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ARTICLES

COMMENT

RECENT DEVELOPMENT

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ARTICLES

MAKING LAW OUT OF NOTHING AT ALL:* THE ORIGINS OF THE *CHEVRON* DOCTRINE

GARY LAWSON**
STEPHEN KAM***

TABLE OF CONTENTS

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* With acknowledgement to the genius of Jim Steinman and the vocal elegance of G. Russell and Russell H.

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INTRODUCTION: LOOKIN' FOR LAW IN ALL THE WRONG PLACES[1]

For more than a quarter of a century, federal administrative law has been dominated by the so-called *Chevron* doctrine, which prescribes judicial deference to many agency interpretations of statutes. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[2] for which the doctrine is named, has become the most cited case in federal administrative law, and indeed in any legal field,[3] and the scholarship on *Chevron* could fill a small library.[4] Love it[5] or hate it,[6] *Chevron* virtually defines modern administrative law.

Anyone who has ever taken a course in administrative law or legislation knows the *Chevron* mantra:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[7]

Even after almost thirty years and thousands of recitations, unanswered questions about this *Chevron* framework abound. Does this framework involve two distinct analytical steps or just one unitary decision about the

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1. With acknowledgment to the one-shot country cool of Johnny Lee.

2. 467 U.S. 837 (1984).

3. *See* Thomas W. Merrill, *Justice Stevens and the* Chevron *Puzzle*, 106 NW. U. L. REV. 551, 551–53 (2012).

4. A simple Westlaw search of the "Journals & Law Reviews" database for "(467 /2 837) & Chevron" yielded 8,656 hits on August 17, 2012. For a similar search involving article titles, see generally Peter L. Strauss, Essay, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight"*, 112 COLUM. L. REV. 1143 (2012).

5. *See, e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516–21 ("[I]n the long run *Chevron* will endure . . . because it more accurately reflects the reality of government, and thus more adequately serves its needs.").

6. *See, e.g.*, Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 782 (2010) ("[T]he *Chevron* doctrine . . . has proven to be a complete and total failure, and thus the Supreme Court should overrule it at the first possible opportunity.").

7. 467 U.S. at 842–43 (internal footnotes omitted).

reasonableness of an agency's interpretation?[8] When is the intent of Congress "clear" on a "precise" question of statutory interpretation?[9] What might make an agency's statutory interpretation something other than a "permissible construction"?[10] To what class of agency legal interpretations does this framework apply?[11]

We do not intend to answer any of these questions here. Our goal is, rather, to help explain why such questions have proven so contentious and seemingly intractable despite decades of prodigious case law and scholarship on judicial review of agency legal interpretations. We suggest part of the problem is the continuing insistence, even by people who know better, on answering questions about the *Chevron* doctrine by invoking the *Chevron* decision. The two have very little to do with each other. The modern doctrine of federal court review of federal agency interpretations of

8. *See* Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 218 n.4 (2009) (advocating the one-step position); Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 884 n.78 (1992) (noting the *Chevron* framework can be formulated easily as one question); Matthew C. Stephenson & Adrian Vermeule, Essay, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009) (arguing that the two-step inquiry is an "artificial division" that leads to confusion). *But see* Kenneth A. Bamberger & Peter L. Strauss, Essay, Chevron*'s Two Steps*, 95 VA. L. REV. 611 (2009) (defending the two-step formulation, which continues to dominate the case law).

9. *See* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 608–57 (6th ed. 2012) (discussing ambiguities in *Chevron*'s first step); Melina Forte, *May Legislative History Be Considered at* Chevron *Step One? The Third Circuit Dances the* Chevron *Two-Step in* United States v. Geiser, 54 VILL. L. REV. 727, 728 n.11 (2009) (comparing judicial and scholarly opinions on the amount of ambiguity needed for statutory meaning to be unclear).

10. There is no universally accepted test for determining when an interpretation is impermissible or, as modern cases tend to frame it, unreasonable. It is particularly unsettled whether an interpretation can be unreasonable only when it deviates too far from the statute or also when it is inadequately explained by the interpreting agency. *See* LAWSON, *supra* note 9, at 779–85 (noting agency interpretations rarely fail at the reasonableness stage of *Chevron* analysis unless the interpretations "fail completely to advance the goals of the underlying statute" or are too "bizarre" to warrant closer analysis); Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 316 (1996) ("Participants in and observers of the federal administrative scene have not adequately distinguished among judicial review of the *outcome* of the agency proceeding, the *procedures* employed by the agency in reaching that outcome, and the *process of decisionmaking*, or *chain of reasoning*, by which the agency reached its conclusions.").

11. This is the now famous "step zero" problem, first given that label by Thomas W. Merrill and Kristin E. Hickman. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001) (introducing the initial inquiry needed to determine if *Chevron* analysis is necessary). For other surveys of the step-zero inquiry, see LAWSON, *supra* note 9, at 551–608 (reviewing the types of agency legal interpretations given *Chevron* deference); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006) (arguing that the Supreme Court's step-zero analysis is overly complex and should be abandoned in favor of a simpler approach favoring ordinary *Chevron* analysis).

statutes does not stem in any substantive way from *Chevron.* Rather, it comes from a series of lower court decisions in the mid-1980s that converted a narrow Clean Air Act case about imaginary bubbles over factories into a generalized doctrine of administrative law. The Supreme Court adopted the doctrine from that line of decisions essentially by default. Accordingly, there is no canonical decision systematically laying out either the theory or practice of *Chevron*. The *Chevron* decision itself is a very poor well from which to draw because it did not create, or purport to create, the doctrine that bears its name. The result of this unsystematic origin of the *Chevron* doctrine is a great many unanswered questions about the *Chevron* methodology, a great deal of wiggle room for a wide range of answers to those questions, and no chance whatsoever of finding definitive answers in the place in which too many people continue to look.

At one level, everyone already knows that the issuing Court, and the arguing parties, did not view the *Chevron* decision as having any broad implications for administrative law. However, for some odd reason, people seem unwilling to follow through on the obvious conclusion that referring to the *Chevron* decision to answer questions about the *Chevron* doctrine is pointless and counterproductive.

Our goal in this Article is to rid the administrative law world of references to the *Chevron* decision—except in cases involving the Clean Air Act and imaginary bubbles over factories, to which it surely continues to have strong relevance. We do so by tracing in detail the origins of the *Chevron* doctrine, primarily in the D.C. Circuit in the years immediately following the *Chevron* decision. We believe the process by which the *Chevron* doctrine developed is a fascinating piece of legal history in its own right, and that story deserves to be told even if it fails to lay the ghost of *Chevron* to rest.

In Part I, we set out some preliminary matters, including the state of the law in 1984 when *Chevron* was decided, and some methodological problems related to our survey of both pre- and post-*Chevron* case law. We show that the best account of pre-*Chevron* law involved classifying agency legal decisions as either "pure" or "mixed/law-applying" questions and then employing rebuttable presumptions of de novo judicial review to the former and deferential judicial review to the latter. The precise contours of those classifications, the strength of the presumptions, the circumstances that would overcome the presumptions, and the degree of deference due to mixed or law-applying interpretations are impossible to specify—which in part explains the attractiveness and ultimate success of the *Chevron* revolution.

In Part II, we briefly revisit the oft-told story of the *Chevron* decision, explaining that the Court in 1984 saw itself as restating and applying the

long-settled law described in Part I. We add very little to the seminal and definitive work of Professor Thomas Merrill on this subject, which has justly and correctly elevated this view of *Chevron* to the status of conventional wisdom.

Part III then shows how lower courts molded the narrow, unpromising *Chevron* decision into a revolutionary doctrinal engine. We trace the evolution of *Chevron* through every significant lower court decision in the first year-and-a-half after *Chevron* was decided, illuminating the many ups and downs in the breadth of the courts' readings and applications of *Chevron*. This non-linear developmental process was hardly complete by 1986, but at that point one could meaningfully speak of a "*Chevron* doctrine"—uncertain, unelaborated, in many ways protean, but a doctrine nonetheless—that was surely not on the mind of anyone on the Supreme Court in 1984 and that had the potential to transform administrative law practice.

Part IV describes how those lower court developments uneasily found their way into Supreme Court jurisprudence, where they continue to guide doctrine in the misguided name of the *Chevron* decision. This process of incorporation, or more precisely migration, was hardly what one normally expects from landmark Supreme Court doctrines.[12] The Court never straightforwardly faced down the crucial questions posed by the *Chevron* framework. Instead, the Court stumbled into the *Chevron* doctrine in a series of cases that avoided, rather than confronted, the major issues. Perhaps no one should see how laws, sausages, or the *Chevron* doctrine are made, but we are going to discuss the latter nonetheless.

Part V briefly concludes with some implications of this research for modern doctrine, most of which amount to the proposition that judges, lawyers, and scholars should stop talking about *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* However, we do not argue here that any particular aspect of modern doctrine is substantively correct or incorrect. We express no view on whether the *Chevron* doctrine in general is a step forward or backward from what preceded it. We argue only that any debate on such questions should take place without reference to the *Chevron* decision itself.

In sum, we come not to praise (or criticize) *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, but to bury it.

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12. *But see* Gary Lawson, Katharine Ferguson & Guillermo A. Montero, *"Oh Lord, Please Don't Let Me Be Misunderstood!": Rediscovering the* Mathews v. Eldridge *and* Penn Central *Frameworks*, 81 NOTRE DAME L. REV. 1 (2005) (showing that both the *Mathews* and *Penn Central* three-part tests did not stem from the cases for which they are named).

I. BEFORE THE DAWN

In order to evaluate the impact of *Chevron* on administrative law doctrine and practice in the years shortly following the decision, one needs to (1) discern the pre-*Chevron* baseline for judicial review of agency legal determinations, (2) determine any changes to that baseline that *Chevron* was seen by at least some legal actors to require, and (3) evaluate the extent to which lower courts actually treated *Chevron* as effecting changes in legal practice. None of these tasks is easy or straightforward. There is considerable ambiguity about both the pre-*Chevron* baseline and the nature of any changes to that baseline prescribed by *Chevron*. Indeed, scholars and courts disagree about almost every aspect of those inquiries except for the fact of ambiguity in both of them. To make matters more complicated, the process by which *Chevron* became law—a series of lower court decisions and then default acceptance in the Supreme Court—prevented those ambiguities from being vented and resolved in an authoritative forum; instead, they remain to this day largely submerged and unaddressed. In addition, what matters for historical purposes is not what either *Chevron* or pre-*Chevron* law actually said, but rather what lower courts in the months before and after *Chevron believed* it to say. However, those courts almost never articulated their beliefs, leaving much of the historical inquiry to speculation and inference about matters that it is possible the judges poorly understood themselves.

Nonetheless, we think it is possible to give accounts of the pre-*Chevron* practice, the *Chevron* decision, and the understandings of that practice and decision evinced by lower courts that permit at least tentative judgments about the development of the *Chevron* revolution. We do not maintain that such accounts are the only possible ones—though we think they are the best available—nor do we maintain that they explain or are consistent with all reported decisions. But to the extent that a reasonably coherent account of the evolution of *Chevron* in its early days can help modern courts and scholars wrestle with the problems that still plague judicial review of agency legal conclusions, we think that we can provide at least a starting point for further research.

A. State of Confusion[13]

In an article written on the eve of the *Chevron* decision, Professor Colin Diver noted, "Two competing traditions in American jurisprudence address the issue of the appropriate allocation of interpretive authority between

13. With acknowledgement to the sheer brilliance of The Kinks.

agencies and courts."[14] One tradition, he observed, "views matters of statutory interpretation as questions of 'law' reserved for independent determination by the judiciary,"[15] while the other "views agencies as delegates, empowered by the legislature to exercise legislative power to articulate and implement public goals,"[16] and therefore calls for deferential judicial review of agency legal determinations. This seeming duality in judicial approaches had been a staple of administrative law scholarship long before Professor Diver's article.[17] Also, while the Supreme Court said relatively little about it in the pre-*Chevron* era, lower courts were often vocal in identifying the apparent inconsistencies in Supreme Court pronouncements about review of agency legal conclusions.

Perhaps the most famous judicial expression along these lines came from Judge Henry Friendly in 1976:

> We think it is time to recognize . . . that there are two lines of Supreme Court decisions on this subject which are analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for the case at hand. Leading cases support[ ] the view that great deference must be given to the decisions of an administrative agency applying a statute to the facts and that such decisions can be reversed only if without rational basis . . . . However, there is an impressive body of law sanctioning free substitution of judicial for administrative judgment when the question involves the meaning of a statutory term.[18]

Other courts echoed Judge Friendly's sentiments. In *Hi-Craft Clothing Co. v. NLRB*,[19] a Third Circuit panel in 1981 stated the court's role in reviewing agency legal determinations "is an uncertain one."[20] After surveying a substantial number of Supreme Court decisions, including a slew specifically involving the National Labor Relations Board (NLRB), the court agreed with Judge Friendly that "it is time to recognize that there are

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14. Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 551 (1985). This article was published after *Chevron* but obviously written beforehand.

15. *Id.*

16. *Id.*

17. *See, e.g.*, Louis L. Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239 (1955) (refuting that agencies have no lawmaking abilities and positing that agencies share the ability to determine questions of law with their "senior partner[s]," the courts); Nathaniel L. Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 VAND. L. REV. 470 (1950) (advocating judicial deference toward reasonable agency interpretations of ambiguous statutory language when courts retain ultimate responsibility for interpreting statutory meaning).

18. Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2d Cir. 1976) (internal footnote omitted), *aff'd sub nom.* Ne. Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977).

19. 660 F.2d 910 (3d Cir. 1981).

20. *Id.* at 912.

two lines of Supreme Court decisions on the subject which are analytically in conflict."[21] In 1984, just months before the *Chevron* decision issued, several panels of the D.C. Circuit weighed in on the subject. In *Natural Resources Defense Council, Inc. v. EPA*,[22] Judge Mikva, writing for a unanimous panel that included then-Judge Scalia, observed:

> The parties sharply contest the standard of review we are to apply to determine whether [the Environmental Protection Agency's (EPA's)] abnegation of all power to reach vessel emissions is "not in accordance with law." One reason for this dispute is that the case law under the Administrative Procedure Act has not crystallized around a single doctrinal formulation which captures the extent to which courts should defer to agency interpretations of law. Instead, two "opposing platitudes" exert countervailing "gravitational pulls" on the law. At one pole stands the maxim that courts should defer to "reasonable" agency interpretive positions, a maxim increasingly prevalent in recent decisions. Pulling in the other direction is the principle that courts remain the final arbiters of statutory meaning; that principle, too, is embossed with recent approval.[23]

In *Trailways, Inc. v. ICC*,[24] a unanimous panel, consisting of Judges Wright, Wilkey, and Wald noted:

> The Commission suggests that, because the regulation at issue is an agency interpretation of one of its own governing statutes, it is entitled to great judicial deference. Trailways, on the other hand, argues that courts are the final arbiters of the meaning of statutes, and that this court therefore must exercise its own judgment . . . . The principle urged by the Commission and that advanced by Trailways, though conflicting, are both well-entrenched in the case law.[25]

It is, of course, one thing to say that there are competing lines of authority, and quite another that those lines are irreconcilable or that there

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21. *Id.* at 913–14.

22. 725 F.2d 761 (D.C. Cir. 1984).

23. *Id.* at 767 (internal citations omitted). The court determined that it did not need to decide the appropriate level of deference because the decision to remand the case to the agency

> is not based upon our assessment of the accuracy of the result reached by the agency, but rather upon the agency's complete failure to consider the criteria that should inform that result; as a consequence, whatever deference might be owing to the agency's conclusions under other circumstances, on this issue none at all is warranted.

Id. at 768. In other words, the agency decision was held to be "arbitrary or capricious" because there was a defect in the agency's decisionmaking process. *See* LAWSON, *supra* note 9, at 706–08 (describing the differences among judicial review of agency outcomes, procedures, and decisionmaking processes).

24. 727 F.2d 1284 (D.C. Cir. 1984).

25. *Id.* at 1287 (internal citations omitted).

are no principles determining when one or the other is appropriate. While some notable figures in the pre-*Chevron* period were prepared to state the latter,[26] there were also plenty of others who sought some kind of order in the seeming chaos of conflicting standards of review.[27]

We do not believe any single principle can either account for all pre-*Chevron* Supreme Court decisions or—more to the point for this study—describe the views of all pre-*Chevron* lower courts about the law prescribed by pre-*Chevron* Supreme Court decisions, but we do think that such decisions and views converge on the key inquiry, implicit in Judge Friendly's description in *Pittston Stevedoring*: whether the legal question decided by the agency and under judicial review is a *pure question of legal interpretation* or a *mixed question of law application to a particular set of facts*. In the former, reviewing courts would *presumptively* conduct de novo review, subject to modification by various factors counseling deference in specific cases. In the latter, courts would *presumptively* grant great deference to the agency, reviewing its decision only for reasonableness, and again subject to modification by various factors counseling against deference. Before we present the evidence in favor of this account of pre-*Chevron* law, which is hardly original with us,[28] several preliminary issues about the nature of administrative deference must be addressed.

First, the word "deference" is used in many different senses, and its usage is not always consistent even within individual opinions.[29] A full exploration of the concept of deference would require a book (which one of us is currently planning), but certain ideas central to the *Chevron* saga must be clarified at the outset.

Deference can mean anything from complete entrustment of

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26. *See* Kenneth Culp Davis, *"Judicial Control of Administrative Action": A Review*, 66 COLUM. L. REV. 635, 670–71 (1966) (emphasizing the Supreme Court's use of both analytical and practical approaches to distinguish between questions of law and fact).

27. For notable efforts to rationalize the varying approaches, see Diver, *supra* note 14, at 599 (arguing that the choice of a standard of review involves dividing interpretive power between "the bureaucracies of court and agenc[ies]"); Jaffe, *supra* note 17, at 275 (noting judicial review should ensure not only that agency decisions comport with the governing statute but also with the statutory scheme, common law, and Constitution); Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 63 (1985) (positing that disagreement over the scope of judicial review can be a result of underlying judicial uncertainty over the substantive law at issue); Nathanson, *supra* note 17, at 491–92 (finding judicial deference to rational administrative judgments can comport with the Administrative Procedure Act).

28. This is more or less the schema Nathaniel Nathanson identified more than half a century ago. *See* Nathanson, *supra* note 17, at 470 (identifying a doctrine of judicial review that does not require courts to decide if the agency's decision is right, but only if it is reasonable).

29. For similar observations, see Strauss, *supra* note 4, at 1145.

decisionmaking authority to another—essentially the absence of review—to a simple acknowledgment that someone else has an opinion on the subject. This possible range in the scope of deference afforded administrative legal interpretations has been an important part of administrative law doctrine at least since *Skidmore v. Swift & Co.*,[30] and whenever one sees the word "deference," one must accompany it with the question: "How much?" The answer to the question is critical: "reasonableness review" and "careful respect" can both legitimately be called "deference," but it is wildly misleading to lump them together for purposes of a scholarly study. A good portion of the time, however, judges who use the term "deference" may not have thought very hard about its different meanings, which makes generalizations about deference based on scrutiny of judicial opinions very treacherous.[31] We do not have a solution to this problem other than to acknowledge it openly and to tease out the usage intended in any given context.

More importantly for this study, there can be very different *reasons* for affording deference, in any particular degree, to agency decisions—or indeed to any kind of decisions.[32] Sometimes, one might defer to the views of another because one thinks the other's decision is good evidence of the right answer. That is, one sets out with the express goal of determining the correct answer to a problem but concludes along the way that someone else is better situated to resolve all or some portion of that problem. For lack of a better term, we call this kind of evidence-based deference *epistemological deference*.

On other occasions, one might give deference to another's decision simply because it is their decision, without regard to whether it is good or bad evidence of the right answer. Consider the treatment of jury verdicts. Jury decisions get deference—and in the case of acquittals in criminal cases, absolute deference—simply because they are jury decisions, with no case-by-case assessment of whether any particular jury was likely to have gotten the right answer. Again, for lack of a better term, we call this kind of deference based simply on the *identity* of the prior decisionmaker *legal deference.* Of course, a well-functioning legal system is unlikely to craft a regime of legal deference unless there are plausible reasons to think the actors to whom deference is given are likely to reach right answers in a wide range of cases, but once the system of legal deference is in place, there is no

30. 323 U.S. 134 (1944).

31. *See* Diver, *supra* note 14, at 565–67.

32. The foregoing typology of reasons for deference was given in Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1271, 1278–79, 1300–02 (1996) (listing and elaborating upon *legal* deference, *pragmatic* deference, and *epistemological* deference).

need to consider whether any given decision shows specific indicia of correctness.

Epistemological deference, as we have described it, does not require any specific doctrine for implementation. It is simply common sense applied to the task of figuring out right answers. If the views of another actor are relevant for the correct resolution of a dispute, it would be bad judgment not to consider those views for whatever they are worth.[33] So-called *Skidmore* deference,[34] in which agency views expressed in such non-binding instruments as amicus briefs and interpretative rules are given whatever respectful consideration their reasoning and pedigree warrant,[35] is a species of epistemological deference. It makes no more sense to treat *Skidmore* deference as a "doctrine" than it would to formulate a doctrine called "Lawson deference" for giving weight to Gary Lawson-authored amicus briefs to reflect (if one wisely deems it a fact) that Gary Lawson is more likely to be right about certain matters that he has studied in great depth than would be a judge who has not engaged in that study.

