening the citation of legislative history to "looking over a crowd and picking out your friends"). Jonathon Macey has objected to this critique, arguing that special interest groups have an incentive to hide their real legislative agendas behind public interest justifications. Macey, *supra* note 125, at 251. For Macey, having the courts enforce the announced purposes of a statute provides a check on legislation that often represents unjustified political deals that favor special interest groups. *Id.* at 254. Although Macey persuasively points out the need for courts to consider announced legislative purposes when interpreting statutes, his analysis does not balance this need against the costs of inept and unaccountable courts imposing their views about legislative purpose on agencies. Such a balancing suggests to me the need for courts to bring these considerations to bear without definitively imposing their interpretation on an agency.

174. For "intentionalists," legislative history sheds light on how the enacting Congress might have resolved the issue had it been confronted with it. See McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, LAW & CONTEMP. PROBS., Winter 1994, at 3, 14-15 (claiming that interpreting statutes in accordance with the intent of the enacting legislature provides stability of statutory policy that both citizens and legislators are likely to prefer); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 190 (1986) (suggesting that judges confronted with ambiguous statutes should ask what the framers would have wanted them to do); cf. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 220, 220-21 (1980) (describing and critiquing the intentionalist interpreter's attempts "to translate the adopters' intentions into the present in order to apply them to the question at issue"). For "normativists," legislative debates reveal "meta-intent"—legislators' insights whose value survives changes in the particular context within which the legislators may have envisioned the statute applying. See William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 418-19 (1990) (describing the normativist belief that legislative history has a truth value which may be useful in determining not the absolutely true meaning of a statute, but the best meaning for a particular case).

175. See Popkin, *supra* note 168, at 316 (suggesting that clear statements in the legislative history provide significant evidence of statutory meaning without allowing a court to mold legislative history to justify a preferred interpretation); cf. SUNSTEIN, *supra* note 162, at 128 ("Without reference to the [legislative] history, interpretation can become less bounded."). Obviously, I am not sympathetic to

administers a regulatory scheme, legislative intent seems too tenuous a concept for reviewing courts to use at *Chevron's* step one to exclude *entirely* the more technically expert and politically accountable agency from the interpretive process.<sup>176</sup>

Again, *Rust* vividly illustrates how the active approach allows judges to rely on their personal politics to decide statutory issues without paying any heed to agency interpretations. The dissent in *Rust* would have invoked the canon that, to the extent possible, statutes should be construed to avoid serious doubt regarding their constitutionality.<sup>177</sup> Finding the HHS interpretation of Section 1008 constitutionally suspect, the dissent would have reversed the regulation and left Congress with the task of making "explicit and unambiguous" any legislative intent to burden the speech interests of Title X project physicians and the privacy interests of pregnant clients.<sup>178</sup> The majority, however, easily sidestepped this issue; for the five Justices who joined the opinion of the Court, "the regulations promulgated by the Secretary [did] not raise the sort of 'grave and doubtful constitutional questions' . . . that would lead [these Justices] to assume

the formalist critique that reliance on anything other than statutory text allows judicial usurpation of the legislative policymaking function. For examples of this critique, see Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87, 92 (1984) (concluding that the intentionalist approach must fail because it is impossible for judges to know what 535 legislators would do if faced with a question they did not consider); Starr, *supra* note 171, at 376, 379 (reflecting the view that the use of legislative history allows courts to enter the political process by selecting which voice in a political debate to emphasize).

176. Agencies are more expert and more accountable than courts not only in the traditional senses of technical knowledge and non-life-tenured appointments, but more significantly because of their "closeness to the legislative process, continued involvement [in this process], and responsibility [for administering the statute]." Strauss, *supra* note 171, at 346.

177. See *Rust v. Sullivan*, 500 U.S. 173, 204 (1991) (Blackmun, J., dissenting) (stating that while the majority does not dispute this canon of construction, it refuses to apply it). Some commentators would distinguish between judicial use of canons of interpretation and legislative history in interpreting statutes. *E.g.*, Eskridge, *supra* note 69, at 663-64. To the extent that some canons, such as "the inclusion of the one is the exclusion of another," reflect logical uses of language and commonly held norms of grammar, one might reasonably assume that Congress acted consistently with these canons in fashioning legislation. See David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 927-28 (1992) (defending the use of canons as simply expressions of a drafter's likely natural tendencies); see also Marshall J. Breger, *Introductory Remarks to Conference on Statutory Interpretation: The Role of Legislative History in Judicial Interpretation*, 1987 DUKE L.J. 362, 365-70 (distinguishing between canons that are used in interpreting legislative intent when the statutory language is unclear and canons that are used when the statute is silent as to the problem at hand). But the canon at issue in *Rust*—that the court should interpret statutes to avoid deciding difficult constitutional issues—is, in all likelihood, not one to which Congress paid any attention when it passed § 1008 of Title X. Cf. Abner J. Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627, 629 (1987) ("When I was in Congress the only 'canons' we talked about were the ones the Pentagon bought that could not shoot straight.").

178. See *Rust*, 500 U.S. at 207 (Blackmun, J., dissenting) ("It is both logical and eminently prudent to assume that when Congress intends to press the limits of constitutionality in its enactments, it will express that intent in explicit and unambiguous terms.").

Congress did not intend to authorize [the regulations'] issuance."<sup>179</sup> In essence, the use of the canons of statutory interpretation to resolve ambiguities in the statute permitted both the majority and the dissent to find different meanings in line with the individual Justices' predilections about the ability of government to restrict subsidized nondirective counseling about abortion. Ultimately, under the active approach to *Chevron*, the Court's interpretation of Congress's intent depended on the Justices' attitudes toward abortion and state-funded family planning.

Having judges determine statutory meaning in terms of their personal predilections is not desirable. Not only are federal judges unaccountable to the electorate, but they also tend to hail from mainstream, middle-class America; few come from impoverished families, relatively few are minorities, and women continue to be under-represented.<sup>180</sup> Yet, personal values often derive from cultural backgrounds and economic class.<sup>181</sup> Hence, to the extent that a court's reading of statutory meaning reflects personal values, judicial determinations are unlikely to comport well with the values the entire polity would like to see supported by regulatory statutes.<sup>182</sup>

One response to these concerns lies in Congress's power to override objectionable judicial constructions of statutes. Although this can and does occur in the most salient or egregious cases,<sup>183</sup> Congress's structure and cumbersome legislative process render congressional oversight impractical as the usual means of ensuring fidelity to the polity's values.<sup>184</sup> One

179. *Id.* at 1771 (quoting *United States ex rel. Attorney Gen. v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)).

180. Paul Brest, *Who Decides?*, 58 S. CAL. L. REV. 661, 664, 669 (1985); see A. Leon Higginbotham, Jr., *Seeking Pluralism in Judicial Systems: The American Experience and the South Africa Challenge*, 42 DUKE L.J. 1028, 1053 (1993) ("As of January 1, 1993, of the 837 authorized, active Article III judges, blacks comprised a total of 5.1%, women 10.9%, Hispanic-Americans 3.7%, and Asian-Americans 0.7%.").

181. Brest, *supra* note 180, at 664 ("Many of these characteristics [such as race and socio-economic background] correlate with attitudes on social, political and economic issues.").

182. *Cf. id.* at 669 ("[J]udges' attitudes on important social and political issues do not reflect those of the population at large.").

183. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretations Decisions*, 101 YALE L.J. 331, 332 (1991) (listing eight cases that the 101st Congress overrode).

184. PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 32 (1970); Merrill, *supra* note 167, at 22-23; *cf. Seidenfeld*, *supra* note 15, at 1551 (explaining why Congress cannot regularly overcome "institutional inertia" to explicitly override agency decisions with which legislators disagree). Studies have shown that Congress does not frequently override Supreme Court decisions. See, e.g., Thomas R. Marshall, *Policymaking and the Modern Court: When Do Supreme Court Rulings Prevail?*, 42 W. POL. Q. 493, 493-94, 503 (1989) (using computer models to identify factors that explain why some Supreme Court rulings prevail and others do not). A recent study by William Eskridge, however, disputes these findings. Eskridge, *supra* note 183, at 335. Eskridge concedes, however, that "Congress tends not to be aware of [lower court decisions] and overrides a much smaller percentage of them." *Id.* at 337 n.12. Congressional oversight of agency interpretations is more likely to work because the appropriations process and the relationship of committees to agencies

simply cannot count on congressional oversight as the primary means to ensure that the judiciary interprets statutes in a manner that responds to the public's values.