In this Article, we are primarily concerned with *legal* deference: the extent to which courts are *obliged* to give a certain degree of deference to agency legal decisions simply because they are the legal decisions of agencies. That is plainly the kind of deference about which the various debates over *Chevron* are concerned. To be sure, courts do not draw, and have never drawn, the distinction between legal and epistemological deference as sharply as we do here. Indeed, that particular distinction is not even part of formal legal vocabulary. But it is analytically crucial to understanding both the theoretical and practical scope of any doctrine of deference, and we will do our best to isolate aspects of court decisions that are best explained in terms of one or the other kind of deference. Because we are layering this framework on top of decisions that probably did not think about what they were doing in those terms, we are surely "contaminating" our sample in the process. Again, we do not see any way out of this problem other than to acknowledge it.

Second, both pre-*Chevron* and post-*Chevron* case law distinguish statutes

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33. This observation is subject to the qualification that such epistemological deference would be inappropriate if the costs of considering someone else's views, including the costs involved in discovering, interpreting, and processing those views, exceed the likely benefits. In that circumstance, it would be poor reasoning to engage in such deference.

34. Named for *Skidmore*, 323 U.S. 134, and invigorated in modern times by *Christensen v. Harris County*, 529 U.S. 576 (2000).

35. *See generally* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235 (2007) (arguing that modern *Skidmore* deference is conceptualized as on a sliding scale, falling either way depending on factors such as respecting an agency's expertise and avoiding its arbitrariness).

administered by agencies from statutes *applied* by agencies. Roughly speaking, agencies *administer* those statutes for which they have some special responsibility, as when an agency interprets the substantive provisions of its own organic act. They often *apply* and interpret statutes for which they have no such responsibility, either because all or many agencies equally apply those statutes,[36] because some other agency administers the statute,[37] or because the statutes are primarily entrusted to (administered by) courts rather than agencies.[38] In this study, we confine ourselves only to the interpretation of statutes administered by agencies. Because this particular distinction predates *Chevron*, it should have little or no effect on the course of doctrinal development. All cases upon which we focus involve statutes obviously administered by the agencies in question, under either pre- or post-*Chevron* law.

Third, agency conclusions of *law* are, at least formally, reviewed differently from agency determinations of *policy*. Policy decisions are subject to review under § 706(2)(A) of the Administrative Procedure Act (APA), which tells courts to reverse agency decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[39] Technically, one could use this same provision as the statutory source for review of agency legal conclusions (and one encounters some cases that do so), but the application of this provision to agency policy determinations is quite different from any application to agency legal conclusions. As the law has developed over the past half-century, agency policy decisions—or at least policy decisions of threshold consequence—are reviewed under the so-called "hard look doctrine," which requires agencies to articulate the reasons behind their actions and requires courts to ensure agencies have

36. *See, e.g.*, Administrative Procedure Act, Pub. L. No. 79–404, 60 Stat. 237 (1946) (codified in scattered sections scattered of 5 U.S.C.); Regulatory Flexibility Act, Pub. L. No. 96–354, 94 Stat. 1164 (1980) (codified in scattered sections of 5 U.S.C.); Back Pay Act of 1966, Pub. L. No. 89–380, 80 Stat. 94 (codified in 5 U.S.C. § 5596 (1966)); Federal Tort Claims Act, Pub. L. No. 79–601, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.).

37. For example, a ratemaking agency may well have to apply and interpret the Internal Revenue Code, but only the Internal Revenue Service administers the code.

38. The U.S. Department of Justice, for example, does not administer (in the specialized administrative law sense) the federal criminal code; the courts do. Provisions in organic acts for judicial review of agency decisions also fall into this category. *See* Murphy Exploration & Prod. Co. v. U.S. Dep't of the Interior, 252 F.3d 473, 478–80 (D.C. Cir. 2001) (holding congressionally imposed jurisdictional limits to preclude *Chevron* deference to an agency). One might think the same of statutes of limitations in organic acts, but the case law on that point is oddly inconclusive. *See* AKM LLC v. Sec'y of Labor, 675 F.3d 752, 754–55 (D.C. Cir. 2012) (leaving the question open); *id.* at 764–69 (Brown, J., concurring) (arguing, forcefully, that agencies do not administer such provisions).

39. 5 U.S.C. § 706(2)(A) (2006).

seriously considered both the problems before them and their relevant factors.[40] This review, which focuses on the process by which agencies reach and justify conclusions, is quite different from substantive review that focuses on whether the agency's outcomes accord with external sources, such as the record in the case of agency fact-finding or statutes in the case of agency law-finding. Unfortunately, the line between agency policymaking and agency law-finding is anything but sharp, especially in a world from which the nondelegation doctrine has been largely expunged.[41] If a statute is sufficiently vacuous, an agency's "interpretation" of that statute simply cannot be described as interpretation. The task of giving meaning to an empty shell of a statute is legislative rather than legal or interpretative. For example, if an agency administers a statute instructing the agency to award licenses for the "public interest, convenience, or necessity," all agency actions under that statute formally are "interpretations" of the statute, but in reality the agency is *constructing* rather than *construing* the law through its actions. The statute empowers the agency but does not constrain it in any serious way. But because the form of the agency's action is "interpretation" of a statute, a reviewing court might cast its analysis in terms of reviewing an agency's statutory construction, when in fact the court is (or should be) reviewing the agency's exercise of policymaking discretion.

There is no clear line describing when agency action taking the form of statutory interpretation is instead best treated as an instance of agency policymaking. We here exercise some measure of ill-defined judgment when deciding which cases to include in our sample of decisions involving review of agency legal conclusions. We do not believe that changing our sample at the margins would alter our results in any noticeable way, but we think it necessary to note the problem.

B. From the Beginning[42]

Consider three noteworthy cases involving agency interpretations of statutes decided between 1941 and 1951: *Gray v. Powell*,[43] *NLRB v. Hearst Publications, Inc.*,[44] and *O'Leary v. Brown–Pacific–Maxon, Inc.*[45] Each case reflects a pattern of judicial review that serves as a framework for the law

40. See LAWSON, *supra* note 9, at 697–709.
41. *See id.* at 786–87.
42. With acknowledgement to the artistry of Emerson, Lake, and Palmer.
43. 314 U.S. 402 (1941).
44. 322 U.S. 111 (1944).
45. 340 U.S. 504 (1951).

leading to *Chevron* and beyond.[46]

Gray involved an interpretation of the Bituminous Coal Act of 1937[47] by the Director of the Bituminous Coal Division of the Department of the Interior. The Act authorized the Agency to prescribe a detailed code for the regulation (really the cartelization) of the bituminous coal industry. To coerce coal producers to submit to the regulatory scheme, the Act imposed a punitive 19.5% tax "upon the sale or other disposal of bituminous coal produced within the United States, when sold or otherwise disposed of by the producer thereof,"[48] with a blanket exception from the tax for any producer who was a "code member"[49] under the statute and whose transaction complied with the code.[50] For purposes of the tax provision, the Act defined "disposal" of coal to "include[ ] consumption or use . . . by a producer, and any transfer of title by the producer other than by sale,"[51] but then carved an exception from the terms of the coal code for "coal consumed by the producer or . . . coal transported by the producer to himself for consumption by him."[52] The effect of these provisions was to exempt from the code, and therefore from the punitive tax for non-compliance with the code, coal that was consumed by its producer.

Seaboard Air Line Railway Company was a large coal consumer. If it had bought coal on the open market from a mine, there is no doubt that such a transaction would have come within the purview of the statute and thus would have needed to comply with the code provisions to avoid the tax penalty. If it had owned its own mine, hired its own employees to mine coal, and then consumed the coal from its own mines, there is no doubt it would have fallen within the statute's producer/consumer exception. Seaboard did neither of these things. Instead, it leased coal lands and then hired an independent contractor to mine the coal and deliver it to Seaboard.[53] Seaboard owned the coal, for all common-law purposes, from ground to locomotive, but at some point the coal had to be transferred from the possession of the independent mining company that dug it up to Seaboard. Seaboard (through its receiver) asked the Director of the

46. The discussion in this section draws upon material found in Professor Lawson's casebook. *See* LAWSON, *supra* note 9, at 502–33. He is profoundly grateful to Thomson/Reuters for permission to use and adapt that material.

47. Pub. L. No. 75–48, 50 Stat. 72 (codified but repealed at 15 U.S.C. §§ 828–52 (2006)).

48. *Id.* § 3(b), 50 Stat. at 75.

49. *Id.*

50. There was also an exception from the tax for any coal sold exclusively to a governmental entity. *Id.* § 3(e), 50 Stat. at 75–76.

51. *Id.* § 3(a), 50 Stat. at 75.

52. *Id.* § 4(*l*), 50 Stat. at 83.

53. *See* Gray v. Powell, 314 U.S. 402, 407–09 (1941).

Bituminous Coal Division to declare these transactions exempt from the coal code, but the Director refused.[54]

On appeal, Seaboard advanced two arguments. First, it argued that it was the actual producer of the coal, as if it had hired its own employees rather than independent contractors to mine it.[55] If that argument had been correct, Seaboard would clearly be exempt from the code as a producer or consumer. Second, it argued that even if its independent contractor was the coal's actual producer, the coal's transfer of possession from the contractor to Seaboard was not a "sale or other disposal" subject to tax for non-compliance because the coal's title never changed hands.[56] The Supreme Court ruled in favor of the agency on both counts—but did so for very different reasons and with very different accounts of agency deference.

Regarding whether Seaboard was the coal's actual producer, the Court declared after examining in detail the contractual arrangements between Seaboard and one of its contractors:

> The separation of production and consumption is complete when a buyer obtains supplies from a seller totally free from buyer connection. Their identity is undoubted when the consumer extracts coal from its own land with its own employees. Between the two extremes are the innumerable variations that bring the arrangements closer to one pole or the other of the range between exemption and inclusion. To determine upon which side of the median line the particular instance falls calls for the expert, experienced judgment of those familiar with the industry. Unless we can say that a set of circumstances deemed by the Commission to bring them within the concept "producer" is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the Court's duty to leave the Commission's judgment undisturbed.[57]

This is very strong deference indeed. The Court reviewed the agency decision for reasonableness rather than correctness.[58]

Regarding whether transactions between a producer (assuming, as the agency and Court found, that the independent contractor was the producer) and Seaboard were outside the scope of the Act because there was no transfer of title to the coal, and therefore no "sale or other disposal" within the statute, the Court affirmed the agency in a lengthy discussion

54. *See id.* at 403–05.

55. *See id.* at 411.

56. *See id.* at 414–15.

57. *Id.* at 413.

58. Three Justices would have reviewed this decision de novo. *See id.* at 417–18 (Roberts, J., dissenting).

that made no reference to deference.[59] The Court simply determined, after what appears to be strict de novo review, that the agency had construed the statute correctly. The shift in both the opinion's analysis and tone from one issue to the other is inescapable.

There is an obvious difference between those issues that readily explains their treatments.[60] The question whether a "sale or other disposal" of coal within the meaning of § 3(a) of the Bituminous Coal Act of 1937 requires a transfer of title to the coal is a question requiring no special knowledge of the coal industry to answer. A law professor in an ivory tower who has never seen a lump of coal could apply ordinary tools of statutory interpretation (language, structure, legislative history, purpose, etc.) to discern the best construction of the statute. The legal question involved is abstract, or *pure*, in the sense that it can be addressed in principle using nothing more than conventional tools of legal analysis. By contrast, the question whether Seaboard was a "producer" of coal when it leased the mines but hired contractors to mine them is not necessarily answerable abstractly from an ivory tower. One *could* conclude that any arrangement in which the consumer owns the mine makes that consumer the "producer," in which case one needs only the same legal skills necessary to determine whether a transfer of title is a statutory prerequisite for a "sale or other disposal" of coal. But one could also believe the Act's failure to provide a definition of "producer" suggests a more calibrated inquiry, in which case "producer" status other than at the obvious poles (open-market purchases and own-employee mining) may turn on subtleties in the particular arrangements between the mine-owning consumer and the workers who mine the coal. In that circumstance, detailed knowledge and expertise in the coal industry may be essential to a reasoned determination of whether any particular entity is a "producer." More precisely, figuring out whether an entity such as Seaboard is a producer may require an *inductive* rather than *deductive* form of inquiry. Instead of fixing the meaning of the statute and then asking whether Seaboard maps onto that meaning, one might instead define the statute precisely by a common-law-like process of inclusion and exclusion, based on detailed study of the specific facts governing Seaboard's transaction. This kind of inquiry is best described as *law application*—the application of legal terms to specific factual settings—rather than *law determination*—the abstract ascertainment of statutory meaning. In that context, it makes sense to give deference to the

59. *See id.* at 414–17 (basing their decision strictly on a de novo review).

60. We do not mean to suggest that the Court's differential treatment of these issues was inevitable, or even doctrinally correct. Three Justices in 1941 obviously thought otherwise. We mean only that the Court's differential treatment is understandable.

supposedly expert agency charged with the task of applying that particular statute.

So understood, *Gray v. Powell* describes a framework in which the deference afforded agencies in their legal interpretations depends to a great degree upon the *kind* of legal interpretation involved. Pure, abstract, "ivory tower" legal questions call for de novo review, while fact-bound, inductive, law-application questions call for a good measure of deference.

This pattern was at work in many pre-*Chevron* cases. In *NLRB v. Hearst*, one of the most famous of the New Deal-era administrative law cases, the NLRB determined that newsboys—generally adult vendors with fixed sales locations—were "employees" for purposes of the mandatory-bargaining provisions of the Wagner Act. The statute unhelpfully defined (and still defines) an "employee" as "any employee."[61] The newspaper company refused to bargain with the newsboys' union on the ground that the Wagner Act incorporated the common law distinction between employees and independent contractors and that the newsboys were independent contractors rather than employees under generally accepted common law principles. The Court affirmed the agency decision, but as in *Gray* did so in two distinct steps.

First, the Court rejected the newspaper's claim that the Wagner Act's definition of "employee" incorporated common law standards for determining employee status. The Court's discussion of that statutory interpretation point was lengthy, employing a range of considerations including the need for national uniformity, the uncertainty of the common law standard(s), and the purposes of the policies of the Wagner Act.[62] At no point did the Court indicate as relevant that the NLRB had already construed the statute in that fashion. Rather, the Court engaged in de novo review—as one would expect from the framework set forth in *Gray v. Powell*. After all, the question whether the word "employee" in the Wagner Act is meant to incorporate pre-existing common law standards for determining employee status is a classic pure, abstract, ivory tower legal question. One can ask and answer it without knowing anything about the newspaper industry—and indeed without knowing there is a controversy involving the newspaper industry. One only needs traditional tools of statutory interpretation.

Once one has decided that the common law does not determine the statute's meaning, there still remains the problem of interpreting and applying the statute in the case at hand. The newspaper likely would have won (as it did in the lower court) if the common law controlled, but that

61. 29 U.S.C. § 152(3) (1940).

62. NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 120–29 (1944).

does not mean that the newspaper necessarily must lose if the common law does not control. One must still determine whether the newsboys at issue were "employees" under whatever non-common-law meaning of the term applies in the Wagner Act. On that question, the Court said:

> [W]here the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. . . . [T]he Board's determination that specified persons are "employees" under this Act is to be accepted if it has "warrant in the record" and a reasonable basis in law.[63]

As with the determination of who is a "producer" under the Bituminous Coal Act, the determination of who is an "employee" under the Wagner Act seems to require an inductive process of inclusion and exclusion based on detailed understanding of factual settings. The process of filling out the meaning of "employee," after abstractly concluding that it cannot be deduced from the common law, is a process of law application rather than strict law determination, and that process plausibly warrants deference to the agency charged with administering the statute.

This framework also appeared in *O'Leary v. Brown–Pacific–Maxon, Inc.*[64] John Valak was an employee of the defendant company in Guam. The company provided a recreation center that was near a channel "so dangerous for swimmers that its use was forbidden and signs to that effect erected."[65] While at the recreation center one day, Valak braved the channel in an attempt to rescue some men trapped on a reef, but drowned in the process. His mother brought a claim under the Longshoremen's and Harbor Workers' Compensation Act of 1927 (LHWCA), which requires the company to provide benefits for "accidental injury or death arising out of and in the course of employment."[66] The agency awarded a death benefit under the statute. The company objected that the statutory term "in the course of employment" was meant (shades of *Hearst*) to incorporate pre-existing common law standards, and that Valak's actions, however noble, were surely a frolic and detour under common law and not subject to the statutory compensation provisions, as the Court of Appeals concluded.

The Court agreed with the agency that the statute extended beyond the common law meaning of "course of employment,"[67] but, as in *Gray* and

63. *Id.* at 131.
64. 340 U.S. 504 (1951).
65. *Id.* at 505.
66. 33 U.S.C. § 902(2) (1946).
67. *O'Leary*, 340 U.S. at 506–07.

Hearst, did so with no mention of agency deference. The question whether the LHWCA meant to define "course of employment" by strict reference to the common law is clearly a pure and abstract "ivory tower" legal question requiring no special expertise in employment relations to resolve. One could ask and answer it without knowing whether any specific dispute turns on the answer.

Once one extends the statute beyond the common law, however, there remains the problem, as there was in *Hearst*, of determining whether this particular action by this particular employee fell within the expanded boundaries of the statute. The resolution of that problem, as with establishing the statutory meanings of "producer" and "employee," is the kind of inductive, fact-specific, law-application question for which deference is appropriate under the *Gray* framework; and the agency got plenty of deference on that point.[68]

The *Gray/Hearst/O'Leary* framework provides a workable and plausible, even if not inevitable or incontestable, mechanism for reviewing agency legal determinations. It is not always easy to determine whether a legal question is a "pure" question of law determination or a "mixed" question of law application, but it is often a straightforward inquiry. Once that classification is made, the appropriate deference rule seems to follow automatically.

Of course, this Article would probably be unnecessary if things were that simple. The framework was never that simple, so understanding pre-*Chevron* law requires attention to several modifications to the framework.

C. Burning Down the House[69]

The need for some kind of modification to the framework became very clear in 1947 when the Court decided *Packard Motor Car Co. v. NLRB*.[70] As in *Hearst*, the question concerned whether a particular class of persons were "employees" under the Wagner Act. This time, the class of persons was a

68. *See id.* at 507–09. The Court's discussion was a bit muddled by its willingness to indulge the agency Deputy Commissioner's labeling of the question of "course of employment" as a question of fact. Of course, it is not a question of fact, and of course Justice Frankfurter, who authored the majority opinion, knew that it was not a question of fact. The best reading of the opinion, given that it was issued on the same day as *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), is that Justice Frankfurter meant that the degree of deference afforded agency applications of law is comparable in scope to the degree of deference afforded agency findings of fact under the "substantial evidence" standard of review. *See* 5 U.S.C. § 706(2)(E) (2006).

69. With acknowledgement to the Talking Heads, who Professor Lawson does not think were as brilliant as The Kinks or as artistic as Emerson, Lake, and Palmer.

70. 330 U.S. 485 (1947).

group of foremen at an auto plant, who the NLRB determined were an appropriate bargaining unit under the statute. The company countered that the foremen—with responsibility for managing, disciplining, and making recommendations concerning line employees—were part of the "employer" under the statute rather than employees. By a 5–4 vote, the Court agreed with the NLRB—but Congress agreed with the company and promptly passed the Taft–Hartley Act, overruling the decision.

For our purposes, whether the Court correctly or incorrectly interpreted the Wagner Act does not matter. All that matters is that the Court affirmed the agency without resorting to any deference. Indeed, the only mention of the agency's prior decision was a recitation offered by *the company* of the agency's checkered history of "inaction, vacillation and division . . . in applying this Act to foremen."[71] The Court's response was that "[i]f we were obliged to depend upon administrative interpretation for light in finding the meaning of the statute, the inconsistency of the Board's decisions would leave us in the dark,"[72] but that making such reference in this case was unnecessary "in deciding the naked question of law whether the Board is now . . . acting within the terms of the statute."[73]

If the relevant issue of statutory meaning really was a "naked question of law," the conclusion of "no deference" followed logically from the *Gray* framework. That characterization would only be accurate, however, if the relevant legal issue was whether all people who bore the label "foreman" at all times and under all circumstances were outside the coverage of the Act. That was not the issue. No one believed that a company could simply apply the label "foreman" to someone and thereby remove that person from the statute. The real question was whether persons with the responsibilities, duties, and status of the people labeled "foremen" in this particular case were "employees" within the statute. One could resolve even that issue as a "naked question of law" by saying, as the majority opinion at some points seemed to say, that anyone who draws a salary from the company is an "employee." But that would have the intriguing consequence, as the dissenting opinion pointed out, of making corporate executives, including the president of the company, employees subject to the Wagner Act.[74] Charity demands that one not attribute such a position to the Court. Accordingly, the best interpretation of the opinion is that it really was treating the relevant issue as more akin to the inductive, fact-specific, law-applying process involved in deciding whether newsboys are

71. *Id.* at 492.
72. *Id.*
73. *Id.* at 493.
74. *See id.* at 494 (Douglas, J., dissenting).

"employees." On that understanding, one would expect the agency decision to receive a great deal of deference, amounting essentially to reasonableness review.

A long tradition of viewing *Packard* and *Hearst* in tension with each other is explicable only by viewing *Packard*, despite its language, as a case involving law application rather than law determination.[75] If that is the correct characterization of the case, then *Packard* does represent a break, and a fairly sharp one at that, with the *Gray* framework. Why defer to the agency's inductive construction of the term "employee" in *Hearst* but not in *Packard*?

There are many reasons for doubting the agency's judgment in *Packard*. As the company explained, the agency had vacillated for a long term. The NLRB had also developed a reputation for being blatantly pro-labor, and while that might not matter too much to anyone other than newsboys and newspapers in a case like *Hearst*, the decision in *Packard* threatened to re-make industrial relations across the country.[76] From the standpoint of *epistemological deference*, these are all plausible reasons to refuse to defer to the agency. But how can they be relevant from the standpoint of *legal deference*?

The answer must be that the framework set forth in *Gray, Hearst*, and *O'Leary* was a *presumptive* framework: normally, a court defers to an agency's exercise of law application while reviewing de novo agency exercises of law determination, but if certain epistemologically relevant factors are present, those default rules could be altered. Under the right circumstances, agencies might fail to get deference in law application, as in *Packard*, or receive deference in pure law determination, as arguably happened much later in *FEC v. Democratic Senatorial Campaign Committee*.[77] What circumstances are those? In 1985, Professor Diver famously identified no fewer than ten factors that Supreme Court decisions had appeared to regard as relevant for determining whether to grant deference to agency legal interpretations.[78] Sometimes one could find many of those factors at work in a single opinion.[79] Accordingly, the seemingly simple framework of

75. Or at least, as explained above, the law determination aspect of the case was so obvious that it did not warrant Supreme Court attention.

76. *See* Jaffe, *supra* note 17, at 255 (arguing the difference of interpretations in *Hearst* and *Packard* to be in substance rather than form).

77. 454 U.S. 27 (1981) (deferring to the agency's view that a statute forbidding political committees from making expenditures on behalf of candidates did not prevent those committees from acting as spending agents for other organizations).

78. *See* Diver, *supra* note 14, at 562 n.95 (listing factors such as contemporaneousness, duration, consistency, reliance, significance, complexity, rulemaking authority, self-execution, congressional ratification, and quality of explanation as used in determining the role of agency discretion).

79. *See* 454 U.S. at 37–38.

Gray was subject to override by a mélange of factors, with no clear metric for determining how much or when those factors weigh in the balance.

Another important modification to the *Gray* framework stems from the language of certain kinds of statutes. On occasion, Congress will specifically and expressly indicate that an ambiguous term is to be defined by the agency, even where defining it could involve abstract law determination rather than inductive law application. For example, in *Batterton v. Francis*,[80] the relevant statute expressly gave the Secretary of Health, Education, and Welfare the power to determine, through rulemaking, the standards for "unemployment" by referring to "unemployment (as determined in accordance with standards prescribed by the Secretary)."[81] While defining such a term through a rulemaking would ordinarily involve abstract law determination, the Court noted that Congress

> *expressly delegated* to the Secretary the power to prescribe standards for determining what constitutes "unemployment" for purposes of AFDC–UF eligibility. In a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts regulations with legislative effect. A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner.[82]

Once it is settled that assigning this law-determining power to agencies does not violate the nondelegation doctrine,[83] express congressional grants of this kind amount to a command to courts to afford legal deference to agency decisions pursuant to such statutes. Conceivably, one might be able to infer such a command from language less than express, but presumably that would require some kind of unusual, statute-specific evidence indicating Congress intends agencies rather than courts to provide statutory meaning.

Accordingly, we think the best account of pre-*Chevron* law is that it required reviewing courts to conduct roughly the following inquiry:

> (1) Does the agency administer the statutory provision at issue? If not, then the agency gets, at most, epistemological deference pursuant to *Skidmore v. Swift & Co.* if warranted by all of the facts and circumstances. If yes, then:

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80. 432 U.S. 416 (1977).

81. 42 U.S.C. § 607(a) (1976).

82. 432 U.S. at 425 (first emphasis added).

83. That has been settled, however wrongly, for quite some time. *See generally* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002).

(2) Is the agency's legal interpretation a pure, abstract, "ivory tower" legal question that can be asked and answered without knowing anything about the particular dispute before the agency? If no, the agency presumptively gets a strong measure of deference, tantamount to reasonableness review, unless a constellation of factors counsels against it. If yes, the court presumptively reviews the matter de novo, against subject to a constellation of factors that might counsel against it.

(3) Also, if Congress has *expressly* entrusted the law-determination function to the agency, then courts must honor the congressional allocation of authority and give the agency's decision great deference regardless of the classification of the legal question involved.

D. Is This the Real Life? Is This Just Fantasy?[84]

Assume that we are right about the best account of pre-*Chevron* law as articulated by the Supreme Court. There still remains the question whether that account was explicitly or implicitly accepted and applied by lower courts in the period leading to *Chevron*. We cannot say every lower court decision we have encountered is consistent with this understanding, but the lower courts generally appeared to act in accordance with this framework.

We looked through the *Federal Reporter* at every reported decision from the D.C. Circuit Court of Appeals decided between 1982 and the issuance of *Chevron* on June 25, 1984. (We looked at a non-random sample of cases from other circuits as well, but that number is too small to change any of our conclusions.) We selected from that sample all cases that seemed to involve review of agency legal determinations of statutes administered by the agency. We have possibly wrongly omitted some decisions by misclassifying cases involving statutory interpretation (which are relevant to our sample) as cases involving policy determinations (which are not), but given our results, we cannot believe that any such errors could make a difference.[85] It is also possible that the D.C. Circuit did not represent the practices of lower courts generally, but there are strong theoretical and anecdotal reasons to doubt whether this is a serious problem: the D.C. Circuit set the tone for administrative law during that era—as it continues to do today—and a quick glance at cases from other circuits does not reveal

84. With acknowledgement to the virtuosity of Queen.

85. Could we also have wrongly included some decisions that are best understood as policy calls rather than interpretations of statutes? Of course. As we noted earlier, the line between questions of law and questions of policy is fuzzy at best. Again, however, we see no way any such marginal errors could affect the validity of our overall results.

any great differences in approach across federal courts. Accordingly, we think these D.C. Circuit cases give a good flavor for how lower courts generally understood the law governing review of agency legal determinations in the two years leading up to *Chevron*.

A significant majority of these cases involved what we would classify as pure or abstract legal questions, and relatively few involved mixed questions of law application. That is not surprising: appeals from rulemakings, particularly pre-enforcement appeals, are very likely to involve such "purely legal" questions, and in adjudications, parties are likely to focus at the appellate level on pure legal questions. If we are right that agencies presumptively received great deference on mixed questions of law application but not on pure questions of law determination, it makes sense for parties challenging agency decisions primarily to contest pure legal questions in the courts of appeals. To be sure, courts very seldom expressly identified the legal questions involved as being either pure or mixed. The classifications are ours, not theirs, and conceivably a different set of eyes would put at least some of the cases into a different category. Some of them seem to be very close calls that could go either way. Accordingly, we do not claim any empirical rigor for our observations. We simply offer them for what they are worth.

Most courts facing pure or abstract questions of law decided those issues with no significant deference, of either the legal or epistemological variety, to the interpreting agencies. The courts often did not mention the concept of deference, whether they were affirming the agencies[86] or reversing

86. *See, e.g.*, Multi-State Commc'ns, Inc. v. FCC, 728 F.2d 1519, 1522 (D.C. Cir. 1984) (affirming, with no mention of deference, FCC's determination that the word "allocate" does not necessarily mean "assign"); Action on Smoking & Health v. Civil Aeronatics Bd., 699 F.2d 1209 (D.C. Cir. 1983) (affirming, with no mention of deference, the board's determination that a statute enabling it to ensure "safe and adequate service" included the power to regulate the quality of service and hence to regulate smoking on aircraft); B.J. McAdams, Inc. v. ICC, 698 F.2d 498 (D.C. Cir. 1983) (affirming, with no mention of deference, ICC's conclusion that it could pass on an application to remove restrictions on service without considering issues that go back to the original license grant); Duquesne Light Co. v. EPA, 698 F.2d 456 (D.C. Cir. 1983) (affirming, with no mention of deference, Environmental Protection Agency (EPA) regulations implementing pollution penalties); Process Gas Consumers Grp. v. FERC, 712 F.2d 483 (D.C. Cir. 1983) (affirming, with no mention of deference, Federal Energy Regulatory Commission's (FERC's) decision to consider cost and not simply availability of alternative fuels when setting gas priorities); Cont'l Seafoods, Inc. v. Schweiker, 674 F.2d 38, 42–43 (D.C. Cir. 1982) (statute giving the Food and Drug Administration (FDA) jurisdiction over "added" substances does not refer solely to substances added by humans rather than by natural processes that occur after production of the regulated item); Int'l Union of the United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus., Local Unions Nos. 141, 229, 681 & 706 v. NLRB, 675 F.2d 1257 (D.C. Cir. 1982) (affirming, by a 2–1 vote, the NLRB's conclusion

them.[87] A few courts gave very brief nods to what today we call "*Skidmore* deference" (or epistemological deference) in connection with pure questions of law, but said nothing to suggest any legal deference in those circumstances.[88]

On some occasions, the courts engaged in quite substantial discussions of statutory interpretation methodology without mentioning deference as an element in that analysis. For example, in *National Insulation Transportation Committee v. ICC*,[89] the court affirmed the Interstate Commerce Commission's (ICC's) conclusion that it had the discretion not to order refunds when it found unreasonable a carrier's practice, but not the carrier's ultimate rate. The court consumed four pages of the *Federal Reporter* discussing statutory interpretation, but it made no reference to deference to the agency.[90] In *National Soft Drink Ass'n v. Block*,[91] the court similarly held that the Department of Agriculture did not have statutory

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that state right-to-work laws foreclosed bargaining over provisions assessing union representation costs against non-union workers, with no mention of deference to the agency even in response to a vigorous dissenting opinion); McIlwain v. Hayes, 690 F.2d 1041 (D.C. Cir. 1982) (affirming, with no mention of deference, FDA's conclusion that there is no implicit statutory time limit on how long the agency can delay requirement of proof of safety of food additives in light of changing technology); Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982) (affirming, with no mention of deference, an Interstate Commerce Commission (ICC) determination that it need not retroactively impose labor-protective conditions on terminations of lines by state-run railroads); U.S. Lines, Inc. v. Baldridge, 677 F.2d 940, 944–45 (D.C. Cir. 1982) (affirming, with no mention of deference, an agency determination that a shipping line had to repay a portion of government construction subsidies when ships were used for domestic rather than foreign commerce, even when the domestic use was under a military charter).

In *Ashton v. Pierce*, 716 F.2d 56 (D.C. Cir. 1983), the court (and evidently the parties as well) treated the relevant question—whether an "immediate hazard" includes lead in unchipped paint—as a pure question of law, see *id.* at 60, and gave no deference to the agency. *See id.* at 60–63. This seems to be a paradigmatic "mixed" question of law application, but if treated as a pure question of law, the court's analysis is consistent with the usual pattern for such questions.

87. *See, e.g.*, Wilkett v. ICC, 710 F.2d 861 (D.C. Cir. 1983) (reversing, with no mention of deference, ICC conclusion that the "fitness" for a license of a company can include considering the "fitness" of its owner as an individual); Kennecott Corp. v. EPA, 684 F.2d 1007 (D.C. Cir. 1982) (reversing, without mentioning deference, an EPA interpretation of the Clean Air Act that allows use of certain technologies only when use of alternative technologies would force a plant closure).

88. *See, e.g.*, Interstate Natural Gas Ass'n of Am. v. FERC, 716 F.2d 1 (D.C. Cir. 1983); Am. Fed'n of Gov't Emps., Local 2782 v. FLRA, 702 F.2d 1183 (D.C. Cir. 1983); United Food & Commercial Workers Int'l Union Local No. 576 v. NLRB, 675 F.2d 346, 351 (D.C. Cir. 1982); Ry. Labor Execs.' Ass'n v. United States, 675 F.2d 1248, 1254 (D.C. Cir. 1982).

89. 683 F.2d 533 (D.C. Cir. 1982).

90. *See id.* at 537–40.

91. 721 F.2d 1348 (D.C. Cir. 1983).

authority to restrict sales of snack foods at all times during the school day and at all places within schools. Rather, said the court, "An examination of the legislative history leads to the conclusion, *albeit inconclusively*, that the [c]ongressional intent was to confine the control of junk food sales to the food service areas during the period of actual meal service."[92] The court explained the methodology of statutory interpretation in depth[93] but never invoked deference to the agency, even though it admitted the legal question was close. Both of these cases involved pure or abstract legal questions, involving the statutory authority of the relevant agencies, and deference played no role in the decisions.

Under the model we have laid out, deference would be appropriate, even for pure questions of law, if the statute clearly or expressly allocated authority to make those determinations to the agency. We found no cases in our sample in which the D.C. Circuit invoked this doctrine as grounds for deference. The court did, however, once refer to that doctrine, while finding it inapplicable to the case at hand, because there was insufficient evidence Congress had granted the agency such specific law-determining authority.[94]

A number of cases granted agencies deference on questions of law application or mixed questions of law and fact, precisely as our proposed model predicts. These cases involved matters such as whether promulgation of work performance standards were management prerogatives under the federal labor laws,[95] whether commercial paper—specifically "prime quality commercial paper, of maturity less than nine months, sold in denominations of over $100,000 to financially sophisticated customers rather than to the general public"[96]—are "securities,"[97] whether a rail carrier has an "interest" in a water carrier if the stock is held in a

92. *Id.* at 1353 (emphasis added).

93. *See id.* at 1352–53 (analyzing the statute by evaluating the plain meaning and legislative history).

94. *See* Vanguard Interstate Tours, Inc. v. ICC, 735 F.2d 591, 595–97 (D.C. Cir. 1984) (finding Congress held itself as the authority in determining the right of intervention in route application proceedings).

95. *See* Nat'l Treasury Emps. Union v. FLRA, 691 F.2d 553, 554, 558–59 (D.C. Cir. 1982) (following the Federal Labor Relations Authority's (FLRA's) interpretation that Title VII of the Civil Services Reform Act of 1978 guarantees work performance standards to federal agencies' management officials).

96. A.G. Becker, Inc. v. Bd. of Governors of the Fed. Reserve Sys., 693 F.2d 136, 151 (D.C. Cir. 1982).

97. *See id.* at 140 (noting specifically that "deference to an agency's construction of the statute is called for because the agency's decision applies general, undefined statutory terms—'notes and securities'—to particular facts" (emphasis omitted)).

voting trust,[98] whether treating classes of utility customers differently results in "discriminatory" rates,[99] whether a certain job was "temporary,"[100] and whether a certain facility counted as a "mine."[101] These questions involve clarifying the meaning of ambiguous statutory terms through case-by-case determinations on particular facts, which are precisely the kinds of questions that *Gray*, *Hearst*, and *O'Leary* presumptively entrusted to agencies.

On some occasions, courts would refuse to defer to agencies on purely legal matters, while deferring to them on questions of law application within the same case. For example, in *Western Union Telegraph Co. v. FCC*,[102] the court reversed the agency on a pure question of law by holding that a domestic carrier who initiates a call eventually transmitted overseas by an international carrier is the carrier that "originated" the call under the statute and is therefore responsible for tariffing, billing, and collecting on that call. The court made no mention of deference to the agency's view that the international carrier could be tasked with billing and collecting functions.[103] But with respect to a separate question of law application—how to allocate revenues when more than one carrier is involved in a call—the court explicitly gave "considerable deference"[104] to the Federal Communications Commission (FCC) and found it had not acted "unlawfully or unreasonably."[105]

We do not suggest that every decision during this period neatly fell within the framework laid out by pre-1984 Supreme Court case law. That

98. *See* Water Transp. Ass'n v. ICC, 715 F.2d 581, 591–92 (D.C. Cir. 1983) (holding that, despite being contingent on ICC's approval, a rail carrier's stock in the voting trust is an "interest").

99. *See* City of Bethany v. FERC, 727 F.2d 1131, 1138–39 (D.C. Cir. 1984) (reiterating that FERC's decision to charge "the Coops" and "the Cities" different rates did not qualify as discrimination).

100. *See* Moon v. U.S. Dep't of Labor, 727 F.2d 1315, 1317 (D.C. Cir. 1984) (contending that the Secretary did not have a reasonable basis for defining a job position as temporary).

101. *See* Donovan v. Carolina Stalite Co., 734 F.2d 1547, 1552–53 (D.C. Cir. 1984) ("We have before us just the sort of determination the Secretary was empowered by Congress to make. That determination is well within the bounds of reasonableness . . . and we accord it the deference it deserves.").

102. 729 F.2d 811 (D.C. Cir. 1984).

103. *See id.* at 814–15 (concluding that the statutory language and the legislative history provide no rationale for distinguishing between domestic carriers that initiate calls transmitted to international carriers).

104. *Id.* at 816. To be sure, the court emphasized that the agency had to act quickly with very little information, see *id.*, which could be taken to suggest that the court would find the mere classification of the issue as one of law application to be insufficient to find deference.

105. *Id.*

most assuredly did not happen. There was a substantial number of cases in which courts spoke at length about deference when reviewing pure questions of law,[106] though it was never clear whether the courts meant epistemological deference—which should always be on the table regardless of the kind of legal question at issue—or legal deference. In one especially intriguing case, the court managed to defer and not defer at the same time. In *Conference of State Bank Supervisors v. Conover*,[107] the comptroller construed § 4(a) of the International Banking Act (IBA), which authorizes the comptroller to permit foreign banks to operate within a state when "establishment of a branch or agency, as the case may be, by a foreign bank is not prohibited by State law,"[108] to allow the comptroller to approve specific foreign operations, unless the relevant state would prohibit *all* foreign operations of that kind. The states instead urged an interpretation that would allow them to adopt policies that might allow some foreign banks but not others to operate within the state; New York, for example, sought to deny Australian banks branching rights they would grant to other countries' banks because of a state policy to grant rights only when the relevant foreign country extended reciprocal rights to New York banks. The parties thus essentially disagreed about whether the phrase "a foreign bank" in § 4(a) means "any foreign bank"—the comptroller's view—or the specific foreign bank applying for a federal license—the states' view. The court noted, "The language of section 4(a) does not preclude either of the proffered interpretations" and "the legislative history of the IBA does not offer clear guidance on the meaning of section 4(a)."[109] "In short," said the court, "we find two arguably correct interpretations of an ambiguous statutory provision."[110] The court nonetheless resolved the question in the agency's favor solely by reference to the perceived purposes of the statute, with no mention of agency deference.[111] In the next breath, however, the

106. *See, e.g.*, ITT World Commc'ns, Inc. v. FCC, 725 F.2d 732, 741–42 (D.C. Cir. 1984) (emphasizing that the court must determine if FCC's interpretation of the statute was arbitrary and capricious); Bargmann v. Helms, 715 F.2d 638, 641 (D.C. Cir. 1983) (acknowledging that while deference is usually given to an agency's interpretation, Federal Aviation Administration's (FAA's) interpretation of the statute was unreasonable); Planned Parenthood Fed'n of Am., Inc. v. Heckler, 712 F.2d 650, 655 (D.C. Cir. 1983) (recognizing courts typically defer substantially to an agency's statutory interpretation); *cf.* N. Colo. Water Conservancy Dist. v. FERC, 730 F.2d 1509, 1517 (D.C. Cir. 1984) (holding FERC's interpretation unreasonable and therefore reversible even if deference was granted).

107. 715 F.2d 604 (D.C. Cir. 1983).

108. 12 U.S.C. § 3102(a) (Supp. V 1982).

109. 715 F.2d at 614.

110. *Id.* at 615.

111. *See id.* at 615–17 (determining that the legislative history references congressional intent to give foreign banks national treatment, which aligns with the comptroller's

court granted deference to the comptroller's interpretation of § 5(a) of the IBA, which forbids federal chartering of a foreign bank unless "its operation is expressly permitted by the State in which it is to be operated."[112] The comptroller construed "operation" to mean allowance of banks per se rather than specific "operation[s]," or practices, of the bank. Again, as with the comptroller's interpretation of § 4(a), this allowed federal licensing of foreign banks unless states prohibited the entire category of activities in which those banks sought to engage. The court had dealt, at considerable length, with the § 4(a) issue without even a nod to deference, but on this matter, which seems every bit as pure and abstract as the interpretation of § 4(a), the court felt "obliged to defer to the Comptroller's interpretation of the IBA because 'the interpretation of an agency charged with the administration of a statute is entitled to substantial deference.'"[113] Additionally, on another pure legal issue—whether foreign banks could accept deposits from non-United States citizens under § 4(d) of the IBA—the court chastised the district court, which upheld the comptroller's affirmative answer to that question, because it "believe[d] the District Court deferred to the Comptroller when no deference was due."[114] Our model has no explanation for this case, but we defy *any* model to accommodate it.

Notwithstanding the nontrivial, but nonetheless small, number of "outlier" cases, the general pattern in the D.C. Circuit from 1982 to 1984 was broadly consistent with the scheme of review that we have attributed to the pre-*Chevron* Supreme Court. The decisions generally did not speak openly about whether they addressed pure questions of law or law application, nor did they distinguish legal deference from epistemological deference in any meaningful fashion. But the cases correspond reasonably well to a framework that puts those concepts front and center. The courts behaved *as though* the relevant inquiry required identification of the kind of legal question at issue. Indeed, the pattern is strong enough to make what followed even more remarkable than it might seem.

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interpretation of the statute).