2. *Congressional will and the nonexpert courts.*—Even when a statute evidences a congressional understanding that an active court might use to answer the precise question raised by an agency decision, this answer is not always best. When considering a bill, members of Congress cannot possibly envision the myriad of real-world situations to which the statute might apply.<sup>185</sup> Thus, even considering the legislative history, the language, and the structure of a statute, Congress necessarily dictates how the statute will operate at a broader level of generality than does the agency when it seeks to apply the statute. Although this broader level suggests an outcome at the more particular level of application, the agency might find that a different outcome better serves the balance of statutory goals that the public prefers. What is more, a statute may have been passed decades earlier when society may have viewed the various aims underlying a regulatory scheme very differently or before Congress could have envisioned the present situation that demands application of the statutory provisions.<sup>186</sup> In such a situation, an aggressive judicial search for congressional will can constrain the expert agency to choose an interpretation at odds with the polity's present values.<sup>187</sup>

The nature of the judiciary encourages courts to impose a formalistic reading on the agency even when that reading is bad policy. Accepted

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allows Congress to influence agencies without explicitly having to adopt overriding substantive legislation. See Seidenfeld, *supra* note 15, at 1551-52 (suggesting that the power of the purse allows Congress to keep agencies in line with preferred policies).

185. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1480 (1987) (noting that the passage of time gives rise to unanticipated events and circumstances that may render a statute ambiguous).

186. See *id.* at 1488 (discussing the Supreme Court's failure in *Smith v. Wade*, 461 U.S. 30 (1983), to recognize that changing policies underlying 42 U.S.C. § 1983 (1988) could alter its meaning, and therefore that appeals to historical analysis were not instructive).

187. The problem of the static nature of statutory language has, on occasion, led courts to invoke the canon of interpretation that they should ignore the plain meaning of a statute when that meaning leads to absurd results or frustrates the purposes of the statute. See, e.g., *Perry v. Commerce Loan Co.*, 383 U.S. 392, 399 (1966) (refusing to apply the six-year ban on second bankruptcy filings to personal payment extension plans under the Bankruptcy Code); *In re Investment Bankers, Inc.*, 4 F.3d 1556, 1564 (10th Cir. 1993) (rejecting a literal reading of the Securities Investor Protection Act because amendments to the Bankruptcy Code had rendered the plain meaning absurd), *cert. denied*, 114 S. Ct. 1061 (1994). It has also prompted at least one distinguished scholar to suggest that courts should treat old statutory prescriptions as they would common-law doctrine, feeling free to alter the prescriptions as the judges find appropriate to better fit the modern context in which the statutory provisions apply. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 81-171 (1982); see also Eskridge, *supra* note 185, at 1483 (describing a process of dynamic interpretation that focuses on present circumstances as well as original intent).

practice dictates that courts approach their interpretive task as diviners of original legislative meaning.<sup>188</sup> Although courts will take policy implications into account, these considerations enter as background influences, while parsing the words of the statute and massaging the legislative history remain the bread and butter of judicial statutory interpretation.<sup>189</sup> As long as the courts are the statutory interpreters, this focus on legislative intent and statutory meaning is appropriate. After all, judges have neither the expertise nor the political accountability to justify pursuit of their interpretive task primarily with an eye toward setting policy.<sup>190</sup> But the bottom line is that judicial inquiry overemphasizes the formalistic search for legislative will and tends to downplay the policy implications of judicial interpretation. A likely outcome is bad, judicially mandated public policy.<sup>191</sup>

3. *The new textualism and active Chevron review.*—Recently, some jurists have eschewed legislative will in favor of textual approaches to statutory interpretation.<sup>192</sup> They contend that a body like Congress has no singular will or intent and that the only congressional action that has binding legal force is the enactment of specific statutory language.<sup>193</sup>

188. 2A NORMAN J. SINGER, SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION § 45.05 (5th ed. 1992).

189. See Eskridge, *supra* note 185, at 1484-97 (describing various cases in which both the majority and dissent apply an intentionalist approach despite the unilluminating nature of that approach).

190. See Posner, *supra* note 174, at 200 (arguing that judges should interpret statutes as officers should interpret commands from their superiors—with an eye toward the goals of the superiors and not in pursuit of their own objectives). Whether the intent of the enacting legislature should be the sole focus of courts interpreting statutes is presently a hotly debated subject. Compare Merrill, *supra* note 167, at 27 (arguing that separation of powers and electoral accountability limit federal courts “to interpreting federal texts (initially understood as a search for the specific intentions of the enacting body)”) and Posner, *supra* note 174, at 189-90 (arguing for an interpretive framework in which judges search to determine how the drafters of the statute would have answered a particular question) with T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 49-50 (1988) (defending methods of interpretation that consider changing values and policies) and Eskridge, *supra* note 174, at 415 (favoring a model of dynamic statutory interpretation).

191. A noted example of problematic judicial interference in agency policymaking occurred when the courts read the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988), to require protection of air quality in “clean air” areas. *E.g.*, Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979). See generally R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT (1983) (discussing numerous court decisions regarding the Clean Air Act and concluding that the courts do not possess the institutional capacity to efficiently formulate beneficial policy).

192. The founding of the new textualism is usually attributed to Justice Antonin Scalia and Seventh Circuit Judge Frank Easterbrook. *E.g.*, George A. Costello, *Average Voting Members and Other “Benign Fictions”*: The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History, 1990 DUKE L.J. 39, 39; Eskridge, *supra* note 69, at 650; Frickey, *supra* note 69, at 252-55. Other judges, including James Buckley of the D.C. Circuit and Alex Kozinski of the Ninth Circuit have since joined the ranks of those skeptical about the use of legislative history in interpreting statutes. Eskridge, *supra* note 69, at 646-47.

193. See *Hirschey v. FERC*, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring) (opining that courts often place too much reliance on legislative history when interpreting statutes); Frank H.

Reliance on the text alone provides less material from which an active court can find meaning to overcome statutory silence or to resolve statutory ambiguity. But, as Justice Scalia has noted, less material may also mean less evidence of conflicting meanings attributed to the statute by various members of the enacting coalition.<sup>194</sup> Moreover, a creative reading of statutory language and a detailed inquiry into statutory structure can clarify in a particular judge's mind an otherwise hazy statute. Hence, like their colleagues who rely on all the tools of statutory interpretation, judges who apply the new textual learning also can take an active approach to statutory review under *Chevron*.

Unfortunately, when applied to *Chevron* review, the new textualism suffers from problems similar to those that plague interpretive theories premised on legislative will. An active textual approach depends upon the recognition in *Chevron* that statutory language is binding on agencies as well as courts.<sup>195</sup> So long as all reasonable interpreters would agree with the creative textualist's reading of statutory language and structure, the court may legitimately impose that reading on the agency.<sup>196</sup> But the active textualist often finds a plain meaning when other judges see a contrary message.<sup>197</sup>

The active textual approach to *Chevron* engenders controversy precisely when the "plain" meaning is in dispute. In those cases, the question the textualist must answer is not whether the statutory language binds agencies, but rather which entity gets to pick the statute's "plain meaning"—the administering agency or the reviewing court. Because the interpretive process is just as likely to reflect politics and affect policy when courts look to text as when they look to legislative will, the new

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Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60-61 (1988) ("The words of the statute, and not the intent of the drafters, are the 'law.'"). For a more complete description of Justice Scalia's textual approach to statutory interpretation, and a listing of his opinions addressing this subject, see generally Eskridge, *supra* note 69, at 656, 650-56 & n.116 (noting Scalia's leadership in the development of "new textualism" and examining Scalia's critique of the traditional approach to statutory interpretation).