112. 12 U.S.C. § 3103(a).

113. 715 F.2d at 622 (quoting Blum v. Bacon, 457 U.S. 132, 141 (1982)); s*ee also id.* at 623 (making clear that the court was reviewing the agency's decision only for reasonableness).

114. *Id.* at 626. To be sure, the court held the statute's plain language, which says flatly that "a foreign bank shall not receive deposits or exercise fiduciary powers at any Federal agency," 12 U.S.C. § 3102(d), required reversal, which would render any deference to the agency irrelevant, since no amount of deference can turn "shall not receive deposits" into "shall not receive deposits unless the depositor is not a United States citizen."

II. *CHEVRON* RISING

"Most landmark decisions are born great—they are understood to be of special significance from the moment they are decided."[115] However, when *Chevron* was briefed and argued in the Supreme Court, no one thought it was a case involving any serious, general question about the standard of review for questions of law. Instead, all the parties and the Justices understood the case to be an important but relatively narrow dispute about the permissibility of the "bubble concept" under the Clean Air Act, with no broader implications for administrative law doctrine. To understand the significance, or lack thereof, of the decision for scope of review doctrine, one needs a firm grasp on the actual controversy in *Chevron*.

Fortunately, Professor Tom Merrill has exhaustively explored the arguments and decision in *Chevron*,[116] and we leave the details of the *Chevron* decision to him. The following paragraphs essentially summarize and reference his analysis and conclusions, with little value added.

The Clean Air Act Amendments of 1977 required certain states with designated pollution problems to establish a permit program to regulate "new or modified major stationary sources" of air pollution.[117] Specifically, no permit for a new or modified stationary source could issue for so-called non-attainment states—states failing to meet national guidelines for specified pollutants—without meeting stringent criteria.[118] It was fairly clear that the paradigm of a "major stationary source" was something like a refinery, factory, power plant, or smelter. It was less clear, however, precisely how the statute required states to treat multiple pollution-emitting devices within a single facility. One possible interpretation of the statute would treat each distinct opening—for example, each smokestack of a factory or refinery—as a "major stationary source" so that no additions or modifications even to individual smokestacks could be made without complying with the tough permitting requirements. Alternatively, one could treat each integrated economic unit, such as a power plant, refinery,

115. Thomas W. Merrill, *The Story of* Chevron USA Inc. v. Natural Resources Defense Council, Inc.*: Sometimes Great Cases Are Made Not Born*, *in* STATUTORY INTERPRETATION STORIES 164, 168 (William N. Eskridge, Jr. et al. eds., 2011).

116. This article is an updated version of a prior study with which we suspect many readers are familiar. *See* Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, *in* ADMINISTRATIVE LAW STORIES 399 (Peter L. Strauss ed., 2006). For our purposes, the differences between these two versions are unimportant, and we equally well could have cited either.

117. 42 U.S.C. §§ 7502(b) (Supp. II 1979).

118. *See id.* § 7503 (listing criteria as decreasing total emissions, ensuring resulting emissions do not exceed the allowable pollutant amount for an area, and making a source's emissions amount to the lowest possible rate).

or other facility, as a single "source" so that modifications or additions to some segment of the unit would be permissible without triggering the stringent permitting requirements, as long as overall emissions from the entire unit did not increase. (If the modification or addition substituted a more efficient for a less efficient production process, the new or modified source could reduce overall emissions from the plant as a whole.) After vacillating for several years, the EPA adopted a rule embodying the latter definition of a "source," allowing an existing plant to obtain a permit for new equipment not meeting otherwise-applicable permit conditions if the overall plant output of omissions did not increase. This is the so-called "bubble concept," which treats each facility as if covered by an imaginary "bubble" within which pollution is measured.

The Natural Resources Defense Council and other environmental groups challenged the EPA's rule and won in the D.C. Circuit,[119] essentially on the strength of prior precedent in that court,[120] without much discussion of statutory interpretation. The Supreme Court granted certiorari.[121] The "Question Presented" on which it granted review said nothing of deference, scope of review, or even statutory interpretation. Rather, as framed by Chevron, U.S.A.'s merits brief, the question asked:

> Did the court of appeals err in substituting its judgment for that of the Environmental Protection Agency on basic policy determinations, where the court below did not, and could not, find the regulations to be unreasonable? In particular, was it unreasonable for the Environmental Protection Agency
>
> (1) to promulgate regulations which simply confirmed EPA's regulatory definition of "stationary source" to the definition set forth in the Clean Air Act; and
>
> (2) to promulgate regulations which the undisputed record shows comply with the Congressional purpose in enacting the Clean Air Act?[122]

The other merits briefs similarly framed the relevant questions without

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119. *See* Natural Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 720 (D.C. Cir. 1982) (holding that the EPA's use of the bubble concept, which led to decreased mandatory new source review in non-attainment states, was impermissible).

120. *See id.* at 725–26 (reiterating that the bubble concept is unsuitable for programs designated to improving ambient air quality).

121. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 461 U.S. 956 (1983).

122. Brief for Petitioner at 3, *Chevron*, 461 U.S. 956 (Nos. 82-1005, 82-1247 & 82-1591), 1983 U.S. S. Ct. Briefs LEXIS 915 at *3. We have focused on the "Questions Presented" in the merits briefs rather than in the petitions for certiorari because the latter contained extraneous issues regarding the exclusive role of the D.C. Circuit in reviewing EPA regulations under the Clean Air Act. The substantive questions were framed identically at both the certiorari and merits stages. For discussion of the EPA's petition for certiorari, see Merrill, *supra* note 115, at 178–79 (articulating that the purposes of the 1977 Amendments were to improve air quality and further economic growth in dirty-air areas).

reference to broad (or even narrow) issues of statutory interpretation. The American Iron and Steel Institute, speaking for a wide range of industry groups, asked:

> 1. Whether the court below impermissibly intruded upon the discretion vested in the states by the Clean Air Act when that court deprived the states of the authority to define the term "source" as an industrial plant for their new source review programs in nonattainment areas, even where such a definition is demonstrated to be consistent with reasonable further progress toward, and timely attainment of, national ambient air quality standards.
>
> 2. Whether the court below wrongfully substituted its policy judgment for that of EPA, when it determined, without support in the language or legislative history of the Clean Air Act or in the record before it, that EPA had no authority to define "source" as an industrial plant or to allow the states to adopt a similar definition of "source" for the purposes of new source review programs in nonattainment areas.[123]

And the EPA's brief, filed by the Solicitor General, said that the issue was

> Whether the Clean Air Act prohibits EPA from allowing a state to adopt a plantwide approach to new source review in nonattainment areas in circumstances where the state can demonstrate that its State Implementation Plan contains all of the elements required by the Clean Air Act and provides for timely attainment and maintenance of air quality standards.[124]

Respondents, for their part, framed the issue as

> Whether the court of appeals, ruling on provisions of the Clean Air Act for meeting the health-based National Ambient Air Quality Standards where they are now violated, correctly held that the Administrator of the Environmental Protection Agency exceeded her authority when she redefined the term "source" to mean whole industrial plants only and thereby exempted from permit requirements the major industrial installations (such as boilers and blast furnaces) built within such plants.[125]

The substantive discussions in the briefs were similarly devoid of any broad references to deference doctrine. No one was preparing for a debate over general principles of administrative law.

As Professor Merrill has documented at considerable length, the oral argument, the conference voting, and the decision-writing process in the

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123. Brief for Petitioners at 2, *Chevron*, 461 U.S. 956 (Nos. 82-1005, 82-1247 & 82-1591), 1983 U.S. S. Ct. Briefs LEXIS 917 at *2. There were two other questions identified in this brief, but they involved issues that ultimately played no role in the *Chevron* story.

124. Brief for the Administrator of the Environmental Protection Agency at 1, *Chevron*, 461 U.S. 956 (Nos. 82-1005, 82-1247 & 82-1591), 1983 U.S. S. Ct. Briefs LEXIS 919 at *1.

125. Respondents' Brief in Opposition to the Petitions, *Chevron*, 461 U.S. 956 (Nos. 82-1005, 82-1247 & 82-1591), 1983 U.S. S. Ct. Briefs LEXIS 1127 at *1.

Court all similarly framed this case as a narrow but important question about environmental law and policy, with no consciousness that principles of deference were seriously at issue.[126] As far as statutory interpretation doctrine was concerned, all of the parties and Justices seemed to view the *Chevron* case as an application of well-settled law. That much is now beyond cavil.

The question is how the lower courts viewed the *Chevron* decision. We explore that question by focusing on cases involving review of what pre-*Chevron* law would have called pure or abstract legal questions because those are the cases in which the *Chevron* framework might make a difference. Agency decisions involving mixed or law-applying questions would be presumptively entitled to deference under pre-*Chevron* law, and no one has ever suggested that *Chevron* be construed to lower the amount of deference agencies would receive in that context.

III. *CHEVRON* ASCENDANT(?)

Chevron was decided on June 25, 1984. Obviously, a good many cases involving judicial review of agency decisions were briefed and argued in the courts of appeals before that date but decided after *Chevron* issued. Lower courts are certainly aware of major Supreme Court cases that bear on not-yet-issued opinions, so to gauge the impact of *Chevron*, it is reasonable to look at lower court opinions issued in the months after *Chevron*, even if *Chevron* was not part of the briefing and argument in those cases. Accordingly, our sample of cases includes decisions from late 1984 that were argued before the *Chevron* opinion was issued.

A. Where's the Beef?

Chevron got off to a very slow start. No court of appeals cited the case in decisions issued in either June or July of 1984. Citations in August of 1984 were limited to passing mentions involving deference to agencies in cases of law application, to which deference was already due under the pre-*Chevron* framework[127]: deference to the EPA in the application of criteria for

126. *See* Merrill, *supra* note 115, at 180–85 (suggesting the issue in the case centered on the bubble concept's legality).

127. *See* South Dakota v. Civil Aeronautics Bd., 740 F.2d 619, 621 (8th Cir. 1984) (citing *Chevron*, along with other authorities, for the uncontroversial proposition that the Civil Aeronautics Board deserves deference when defining "essential air transportation," 49 U.S.C. § 1389(a)(2)(B) (Supp. II 1979), for communities affected by airline deregulation); *see also* Cospito v. Heckler, 742 F.2d 72, 85 n.21 (3d Cir. 1984) (noting, in a footnote, that regulations defining "inpatient hospital services," 42 U.S.C. § 1396d(a)(14) (1982), need only be reasonable).

approval of State Implementation Plans under the Clean Air Act;[128] and, in a case that did not even involve agency interpretation of a statute, the broad proposition that policy arguments "are 'more properly addressed to legislators or administrators, not to judges.'"[129] There was certainly no consciousness in the lower courts that *Chevron* required any kind of immediate reassessment of their practices in administrative law cases.

Perhaps the best indication of the post-*Chevron* state of the law is found in a First Circuit opinion authored by then-Judge (and former administrative law professor) Stephen Breyer in a case argued six weeks before *Chevron* was issued, but decided on August 2, 1984. *Mayburg v. Secretary of Health & Human Services*[130] involved a Department of Health and Human Services's interpretation of provisions of the Medicare Act. At the time of the decision, Medicare would pay for ninety days of hospital inpatient care and one hundred days of post-hospitalization extended care during each distinct "spell of illness,"[131] which the statute defined as the period

> (1) beginning with the first day (not included in a previous spell of illness) (A) on which such individual is furnished inpatient hospital services or extended care services, and (B) which occurs in a month for which he is entitled to benefits under part A, and
>
> (2) ending with the close of the first period of 60 consecutive days thereafter on each of which he is neither an inpatient of a hospital nor an inpatient of a skilled nursing facility.[132]

The question was how to handle a person who lived in a nursing home but received only custodial, not medical, care. When that person was released from hospitalization—let us say after ninety days of inpatient care to make the example clear—to the nursing home, was she an "inpatient" of the nursing facility? If so, her spell of illness never stopped, because there was no period when she was "neither an inpatient of a hospital nor an inpatient of a skilled nursing facility," so if she again needed hospitalization, it would not be covered by Medicare because the ninety day limit on each spell of illness would have been exhausted. On this interpretation, persons who live in nursing homes would often be at risk of facing uncovered hospitalization. On the other hand, a contrary interpretation of the statute

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128. *See* Bethlehem Steel Corp. v. Gorsuch, 742 F.2d 1028, 1036 (7th Cir. 1984) (remarking on the particular importance of the EPA following enacted statutory procedures given the EPA's amount of discretion to do otherwise).

129. Pub. Inv. Ltd. v. Bandeirante Corp., 740 F.2d 1222, 1236 (D.C. Cir. 1984) (Mikva, J., concurring in part, dissenting in part) (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984)).

130. 740 F.2d 100 (1st Cir. 1984).

131. 42 U.S.C. § 1395d(a) (1982).

132. *Id.* § 1395x(a).

that would try to distinguish nursing home stays that provide medical services from those that do not could produce many difficult cases in the administration of the laws; it surely would be much easier to treat all nursing home residents as inpatients rather than to adopt an interpretation requiring a case-specific inquiry to determine whether any particular resident was an inpatient.

The Department of Health and Human Services opted for the former interpretation that treats all nursing home stays as inpatient stays even when the resident received only custodial but not medical care, with the effect that a spell of illness does not stop when the patient went from a hospital to a nursing home. This interpretation of the term inpatient in the definition of a spell of illness arguably should be a pure question of law; whether one must receive medical services to be an "inpatient" does not require knowledge of the facts or circumstances of any particular case. Accordingly, a court under pre-*Chevron* law would decide this question without any legal deference to the agency, barring some special circumstance requiring it (which does not appear to be present here). If *Chevron* changed the law to require the two-step framework for all cases in which the agency administers the relevant statute, however, deference would be appropriate because the agency administers the statute.

Judge Breyer's opinion faithfully followed the pre-*Chevron* framework in rejecting the agency's interpretation. He noted multiple reasons, all grounded in traditional tools of statutory interpretation, why the agency's interpretation should not be followed: the weight of prior judicial authority, ordinary language, sound policy, canons of construction, and legislative history.[133] The agency responded to these arguments with a call for deference, though the case was argued before *Chevron* could formally provide support. Judge Breyer's answer to this call is telling, including his reference to the recently decided *Chevron* decision and his effectively distinguishing between epistemological and legal deference, and it merits full reproduction:

133. *See Mayburg*, 740 F.2d at 102–03 (agreeing with the district court, Judge Breyer detailed why the Department of Health and Human Services's interpretation should be rejected).

The Secretary also argues that this court should simply defer to HHS's interpretation of the statute. She points to a line of Supreme Court cases that, she argues, compel such deference. A different line of Supreme Court cases, however, cautions us that "deference" is not complete; sometimes a different, and more independent judicial attitude is appropriate. Moreover, the Administrative Procedure Act states that "the reviewing court," not the agency, "shall decide all relevant questions of law."

In order to apply correctly what Judge Friendly has described as conflicting authority, we must ask *why* courts should ever defer, or give special weight, to an agency's interpretation of a statute's meaning. And, here there are at least two types of answers, neither of which supports more than a modicum of special attention here.

First, one might argue that specialized agencies, at least sometimes, know better than the courts what Congress actually intended the words of the statute to mean. Thus, in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Supreme Court wrote

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, 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 will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

The fact that a question is closely related to an agency's area of expertise may give an agency greater "power to persuade." Its interpretation may also carry more persuasive power if made near the time the statute was enacted when congressional debates and interest group positions were fresh in the administrators' minds. An interpretation that has proved to be administratively workable because it is consistent and longstanding is typically more persuasive, as is an interpretation that has stood throughout subsequent reenactment of the statute. All these factors help to convince a court that the agency is familiar with the context, implications, history and consequent meaning of the statute. But, still, under *Skidmore* the agency ultimately must depend upon the *persuasive power* of its argument. The simple fact that the agency *has* a position, in and of itself, is of only marginal significance.

In the case before us, the fact that the agency's interpretation is consistent, longstanding, and left untouched by Congress all count in its favor. Nonetheless, HHS points to no significantly adverse administrative consequences that might flow from the contrary interpretation. Under these circumstances, the considerations mentioned in Part I are simply more persuasive. They convince us, as they have convinced other courts, that in

> this instance, HHS has not interpreted the statute as Congress meant.
>
> Second, a court might give special weight to an agency's interpretation of a statute because Congress intended it to do just that in respect to the statute in question. In *Social Security Board v. Nierotko*, 327 U.S. 358 (1946), for example, the Court noted that an agency, "when it interprets a statute" may act "as a delegate to the legislative power." And the Court added that "such interpretive power may be included in the agencies' administrative functions." If Congress *expressly* delegates a law-declaring function to the agency, of course, courts must respect that delegation. But, if Congress is silent, courts may still infer from the particular statutory circumstances an *implicit* congressional instruction about the degree of respect or deference they owe the agency on a question of law. *See Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). They might do so by asking what a sensible legislator would have expected given the statutory circumstances. The less important the question of law, the more interstitial its character, the more closely related to the everyday administration of the statute and to the agency's (rather than the court's) administrative or substantive expertise, the less likely it is that Congress (would have) "wished" or "expected" the courts to remain indifferent to the agency's views. Conversely, the larger the question, the more its answer is likely to clarify or stabilize a broad area of law, the more likely Congress intended the courts to decide the question themselves.
>
> In this instance, the "spell of illness" provision is central to the statutory scheme. The interpretive skills called for seem primarily judicial, not administrative, in nature. The "administrative" implications seem trifling, or non-existent. And, nothing else suggests any specific congressional intent to place the power to construe this statutory term primarily in the agency's hands. Thus, the arguments for completely deferring to the agency's interpretation of the statute are not strong here.[134]

Judge Breyer treated *Chevron* as a case in which Congress effectively instructed courts to give legal deference to agencies on pure questions of law even without an explicit directive to that effect. However, one can only find in Judge Breyer's analysis such an implied instruction based on a careful, multi-factor, statute-by-statute analysis, in which the *more* important the question involved, the *less likely* one is to find an implicit instruction to defer. One can certainly question whether the issue of interpretation involved in *Chevron* was unimportant, but formally Judge Breyer simply worked *Chevron* into the preexisting structure for review of agency legal determinations and thereby gave it a very narrow construction. His response to the agency's call for deference would likely have been substantively identical had the *Mayburg* decision come out three months

134. *Id.* at 105–07 (some internal citations omitted).

earlier.

Judge Breyer reiterated this quite narrow view of *Chevron* a month after the *Mayburg* decision. In *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*,[135] the First Circuit held that a statute granting a private right of action to parties to enforce in district court "any order"[136] of the FCC did not encompass enforcement of FCC *rules*. The decision was issued on June 29, 1984. The plaintiff sought rehearing, and the FCC then supported the plaintiff's position that the term "order" included "rule," arguing on rehearing that its view of the statute should be given deference. Regardless of *Chevron*, the most the agency could claim was *Skidmore*-style epistemological deference. The agency expressed its view in an amicus brief, and it is very hard to see how it could be thought to "administer" the provisions of a statute authorizing private parties to bypass the agency and sue directly in court. In a denial of rehearing issued on September 10, 1984, the court correctly observed that "[w]hile [the agency] counsel's experience entitles his opinion to respect, it cannot bind a court as to the meaning of a jurisdictional statute."[137] Judge Breyer went on, however, to make the following enlightening comments:

> Moreover, the FCC's legal argument here threatens a highly anomalous result. Its view of statutory construction is one that would place primary authority to decide pure questions of statutory law in the hands of the agency. At the same time, its interpretation of the statute in question is one that would place considerable authority to decide questions of communications policy in the hands of the courts. Each institution—court and agency—would receive comparatively greater power in the area in which it, comparatively, *lacks* expertise. The resulting picture is one of classical administrative law principle turned upside down. At least, the position seems inconsistent with the sound court/agency working partnership that administrative law traditionally has sought.[138]

Note that Judge Breyer makes clear—almost three months after *Chevron*—that pure questions of law are primarily for the court. His position is grounded in a view of comparative institutional competence that clearly echoes the "legal process" view expressed most famously by Harvard Law School professors Henry Hart and Al Sacks[139]—which is not

135. 742 F.2d 1 (1st Cir. 1984).

136. 47 U.S.C. § 401(b) (1982).

137. 742 F.2d at 11.

138. *Id.*

139. *See* HENRY M. HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS (William Eskdrige, Jr. & Philip M. Frickey eds., 1994) (citing Hart and Sacks's groundbreaking work on legal process theory). On comparative institutional competence as an element of the legal process approach, see also Edward L. Rubin, Commentary, *The New Legal Process, the*

surprising because Judge Breyer was a former administrative law professor at Harvard Law School. That view is broadly consistent with what we have described as the pre-*Chevron* framework, in which agencies get primary interpretative responsibility when "interpretation" requires attention to facts, circumstances, and policy, while courts get principal responsibility for matters of pure legal interpretation.

It is clear that as of fall 1984, Judge Breyer and some other First Circuit judges did not view *Chevron* as more than modestly changing the methodology for review of agency legal decisions, perhaps by expanding in some slight fashion the range of cases in which one might find congressional delegations to agencies to interpret pure legal questions.

B. A Spark of Life

In the six months following its issuance, *Chevron* was cited by circuit court decisions that appear in the Westlaw database twenty-two times, eleven of which were issued by the D.C. Circuit. Therefore, examining D.C. Circuit opinions is the best starting point for determining whether and how *Chevron* actually influenced courts' methodology in deferring to agencies. The D.C. Circuit hears a disproportionate share of federal administrative law cases,[140] and is universally recognized as the leading court in shaping administrative law doctrine. It is also the source of the *Chevron* doctrine.