194. Scalia, *supra* note 10, at 520-21.

195. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); see Merrill, *supra* note 5, at 990-92 (pointing out that "Justice Scalia's 'plain meaning' approach to statutory construction" leads to less deference to agency decisions); Scalia, *supra* note 10, at 521 ("One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists." (emphasis in original)).

196. See *Chevron*, 467 U.S. at 842-43 (stating that a statute's clear meaning must be adopted by the agency enforcing the statute).

197. E.g., *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 117, 126-29 (1985) (splitting 5-4 on whether the word "modified," as used in § 301(1) of the Clean Water Act, is ambiguous); *American Mining Congress v. EPA*, 824 F.2d 1177, 1194-97 (D.C. Cir. 1987) (Mikva, J., dissenting) (disagreeing on the meaning of "solid waste").

textualism does not justify allowing courts to determine statutory meaning any more than does the approach premised on legislative will.

Approaches that rely on text alone are no more likely to lead to wise policy decisions than approaches based on legislative will. Often, textual courts will focus on details of structure or particular phraseology that does not reflect any thought about the policies underlying the statute.<sup>198</sup> Again, the judicial propensity to use interpretive maps devoid of policy-driven directions increases the likelihood of judicially mandated bad policy. Thus, the new textualism, like theories premised on legislative will, fails to justify an active judicial role at step one of the *Chevron* analysis.

*Northern Natural Gas Co. v. Federal Energy Regulatory Commission*<sup>199</sup> provides a good example of an active textual approach to *Chevron* that resulted in bad policy. In that case, the District of Columbia Circuit Court of Appeals, sitting en banc, reversed a FERC order conditioning approval of a gas company's new discounted service upon a reduction in the company's rates to nondiscount customers.<sup>200</sup> FERC had conditioned its approval to prevent the gas company from receiving double recovery of capital costs jointly invested in new and existing service.<sup>201</sup>

*Northern Natural Gas* is unique in that the court reversed the agency but did not use the standard technique of finding a clear congressional intent on the precise issue at step one of *Chevron*. Instead, the court admitted that Congress had not spoken directly to the precise issue,<sup>202</sup> but nonetheless, at step two, read the structure of the Natural Gas Act<sup>203</sup> to prohibit FERC from adjusting rates for existing services as part of its approval of new service.<sup>204</sup> The manner in which the court relied on the general architecture of the Act to find FERC's action unlawful corresponds to the manner in which other courts have found clarity in otherwise ambiguous statutes at step one of *Chevron*.<sup>205</sup>

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198. See, e.g., *City of Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1591 (1994) (concluding that a statute exempting a "resource recovery facility" from regulation does not prevent EPA from regulating the ash generated by such an incineration facility); *PUD No. 1 v. Washington Dep't of Ecology*, 114 S. Ct. 1900, 1921 (1994) (Thomas, J., dissenting) (insisting that the text of a statute requires FERC to publish its reasons for failing to resolve inconsistencies with state agency recommendations even when the state and federal agencies have no objections to each other's regulations); *MCI Telecomm. Corp. v. AT&T*, 114 S. Ct. 2223, 2229-30 (1994) (declaring that the word "modify" means to change only partially, not to change fundamentally); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 322-25 (1988) (Scalia, J., concurring in part and dissenting in part) (arguing that the term "foreign manufacture" can only mean manufactured outside the United States).

199. 827 F.2d 779 (D.C. Cir. 1987) (en banc).

200. *Id.* at 781.

201. *Id.*

202. *Id.* at 784.

203. 15 U.S.C. §§ 717-717z (1988 & Supp. V 1993).

204. *Northern Natural Gas*, 827 F.2d at 792-93.

205. The court may have proceeded to step two of the *Chevron* doctrine because of *Panhandle E. Pipe Line Co. v. FERC*, 613 F.2d 1120 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 889 (1980), a pre-



The issue in *Northern Natural Gas* involved the relationship of Sections Four, Five, and Seven of the Act. Sections Four and Five allow a gas company or the Commission, respectively, to initiate a formal rate proceeding to adjust rates that the company or FERC believes are no longer "just and reasonable."<sup>206</sup> Given the volume of information necessary for FERC to review a company's rates, rate proceedings pursuant to Section Four or Five generally take approximately a year to complete.<sup>207</sup> Section Seven addresses an entirely different issue: whether FERC should allow a gas company to provide new service. The Act gives the Commission the "power to attach . . . such reasonable terms and conditions [on a Section Seven approval] as the public convenience and necessity may require."<sup>208</sup>

The controversy in *Northern Natural Gas* arose because large industrial users of natural gas frequently have the capability, known as dual-fuel capacity, to switch to other fuels if the price of gas is too high.<sup>209</sup> If these users switch off a gas company's system, the company will lose a significant contribution these users provide to cover fixed costs shared with other ratepayers. To avoid this, *Northern Natural Gas* sought approval of a discount gas service for dual-fuel customers.<sup>210</sup> FERC agreed that it was desirable to keep these customers on the gas system; in many cases, the customers' decisions to leave the system would be inefficient and would hurt the customers left on the system who would have to pay more to cover the gas company's fixed costs.<sup>211</sup> But FERC determined that simply approving the company's application to provide discount service at negotiated rates would have allowed the company to doubly recover some of its fixed

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*Chevron* case in which the circuit had conceded that "[t]he actual language of section 7(e) . . . conceivably could authorize adjustment of rates not involved in the actual certificate proceeding." *Id.* at 1128. This dicta seemingly precluded the court from finding the statute clear regarding the legal issue raised by the agency decision.

As courts presently apply *Chevron*, steps one and two are not always distinct. Both steps involve some evaluation of whether the agency acted in a manner that the statutory scheme prohibited, and for some judges, both allow the reviewing court to consider policies behind statutory provisions. See Panel Discussion, *supra* note 9, at 124, 126 (comments of Judge Stephen Williams) (suggesting that the synthetic nature of the *Chevron* steps allows the courts to examine the policies underlying the statutory provisions).

206. 15 U.S.C. §§ 717c, 717d (1988).

207. See Jerome C. Muys, *Federal Power Commission Allocation of Natural Gas Supply Shortages: Prorating, Priorities and Perplexity*, 20 ROCKY MTN. MIN. L. INST. 301, 327-30 (1975) (listing the numerous difficulties involved in gathering information for the Federal Power Commission).

208. 15 U.S.C. § 717f(e) (1988).

209. *Northern Natural Gas Co. v. FERC*, 27 Fed. Energy Reg. Comm'n Rep. (CCH) ¶61,299, at 61,553 (1984).

210. *Id.*

211. See 1 ALFRED E. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* 141 (1970) (explaining that price discrimination may be desirable from a social viewpoint).

costs and thereby earn a higher-than-justified rate of return.<sup>212</sup> To avoid this outcome, FERC conditioned its approval of the discount service on the company's crediting additional revenues generated by the new service to reduce the rates of nondiscount ratepayers.<sup>213</sup>

The court held this to be an impermissible condition on a Section Seven certificate because it allowed the Commission to alter rates found at one time to be "just and reasonable" without invoking the rate-setting procedures of Section Five.<sup>214</sup> The majority viewed the statute as requiring the Commission to initiate a full-blown rate proceeding to adjust these rates to prevent the company from recovering its expenses twice.<sup>215</sup> The court thus justified its decision by piecing together the various sections of the Natural Gas Act as if Congress had carefully crafted their interplay.

The court failed, however, to acknowledge that the sections it tried to fit so snugly together were aimed at very different concerns, and the court cited no evidence that the enacting Congress had ever considered the interplay between these sections. The majority also paid no heed to the fact that the Act was written broadly to give the Federal Power Commission, now FERC, the authority to regulate natural gas rates effectively and fairly.<sup>216</sup> It ignored the fact that Congress had neither altered the provisions of the Act during more than a half-century of gas pipeline rate regulation nor taken any other action that indicated an intent to micro-manage pipeline rate regulation.<sup>217</sup> Nor did the majority advert to the fact that the enacting Congress would have had to have been ingeniously prescient to foresee the issue before FERC in *Northern Natural Gas* because when the statute was enacted, no customers utilized dual-fuel technology.<sup>218</sup> Most troubling, however, was that the Commission's technical construction of the Act left FERC unable to implement the best policy to avert double recovery by the petitioners.