In examining the cases that emerged from that circuit in 1984 and 1985, we must engage in a bit of imaginative reconstruction. To know whether and how any particular understanding or application of *Chevron* affected case decisions, one would have to know how those cases would have been decided if there were no *Chevron* doctrine. This kind of counterfactual inquiry is particularly difficult given that the courts, both before and after *Chevron*, often said little about their employed methodology and assumptions. There is a very large risk of inferring reasons or frameworks that simply were not present. We see no way to avoid this risk other than to acknowledge it—and to discount to some degree whatever conclusions are drawn from analysis of the cases. Nonetheless, we think the story of *Chevron*'s evolution emerges with reasonable clarity.

The *Chevron* doctrine originates with *General Motors Corp. v. Ruckelshaus*,[141]

Synthesis of Discourse, and the Microanalysis of Institutions, 109 HARV. L. REV. 1393, 1396 (1996) (discussing comparative institutional competence as an element of the legal process approach).

140. *See* John G. Roberts, Jr., Lecture, *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 376–77 (2006) (observing, "One-third of the D.C. Circuit appeals are from agency decisions" and "[t]hat figure is less than twenty percent nationwide").

141. 742 F.2d 1561 (D.C. Cir. 1984).

an en banc decision of the D.C. Circuit that issued on September 7, 1984—slightly more than four months after the case was argued on April 25, 1984. The case turned on § 207(c)(1) of the Clean Air Act, which provides:

> If the Administrator determines that a substantial number of any class or category of vehicles or engines, although properly maintained and used, do not conform to the regulations prescribed under section 7521 of this title [*i.e.*, EPA emission standards], when in actual use throughout their useful life (as determined under section 7521(d) of this title), he shall immediately notify the manufacturer thereof of such nonconformity, and he shall require the manufacturer to submit a plan for remedying the nonconformity of the vehicles or engines with respect to which such notification is given. The plan shall provide that the nonconformity of any such vehicles or engines which are properly used and maintained will be remedied at the expense of the manufacturer.[142]

In essence, this provides for the EPA-ordered recalls of vehicle classes that fail to meet the EPA emissions standards. The EPA interpreted this provision to authorize recalling all members of a nonconforming class of vehicles, except those not "properly maintained and used," regardless of the age or mileage of any given member. General Motors, by contrast, insisted the phrase "throughout their useful life" limited the scope of permissible recalls to vehicles falling within the statutory criterion for a vehicle's useful life of "five years or fifty thousand miles (or the equivalent), whichever first occurs."[143]

This is a dispute over a pure question of law: it concerns whether the EPA's recall authority extends to vehicles exceeding their useful lives when a large part of their class has not done so. Under pre-*Chevron* methodology, there is no reason to depart from the presumptive baseline of de novo review regarding legal deference, leaving the Agency's reasoning to stand or fall on its merits. This was essentially the methodology of the three dissenting judges, who found that the usual mélange of case-specific factors governing the degree of (epistemological) deference to an agency counseled against upholding the Agency's rule:

> The rule was not a contemporaneous interpretation of the Clean Air Act, and there is no evidence that it reflects a longstanding interpretation of the Act by the agency. Nor, in my view, did the rule "simply restate[ ] the consistent practice of the agency in conducting recalls pursuant to section 207(c)"—a proposition upon which the majority places substantial weight. Finally—and this point can scarcely be overemphasized—the interpretative rule at issue in this case does not involve the kind of fact-intensive questions concerning which great deference need be given the agency's technical

142. 42 U.S.C. § 7541(c)(1) (1982).
143. *Id.* § 7521(d)(1).

> expertise; rather, as the agency itself concedes, "[s]ince the rule simply expresses an interpretation of the law based on the language, legislative history and policy of the Clean Air Act, no factual data need be analyzed or commented on."[144]

The majority, however, took a somewhat different approach. Writing for eight judges, Judge Wald seemed to view *Chevron* as changing and now governing the inquiry:

> The Supreme Court has recently outlined our proper task in reviewing an administrative construction of a statute that the agency administers. First, we must determine whether Congress "has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. National Resources Defense Council,* 467 U.S. 837, 842 (1984). If the administrative construction runs counter to clear congressional intent, then the reviewing court must reject it. *See id.* at 842–43 n.9. On the other hand, if the administrative construction does not contravene clearly discernible legislative intent, then the reviewing court "does not simply impose its own construction on the statute." *Id.* at 843. Instead, we then must conduct the "narrower inquiry into whether the [agency's] construction was 'sufficiently reasonable' to be accepted by a reviewing court."[145]

This is the first opinion in which *Chevron* was treated as a general statement of scope-of-review doctrine. This treatment significantly appears in a case presenting a pure legal question, which is precisely the context in which a broad reading of *Chevron* would likely make a difference. The rest of the majority opinion is filled with multiple references to the reasonableness of the agency's interpretation.[146] It seems the majority shifted away from classifying the relevant legal issue combined with a multi-factor epistemological deference inquiry toward a facially simpler "reasonableness" inquiry.

The dissenting opinion, authored by Judge Bazelon and joined by Judges Tamm and Wilkey, wrote as if *Chevron* changed nothing. The dissent's only citation to *Chevron* was for the proposition that "[t]he judiciary is the final authority on issues of statutory construction."[147] The only deference acceptable to the dissent was *Skidmore* epistemological deference,[148] under

144. 742 F.2d at 1574–75 (Bazelon, J., dissenting) (alteration in original) (footnotes omitted).

145. *Id.* at 1566–67 (alteration in original) (some internal citations omitted).

146. *See id.* at 1567 ("EPA reasonably mandated"); *id.* ("agency reasonably required"); *id.* at 1568 ("EPA reasonably reads"); *id.* ("the May 30 rule is not precluded by the statute's definition of 'useful life'"); *id.* at 1568 ("a reasonable method"); *id.* at 1570 ("a reasonable agency interpretation"); *id.* at 1571 ("agency therefore may reasonably require").

147. *Id.* at 1578 n.33 (Bazelon, J., dissenting) (alteration in original) (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984)).

148. *Id.* at 1573–74 (clarifying what deference will be afforded to an agency contextual

which "[t]he EPA rule does not 'receive high marks'"[149] for reasons presented at the outset of this discussion.

Thus the seeds were planted, but there was a lot of growth to come. The majority did not expressly say *Chevron* materially altered prior law, nor did it elaborate on what any new *Chevron* framework might entail.

The seeds began to germinate in *Rettig v. Pension Benefit Guaranty Corp.*,[150] with arguably the first clear application of the "*Chevron* two-step" in the lower courts. The Employee Retirement Income Security Act of 1974 (ERISA)[151] required pre-retirement vesting for most employer pension plans and also provided a federal insurance program, administered by the Pension Benefit Guaranty Corporation (PBGC),[152] to guarantee benefits to retirees if their plans terminated with insufficient assets to cover vested liabilities. As part of the transition to the new ERISA regime, the statute specified that to determine the amount of guaranteed retiree benefits, "any increase in the amount of benefits under a plan resulting from a plan amendment which was made, or became effective, whichever is later, within 60 months before the date on which the plan terminates shall be disregarded."[153] The evident purpose of this "phase-in" section "was to prevent abuse of the termination insurance program by plan administrators who might 'balloon' benefits, and thus unfunded plan liabilities, in anticipation of termination."[154]

The PBCG issued a rule defining "benefits increases" to be "not only increases in the amount of monthly benefits but also 'any change in plan provisions which advances a participant's . . . entitlement to a benefit, such as liberalized participation requirements or vesting schedules, reductions in the normal or early retirement age under a plan, and changes in the form of benefit payments.'"[155] This rule barred consideration of changes in vesting rules made within five years of plan termination, even when those vesting rules were mandated by other provisions of ERISA. Plaintiffs were employees of a company that changed its vesting rules within the five-year time period and then terminated its plan with insufficient assets. The PBGC ruled that it could not consider the vesting changes made within the five-year period, and the plaintiffs appealed.

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interpretation).

149. *Id.* at 1574 (quoting Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 143 (1976)).

150. 744 F.2d 133 (D.C. Cir. 1984).

151. Pub. L. No. 93–406, 88 Stat. 829 (codified as amended in scattered sections of 5 U.S.C., 18 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.).

152. 29 U.S.C. § 1302(a) (2006).

153. *Id.* § 1322(b)(1)(B).

154. *Rettig*, 744 F.2d at 137.

155. *Id.* at 138.

Rettig presents a classic pure, "ivory tower" question of law: whether the phrase "increase in the amount of benefits" can include matters such as changes in vesting rules not directly changing the periodic amounts payable to retirees. One can ask and answer that question without reference to the specific facts of any particular case. Under the pre-*Chevron* regime, such a pure question of law would be addressed through a de novo standard of review, absent some special reason to defer to the PBGC.

Instead, the panel opinion authored by Judge Wald (as was the opinion in *General Motors v. Ruckelshaus*) and issued on September 11, 1984 laid out the now-familiar *Chevron* two-step framework:

> We are initially confronted with the familiar task of reviewing an agency's construction of the statute it is charged with implementing, a task which of course we undertake with due deference to the agency's congressional mandate and expertise. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). As we understand the Supreme Court's most recent pronouncements in *Chevron*, our inquiry consists of two steps. First, we must determine whether Congress had a specific intent as to the meaning of a particular phrase or provision. *Id.* at 842–43. To do this, we analyze the language and legislative history of the provision. As the Court noted in *Chevron*, "[t]he judiciary is the final authority on issue of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n. 9. Thus, in ascertaining the congressional intent underlying a specific provision, we are not required to grant any particular deference to the agency's parsing of statutory language or its interpretation of legislative history.
>
> However, if that inquiry fails to answer the precise question before us—if it appears that "Congress did not actually have an intent" regarding the particular question at issue, *id.* at 845—then we must seriously consider whether Congress implicitly delegated to the agency the task of filling the statutory gap. At this second stage, when policy considerations assume a prominent role, we must uphold the agency's interpretation if it "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." *Id.* In this case, if we conclude that "Congress did not actually have an intent" with respect to the phase-in of mandatory vesting improvements, we are required to grant a considerable degree of deference to the PBGC's reconciliation of competing statutory policies.[156]

The court then engaged in a lengthy analysis of the statute's language, purpose, and legislative history, and while it said "we emerge from our foray into the statute and its history with the indubitable impression that Congress intended that the PBGC fully guarantee benefits to those

156. *Id.* at 140–41 (alteration in original) (internal citations omitted).

employees meeting the vesting standards,"[157] it found itself "unable to characterize as entirely clear and unambiguous the evidence reviewed here of the intent of Congress as to the precise question before us."[158] The court thus felt compelled to "proceed to the second stage of our task of statutory construction, and determine whether the PBGC's interpretation of the statute reflects 'a reasonable accommodation of conflicting policies . . . committed to the agency's care by the statute.'"[159] Somewhat anticlimactically, the court found the agency's interpretation failed to account for all the relevant factors, and it remanded the case to the agency for reconsideration.[160]

The court surely would have sided with the plaintiffs in the absence of *Chevron*,[161] so the precise framework employed likely did not affect the outcome of the case, but the court significantly couched its entire discussion in terms of what it thought *Chevron* prescribed. Also, it is significant that the court moved to step two and deferred to the agency despite believing there was a *best* interpretation of the statute. That was not enough to end the case at step one; the court in some manner understood the search for a "specific intent" of Congress to require some level of confidence in the statutory meaning beyond an "indubitable impression." Thus, not only was the court employing something recognizable as the *Chevron* framework; it was starting the long, difficult, and still radically incomplete path toward making that framework operational. The opinion at least reads as though *Chevron* changes the methodology for scope of review of agency legal conclusions.

C. Two Steps Back

The D.C. Circuit did not rush to embrace the framework set forth by Judge Wald in *General Motors* and *Rettig*. To the contrary, the D.C. Circuit's early reception to the *Chevron* two-step was decidedly mixed. On the court's next occasion to employ *Chevron*,[162] the majority ignored it entirely.

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157. *Id.* at 150.

158. *Id.*

159. *Id.* (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 845 (1984)).

160. *See id.* at 155–56 (noting the disposition anticipated the still-vibrant debate of whether *Chevron*'s second step duplicates, overlaps with, or complements hard look review under the arbitrary or capricious test of § 706(2)(A) of the Administrative Procedure Act).

161. *See id.* at 152 (exhibiting the court's unwillingness to second-guess informed agency balancing of interests).

162. Along the way, *Chevron* was briefly cited, in a case plainly involving law application, for the general proposition that agencies receive deference subject to the ultimate authority of courts to pronounce the law. *See* Coal Exps. Ass'n of the U.S., Inc. v. United States, 745

Middle South Energy, Inc. v. FERC[163] concerned the Federal Power Act. In 1984, the Act required electric utilities subject to Federal Energy Regulatory Commission (FERC) jurisdiction to file rate schedules and to notify FERC of any changes in rates. It crucially provided, "Whenever any such new [rate] schedule is filed the Commission shall have authority . . . to enter upon a hearing concerning the lawfulness of such rate . . . ; and, pending such hearing and the decision thereon, the Commission . . . may suspend the operation of such schedule . . . ."[164] This provision gave FERC the authority to suspend changes in rates, pending a hearing. The agency claimed power under this provision to suspend, pending hearing, *original* rates even in the absence of any changes or new filings. The case essentially came down to whether the phrase "such new schedule" refers only to schedules *changing* rates or also to schedules *establishing* rates in the first instance. This is a pure question of law, so the agency would not have received legal deference pre-*Chevron*. But under the framework set out in *General Motors* and *Rettig*, both of which also involved pure questions of law, FERC would be entitled to some measure of legal deference regardless of the classification of the question, and the court should have decided only whether the Agency's view is reasonable.

The majority opinion, authored by Judge Bork and issued on November 6, 1984, rejected the Agency's position without mention of deference and without citation to *Chevron*. The court relied entirely on the statute's language, legislative history, and the Agency's prior interpretations.[165] This was not for lack of *Chevron* awareness: the case was argued on March 8, 1984, well before *Chevron* was decided, but Judge Ginsburg's dissenting opinion explicitly invoked *Chevron* for the proposition that "FERC's current interpretation merits deferential judicial consideration."[166] Judge Ginsburg found the reference in the statute to "such new schedule" to be ambiguous between original schedules and changed schedules, found the statute "bears the reading FERC now gives it,"[167] and would have affirmed the agency on that point. The majority evidently wanted no part of it.

Chevron was prominent, though not necessarily recognizably, in *Montana v. Clark*,[168] a case decided on November 20, 1984, after having been argued on September 25, 1984—making it the first case we discuss argued after

F.2d 76, 96 (D.C. Cir. 1984).

163. 747 F.2d 763 (D.C. Cir. 1984).

164. 16 U.S.C. § 824d(e) (1982).

165. 747 F.2d at 767–71.

166. *Id.* at 774 (Ginsburg, J., concurring in part and dissenting in part) (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 841–45 (1984)).

167. *Id.*

168. 749 F.2d 740 (D.C. Cir. 1984).

Chevron. A statute provided for allocating funds from mine reclamation "in any State or Indian reservation . . . to that State or Indian reservation."[169] The Secretary of the Interior construed the statute as though the term "Indian reservation" meant "Indian lands," with the effect that Indian tribes could receive funds from reclamation projects on lands in which they had a beneficial interest, but which were not actually on their reservations. The State of Montana challenged the Agency's regulation and the D.C. Circuit affirmed.

The case involved a pure, abstract question of law, as the court (in a rare recognition of the categorization problem) expressly acknowledged: "Montana raises a pure question of law, whether the challenged regulation is inconsistent with the organic statute."[170] As such, the case brought into focus "two superficially conflicting principles of statutory interpretation."[171] On the one hand, Montana invoked "the principle that the judiciary is uniquely responsible for the final determination of the meaning of statutes,"[172] while the "federal appellees, on the other hand, acknowledge[d] the purely legal nature of the question but insist[ed] that [the] court should afford substantial deference to the Department of the Interior's construction of a statute it is entrusted to administer."[173]

Judge Wright found this conflict "more apparent than real,"[174] because:

> properly understood, deference to an agency's interpretation constitutes a *judicial* determination that Congress has delegated the norm-elaboration function to the agency and that the interpretation falls within the scope of that delegation. Thus the court exercises its constitutionally prescribed function as the final arbiter of questions of law when it evaluates the breadth of congressional delegation and, in so doing, determines the degree of deference warranted in the particular controversy before it."[175]

Judge Wright saw *Chevron* as expressing this principle and prescribing "the appropriate methodology for ascertaining whether to afford deference to an agency construction of its governing statute."[176] After setting forth the standard elements of the *Chevron* two-step framework, however, Judge Wright explained that determining whether Congress had delegated interpretative authority to the agency, so that (legal) deference was warranted, required a multifaceted, statute-specific inquiry:

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169. 30 U.S.C. § 1232(g)(2) (1982).
170. 749 F.2d at 744.
171. *Id.*
172. *Id.* (citing FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965)).
173. *Id.*
174. *Id.* at 745.
175. *Id.* (internal citation marks omitted).
176. *Id.*

> [W]e must determine whether the agency's construction warrants deference by measuring the breadth of delegation . . . . [T]he absence of several of the typical indicia of broad congressional delegation to the agency counsels against deference. . . . [T]he construction . . . required no technical or specialized expertise . . . . Similarly, the statutory language at the center of this controversy is not "of such inherent imprecision . . . that a discretion of almost legislative scope was necessarily contemplated."
>
> On the other hand, . . . Congress expressly recognized that the jurisdictional status of Indian lands was too uncertain to permit effective allocation of regulatory authority for those regions. . . . Given this rather remarkably mixed message, we can only conclude that, pending congressional clarification, Congress afforded the Secretary substantial discretion in the administration of the fund on Indian lands. Thus deference is appropriate, and we will uphold the agency's interpretation provided only that it is not expressly foreclosed by congressional intent and that it is reasonable.[177]

The result seems like an application of the *Chevron* framework, complete with a "step-two" affirmance, but with a view of *Chevron*'s scope much narrower than the view reflected in *General Motors* and *Rettig*. Those cases did not find it necessary to conduct detailed inquiries into whether they involved the kinds of statutes for which Congress intended deference to agencies on pure law interpretation. Under pre-*Chevron* law, one could conceivably find case-specific reasons to defer to agencies in such circumstances—de novo review was presumptive, not absolute—but they were relatively rare. Accordingly, Judge Wright—like Judge Breyer three months earlier—fit a narrow understanding of *Chevron* into the preexisting legal order rather than seeing that *Chevron* mandated a significant change in legal practice.

After brief and uninformative appearances in cases involving agency policy decisions,[178] and a fairly flagrant agency misconstruction of a statute,[179] *Chevron* re-emerged in a major way in two decisions issued on December 5, 1984. Both, again, were authored by Judge Wald.

Railway Labor Executives' Ass'n v. United States Railroad Retirement Board[180] concerned two related statutes that provided retirement benefits to railroad

177. *Id.* at 746 (internal citations omitted).

178. *See* Walter O. Boswell Mem'l Hosp. v. Heckler, 749 F.2d 788, 801 (D.C. Cir. 1984) (holding that the Secretary of Health and Human Services's policy interpretation of the Medicare Act was not arbitrary and capricious).

179. *See* Am. Methyl Corp. v. EPA, 749 F.2d 826, 833–34 (D.C. Cir. 1984) ("[T]he legislative history is inconsistent with the standardless and open-ended authority to revoke waivers . . . .").

180. 749 F.2d 856 (D.C. Cir. 1984).

workers "in the service of one or more employers,"[181] including workers in foreign countries and non-resident and non-citizen workers, subject to the proviso that

> an individual not a citizen or resident of the United States shall not be deemed to be in the service of an employer when rendering service outside the United States to an employer who is required under the laws applicable in the place where the service is rendered to employ therein, in whole or in part, citizens or residents thereof.[182]

The Railroad Retirement Board understood a 1978 Canadian immigration regulation to require the hiring of Canadian workers and accordingly held that the relevant statutes did not cover such workers. The petitioners, the Railroad Labor Executives' Association (RLEA), appealed.

Everyone agreed the Board should get no deference in the interpretation of Canadian law.[183] But the Board argued, and the court agreed, that this case did not simply involve an interpretation of Canadian law. Rather, RLEA insisted that the statutory word "required" had a strict, firm meaning of "mandated by law" and that a foreign "require[ment]" not imposing something like a hiring quota could not serve to activate the statutory exemption. Those are propositions about the meaning of American statutes administered by the Board, and they are pure, abstract legal questions that can be asked and answered outside the context of a specific controversy. So framed, the case looks like a prime candidate for the *Chevron* framework Judge Wald set forth in prior opinions.

Judge Wald thought so as well; her opinion set forth and applied the *Chevron* two-step analysis.[184] She found the statute ambiguous at step one: "[T]he plain words contained in the . . . exceptions to covered service do not compel us to adopt any particular meaning . . . [and] nothing in the legislative history of these provisions gives us any clue as to the meaning Congress intended."[185] Accordingly, "Our task in determining the reasonableness of the Board's decision is not to interpret the statutes as we think best but only to inquire as to whether the Board's interpretation is 'sufficiently reasonable' to be accepted by a reviewing court."[186] As happened in *Rettig*, however, the court found the agency had not sufficiently

181. 45 U.S.C. §§ 231(b)(1), 351(d) (1982).