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212. *Northern Natural Gas*, 27 Fed. Energy Reg. Comm'n Rep. (CCH) at 61,554.

213. *Id.*

214. *Northern Natural Gas Co. v. FERC*, 827 F.2d 779, 780-81 (D.C. Cir. 1987) (en banc).

215. *Id.* at 791-92.

216. See *Federal Power Comm'n v. Louisiana Power & Light Co.*, 400 U.S. 621, 631 (1972) (noting that Congress "meant to create a comprehensive and effective regulatory scheme" (quoting *Panhandle E. Pipe Line Co. v. Public Serv. Comm'n*, 332 U.S. 507, 520 (1947))); *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 611 (1944) (describing the broad powers of regulation granted to the Federal Power Commission).

217. Congress passed the Natural Gas Act in 1938. Natural Gas Act, ch. 556, 52 Stat. 821 (1938). In 1942, Congress did significantly amend Section Seven of the Natural Gas Act, governing certificates of need for gas pipelines, but only to expand the Federal Power Commission's jurisdiction to cover all interstate natural gas pipelines. Natural Gas Act, ch. 49, 56 Stat. 83, 83-84 (1942). Otherwise, Congress has not changed Sections Four, Five, or Seven of the Act in any relevant way since 1938.

218. See E.F. Scaright et al., *Interchangeability of High-BTU Oil Gases and Natural Gases*, INST. GAS TECH. RES. BULL., Jan. 1956, at 1 (noting the difficulties in developing dual-fuel burners in the 1950s).

The *Northern Natural Gas* decision left the Commission with three options in response to a company's petition for a new service, all of which were inferior to the one FERC had sought to exercise. First, FERC could refuse to grant the Section Seven certificate until the completion of a Section Five general rate proceeding to adjust rates to account for the ultimate approval of the certificate. This would require FERC to devote a great amount of administrative resources to Section Seven applications that raised the potential of double cost recovery, which in many instances would be wasteful. More significantly, it would delay approval of the certificate until the Section Five proceeding was complete, during which time many large users would have switched to other fuels.<sup>219</sup> The loss of gas purchases by large customers would be bad for the company. It would also hurt both the large user, forced to switch to a less desirable fuel, and the other ratepayers, left with a greater bill due to a shrinking user base to cover the same fixed costs.<sup>220</sup> Second, FERC could order the company to set the rates for the Section Seven service low enough to prevent the company from reaping windfall profits. But this strategy could create inefficient distortions in users' decisions whether to remain on the gas system.<sup>221</sup> Other customers would also perceive it as unfair, given that it would allow the large user with alternative fuel flexibility to avoid having to contribute to the capital costs of the gas pipeline system.<sup>222</sup> FERC's third option would be to allow the company to retain the double recovery of capital costs until FERC could find the time and resources to alter the company's rates for other services in a Section Five proceeding.

The active approach in *Northern Natural Gas* thus precluded a wise policy choice by FERC due to a highly technical reading of the structure of the Natural Gas Act. It is common for courts to apply a literal method of statutory interpretation because this method saves them from having to make tough policy choices and allows judges to engage in legal inquiries with which they are comfortable. Unfortunately, the method also increases the likelihood of statutory interpretation that subverts good agency policymaking.

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219. The Supreme Court relied on the need to avoid this delay to allow the Federal Power Commission to set rates for a new service under Section Seven without first determining that the rates are just and reasonable. See *Atlantic Ref. Co. v. Public Serv. Comm'n*, 360 U.S. 378, 389 (1959).

220. See STEPHEN BREYER, *REGULATION AND ITS REFORM* 54 (1982) (describing how price discrimination to keep customers on a utility system can benefit all customers and society generally); KAHN, *supra* note 211, at 141-42.

221. Setting prices at different levels above marginal cost for different gas customers can lead to inefficiencies by distorting secondary markets—that is, by giving the receiver of the discounted price an advantage over competitors who shoulder a greater portion of the costs in excess of marginal cost. See KAHN, *supra* note 211, at 168-71.

222. See *Northern Natural Gas Co. v. FERC*, 827 F.2d 779, 798 (D.C. Cir., 1987) (Wald, J., dissenting) (explaining that consumers "of existing services," having no choice but to use natural gas, are forced to "bear all of the pipeline's fixed costs").

### III. A Deliberative Alternative: Emphasizing *Chevron's* Second Step

The foregoing examination of the theoretical roots of *Chevron* suggests that the deferential approach fails because it implements pluralistic theory, which subjects agency interpretations of statutes to influences of an imperfect and impoverished political process. At the same time, the examination suggests that the active approach falls victim to the unrealistic assumptions made by the transmission-belt and expertise models—that agency interpretations are driven by congressional will or agency expertise respectively. These assumptions, in turn, lead courts sometimes to impose their own policy preferences and other times to abdicate their responsibility to prevent runaway agency decisionmaking. To resolve this conundrum, we must seek a different theoretical conception of the role of government and more particularly of the administrative state.

#### A. *Deliberative Democracy as an Alternative to the Pluralistic Vision of the Administrative State*

Some scholars have recently turned to political theory's republican revival for a more satisfactory conception of bureaucratic government.<sup>223</sup> This underlying theory of government, which here I label "deliberative democracy,"<sup>224</sup> views politics as a process by which members of society seek both to define the public interest and to determine the best way to further that interest.<sup>225</sup> According to this theory, the political process, rather than merely performing the pluralistic role of registering pre-political private preferences, should also transform private values in an attempt to reach consensus about the public interest.<sup>226</sup> The theory advises that citizens should participate in the political process with an open mind and be willing to change their policy preferences in response to discourse with

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223. See, e.g., Seidenfeld, *supra* note 15, at 1541-43 (hailing administrative agencies as the only institutions capable of fulfilling the civic republican ideal); Sunstein, *supra* note 77, at 59-64 (discussing factions and their impact on administrative law). For a more general discussion of the republican revival in legal theory, see Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988).

224. Elsewhere I have used the label "civic republicanism" for this political theory. Seidenfeld, *supra* note 15, at 1528-33. I believe, however, that a reference to republicanism inappropriately suggests a tension between this political theory and liberal theory. In fact, deliberative democracy borrows heavily from liberal as well as republican philosophy. See Sunstein, *supra* note 122, at 1567, 1567-68 (describing the tension between liberal and republican thought as "false" and noting that some liberal and republican elements are "highly congenial").

225. See Sunstein, *supra* note 122, at 1548-49 (describing the procedures by which civic republicans might use collective discussion and debate to determine preferences and entitlements in society).

226. See Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 CAL. L. REV. 329, 357 (1994) (pointing out that the various theories of deliberative democracy share the belief that people can change their personal preferences through dialogue with others); Sunstein, *supra* note 122, at 1554-55 (describing the way in which compromises are reached through deliberation).

individuals with diverse interests.<sup>227</sup> Although universal consensus is not feasible, the hope of deliberative democracy is that its value-altering process will enable society to come close enough to achieving consensus that the legal rules the process generates will be less coercive than those that would result from the operation of pluralism's political marketplace.<sup>228</sup>

Open discourse and a deliberative political process thus play key roles in the deliberative democracy conception of government. To be legitimate, government decisions must pay equal respect to the concerns of all individuals.<sup>229</sup> The values and aspirations of all members of society must be represented in the debate that not only defines the public interest but also ultimately justifies government action to further that interest.<sup>230</sup> The political process, at the least, must attempt to persuade those affected by government action of the need for such action, with the hope that all affected will accept the action in light of the concerns of all citizens.<sup>231</sup> For these reasons, before the state uses its coercive power—adopting binding rules or enforcing those rules within particular contexts—it must listen to the arguments by representatives of the affected interest groups and must explain how its use of such power furthers the public interest given social, political, and economic circumstances.<sup>232</sup>

The administrative bureaucracy plays an essential role in at least some versions of deliberative democratic theory. The structure of agencies allows for public participation, political influence, and reasoned decision-making as part of the regulatory discourse. In fact, the administrative “branch” of government may hold the greatest promise for implementing the deliberative democratic ideal.<sup>233</sup> Deliberative democratic theory,

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227. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 135-36 (1993) (emphasizing the necessity for participation by all groups in society); Galston, *supra* note 226, at 361-62 (“Deliberative democracy can never be a reality unless people are willing to enter into the public dialogue in the first place.”).

228. Seidenfeld, *supra* note 15, at 1539; *see also* Sunstein, *supra* note 122, at 1550 (noting that pluralism often results in intimidation, manipulation, and disparities in political influence).

229. Seidenfeld, *supra* note 15, at 1531; *see* Sunstein, *supra* note 122, at 1552 (suggesting that political outcomes should be supported by a consensus among a politically equal citizenry); *see also* Michelman, *supra* note 146, at 1531 (asserting that civic republicanism's dialogic, critical-transformative dimension cannot take place without the stimulation provided by the views of those at the margins of society).

230. Seidenfeld, *supra* note 15, at 1530; *see* SUNSTEIN, *supra* note 162, at 212-14 (stressing that the interests of regulatory beneficiaries are no less important than those of regulated entities). Thus, deliberative democracy must include in the political discourse “persons who, at many historical moments, could not count themselves heirs to traditions whose meanings . . . involve the exclusion or subordination of just those persons.” Michelman, *supra* note 146, at 1496.

231. *See* Sunstein, *supra* note 122, at 1544, 1544-45 (noting that legislators and other political actors in a deliberative democracy must “justify their choices by appealing to a broader public good” in order to successfully implement such legislation).

232. Seidenfeld, *supra* note 15, at 1530.

233. I have elaborated my reasons for this belief in detail in Seidenfeld, *supra* note 15, at 1541-62.

however, also suggests the need for certain changes in the manner in which the federal government makes and enforces law, and achievement of that ideal still requires some restructuring of the administrative state. The three constitutionally specified branches of government must reconceptualize their relationships to administrative agencies to ensure the proper balance between political responsiveness and reasoned decisionmaking. Review of statutory interpretation represents a major arena in which the judiciary interacts with agencies, and deliberative democracy demands some revamping of the *Chevron* doctrine as one means of ensuring that agencies act deliberatively yet remain politically accountable.

### *B. Deliberative Democracy and a Syncopated Chevron*

To retain the benefits of an administrative decisionmaking process geared toward broad public participation in regulatory debate influenced by agency expertise and political accountability, deliberative democracy counsels placing primary responsibility for statutory interpretation in the administrative agency. But, to ensure deliberative decisionmaking, as well as to avoid excessive special interest influence and agency capture, courts must retain the authority to review agency interpretations in a meaningful manner. This need suggests a modification of *Chevron* that retains the two-step paradigm but emphasizes the second step rather than the first.

1. *The agency as primary interpreter and Chevron's step one.*—Recognizing the agency as the primary interpreter of statutes implies that the deferential approach to *Chevron's* step one is appropriate under deliberative democracy. The active approach allows too much leeway for a reviewing court to find support for its preferred interpretation in the legislative history and to parlay that support into "clear" meaning.<sup>234</sup> Deliberative democracy does not condone the propensity of active courts to substitute their policy judgments for those of the agency by creative statutory interpretation.

Nonetheless, courts must overrule agency interpretations that contravene the clear dictates of a statute that addresses the precise question confronting the agency. Congressional override of agency policy provides an important means of ensuring that agency policymaking remains true to the polity's notions of the public interest.<sup>235</sup> In other words, in those

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234. See Pierce, *supra* note 8, at 308 (citing "creative" statutory interpretation and the "teasing" of meaning from ambiguous legislative history as ways in which courts find "support" for their interpretations); Silberman, *supra* note 40, at 827 (bemoaning the judiciary's ability to express dislike for or allegiance with congressional policy under the rubric of "recourse to the purpose of the statute").

235. See Seidenfeld, *supra* note 15, at 1551 (noting that congressional review of agency decisionmaking prevents agencies from straying too far from the "consensus of the common good").

instances when Congress musters the energy explicitly to constrain an agency on a precise policy decision, deliberative democracy requires a mechanism to enforce that constraint. Leaving to the agency unfettered discretion to interpret a statute that is meant to limit the agency's discretion invites abuse; the agency has a strong incentive to construe the statute narrowly and thereby to avoid the constraint Congress intended.<sup>236</sup>

In short, deliberative democracy suggests that a court should find a statute silent or ambiguous under *Chevron's* step one unless the statute clearly manifests congressional intent to constrain agency discretion, as opposed to merely providing guidance on the substantive regulatory issues the statute addresses. When a reviewing court determines that Congress drafted a statutory provision to constrain directly agency policymaking, the court should retain primary responsibility for interpreting the statute. In such a case, the court should not defer to the agency even if the statute is silent or ambiguous on the precise issue before the agency, as the legislation would evidence a meta-intent that the courts, and not the agency, decide issues of law.<sup>237</sup>

2. *Taking a hard look under Chevron's step two.*—Having left most questions of statutory interpretation to the agency via a deferential approach to step one, courts must not abdicate their role of reviewing agency determinations of law. Viewed from the perspective of deliberative democracy, the problem is one of providing meaningful judicial review while not allowing the court to substitute its judgment for that of the agency. This precise problem, however, has been addressed by courts reviewing agency reasoning and explicit policy choices under the APA's arbitrary and capricious standard.<sup>238</sup> In that context, the D.C. Circuit created the "hard look" test,<sup>239</sup> which asks courts to steep themselves in agency

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236. To borrow from Cass Sunstein, granting agencies such unfettered discretion is like having "foxes . . . guard henhouses." Panel Discussion, *supra* note 4, at 368 (comments of Cass Sunstein).

237. In determining whether Congress intended directly to constrain the agency in adopting legislation, it may sometimes be appropriate for the reviewing court to look at the legislative history. This is so because Congress rarely includes explicit statutory instructions on the meta-question of which institution should interpret the statute. For example, legislative history may indicate that Congress amended a statute in direct response to an agency decision, but the language of the amendment might not include that information. In such a case, the court should construe the amendment and should not defer to the agency.

238. See Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 183 (tying the hard look test under the arbitrary and capricious standard of review to deliberative democracy); cf. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 653 (1993) (arguing that the purpose of hard look review should be to create a dialogue between courts and agencies).

239. Judge Leventhal first announced the test in a case involving substantial evidence review of an FCC licensing. See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971). The D.C. Circuit has since adopted the test for the review of informal rulemaking under the arbitrary and capricious standard. See, e.g., *Sierra Club v. Costle*, 657

policy and the substantive debate framing the issue under consideration to ensure that the agency below gave a "hard look" to all factors relevant to its decision.<sup>240</sup> Substituting something akin to hard look review for the deferential reasonableness standard that courts have used in *Chevron's* step two would go far toward implementing the deliberative model.<sup>241</sup>

Step two in the judicial review of agency statutory interpretation would differ from traditional hard look review because the statute binds the agency as well as the courts and, hence, constrains the agency's policy choices. Thus, in reviewing an agency's interpretation, courts should require the agency to identify the concerns that the statute addresses and explain how the agency's interpretation took those concerns into account. In addition, the agency should explain why it emphasized certain interests instead of others. In other words, the agency must reveal what led it to balance the statutory aims as it did. The agency should also respond to any likely contentions that its interpretation will have deleterious implications. In short, to satisfy the second step of the syncopated *Chevron*, the agency should explain why its interpretation is good policy in light of the purposes and concerns underlying the statutory scheme.<sup>242</sup>

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F.2d 298, 410 (D.C. Cir. 1981) (upholding EPA regulation of sulphur dioxide under the Clean Air Act after an exhaustive hard look analysis); *Ethyl Corp. v. EPA*, 541 F.2d 1, 33-36 & n.75 (D.C. Cir. 1975) (describing the standard set out in *Greater Boston Television* and applying that standard to uphold EPA's regulation of lead as a fuel additive under the Clean Air Act), *cert. denied*, 426 U.S. 941 (1976). The Supreme Court has applied something akin to hard look review to informal agency decisionmaking without invoking the talismanic phrase. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-44 (1983) (reversing an agency's rescission of a passive restraint requirement due to an inadequate consideration of alternatives); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (reversing approval of a highway through a city park for failure to consider all relevant factors).