182. *Id.* §§ 231(d)(3), 351(e).

183. Ry. Labor Execs.' Ass'n, 749 F.2d at 860 (noting that the court can independently reach its own determination of Canadian law since the issues are purely questions of law).

184. *See id.* (identifying that considerable deference is required under *Chevron* when an agency constructs its own governing statutes).

185. *Id.* at 861.

186. *Id.* at 862 (quoting FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 39 (1981)).

considered all relevant factors or adequately explained its statutory interpretation, and the Board's decision was vacated and remanded.[187] Nonetheless, the *Chevron* framework governed, which makes all the more puzzling the court's opinion in *Pennsylvania Public Utility Commission v. United States*.[188] *Pennsylvania Public Utility Commission* involved the Bus Regulatory Reform Act, which made it easier for bus companies to discontinue unprofitable routes—mainly serving small towns—by allowing ICC to override refusals by state regulators to permit the discontinuance of routes. (Under the prior law, essentially either the state commission or ICC could block discontinuance, but either agency could grant it under the new law.) ICC overrode the state agency on twelve routes, and the state agency appealed. The governing statute required ICC to consider such matters as "the public interest" and "an unreasonable burden on interstate commerce,"[189] so most issues that arose involved either agency policymaking or, at most, questions of law application. One important pure question of law, however, slipped through the cracks.

ICC was statutorily required to grant a request for discontinuance of a route

> unless the Commission finds, on the basis of evidence presented by the person objecting to the granting of such permission, that such discontinuance or reduction is not consistent with the public interest or that continuing the transportation, without the proposed discontinuance or reduction, will not constitute an unreasonable burden on interstate commerce.[190]

ICC granted a request because balancing the public interest—continuing service but burdening interstate commerce by forcing continuation of unprofitable service—weighed in favor of granting the request. The petitioners countered that ICC had to find *both* the public interest *and* economic efficiency would be served by discontinuance, and could not balance one against the other. That is a pure question of law, and it seemed ripe for the *Chevron* framework, which would affirm the agency's decision unless its interpretation was contrary to the statute's clear meaning or otherwise unreasonable.

The court briefly mentioned *Chevron* at several points in its lengthy opinion,[191] but it made no mention of *Chevron* when discussing what it termed the "substantial issues of statutory interpretation"[192] raised by ICC's

187. *Id.* at 862–64.

188. 749 F.2d 841 (D.C. Cir. 1984).

189. *Id.* at 844–45.

190. *Id.* at 844 (quoting the statutory language).

191. *See id.* at 847, 849 (referencing *Chevron*'s two-step framework and judicial deference toward agency interpretation).

192. *Id.* at 849.

decision. The court found the statute's legislative history, structure, and purpose contrary to the Agency's decision.[193] In theory, one could treat this as a finding under *Chevron* step one that the meaning of the statute was clear; the many references in the opinion to congressional intent—step one's touchstone as articulated in the *Chevron* decision—support this reading. But by December 1984, one might expect something more explicit from the court, especially in an opinion written by Judge Wald. Instead, the discussion in *Pennsylvania Public Utility Commission* could have been written precisely the same way, in both substance and form, if *Chevron* (and *General Motors* and *Rettig*) had never existed. There was nothing to suggest that *Chevron* was relevant to its analysis.

Perhaps most telling of *Chevron*'s status (or lack thereof) as a landmark is the large number of D.C. Circuit opinions in late 1984 and early 1985 involving agency interpretations of statutes in which *Chevron* was not mentioned. Such cases were legion, involving both pure questions of law[194] and questions of law application.[195] It is hard to say how any of those cases would have differed had *Chevron* supplied the analytical framework, but for our purposes the significance lies simply in the absence of that framework. It is true that almost all of them were argued before *Chevron*, and some long before *Chevron*,[196] but we have seen the court was capable of incorporating *Chevron* into the analysis of already-argued cases. *Chevron* simply was not seen as important enough to require inclusion. By the end of 1984, the D.C. Circuit thus was applying the *Chevron* two-step episodically at best. Even the judge who birthed the *Chevron* doctrine was not applying it consistently.

D. A Tale of Two Readings

1985 was the best of times and the worst of times for supporters of a

193. *Id.* at 851–53.

194. *See* Am. Fed'n of Gov't Emps. v. Fed. Labor Relations Auth., 750 F.2d 143 (D.C. Cir. 1984); Ill. Commerce Comm'n v. ICC, 749 F.2d 875 (D.C. Cir. 1984); Ctr. for Auto Safety v. Ruckelshaus, 747 F.2d 1 (D.C. Cir. 1984); City of Winnfield v. Fed. Energy Regulatory Comm'n, 744 F.2d 871 (D.C. Cir. 1984); E. Ark. Legal Servs. v. Legal Servs. Corp., 742 F.2d 1472 (D.C. Cir. 1984); Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 737 F.2d 1095 (D.C. Cir. 1984).

195. *See* Ass'n of Civilian Technicians, Montana Air Chapter v. Fed. Labor Relations Auth., 756 F.2d 172 (D.C. Cir. 1985); Sierra Club v. U.S. Dep't of Transp., 753 F.2d 120 (D.C. Cir. 1985); Equal Emp't Opportunity Comm'n v. Fed. Labor Relations Auth., 744 F.2d 842 (D.C. Cir. 1984); Nat'l Treasury Emps. Union v. U.S. Merit Sys. Prot. Bd., 743 F.2d 895 (D.C. Cir. 1984); Oil, Chem. & Atomic Workers Int'l Union v. Am. Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984).

196. Six of the cases cited *supra* notes 194 and 195 were argued in 1983.

broad reading of *Chevron*. The year began with a series of D.C. Circuit decisions that seemed to treat *Chevron* as settled law prescribing the methodology for review of agency legal determinations, without need for extended discussion of the point.[197] Those brief treatments raised more questions than they answered about the mechanics of *Chevron*, but they suggest the *Chevron* framework, however unelaborated, had taken hold. The same could not be said for decisions by other circuit courts, whose treatment of *Chevron* was far more equivocal and considerably less sophisticated than the D.C. Circuit's,[198] but nevertheless, one can still see in them outlines of an emerging "*Chevron* doctrine."

A pair of decisions by Judge Ken Starr did cast considerable doubt on this picture—notable because Judge Starr is often seen as one of *Chevron*'s progenitors.[199] The key decision was *American Federation of Labor & Congress of Industrial Organizations v. Donovan*.[200] The details of the case, involving challenges to eight separate rules implementing various provisions of the Service Contract Act, are not important here; instead, we focus on the case's scope of review principles. The Department of Labor urged, and the district court held, that the Agency's rules should be reviewed under the deferential arbitrary and capricious standard of § 706(2)(A) of the APA.[201] Judge Starr, writing for himself, Judge Bork, and Judge Ginsburg, begged to differ at least in part:

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197. *See* FAIC Secs., Inc. v. United States, 768 F.2d 352, 362–63 (D.C. Cir. 1985); Cent. & S. Motor Freight Tariff Ass'n v. United States, 757 F.2d 301, 314–17 (D.C. Cir. 1985); Atlanta Gas Light Co. v. Fed. Energy Regulatory Comm'n, 756 F.2d 191, 196 (D.C. Cir. 1985); Def. Logistics Agency v. Fed. Labor Relations Auth., 754 F.2d 1003, 1004, 1013–14 (D.C. Cir. 1985).

198. *See* Friends of the Shawangunks, Inc. v. Clark, 754 F.2d 446, 449–50 (2d Cir. 1985) (including *Chevron* in a string citation for deference to agency expertise); Kamp v. Hernandez, 752 F.2d 1444, 1453 (9th Cir. 1985) (citing *Chevron* with no discussion while holding that the EPA "reasonably" interpreted the Clean Air Act); Mattox v. Fed. Trade Comm'n, 752 F.2d 116, 123 (5th Cir. 1985) (finding, with little discussion, *Chevron* to be an "apt standard" for review of agency decisions); Phila. Gear Corp. v. Fed. Deposit Ins. Corp., 751 F.2d 1131, 1135 (10th Cir. 1984) (treating *Chevron* as requiring deference only in the case of express delegations of interpretative authority). Perhaps the one exception was *Washington Department of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985), which read *Chevron* quite broadly to prescribe the framework for review of at least EPA legal conclusions. *See id.* at 1469–70.

199. *See, e.g.*, William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1087 (2008).

200. 757 F.2d 330 (D.C. Cir. 1985).

201. *See* 5 U.S.C. § 706(2)(A) (1982) (instructing courts to strike down agency actions found "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

> Not all agency determinations, of course, are due an equally high degree of deference. Agencies are of necessity called upon from time to time to interpret terms in the statute they are charged with implementing or enforcing. Ordinarily, such "administrative interpretations of statutory terms are given important but not controlling significance." "[A] court is not required to give effect to an interpretative regulation[, but v]arying degrees of deference are accorded . . . based on such factors as the timing and consistency of the agency's position, and the nature of its expertise." In a word, when an agency interprets a statute, courts employ, in effect, a sliding scale of deference, taking into account a variety of deference-related factors such as those enumerated in *Batterton v. Francis*, 432 U.S. 416 (1977). *See, e.g., NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130–31 (1944); *Center for Auto Safety v. Ruckelshaus*, 747 F.2d 1, 5 (D.C. Cir. 1984).[202]

This is an elegant statement of pre-*Chevron* scope of review doctrine. What about *Chevron*?

> Circumstances do exist, of course, under settled principles of law when an agency's view of a statute is still to be reviewed under the traditional "arbitrary and capricious" standard. Where Congress *delegates*, explicitly or implicitly, to an administrative agency the authority to give meaning to a statutory term or to promulgate standards or classifications, the regulations adopted in the exercise of that authority enjoy "legislative effect." *See Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–44 (1984). As *Chevron* teaches us, "[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, supra, at 844.[203]

The key under this analysis is to figure out when Congress implicitly delegated interpretative authority to an agency, so that a deferential approach should govern. Judge Starr addressed that crucial topic in a footnote:

> Under the Supreme Court's decision last Term in *Chevron*, where Congress has delegated, *either expressly or implicitly*, to an agency the authority to interpret a statutory term, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 844. An implicit delegation is more difficult to recognize than an explicit delegation. However, such implicit delegations have been recognized where an undefined statutory term, such as "extreme hardship," constitutes the operative standard to guide Executive Branch action, and where the standard is one "of such inherent imprecision . . . that a discretion of almost

202. 757 F.2d at 340–41 (alterations in original) (some internal citations omitted).

203. *Id.* at 341 (alteration in original) (some internal citations omitted).

legislative scope was necessarily contemplated" . . . .[204]

This discussion limits *Chevron* essentially to those circumstances identified by pre-*Chevron* law as warranting deference: cases in which there are special circumstances in the statutory scheme prescribing deference, characterized (against a general background of de novo review for legal questions) by *highly* undefined or imprecise statutory language. In *Donovan*, the court said, "We have not divined in the matters before us an implicit delegation of authority to the Secretary,"[205] suggesting the court was serious when it described a narrow band of cases in which deference would be appropriate. This analysis for identifying instances in which legal deference is due agencies on pure questions of law does not differ noticeably from Judge Breyer's discussion in *Mayburg* and Judge Wright's discussion in *Clark*, both of which folded a very modest interpretation of *Chevron* into the preexisting methodology. If anything, Judge Starr's opinion gives a *narrower* scope to *Chevron* than did these other decisions by seemingly imposing a very strict standard for finding implicit delegations to agencies. If Judge Starr was *Chevron*'s friend, then in Spring 1985, it needed no enemies.

Four days after *Donovan* was issued, another opinion authored by Judge Starr was released. *Community Nutrition Institute v. Young*[206] concerned whether the Food and Drug Administration (FDA) could regulate the level of aflatoxins allowed in corn through informal "action levels" rather than formal, specified "tolerances." Under the statute, poisonous or deleterious food additives—which concededly included aflatoxin in corn—were generally deemed unsafe and prohibited, "but when such substance is so required or cannot be so avoided, the Secretary shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health."[207] The petitioners argued that this provision mandated quantity-based regulations, while the FDA argued it authorized but did not require them. This is a classic pure question of law that would seem to require the *Chevron* framework. The court briefly cited *Chevron*, found Congress had directly spoken to the precise question at issue (*i.e.,* the meaning of the statute was clear), and held quantitative regulations were required.[208]

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204. *Id.* at 341 n.7 (some internal citations omitted).

205. *Id.* The court added that it "need not plumb deeply into those matters inasmuch as we find in each instance, for reasons to be set forth hereafter, the Secretary's interpretation to be concordant with the statutory scheme and provisions." *Id.* No deference was given, but no deference was needed in that case to affirm the agency.

206. 757 F.2d 354 (D.C. Cir. 1985), *rev'd*, 476 U.S. 974 (1986).

207. 21 U.S.C. § 346 (1982).

208. *See Cmty. Nutrition Inst.*, 757 F.2d at 357 (rejecting the FDA's statutory interpretation as "fl[ying] in the teeth of Congress' clear intent").

The case can be understood as a straightforward step-one decision cleanly within the *Chevron* framework. That is probably formally right—if a court really believes the meaning of the statute is clear, there is no occasion to talk about methodology, reasonableness, deference, or anything else, because the case is over.[209] Slightly more than a year later, however, the Supreme Court reversed the decision in *Community Nutrition Institute* by an 8–1 vote,[210] finding the statute ambiguous and the FDA's interpretation reasonable. (The lone dissenter in the Supreme Court was Justice Stevens.) If the D.C. Circuit's decision was an application of *Chevron*, it was an uncharitable one.

These decisions, neither of which puts the *Chevron* framework at center stage, make more puzzling another opinion from Judge Starr, issued on April 16, 1985, just weeks after his prior two opinions noted above. In *Eagle-Picher Industries, Inc. v. EPA*,[211] there were several challenges to the EPA's classification of certain sites as issuers of "hazardous substances."[212] In a footnote at the outset of his analysis, Judge Starr briefly set out the *Chevron* framework.[213] Most of the opinion was devoted to what seemed like a step-one argument in favor of the EPA's interpretation, though the decision never declared the meaning of the statute clearly supported the EPA. After considering the various arguments against the EPA's position, the court noted:

> The best case to be made for petitioners, upon analysis, is that when one examines the statute and the specific part of the legislative history upon which they rely, it becomes unclear as to what Congress' intent actually was. However, when Congress' intent is unclear, settled principles of law require us to determine whether EPA's interpretation is sufficiently reasonable for us

209. Such was obviously the case, for example, in *Wisconsin Electric Power Co. v. Department of Energy*, 778 F.2d 1 (D.C. Cir, 1985), in which the agency very neatly read out of the statute an express requirement that power be sold. No elaborate discussion of methodology was necessary to invalidate the agency decision.

210. Young v. Cmty. Nutrition Inst., 476 U.S. 974 (1986).

211. 759 F.2d 922 (D.C. Cir. 1985).

212. 42 U.S.C. § 9601(14) (1982).

213. Judge Starr wrote:

> In reviewing the interpretation of a statute by the agency that administers it, a court must first determine if Congress "has directly spoken to the precise question at issue," and if Congress' intent is clear, the court "must give effect to the unambiguously expressed intent of Congress." Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842–43 (1984). If Congress' intent is not clear, however, the court "must conduct the 'narrower inquiry into whether the [agency's] construction was "sufficiently reasonable" to be accepted by a reviewing court.'"

See 759 F.2d at 927 n.5 (alteration in original) (some internal citations omitted).

to accept that interpretation.[214]

This was a straightforward application of the *Chevron* two-step as settled law.

Indeed, a companion case to the first *Eagle-Picher* decision—issued the same day and decided by the same panel of Judges Starr, Edwards, and Robinson—reinforced the notion of *Chevron* as settled law. The second *Eagle-Picher Industries, Inc. v. EPA*[215] concerned a challenge to the methodology employed by the EPA to construct its Hazardous Ranking System. The court, in an opinion by Judge Edwards, announced the *Chevron* formula,[216] found reasonable the Agency's interpretation of the governing statute,[217] and affirmed the Agency in a very brief discussion. The evident message of the two *Eagle-Picher* cases was that *Chevron* was a generally applicable doctrine.

By mid- to late-1985, near *Chevron*'s first anniversary, many decisions across many circuits could be cited for the proposition that the two-step *Chevron* framework—which does not mention whether the relevant legal question was pure or mixed and which does not look for statute-specific evidence of congressional intent to entrust the agency with interpretative authority over the former—was simply settled law.[218] This is enough authority to warrant the recognition of the "*Chevron* doctrine," but identifying its contents is no easy feat; the oft-recited two-step framework both raised and obscured as many questions as it answered. However, one could minimally and fairly say the distinction between pure and mixed

214. *Id.* at 930.

215. 759 F.2d 905 (D.C. Cir. 1985).

216. *Id.* at 920.

217. *Id.* at 920–21.

218. *See, e.g.*, FORMULA v. Heckler, 779 F.2d 743, 756 (D.C. Cir. 1985); Am. Fed'n of Gov't Emps., v. Fed. Labor Relations Auth., 778 F.2d 850, 856–58 (D.C. Cir 1985); Am. Fed'n of Gov't Emps., Local 3090 v. Fed. Labor Relations Auth., 777 F.2d 751, 754 n.14 (D.C. Cir. 1985); Ohio v. Ruckelshaus, 776 F.2d 1333, 1338–39 (6th Cir. 1985); Lugo v. Schweiker, 776 F.2d 1143, 1146–47 (3d Cir. 1985); S. Motor Carriers Rate Conference v. United States, 773 F.2d 1561, 1567 (11th Cir. 1985); Natural Res. Def. Council, Inc. v. Herrington, 768 F.2d 1355, 1369 (D.C. Cir. 1985); Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. EPA, 768 F.2d 385, 389 (D.C. Cir. 1985); Sudomir v. McMahon, 767 F.2d 1456, 1459 (9th Cir. 1985); Idaho Power Co. v. FERC, 767 F.2d 1359, 1363 (9th Cir. 1985); Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 968 (D.C. Cir. 1985); Simmons v. ICC, 766 F.2d 1177, 1179 n.2 (7th Cir. 1985); Trailways Lines, Inc. v. ICC, 766 F.2d 1537, 1542 (D.C. Cir. 1985); Hudson Transit Lines, Inc. v. United States, 765 F.2d 329, 341–42 (2d Cir. 1985); Gen. Elec. Uranium Mgmt. Corp. v. U.S. Dep't of Energy, 764 F.2d 896, 905 (D.C. Cir. 1985); Callaway v. Block, 763 F.2d 1283, 1288 (11th Cir. 1985); Mo. Pub. Serv. Comm'n v. ICC, 763 F.2d 1014, 1017 (8th Cir. 1985); Storer Commc'ns, Inc. v. FCC, 763 F.2d 436, 440 (D.C. Cir. 1985); Black v. ICC, 762 F.2d 106, 114–15 (D.C. Cir. 1985); Schwartz v. Gordon, 761 F.2d 864, 868 (2d Cir. 1985); Lawrence v. Commodity Futures Trading Comm'n, 759 F.2d 767, 772 (9th Cir. 1985).

questions of law had lost much of its bite by 1986. It was now routine, not exceptional, for courts to grant deference—legal deference not justified by case-specific factors pertaining to agency expertise—when agencies interpreted pure questions of law. There was still disagreement over the precise range of extending deference. Some cases continued to search for statute-specific evidence of congressional intent to delegate interpretative authority to the agency, but many just proceeded to the *Chevron* framework. There is no rigorously empirical way to verify this claim, but there is good reason to think the law of judicial review looked very different in 1985 than in 1975.

There was still enough authority to allow doubt as to whether any major change in the law had really occurred. Cases often still arose in which the *Chevron* framework appeared to play no role. For example, *Amalgamated Transit Union International v. Donovan*[219] involved § 13(c) of the Urban Mass Transportation Act, which provides federal funds to public transit authorities that take over formerly private transit systems, but only if the Secretary of Labor certifies the public transit authority has made "fair and equitable" labor protective arrangements, including specifically "such provisions as may be necessary for . . . the continuation of collective bargaining rights."[220] The Secretary approved funds for an Atlanta transit authority, notwithstanding a state law removing important subjects from collective bargaining, on the ground that the authority's overall labor package was "fair and equitable."[221] The unions objected that the "fair and equitable" determination had to be *in addition to*, rather than *substituted for*, the preservation of collective bargaining rights. The D.C. Circuit agreed with the unions. The court's discussion of the language and legislative history of the statute is lengthy,[222] detailed, and likely correct. One could imagine seeing the court declare a union victory at step one of *Chevron* because the meaning of the statute was clear. One could not in fact see that in *Amalgamated Transit Union*, however, because the court did not mention *Chevron*, deference, the clear meaning of the statute, step one, or any related concept. It simply launched into an analysis of the relevant statute. The omission of *Chevron* from this discussion is intriguing because *Chevron* appeared in an earlier part of the opinion rejecting the Department's claim that the relevant inquiry was committed to agency discretion by law.[223] The case is not literally contrary to *Chevron* because there is no reason

219. 767 F.2d 939 (D.C. Cir. 1985).
220. 49 U.S.C. app. § 1609(c) (1982).
221. *Amalgamated Transit Union Int'l*, 767 F.2d at 941.
222. *See id.* at 946–50 (stretching across five pages of the Federal Reporter).
223. *See id.* at 944 n.7.

applying the *Chevron* framework would have changed the result. But it is striking that the *Chevron* framework did not merit a mention.