240. *Volpe*, 401 U.S. at 416; *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1499-1500 (D.C. Cir.), *cert. denied*, 469 U.S. 1034 (1984); *Greater Boston Television Corp.*, 444 F.2d at 851.

241. The relationship between the hard look doctrine and deliberative democracy was first noted in Sunstein, *supra* note 77, at 60-61.

242. Traditional hard look review mandates that agencies give detailed explanations for their decisions, including reasons for rejecting all reasonable alternatives. *See, e.g.*, *Brae Corp. v. United States*, 740 F.2d 1023, 1039, 1047 (D.C. Cir. 1984) (reversing and remanding part of an ICC rule due to the lack of explanation for that part of the rule), *cert. denied*, 471 U.S. 1069 (1985); *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1425 (D.C. Cir. 1983) (requiring that an agency provide a "reasoned analysis" whenever it chooses to depart from prior policies). The rigorous review of agency interpretations that I propose thus differs from traditional hard look review in its demand that agencies tie their decision to acknowledged statutory goals. *Cf.* CHRISTOPHER EDLEY, JR., *ADMINISTRATIVE LAW* 192-96 (1990) (advocating "harder-look" review in which courts would demand that agencies openly explain their resort to politics to answer questions left open by other paradigms, such as law and expertise). I would also advocate that courts apply this rigorous review pragmatically to avoid the ossification of regulation that some have blamed on hard look review. Seidenfeld, *supra* note 15, at 1570 n.289. For a discussion of the potential deleterious effects of hard look review on regulation, see Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 315 (1987) (noting that



At step two, the courts should employ traditional tools of construction. Although legislative debate will rarely evidence a universally shared understanding of statutory meaning, frequently it will reveal the concerns of the various interest groups in the enacting coalition. A statute's legislative history can thereby provide judges with insights into the policy choices entailed by interpretation. Likewise, canons of construction often reflect policy considerations that go beyond the question of interpreting any particular statute—considerations such as institutional competence and maintaining checks and balances that characterize our constitutional democracy. Any discourse about the policy implications of a statute's meaning would be incomplete if it failed to factor in such overarching considerations.

Active statutory construction at step two does not pose a great threat of judicial usurpation of the agency's policymaking role because this approach merely subjects the agency's interpretation to more exacting scrutiny. If the reviewing court finds that the agency ignored an important purpose of the statute or that the agency failed to balance the statutory concerns with the public interest in mind, then it should remand the decision to the agency rather than interpret the statute itself. The agency then has another opportunity to interpret the statute. The agency remains free to maintain its original interpretation and provide better support and reasoning for it or modify its interpretation in response to the concerns raised by the court. In this way, the review process would create "a meaningful dialogue between court and agency in which the court stands in for the knowledgeable citizen that the agency must persuade to accept [its] regulatory policy."<sup>243</sup>

3. *The syncopated Chevron applied.*—To illustrate how the syncopated *Chevron* suggested by deliberative democracy might operate, I will

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hard look reviews invite overcorrection and paralysis in all agencies); Pierce, *The Role of the Judiciary*, *supra* note 13, at 1263-64 ("The uncertainty surrounding the reasonableness requirement can lead agencies to commit vast resources to a single policymaking initiative."); Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1, 9 & n.48 (1989) (noting that agencies are required to devote significant resources to justify their opinions).

243. Seidenfeld, *supra* note 15, at 1550; *cf.* Friedman, *supra* note 238, at 655-58 (describing how judicial review focuses and facilitates a political dialogue about constitutional issues). This approach to review leads to the possibility of a standoff between the court and the agency. However, I do not believe that such standoffs would occur frequently. Agencies tend to want to avoid the devotion of resources and the embarrassment caused by judicial reversal. Reviewing courts also tend to be more reserved if the agency sticks to its guns after an initial reversal. In those instances when a standoff does result, Congress could step in to resolve the issue. Although Congress may not be capable of providing sufficient oversight to provide the primary means of monitoring everyday agency decisions, it is capable of oversight and response to infrequent salient controversies, and the very fact that the standoff occurred would tend to make the issues involved politically salient. See Friedman, *supra* note 238, at 656-57 (noting how a judicial decision can make "some previous dormant issue important").

reconsider *Rust* and *Northern Natural Gas*. In *Rust*, the precise issue facing the agency was the extent to which federally subsidized family-planning programs could provide nondirective abortion counseling.<sup>244</sup> The statute was silent on this question and gave no indication of how Congress intended HHS to balance the interest in not having the federal government subsidize abortion against other statutory interests such as decreasing the health risks related to contraception, pregnancy, and childbirth. As the Supreme Court's opinion makes clear, the legislative history provides evidence that a reviewing court could use either to allow or to prohibit nondirective counseling.<sup>245</sup> Hence, the Court was correct to let the agency decide the issue in the first instance.

HHS, however, failed to explain how its interpretation responded to many of the policy concerns raised by the comments filed in the rule-making proceeding. For example, the Department did not elucidate how its interpretation would affect the risks facing poor pregnant women who eventually choose abortion. Likewise, it did not indicate the cost, if any, of the previous policy of allowing nondirective counseling. The only discussion of policy considerations concerned anecdotal evidence of coercive counseling and other counseling abuses.<sup>246</sup> Yet, the agency never estimated the extent of such abuses. In addition, the agency failed to explain why a more focused approach, such as cutting off funds for Title X programs that engaged in coercive or directive counseling, would not have been an adequate solution. In contrast, the review I suggest for *Chevron's* step two would have required a remand by the court in order to give the agency an opportunity to respond to these criticisms and to reconsider its interpretation in light of them.

Supporters of *Rust* might respond that the agency decision was a political choice reflecting HHS's perception of attitudes about abortion. But this is precisely the type of rationalization that deliberative democracy deems invalid. Under the deliberative model, an agency cannot justify its action merely by asserting that it was done to appease political pressure from an interest group. If the action constitutes a direct benefit accorded to a particular interest group, the agency must explain why that benefit is good public policy in light of the statutory objectives. Such an explanation will at least help focus legal and political oversight of the agency action. For example, in *Rust*, HHS might have set forth its motivation more candidly and admitted that its action reflected a desire to discourage abortion. Such an explanation, however, would have made the decision far more suspect as a matter of statutory interpretation and constitutional law, while

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244. *Rust v. Sullivan*, 500 U.S. 173, 177-81 (1991).

245. *Id.* at 189.

246. *Id.* at 187.

potentially subjecting the agency to greater political criticism, which might even have allowed Congress to succeed in its failed attempt to override the gag rule.<sup>247</sup>

In *Northern Natural Gas*, the issue facing the agency was whether FERC could require a gas company to lower its rates on existing service as a condition for certification of new service.<sup>248</sup> Again, the reviewing court correctly found the statute silent under step one.<sup>249</sup> The Natural Gas Act entirely fails to address the relationship between existing rates and the provision of new service.

Unlike the Supreme Court in *Rust*, the D.C. Circuit in *Northern Natural Gas* applied a fairly rigorous analysis at step two and reversed FERC. The court deviated from the syncopated *Chevron* approach, however, because it failed to ask the correct questions. The court addressed the structure of the statute and how its provisions had been applied in other nonanalogous contexts to discern the limits of the Natural Gas Act's grant of authority to the agency to place conditions on certificates for new service.<sup>250</sup> The court essentially applied an analysis similar to that which an active court uses at step one but did so at *Chevron*'s second step. Most significantly, the court altogether ignored the policy implications of its interpretation.

As was intimated earlier, FERC's interpretation was reasonable in light of the agency's concerns about efficiency and the desire to prevent a substantial windfall to the gas company. Under the approach suggested here, it would have been difficult for a court to reverse the agency decision as unreasonable. But, even if FERC had not persuaded the court that its interpretation struck a reasonable balance of the statute's goals in an attempt to further the public interest, under a syncopated *Chevron* the court should have remanded the case to the agency. Given another opportunity to explain itself, the agency could have explained the fundamental nature of the prohibition against double cost recovery and emphasized the ramifications of the court's denial to FERC of a means to prevent such recovery.

#### IV. Evaluation of the Syncopated *Chevron*

Deliberative democratic theory thus suggests that courts should review agency interpretations of statutes using a two-step analysis under which courts would leave most decisions to the agencies authorized to implement the statutes, but would demand that the agencies provide persuasive reasoning for their interpretations. This analysis holds the promise of respecting

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247. See *supra* text accompanying notes 136-39.

248. *Northern Natural Gas Co. v. FERC*, 827 F.2d 779, 780-81 (D.C. Cir. 1987).

249. *Id.* at 784.

250. *Id.* at 789-93.

the policy choices of the more expert and accountable agencies and simultaneously providing judicial restraints against special interest decision-making. The question remains, however, whether a syncopated *Chevron* is likely to fulfill this promise without creating greater evils in the process.

*A. The Potential Evils of an Expanded Agency Role in Statutory Interpretation*

The syncopated *Chevron* would leave more questions of statutory interpretation, in the first instance, to agencies. This approach frowns upon courts using traditional tools of statutory construction to remove questions of law from agency discretion. Hence, at step one, this approach grants at least as much authority to agencies as the existing deferential approach under *Chevron*. The rationale for giving interpretive authority to agencies under the deliberative model might even justify greater reliance on agency interpretation than does the pluralistic rationale underlying *Chevron*. According to deliberative democracy, agencies, rather than courts, should have primary interpretive authority not only because of their superior expertise and greater political accountability but also because agency decisionmaking processes are geared toward more meaningful interest group discourse.<sup>251</sup> Hence, agency statutory interpretation is preferable because it is more likely to reflect a politically determined public interest than is judicial statutory interpretation.

Therefore, the deliberative democratic ideal would counsel courts to grant agencies primary interpretive authority even when courts would not do so under existing doctrine. For example, some Supreme Court opinions have intimated that *Chevron* applies only when Congress has delegated to the agency authority to make binding legal prescriptions.<sup>252</sup> This makes sense under pluralistic theory because agencies without such authority cannot be held responsible for the implementation of the statute, and interest groups will have to secure their political deals outside of the administrative arena. Deliberative democracy, however, would counsel granting the agency primary interpretive authority, even though the agency has only an indirect role in administering the statute, so long as the agency

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251. Seidenfeld, *supra* note 15, at 1542.

252. See, e.g., *Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 152-53 (1991) (noting that the Secretary of Labor and not OSHRC should be given deference because the Secretary has lawmaking authority while OSHRC merely adjudicates disputes under the statute); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (holding that *Chevron* is not applicable when the "[j]udiciary and not the [agency is] the adjudicator of private rights of action arising under the statute"); see also Anthony, *supra* note 12, at 42 ("Courts should defer under *Chevron* only when Congress has authorized the agency to issue interpretations with the force of law in [the] format [that the agency used].") (emphasis in original)); Weaver, *supra* note 17, at 595 (arguing that the *Martin* Court's focus on agencies' lawmaking authority "suggests a significant limitation on *Chevron*'s scope").

procedures encourage discourse about the implications of potential interpretations.

Such an expansion of agency responsibility might increase the potential for abuse of discretion by agencies. This danger is of particular concern because statutory dictates provide a crucial mechanism whereby Congress influences government policy. Hence, an expanded agency role in the interpretive process is acceptable only if it does not compromise Congress's ability ultimately to control policy by statutory command.<sup>253</sup> This threat in turn calls for institutional checks on agencies' statutory interpretation adequate to prevent an agency from pursuing special interests or its own idiosyncratic notion of the public good.<sup>254</sup>

The most obvious check can be provided by the more rigorous judicial review at step two of the syncopated approach. Requiring the agency to justify its interpretation in terms of the goals underlying the statute will make the agency think twice before pursuing a special interest agenda. Cynics might object that this reasoned decisionmaking requirement will not constrain the agency's discretion at all, but will merely cause the agency to fabricate an elaborate justification for the same interpretation the agency would have made without the requirement.<sup>255</sup> For them, a rigorous second step would add administrative costs to regulation without any concomitant benefits.

These cynics, however, underestimate the values of a reasoned decisionmaking requirement. First, they assume that agencies will always concoct reasons to explain decisions already made on other grounds. But agencies frequently act in good faith and respond to the findings of their own reasoned analyses by altering their decisions and even their decision-making structures.<sup>256</sup> The problem is getting an agency to analyze

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253. Although I have argued that Congress is too inefficient and nondeliberative to set day-to-day policy via statutory enactments, Congress must still retain the ability to set policy by this mechanism when it is capable of acting. Ultimately, the democratic nature of our government does depend on Congress having this power. Within the deliberative democratic model of the administrative state, this power is crucial for Congress to fulfill its role of monitoring agency policymaking and correcting policies that Congress finds politically unacceptable.

254. See PAUL J. QUIRK, *INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES* 16-21 (1981) (describing various mechanisms that industries use to "capture" agencies); Michael E. Levine & Jennifer J. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 174-78 (1990) (special issue) (distinguishing capture by private interest groups from regulators' use of the agency to pursue their own conception of the public good).

255. See, e.g., Peter L. Strauss, *Considering Political Alternatives to "Hard Look" Review*, 1989 DUKE L.J. 538, 540 (arguing that agencies will respond to heightened scrutiny by creating explanations of their conduct rather than changing their conduct); cf. SHAPIRO, *supra* note 35, at 152 (arguing that "synoptic"—hard look—review encourages agencies to choose alternatives that are easiest to defend rather than those the agency deems best); Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 428-29 (1981) ("[C]omprehensive rationality merely masks the decision-maker's private biases under a legitimizing facade of objectivity and analytic rigor.").

256. See MELNICK, *supra* note 191, at 379 ("EPA officials speak highly of the courts precisely because court decisions have played such a major role in shaping the agency's structure, strategy, and

thoroughly its interpretation of a statute. For most agency decisions, the type of policy analysis suggested by step two of the syncopated *Chevron* occurs when the technical staff in the program office responsible for an agency decision reports its recommendations to its director. After that, the agency will usually not perform a policy review unless the courts subject the agency reasoning to meaningful judicial review.<sup>257</sup> For questions of statutory meaning, the decision may never reflect the input of the technical staff, as the statutory interpretation may come from the agency's counsel rather than a program office. Hence, rigorous judicial review may provide the only impetus for the agency to consider comprehensively the policy implications of a proposed interpretation.

Second, a reasoned decisionmaking requirement may prevent an agency from attempting to justify a decision it has already made on unacceptable grounds. An agency's explanation of the reasoning behind its decision will often appear implausible absent candor;<sup>258</sup> hence, an agency interpretation supported by post hoc rationalization stands a good chance of being remanded by the reviewing court. For example, had HHS genuinely tried to justify its ban on nondirective abortion counseling as a matter of policy, instead of by an appeal to a fictitious statutory intent, the agency would have been forced to concede that its actual basis was a desire to discourage abortions. But such a desire is well beyond the legislative purpose of avoiding state-subsidized abortions or abortion counseling. Because HHS never explained why it believed discouraging abortions was good policy, under the syncopated *Chevron* the ban would have been remanded to the agency for further justification.<sup>259</sup>

The reasoned decisionmaking requirement provides yet a third constraint on agency statutory interpretations. Even if an agency wishes to pursue its own agenda or appease a special interest group and believes it

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sense of mission."); Richard B. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons From the Clean Air Act*, 62 IOWA L. REV. 713, 731-32 (1977) (asserting that the requirement that EPA "explain in detail the bases for its decision [has] contributed significantly to the improvement of EPA decisionmaking"); Sunstein, *supra* note 34, at 471 (noting that "[t]he requirement of detailed explanation has been a powerful impediment to arbitrary or improperly motivated . . . decisions"). Such a good faith response to the hard look requirement "strengthens both analytic processes and accountability to superiors within agencies." Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 527 (emphasis in original).