To much the same effect is *Norfolk & Western Railway Co. v. United States*,[224] authored by Judge Bork. The case was part of a long line of decisions, statutes, and agency rulings dealing with the shipping of recyclable materials. Railroads had previously been ordered to pay millions of dollars in refunds to shippers of recyclables based on territorial averages of variable shipping costs. In the latest iteration, the ICC ordered additional refunds to individual shippers who could show that the variable costs of shipping specific materials were below statutory maxima. The railroads claimed that this would result in double refunds to some customers. The court agreed the ICC ruling was contrary to § 204(e) of the Staggers Rail Act of 1980,[225] which reads in full:

> Notwithstanding any other provision of this title or any other law, within 90 days after the effective date of the Staggers Rail Act of 1980, all rail carriers providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title shall take all actions necessary to reduce and thereafter maintain rates for the transportation of recyclable or recycled materials, other than recyclable or recycled iron or steel, at revenue-to-variable cost ratio levels that are equal to or less than the average revenue-to-variable cost ratio that rail carriers would be required to realize, under honest, economical, and efficient management, in order to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital employed in the business sufficient to attract and retain capital in amounts adequate to provide a sound transportation system in the United States. As long as any such rate equals or exceeds such average revenue-to-variable cost ratio established by the Commission, such rate shall not be required to bear any further rate increase. The Commission shall have jurisdiction to issue all orders necessary to enforce the requirements of this subsection.[226]

If it is not obvious to the reader how the ICC's interpretation contravenes the clear meaning of this statute, the reader is not alone. There is a plausible argument that the ICC's reading renders irrelevant the second sentence of the statute, as that sentence assumes that at least some rates might exceed the average revenue-to-variable cost ratio but still be lawful (though frozen), while the ICC's actions in this case suggested that *all* rates above that ratio were necessarily unlawful. But to foreclose the ICC's reading on that basis seems strongly contrary to *Chevron*; after all, as the

224. 768 F.2d 373 (D.C. Cir. 1985).

225. Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified as amended in scattered sections of 49 U.S.C.).

226. *Id.* § 204(e), 94 Stat. at 1905 (codified at 49 U.S.C. § 10731(e) (1982)).

ICC argued, perhaps the first sentence merely *authorizes* the ICC to declare all such rates unlawful without *requiring* it to do so, so the second sentence would have plenty of work to do if the ICC chose not to make such a declaration.

The court never did explain how its decision fit into the *Chevron* framework, because the court never cited or mentioned *Chevron*. Unlike *Amalgamated Transit Union*, this is a case in which employing the *Chevron* framework may well have changed the outcome, with its explicit focus on deferring to the agency absent a clear meaning of the relevant statute. Judge Starr in dissent certainly thought so.[227]

One more example will make the point.[228] In *American Cyanamid Co. v. Young*,[229] the petitioner argued that upon filing a *supplemental* new animal drug application, the FDA could consider only the safety and effectiveness of the marginal changes effected by the supplemental application and could not revisit the safety and effectiveness of the drug as shown by the original application. The court rejected this challenge and affirmed the Agency's action, largely by reference to canons of construction.[230] *Chevron* did not provide the framework for analysis and warranted only an unelaborated *see also* citation.[231] By the end of 1985, *Chevron* was thus clearly taking root, but with serious room for debate about its vitality and ability to survive.

One more thought: *Chevron* was decided by the Supreme Court in the middle of 1984, and the story thus far has taken us through 1985. What did the Supreme Court have to say about *Chevron* during this period?

Fortunately, the answer to that question (spectacularly little) is well-known and well-documented, thanks again to Tom Merrill. Professor Merrill famously tracked the use—or non-use—of *Chevron* in the Supreme Court in the half-dozen years after *Chevron* and showed that through 1990 *Chevron* was not consistently used by the Court as a framework for reviewing

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227. Judge Starr wrote in dissent:

> I think even the railroads would admit that Congress did not appear to have an intent as to whether only average rates, or some other rate methodology, should be employed. Under elementary principles, adequately obvious so as to require little elaboration, when Congress does not express an intent, the court's sole duty is to determine whether the agency's action in the context of its mission is reasonable; if so, then the agency's view must be upheld.

See Norfolk & W. Ry. Co., 768 F.2d at 382 (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)).

228. A few more could be added. *See, e.g.*, Gen. Med. Co. v. FDA, 770 F.2d 214, 218 (D.C. Cir. 1985) (offering only a throwaway reference to *Chevron*).

229. 770 F.2d 1213 (D.C. Cir. 1985).

230. *See id.* at 1217–18 (deferring to the FDA's interpretation despite being inconsistent with prior interpretations).

231. *Id.* at 1217.

agency legal determinations.[232] The October 1984 term was particularly uninformative for lower courts looking for guidance about the scope and impact of *Chevron*. There were two decisions that arguably, if briefly and without discussion, suggested *Chevron* might prescribe a generally applicable framework,[233] but it is fair to say no case elaborated seriously on the *Chevron* framework—or even expressly identified something resembling a "*Chevron* framework" as a distinct legal entity. *Chevron* simply was not a major presence on the Supreme Court in the October 1984 term.

This is not an altogether surprising result. *Chevron*'s broad impact, if any, was on administrative law, and the Supreme Court circa 1985 was neither interested nor versed in the subject. Of the nine Justices at that time,[234] none could be said to have any special expertise or interest in administrative law.[235] Only one Justice—Warren Burger—had prior experience on the D.C. Circuit, with regular exposure to administrative law issues, and it is no great slap at him to note that he has never been regarded as a giant in the field.[236] The impact of *Chevron* on scope of review doctrine simply is not something to which one would expect the Supreme Court of 1985 to give much thought.

Through 1985, whatever was happening with *Chevron* was happening entirely in the lower courts. And something, however hard to define, was happening.

IV. COCONUTS DON'T MIGRATE . . . BUT DOCTRINES MIGHT

In a series of (unconnected) law review articles in 1986, judges on the D.C. Circuit described *Chevron* as a "landmark,"[237] a "far-reaching

232. *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 980–83 (1992) (finding the *Chevron* two-step framework to have been applied in only one-third of the cases in which a Justice recognized an issue of agency deference).

233. *See* Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc., 470 U.S. 116, 125 (1985) (regarding the EPA's interpretation of Clean Water Act provisions); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985) (again, regarding EPA and the Clean Water Act).

234. In order of seniority, they were: William Brennan, Byron White, Thurgood Marshall, Warren Burger, Harry Blackmun, Lewis Powell, William Rehnquist, John Paul Stevens, and Sandra Day O'Connor.

235. This is in stark contrast with the current Court, which includes three former administrative law professors (Justices Breyer, Kagan, and Scalia) and a former chairman of a federal administrative agency (Justice Thomas).

236. The current Court has four former D.C. Circuit judges (Chief Justice Roberts, and Justices Ginsburg, Scalia, and Thomas).

237. Antonin Scalia, *The Role of the Judiciary in Deregulation*, 55 ANTITRUST L.J. 191, 193–94 (1986).

development,"[238] and a "watershed."[239] Whatever *Chevron* stood for, by this time it had reached a noteworthy level of ascendancy in the lower courts. One could still find cases that downplayed it,[240] but they were becoming harder to find. It was much easier to find decisions reciting the "familiar two-step framework set forth in *Chevron*,"[241] *Chevron*'s "now familiar framework for analyzing interpretations of statutes by agencies charged with their administration,"[242] and the "now familiar dictates of *Chevron*."[243] We are unable to identify precisely when the dam burst, but by *Chevron*'s two-year anniversary, it had become the dominant methodology in the lower courts for review of agency legal determinations.[244]

If the *Chevron* framework really was supplanting the old regime for judicial review of agency legal determinations, there would be consequences. The extent of those consequences depended on what the "*Chevron* framework" prescribed, which was profoundly unclear in 1986. The *Chevron* framework has an air of simplicity. No need to think about whether the question of law is pure or mixed, whether the statute clearly delegates authority to the agency, or how to apply the "sliding scale of deference, taking into account a variety of deference-related factors,"[245] all of which dominated pre-*Chevron* law. One arguably need only ask whether the agency administers the statute, and a measure of legal deference flowed automatically. That deference was not absolute, of course—step one made that clear. But *Chevron* did potentially hold out the promise of a simpler, easier-to-administer scope of review doctrine. For lower courts that had openly complained for years in the pages of the Federal Reporters that the

238. Abner J. Mikva, Speech, *How Should the Courts Treat Administrative Agencies?*, 36 AM. U. L. REV. 1, 6 (1986).

239. Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 283–84 (1986).

240. *See, e.g.*, Am. Fed'n of Gov't Emps., Local 1738 v. Fed. Labor Relations Auth., 806 F.2d 1105, 1108 (D.C. Cir. 1986) (concluding, seemingly grudgingly, that *Chevron* entitles agency decisions to "some deference," but otherwise ignoring the decision).

241. Int'l Bhd. of Teamsters v. ICC, 801 F.2d 1423, 1426 (D.C. Cir. 1986).

242. Inv. Co. Inst. v. Conover, 790 F.2d 925, 932 (D.C. Cir. 1986).

243. Natural Res. Def. Council, Inc. v. Thomas, 805 F.2d 410, 420 (D.C. Cir. 1986).

244. A full string citation of cases from this period that treat *Chevron* as settled law would get tedious even by the standards of string citations. *See, e.g.*, Kean v. Heckler, 799 F.2d 895, 899 (3d Cir. 1986); Prod. Workers Union of Chi. & Vicinity, Local 707 v. NLRB, 793 F.2d 323, 328 (D.C. Cir. 1986); Transbrasil S.A. Linhas Aereas v. Dep't of Transp., 791 F.2d 202, 205 (D.C. Cir. 1986); Coal. to Pres. the Integrity of Am. Trademarks v. United States, 790 F.2d 903, 907–08 (D.C. Cir. 1986); Humane Soc'y of the United States v. EPA, 790 F.2d 106, 115–16 (D.C. Cir. 1986); Reckitt & Colman, Ltd. v. DEA, 788 F.2d 22, 25–26 (D.C. Cir. 1986); Ry. Labor Execs.' Ass'n v. ICC, 784 F.2d 959, 963–64 (9th Cir. 1986).

245. Am. Fed'n of Labor & Congress of Indus. Orgs. v. Donovan, 757 F.2d 330, 341 (D.C. Cir. 1985).

Supreme Court had not given them a clear scope of review doctrine, *Chevron* offered possible reprieve from the darkness.

Whether *Chevron* actually, or could have, delivered on that promise of simplification is another question. It depends on how simple one makes the *Chevron* framework. If *Chevron*'s application required a detailed, statute-by-statute analysis of whether Congress intended the agency to have primary interpretative authority, as some cases held, *Chevron* would be of little consequence. If figuring out whether a statute's meaning is "clear" were no easier (and perhaps harder) than figuring out whether a question of law were pure or mixed, *Chevron* could make the courts' job harder rather than easier. And if the degree of agency deference continued to slide along many factors with or without *Chevron,* the marginal gain from the *Chevron* framework could be very small. None of these questions had answers in 1986, nor were courts even openly asking those questions. They would typically recite the *Chevron* framework and then proceed with little inquiry into the methodology's foundations or mechanics. The fullest treatment of *Chevron*'s methodology came in a case in which *Chevron* probably did not make a difference because the case involved a mixed question of law application.[246] The *Chevron* two-step was something of a black box—which perhaps helps to explain its success, as judges could pour into the still skeletal framework a wide range of preferences and predilections.

At least two other important consequences of *Chevron* were difficult to avoid and too plain to ignore. One was pointed out as early as 1984 by Judge Breyer:[247] To the extent *Chevron* increases the range of circumstances in which judges defer to agencies on pure legal questions, it seems to reverse the common-sense view of comparative institutional competence in which courts are generally better at determining the law and agencies are generally better at finding facts and making policy. Anyone who subscribes to the legal process approach, in which decisional authority should be allocated where best applied, will find a broad reading of *Chevron* troublesome at best and absurd at worst. Given the number of judges (and law clerks) trained either at Harvard Law School or by professors who were trained at Harvard Law School, where the legal process approach grew and flourished, it would not be surprising to find serious resistance to the *Chevron* revolution.

A second consequence was noted by Judge Wald in a 1987 article: "A broad reading of *Chevron*, of course, tilts strongly in the direction of the

246. *See Conover*, 790 F.2d at 931–36 (involving whether collective IRA trusts are "securities").

247. *See supra* pages 34–39 (discussing Judge Breyer's analyses in *Mayburg* and *New England Telephone*).

executive."[248] The more *Chevron* mandates deference, the more power flows from the judiciary to the executive. For those who place faith in the courts as the primary engine of justice, that is unwelcome. And in the mid- to late-1980s, the executive to whom power flowed was, and was widely expected to be in the future, a *Republican* executive. To be absolutely clear, the pro and con *Chevron* forces did not align along classic party lines. It is a fair guess that Judge Wald did not vote for Ronald Reagan, and it would be difficult to find a D.C. Circuit judge whose opinions showed less enthusiasm for *Chevron* than Robert Bork. One of *Chevron*'s earliest academic champions was Richard Pierce,[249] who no one would mistake for a conservative shill, and one of the most trenchant critiques of *Chevron* came from Tom Merrill.[250] Nonetheless, one need not have been a right-leaning law clerk in *Chevron*'s formative era (though, as one of this Article's authors can attest, it certainly does not hurt for this purpose) to appreciate how difficult it is to overestimate the importance of that particular partisan perception, especially among the behind-the-scenes law clerks who often drafted the opinions. This was in the era of the "electoral lock,"[251] when California was a reliably republican state and the Carter presidency was seen as a post-Watergate blip. President Clinton was not even a gleam in a pollster's eye. Battles over *Chevron* were battles over power, and it seemed obvious at the time to whom the power was going. Some kind of face-off about the future of *Chevron* was almost inevitable.

A. Enter the Dragon

The story of *Chevron* has so far been almost exclusively that of the D.C. Circuit. But as the *Chevron* doctrine gained steam, and its consequences for allocating decisionmaking power became increasingly apparent, opposition

248. Patricia M. Wald, *The D.C. Circuit: Here and Now*, 55 GEO. WASH. L. REV. 718, 727 (1987).

249. *See* Richard J. Pierce, Jr., Chevron *and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988) (noting the progression in administrative law due to *Chevron*); Richard J. Pierce Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 486–88 (1985) (advocating that EPA's interpretation was well within the confines of its congressionally bestowed power).

250. *See* Merrill, *supra* note 232, at 1032–33 (contending that *Chevron* has all the markings of a failure and a better solution could have been advanced).

251. The "electoral lock" or "electoral college lock" was a colloquial phrase for the supposed advantage of Republicans in the electoral college as a result of their wide geographical dominance. Thomas Brunell & Bernard Grofman, *The 1992 and 1996 Presidential Elections: Whatever Happened to the Republican Electoral College Lock?*, 27 PRESIDENTIAL STUD. Q. 134, 134 (1997). The facts did not necessarily fit the theory, *see id.* at 135; I.M. Destler, *The Myth of the "Electoral Lock"*, 29 POL. SCI. & POL. 491 (1996), but the theory was widely held.

began to build—and for reasons that did not need to involve the relative virtues and vices of strengthening Reagan Administration agencies. One need not be a devotee of the legal process school to recognize there is something odd about courts routinely deferring to agencies on legal interpretation—what were the appellate judges getting paid to do if not decide questions of law, for which they, not the agencies, are supposedly the experts?[252] Moreover, there is little evidence of this in reported judicial decisions, but as courts acquired more experience with the *Chevron* framework, the many unanswered questions about its mechanics (how clear is clear? how reasonable is reasonable? is deference now an all-or-nothing proposition?) were bound to loom larger. The more one thinks about those questions, the more complex the facially simple *Chevron* two-step framework becomes. Maybe the uncertain but fluid pre-*Chevron* law was not so bad after all.

Law clerks on the D.C. Circuit who dealt with *Chevron* daily, if not hourly, were awash in these controversies. As many of those law clerks moved to the Supreme Court, they took those still-unresolved controversies with them.

They also had company: on September 26, 1986, Antonin Scalia became an Associate Justice of the United States Supreme Court. Justice Scalia actually had very little to do with the *Chevron* doctrine's genesis while he was on the D.C. Circuit, but he brought interest and expertise in administrative law to the Supreme Court, along with a firsthand understanding of the significance of various interpretations of *Chevron*. The combination of Justice Scalia and a crop of law clerks with *Chevron* on the brain all but assured that the Supreme Court of 1987 would have something to say.[253]

The initial battle was fought in an unlikely context. Section 243(h) of the Immigration and Nationality Act provided in 1982 that "[t]he Attorney General shall not deport or return any alien . . . [with some exceptions not relevant here] to a country if the Attorney General determines that such alien's life or freedom *would be threatened* in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."[254] If the otherwise-deportable alien could show he or she "would be threatened" in their country of return, which the Supreme Court construed to mean "more likely than not that the alien would be subject to

252. *See* Mikva, *supra* note 237, at 8 (noting that judges are better at "construing statutes" but that *Chevron* and its progeny deny and undermine their knowledge).

253. Tom Merrill has termed this explanation for the rise of awareness of *Chevron* in the Supreme Court the "reverse-migration hypothesis." Merrill, *supra* note 115, at 188.

254. 8 U.S.C. § 1253(h)(1) (1982) (emphasis added).

persecution"[255] upon return, the Attorney General—typically acting through the Immigration and Naturalization Service (INS)—was *required* to withhold deportation ("shall not deport"). Alternatively, the Refugee Act allowed the Attorney General, in his or her discretion, to grant asylum to a refugee,[256] defined as a person "unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that [person's home] country because of persecution or *a well-founded fear of persecution* on account of race, religion, nationality, membership in a particular social group, or political opinion."[257]

In *INS v. Cardoza-Fonseca*,[258] the government argued the standard of proof for establishing refugee status, via a showing of a "well-founded fear of persecution," was the same "more likely than not" standard governing proof of entitlement to a withholding of deportation under the Immigration and Nationality Act.[259] The respondent argued one could have a "well-founded fear of persecution" even if such persecution was not "more likely than not" to occur[260]—meaning a forty-nine percent chance of imprisonment or execution upon return to one's home country is enough to ground a "well-founded fear." The case thus revolved around a pure question of law: whether the legislatively prescribed standards of proof under two different statutes were the same.

The Ninth Circuit had agreed with respondent that the standard for proving a "well-founded fear" was different, and more generous to the alien, than was the standard for showing that life or freedom "would be threatened"[261] upon return. The court made no reference to *Chevron* or deference to the INS, as prior circuit precedent controlled the case instead.[262]

In its brief to the Supreme Court, the government briefly but forcefully urged deference to the INS's views, though *Chevron* was only one of many cases cited and received no special attention.[263] The brief concentrated on statutory analysis and administrative policy. The respondent's brief argued,

255. INS v. Stevic, 467 U.S. 407, 429–30 (1984).

256. *See* 8 U.S.C. § 1158(a) ("The Attorney General shall establish a procedure for an alien . . . and the alien may be granted asylum in the discretion of the Attorney General.").

257. *Id.* § 1101(a)(42) (emphasis added).

258. 480 U.S. 421 (1987).

259. *Id.* at 423.

260. *Id*. at 425.

261. Cardoza-Fonseca v. INS, 767 F.2d 1448, 1455 (9th Cir. 1985).

262. *See id.* at 1451–52 (citing cases from the Sixth, Seventh, and Ninth Circuits, but not *Chevron*).

263. *See* Brief for the Petitioner at 18–19, *Cardoza-Fonseca*, 480 U.S. 421 (1987) (No. 85-782), 1986 U.S. S. Ct. Briefs LEXIS 367. The string citation on page 18 was the brief's only mention of *Chevron*.

citing *Chevron* in a footnote, that deference to the INS was appropriate only when Congress specifically delegates interpretative authority, as had arguably occurred in some prior immigration cases,[264] and that § 208(a) of the Refugee Act delegates no such authority.[265] The discussion of deference was brief, and *Chevron* was decidedly in the background. The government's reply brief did not cite *Chevron*.[266]

The oral argument, held on October 7, 1986, raised the stakes. The government (through long-time Deputy Solicitor General Larry Wallace) opened its argument calling for deference to the INS, but intriguingly did not cite, invoke, or otherwise mention *Chevron*. The deference argument instead focused on the INS's expertise as "an active participant in the legislation as it developed,"[267] and its opportunity to "study the legislative background against the experience that it has had in applying the standards."[268] This was consistent with the position in the government's brief, which easily could have been written without any mention of *Chevron*.

Chevron was introduced into the oral argument in a question addressed to Dana Marks Keener, counsel for the respondent, who (perhaps ironically) later became an immigration judge. The first words out of Ms. Keener's mouth after "may it please the Court" were:

> Understandably, the Government is putting considerable emphasis on their deference argument. That's because it's the only argument that it has. Unfortunately, there are some—or fortunately for our side—there are some considerable problems with deference to the agency in this particular context.
>
> By reviewing the statutory canons that apply to deference, the first place you start is with the fact that a court is the expert in terms of statutory construction. The meaning of the "well-founded fear" standard is an issue of law. It's clearly within the traditional function of this Court to interpret. It is not an area . . . [269]

At that point, Ms. Keener was interrupted by a question from Chief Justice Rehnquist: "Are you suggesting that the INS in this case should be

264. *See, e.g.*, INS v. Wang, 450 U.S. 139, 145 (1981) (arguing that the Attorney General has "the authority to construe 'extreme hardship'" if he or she chooses to do so).