257. See William F. Pederson, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 59-60 (1975). For statutory interpretation made as part of a rule with significant economic impact, the agency may perform a policy analysis in preparing the regulatory impact analysis required by OMB regulatory review. See Exec. Order No. 12,866, 58 Fed. Reg. at 51,735, 51,741 (1993).

258. Garland, *supra* note 32, at 554-55.

259. In *Rust*, an admission by HHS that its true goal was the outright discouraging of abortion might have resulted in invalidation of the gag rule on constitutional grounds. Such an admission amounts to clear evidence of government intent to discourage the exercise of a fundamental right.

would escape judicial remand, its justification for its interpretation might force the agency to reveal its goals to the electorate.<sup>260</sup> For example, even if the Supreme Court accepted a more candid HHS explanation of the ban on nondirective counseling, that explanation might have increased the saliency of the decision and, hence, popular dissatisfaction with the HHS interpretation. An agency seeking to avoid political disapproval might moderate its interpretation to conform more closely to a position with broad public support.<sup>261</sup>

In addition to meaningful judicial review, congressional oversight remains a significant check on agency discretion in interpreting statutes. Compared to the traditional alternatives that place the ultimate authority for statutory interpretation in the courts, the syncopated *Chevron* gives Congress greater control over the interpretive process. Congress must explicitly pass overriding substantive legislation to reverse any judicial interpretation that it finds unacceptable. The burdensome nature of the congressional committee system along with the Constitution's requirements of bicameralism and presentment renders this method of control over statutory policy unreliable.<sup>262</sup>

Congress, however, retains greater controls over agency action than it does over judicial decisionmaking.<sup>263</sup> Using the power of the purse, Congress can cajole agencies or, alternatively, threaten their appropriations.<sup>264</sup> In extreme cases, an agency policy could jeopardize the likelihood of Senate confirmation if the President reappoints the agency head at the end of her term. Even the active judicial role at step two of the syncopated *Chevron* might increase Congress's control over some agency decisions; if courts and an agency reach an impasse over the meaning of a particular statute, the resulting media attention and public reaction could give Congress the impetus it needs to overcome the inertia of the legislative process. In short, the increased agency authority under the syncopated approach is not likely to facilitate agency pursuit of special interest or idiosyncratic aims. Rather, given the more meaningful judicial review of step two, this approach should actually decrease the likelihood of such pursuit.

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260. According to Sunstein, the "technocratic rationality" required by hard look review aims "to ensure that the relevant considerations are opened up to public scrutiny." Sunstein, *supra* note 238, at 188.

261. Essentially, judicial remand reduces the cost of discovering what the agency is doing and hence facilitates reaction from the more diffused interest groups apt to oppose a special interest interpretation. Macey, *supra* note 125, at 256.

262. See *supra* notes 81-86 and accompanying text.

263. See Seidenfeld, *supra* note 15, at 1551-54; Silberman, *supra* note 40, at 824 (both noting that Congress has considerable control over agency decisionmaking).

264. STRAUSS, *supra* note 17, at 55-56.

### B. *Potential Evils of Rigorous Review Applied to Agency Statutory Interpretation*

A second potential evil of a syncopated *Chevron* is the threat that rigorous review at step two will allow courts too much leeway to interfere with agency policy.<sup>265</sup> This concern, however, must be tempered by a recognition that courts have traditionally retained ultimate control over the interpretation of statutes.<sup>266</sup> Moreover, even under *Chevron*, the control courts retain threatens greater interference with agency policy than does court control under the syncopated approach.

Unlike traditional models of the relationship between agencies and courts, deliberative democratic theory does not necessarily view courts as the ultimate interpreters of statutes.<sup>267</sup> Under this theory's operative doctrine of statutory construction—the syncopated *Chevron*—the court does not retain authority to make a definitive interpretation of a statute administered by an agency except in those few instances in which the statute reveals an explicit answer to the precise question before the agency or otherwise indicates that the court and not the agency is to interpret the statute. The most a reviewing court can do is remand the decision to the agency. The agency has just as much power to resist a reviewing court's interpretation—by construing the statute on remand as it did originally—as the court has to resist the agency interpretation by repeated reversal and remand. Hence, compared to traditional notions of the judicial role in statutory interpretation, the syncopated *Chevron* limits the power of reviewing courts to interfere with agency policy via creative construction of statutory provisions.

Even compared to *Chevron* as presently applied, the syncopated approach may provide greater constraints on judicial interference with agency

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265. See Strauss, *supra* note 255, at 549 (arguing that too much judicial oversight of agency action causes agencies to devote resources to explaining decisions rather than making decisions). Critics of aggressive judicial review charge that such judicial intervention imposes arbitrary and uncoordinated requirements on agency policymaking, which in turn threaten to paralyze agency regulatory and enforcement activity. See, e.g., JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 225 (1990) ("The result of judicial requirements for comprehensive rationality has been a general suppression of the use of rules."); MELNICK, *supra* note 191, at 360-87 (describing the numerous adverse and unintended consequences of judicial oversight of air pollution regulation); JOHN M. MENDELOFF, *THE DILEMMA OF TOXIC SUBSTANCE REGULATION: HOW OVERREGULATION CAUSES UNDERREGULATION* at OSHA 116, 115-16 (1988) (stating that activist judicial review and the resulting "prospect of reversal has a chilling effect on [agencies'] development of standards").

266. See Callahan, *supra* note 13, at 1276 ("Prior to *Chevron*, federal courts implicitly had taken a case-by-case approach, considering agency views and accepting agency interpretations of statutes only in those instances where such deference was deemed to be appropriate."); Seidenfeld, *supra* note 15, at 1548 (noting that after *Chevron*, courts can overturn an agency's interpretation by finding that the statute imparts a clear meaning that renders the agency decision unlawful, or by determining that the statute requires consideration of factors that the agency failed to take into account).

267. Cf. Cass R. Sunstein, *Liberal Constitutionalism and Liberal Justice*, 72 TEX. L. REV. 305, 305 (1993) (indicating that deliberative democracy envisions a limited role for the judiciary).



policy. Under *Chevron's* step one, some courts feel free to overturn an agency interpretation of a statute even when the statute appears to give the agency broad discretion to implement its policies. The syncopated *Chevron*, however, would clarify that courts are not to reach out at step one to overturn policy-driven agency readings of statutes. Thus, because the syncopated approach limits courts to remanding agency interpretations and clarifies that the courts are not to impose their preferred interpretations on agencies, it provides ample protection against judicially chosen policy.

## V. Conclusion

Ten years ago the Supreme Court decided *Chevron*, dramatically altering the customary method of judicial review of agency statutory interpretation. *Chevron* reflects the concerns pluralistic democratic theory raised about more traditional models of the administrative state; in particular, it rejects the notions that agencies exist only to implement congressional will and that agency decisionmaking merely applies objective expertise to resolve technical regulatory problems. Instead, *Chevron* views agencies as institutions that possess expertise and remain politically accountable and, thus, as prime candidates for resolving the tough political questions often raised by disputes over statutory interpretation. *Chevron*, therefore, instructs reviewing courts to defer to reasonable agency interpretations of statutes unless Congress has provided clear direction on the precise issue before the agency.

Unfortunately, pluralistic theory, on which *Chevron* implicitly rests, has its own shortcomings. The "political marketplace" that the theory sanctifies encourages government regulation to benefit special interests; such regulation can be both inefficient and unfair to those without access to power in society. Recently, scholars have proposed an alternative to pluralistic theory—deliberative democracy—which seeks to ensure that government pursues the public interest and simultaneously allows government a broader role in influencing how the polity defines that public interest. Deliberative democratic theory suggests a revamping of *Chevron*. An agency should have primary authority to interpret statutes that it administers, but must persuasively explain its interpretation of those statutes. This approach will allow agencies to use their expertise, political accountability, and deliberative decisionmaking processes to ensure that statutes are interpreted to implement policy wisely, without encouraging agencies to interpret statutes to benefit powerful special interest groups or to further the agencies' own idiosyncratic notions of the public interest.