265. *See* Brief of Respondent at 38–39, 39 n.32, *Cardoza-Fonseca*, 480 U.S. 421 (No. 85-782), 1986 U.S. S. Ct. Briefs LEXIS 362.

266. *See* Reply Brief for the Petitioner, *Cardoza-Fonseca*, 480 U.S. 421 (No. 85-782), 1986 U.S. S. Ct. Briefs LEXIS 596.

267. Transcript of Oral Argument, *Cardoza-Fonseca*, 480 U.S. 421 (No. 85-782), 1986 U.S. Trans. LEXIS 30, at *8.

268. *Id.*

269. *Id.* at *18.

given no deference simply because it is construing a term of the statute?"[270] Her response included the argument's first mention of *Chevron*: "No. Of course the Court also looks at other factors, and deference cases talk about the fact, *Chevron* for example, that first always is Congress' intent."[271] That narrow view of *Chevron* incited an exchange that, for the first time in the *Cardoza-Fonseca* litigation, and indeed for the first time in quite a while in federal courts, brought to the fore the traditional, pre-*Chevron* distinction between pure and mixed questions of law:

> QUESTION (from Chief Justice Rehnquist): Well, my question to you was, which I don't think you've yet answered, is [ ] the agency entitled to no deference because what it is construing is a term of the statute?
>
> MS. KEENER: I think that answer is probably correct. But in arriving at whether deference is considered or not, the courts usually look at several factors, which include the legislative history, the plain language of the statute.
>
> QUESTION (from Chief Justice Rehnquist): Well, is deference one of those factors or not?
>
> MS. KEENER: Well, it can be if a standard is not a question of pure law, if it is an application of the law to a specific set of facts. And courts often look to the agency's expertise to decide whether or not that's the kind of situation presented. However, that's not the case here.
>
> QUESTION (from Justice Scalia): What was *Chevron*? Wasn't that a question of pure law? And didn't we say there that we, and in other cases, that we will accept the expert agency's interpretation of its governing statute where it's a reasonable one?
>
> MS. KEENER: There was a technical gap in *Chevron*, and it was involved in the implementation. So it was construing a term involved in implementing a standard.[272]

And with that the game was on.

By a vote of 6–3 (with Justices Powell, Rehnquist, and White dissenting), the Court agreed with respondent and the Ninth Circuit that the agency could not permissibly read the "well-founded fear" criterion in the discretionary withholding-of-deportation provision of the Refugee Act to require the same "more likely than not" standard of proof required by the "would be threatened" criterion in the mandatory withholding-of-deportation provision of the Immigration and Nationality Act. So framed, the decision's holding is an unexceptional and perhaps obviously correct bit of statutory interpretation. The fireworks were in the dicta.

As Justice Scalia noted in his concurring opinion, once one concluded—

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270. *Id.* at *19.
271. *Id.*
272. *Id.* at *19–*20.

as had the Court—that the statute's plain meaning foreclosed the government's interpretation, there was no occasion to discuss deference, *Chevron*, or anything else. No amount of deference can justify an agency position contrary to the clear meaning of a statute. Nonetheless, in an opinion authored by Justice Stevens—who not at all coincidentally authored *Chevron*—a clean majority of five Justices took the occasion to explicitly and pointedly comment on the *Chevron* framework:

> The INS's second principal argument in support of the proposition that the "well founded fear" and "clear probability" standard are equivalent is that the BIA so construes the two standards. The INS argues that the BIA's construction of the Refugee Act of 1980 is entitled to substantial deference, even if we conclude that the Court of Appeals' reading of the statutes is more in keeping with Congress' intent. This argument is unpersuasive.
>
> The question whether Congress intended the two standards to be identical is a pure question of statutory construction for the courts to decide. Employing traditional tools of statutory construction, we have concluded that Congress did not intend the two standards to be identical. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), we explained:
>
> > The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect. *Id.*, at 843, n. 9.
>
> The narrow legal question whether the two standards are the same is, of course, quite different from the question of interpretation that arises in each case in which the agency is required to apply either or both standards to a particular set of facts. There is obviously some ambiguity in a term like "well-founded fear" which can only be given concrete meaning through a process of case-by-case adjudication. In that process of filling "'any gap left, implicitly or explicitly, by Congress,'" the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program. See *Chevron*, *supra*, at 843. But our task today is much narrower, and is well within the province of the Judiciary. We do not attempt to set forth a detailed description of how the "well-founded fear" test should be applied. Instead, we merely hold that the Immigration Judge and the BIA were incorrect in holding that the two standards are identical.[273]

The implications of this passage in 1987 were potentially enormous. Justice Stevens, writing for five Justices all of whom were part of the *Chevron*

273. *Cardoza-Fonseca*, 480 U.S. at 445–48 (footnotes and some internal citations omitted) (brackets in original).

majority, effectively announced that the pre-*Chevron* distinction between pure and mixed questions of law still governed, which essentially adopted the position of Cardoza-Fonseca's counsel that the interpretation in *Chevron* partook more of law application than of law interpretation. The issue in *Cardoza-Fonseca* itself was characterized as "a pure question of statutory construction *for the courts to decide*." Any doubt Justice Stevens was taking specific aim at the emergent *Chevron* doctrine evaporates with a long footnote that we omitted from the quoted passage. Justice Stevens pointedly introduced the footnote by observing, "In view of the INS's heavy reliance on the principle of deference as described in *Chevron* . . . , we set forth the relevant text in its entirety"[274]—followed by four full paragraphs from the *Chevron* decision.[275] The wording of this sentence was not accidental. The INS did not rely on *Chevron* itself, as we have seen and as Justice Stevens surely knew. The footnote refers to the "principle of deference *as described* in *Chevron*," meaning Justice Stevens was clarifying the "principle of deference" that he, speaking for a unanimous Court, intended to prescribe in 1984. The fourth of the full paragraphs quoted from the *Chevron* opinion begins with the words, "[i]n light of these well-settled principles," indicating *Chevron* was applying settled law rather than setting forth any new conception of deference. The message to the lower courts that had fashioned—however sketchily—their own distinctive "*Chevron* doctrine" was clear: there is no "*Chevron* doctrine" beyond the principles that were "well-settled" in summer 1984, which required distinguishing between pure questions of law and mixed questions of law application.

The message was not lost on Justice Scalia. He agreed with the majority that the government's interpretation of the statute was unsustainable, and therefore concurred in the result, but he emphatically objected to the majority's characterization of *Chevron*:

> This Court has consistently interpreted *Chevron*—which has been an extremely important and frequently cited opinion, not only in this Court but in the Courts of Appeals—as holding that courts must give effect to a reasonable agency interpretation of a statute unless that interpretation is inconsistent with a clearly expressed congressional intent. The Court's discussion is flatly inconsistent with this well-established interpretation. . . .
>
> The Court . . . implies that courts may substitute their interpretation of a statute for that of an agency whenever they face "a pure question of statutory construction for the courts to decide," rather than a "question of interpretation [in which] the agency is required to apply [a legal standard] to a particular set of facts." No support is adduced for this proposition, which is

274. *Id.* at 445 n.29.
275. *See id.*

> contradicted by the case the Court purports to be interpreting, since in *Chevron* the Court deferred to the Environmental Protection Agency's abstract interpretation of the phrase "stationary source."
>
> In my view, the Court badly misinterprets *Chevron*. More fundamentally, however, I neither share nor understand the Court's eagerness to refashion important principles of administrative law in a case in which such questions are completely unnecessary to the decision and have not been fully briefed by the parties.[276]

Presumably, Justice Scalia was not telling Justice Stevens the latter misunderstood his own opinion. As the reference to *Chevron*'s prevalence in the lower courts illustrates, Justice Scalia instead was no doubt identifying that *Chevron* had taken on a life of its own, whether Justice Stevens so intended it in 1984; and to seek casually to alter or undo that structure—especially in a case in which no party was calling for a reconsideration or clarification of *Chevron*—could have serious doctrinal consequences.

No Justice joined Justice Scalia's concurring opinion. The three dissenting Justices found the agency's interpretation of the statute reasonable, but they did not engage in debate over the proper meaning of *Chevron*.

Was the *Chevron* revolution over before it actually began?

A substantial number of lower courts thought so, quite reasonably given the strong dictum of *Cardoza-Fonseca*. There was a surge of decisions in the courts of appeals announcing that deference—or at least legal deference—would no longer be given to agency decisions involving pure questions of law but only to agency applications of law to particular facts.[277] Not every case understood *Cardoza-Fonseca* to cut short the *Chevron* revolution,[278] and because the discussion in *Cardoza-Fonseca* was plainly dictum, there was no requirement that it be so understood, but there were enough decisions cutting down on *Chevron* to question *Chevron*'s future.

B. Exit the Dragon, Enter the Tiger

The stage was set for what promised to be one of the most profound

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276. *Id.* at 454–55 (Scalia, J., concurring) (internal quotations omitted).

277. *See, e.g.*, NLRB Union v. FLRA, 834 F.2d 191, 198 (D.C. Cir. 1987); FEC v. Sailors' Union of the Pac. Political Fund, 828 F.2d 502, 505–06 (9th Cir. 1987); Union of Concerned Scientists v. NRC, 824 F.2d 108, 113 (D.C. Cir. 1987); Regular Common Carrier Conference v. United States, 820 F.2d 1323, 1330 (D.C. Cir. 1987); Adams House Health Care v. Heckler, 817 F.2d 587, 593–94 (9th Cir. 1987); Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock, 816 F.2d 761, 764–65 (D.C. Cir. 1987).

278. *See, e.g.*, Grinspoon v. DEA, 828 F.2d 881, 884–85 (1st Cir. 1987) (holding that *Cardoza-Fonseca* in fact reaffirmed *Chevron*).

battles over administrative law doctrine in American legal history. The lower courts, on their own accord, had constructed a method for reviewing agency legal conclusions that, however uncertain at the margins and in the mechanics, was materially different from what preceded it. That method flew in the face of strongly and widely held precepts about sound allocation of institutional authority, but it offered some promise of a cleaner, simpler, and less intrusive judicial role in administrative review. There was ample room, and strong ammunition, on both sides of that divide. Once the issues raised by *Chevron* had migrated to the Supreme Court—which had happened by the time *Cardoza-Fonseca* was decided—it seemed inevitable that those issues would come to a head in something other than an exchange of dictum.

It certainly did not look good for Justice Scalia and other defenders of some version of the *Chevron* revolution. For one thing, as of 1987 there was still no clear, universally held conception about what *Chevron* entailed. Justice Scalia, in his *Cardoza-Fonseca* concurrence, thought it was an "evisceration of *Chevron*"[279] to say courts should rule against agencies whenever "traditional tools of statutory construction"[280] yield an answer. This reflects an implicit view about the meaning of *Chevron*'s first step, in which courts do not defer when the meaning of the statute is clear, but not necessarily a view that all other proponents of some version of *Chevron* would share. What does it mean to say a statute's meaning is "clear"? There was no answer to be found in the case law in 1987, and Justice Scalia did not offer one. Nor had the lower courts made progress on the other issues surrounding *Chevron*'s application. There were many cases applying the *Chevron* framework, but no cases explaining clearly what was being applied. It was hard to rally the troops around something as ephemeral as the *Chevron* doctrine. There also did not appear to be very many troops to rally. No Justice joined Justice Scalia in *Cardoza-Fonseca*. For all the world could see, he was the only person on the Supreme Court who was at all worried about revival of distinguishing between pure and mixed questions of law in administrative review. As it happened, there were some important things the world could not see.

In 1987, Justice Scalia was the only vote on the Supreme Court for the proposition that courts should routinely give some measure of legal deference to agencies even on pure questions of law interpretation. By 1988, the number had risen to four, with no change in the Court's membership other than the retirement of Justice Powell, who had not taken sides in the *Cardoza-Fonseca* controversy. *NLRB v. United Food & Commercial*

279. 480 U.S. at 454 (Scalia, J., concurring).
280. *Id.*

Workers Union, Local 23[281] concerned "whether a federal court has authority to review a decision of the National Labor Relations Board's General Counsel dismissing an unfair labor practice complaint pursuant to an informal settlement in which the charging party refused to join."[282] A unanimous Court of eight Justices—this was during the interregnum before Justice Kennedy became an active member—found the courts had no such authority. The case came down to whether the proceeding at issue was prosecutorial (not reviewable) or adjudicatory (reviewable). The Court's discussion of the scope of review for this question intriguingly invoked *Cardoza-Fonseca* but made no specific mention of distinguishing between pure and mixed questions of law. The Court's disposition on the merits observed:

> [T]he general congressional framework, dividing the final authority of the General Counsel and the Board along a prosecutorial and adjudicatory line, is easy to discern. Some agency decisions can be said with certainty to fall on one side or the other of this line. For example, as already discussed, decisions whether to file a complaint are prosecutorial. In contrast, the resolution of contested unfair labor practice cases is adjudicatory. But between these extremes are cases that might fairly be said to fall on either side of the division. Our task, under *Cardoza-Fonseca* and *Chevron*, is not judicially to categorize each agency determination, but rather to decide whether the agency's regulatory placement is permissible.[283]

Justice Scalia highlighted the Court's deferential posture in a concurring opinion, this time joined by Chief Justice Rehnquist and Justices White and O'Connor:

> I join the Court's opinion, and write separately only to note that our decision demonstrates the continuing and unchanged vitality of the test for judicial review of agency determinations of law set forth in *Chevron*. . . . Some courts have mistakenly concluded otherwise, on the basis of dicta in *INS v. Cardoza–Fonseca*. . . . If the dicta of *Cardoza–Fonseca*, as opposed to its expressed adherence to *Chevron*, were to be applied here, surely the question whether dismissal of complaints requires Board approval and thus qualifies for judicial review . . . would be "a pure question of statutory construction" rather than the application of a "standar[d] to a particular set of facts," as to which "the courts must respect the interpretation of the agency[.]" Were we to follow those dicta, therefore, we would be deciding this issue conclusively and authoritatively, rather than merely "decid[ing] whether the agency's regulatory placement is permissible[.]" The same would be true, moreover, of the many other decisions alluded to by the Court in which "we have

281. 484 U.S. 112 (1987).
282. *Id.* at 114.
283. *Id.* at 125.

> traditionally accorded the Board deference with regard to its interpretation of the NLRA." Those cases, and this, are decided correctly only because "the statute is silent or ambiguous" with respect to an issue relevant to the agency's administration of the law committed to its charge—which is the test for deference set forth in *Chevron*.[284]

The Court's opinion made no response to this concurrence. A response was certainly available: by describing the decision in terms of line drawing, the Court left open an ability to challenge Justice Scalia's characterization of the case as involving a pure question of law. Line drawing smacks of law application, so it would be possible to slot *United Food* into the circumstances in which deference was permitted by *Cardoza-Fonseca*. The Court made no such effort.

If one enjoyed reading tea leaves, by 1988 it looked as though there might be a 4–4 split on the Court concerning applying deference to pure questions of law, awaiting resolution by Justice Kennedy when he joined the Court. One needed only reasonably assume Justices Stevens, Brennan (who authored the opinion in *United Food*), Marshall, and Blackmun continued to adhere to the strong dictum of *Cardoza-Fonseca*. It remained only for the fully staffed Court to decide a case that squarely, neatly, and cleanly settled the status of Justice Stevens's dictum in *Cardoza-Fonseca*.

It never happened. No such decision came—or has come since. Through a process that we can observe but do not purport to explain, the 4–4 split in *United Food* was almost universally taken by the lower courts as a vindication of Justice Scalia's position in his concurrence, that *Chevron* would extend deference to agency determinations involving pure legal questions.[285] Litigants were still pushing, albeit unsuccessfully, the distinction between pure and mixed legal questions as late as 1991[286]—and Justice Stevens, joined by Justice Breyer, continued to fight the fight well

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284. *Id.* at 133–34 (Scalia, J., concurring).

285. *See, e.g.*, City of Boston v. U.S. Dep't of Hous. & Urban Dev., 898 F.2d 828, 831 (1st Cir. 1990); CSX Transp. v. United States, 867 F.2d 1439, 1444–45 (D.C. Cir. 1989) (Edwards, J., dissenting) (expressing dislike for *Chevron* but conceding it governs); Theodus v. McLaughlin, 852 F.2d 1380, 1382–84 (D.C. Cir. 1988); Ry. Labor Execs.' Ass'n v. U.S. R.R. Ret. Bd., 842 F.2d 466, 471–72 (D.C. Cir. 1988); Fernandez v. Brock, 840 F.2d 622, 631–32 (9th Cir. 1988); Mead Johnson Pharm. Grp. v. Bowen, 838 F.2d 1332, 1335–36 (D.C. Cir. 1988); Cablevision Syss. Dev. Co. v. Motion Picture Ass'n of Am., 836 F.2d 599, 607 n.12 (D.C. Cir. 1988).

286. *See* Wagner Seed Co. v. Bush, 946 F.2d 918, 922 (D.C. Cir. 1991) (clarifying that even the Seventh Circuit, which had afforded a lesser degree of deference to agencies on purely legal issues in one case, had since retreated); Cent. States Motor Freight Bureau, Inc. v. ICC, 924 F.2d 1099, 1102 (D.C. Cir. 1991) (rejecting plaintiff's argument for less agency deference when jurisdictional issues are purely legal rather than a legal analysis of facts).

into the 21st century.[287] But at least some form of the *Chevron* revolution has dominated the lower courts for more than two decades now. As for the Supreme Court: following *United Food*, the law-application/law-determination dichotomy essentially vanished from the scene, to be oddly resurrected by Justice Stevens—perhaps as something of a swan song—in 2009.[288] Over the past quarter-century, *Cardoza-Fonseca* has been cited by the Court almost entirely in immigration cases or for very broad principles of statutory interpretation, aside from one backhanded reference intimating a potential distinction between pure and mixed legal questions.[289] The great debate over *Chevron*'s soul thus ended with nary a whimper, much less a bang.

V. SO WHAT?

The debate is effectively settled whether deference is generally due to agency legal interpretations even regarding pure or abstract legal questions, but *Chevron* continues to be a contentious subject across a wide range of other issues for which the resolutions are much less likely, clear, or both. We still do not know what it means for a statute to be "clear".[290] (That is not altogether surprising, for we still do not have consensus on what it means to talk about the meaning of a statute, clear or otherwise). Step two of *Chevron* remains a mystery, beyond the observation that agencies usually win when they get to it. Reconciling *Chevron* deference with prior judicial interpretations of statutes has plagued *Chevron* from an early time,[291] and it continues to splinter the Court today.[292] Figuring out to which agency

287. *See* Negusie v. Holder, 555 U.S. 511, 531, 534, 538 (2009) (Stevens, J., joined by Breyer, J., concurring in part and dissenting in part). The Fourth Circuit, in *Barahona v. Holder*, distinguished an issue on the merits of immigration law and upheld the analysis from *Negusie* "under the familiar *Chevron* standard." Barahona v. Holder, 691 F.3d 349, 354 (4th Cir. 2012).

288. *See id.* (explaining the distinction as being "more faithful to the rationale" of *Chevron*).

289. *See* INS v. Aguirre-Aguirre, 526 U.S. 415, 424–25 (1999) ("[W]e recognized in *Cardoza-Fonseca* . . . that the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication.'").

290. *Compare* Dole v. United Steelworkers of Am., 494 U.S. 26, 38 (1990) (suggesting that the meaning is clear when a particular interpretation is supported by very strong evidence), *with* Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 696–97 (1991) (suggesting that the meaning is clear when it emerges fairly obviously).

291. *See* Mesa Verde Constr. Co. v. N. Cal. Dist. Council of Laborers, 861 F.2d 1124, 1134–35 (9th Cir. 1988) (en banc) (referencing the conflicting precedent regarding agency deference).

292. *See* United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1842–44 (2012) (rejecting petitioner's proposed argument that as an alternative to *Chevron* deference, courts may adopt their prior construction of an unambiguous statutory term to trump an

interpretations the *Chevron* framework applies has produced a doctrine so perplexing that lower courts labor to avoid dealing with it.[293] One could easily fill an entire article simply listing, much less trying to resolve, the many important operational questions that still swirl about *Chevron*.

The history we have spun yields an important consequence for modern attempts to wrestle with these questions: parsing the prose of the *Chevron* decision for answers is a terrible idea. The *Chevron* decision did not spawn the *Chevron* doctrine, so there is no reason to expect it to clarify it. It would likely descend down very unproductive paths—as arguably happened with formulating the *Chevron* inquiry as a two-step approach (because that is how Justice Stevens wrote it in *Chevron*) rather than as a unitary, one-step inquiry into the reasonableness of the agency's interpretation (as common sense would dictate).[294] The fewer references to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, the better.

If one should not read the *Chevron* decision to find the *Chevron* doctrine's proper mechanics, what decision should one read? There is no answer. The *Chevron* doctrine grew, and continues to grow, organically over a series of decisions, none systematically addressing the fundamental issues at its core. Even read as a whole, the corpus of decisions fails to come to conform or answer many important questions. For example, Professor Lawson has been waiting for almost thirty years for a court to openly acknowledge there is some uncertainty about how to determine the "clear" meaning of a statute—and he is still waiting patiently. If the post-*Cardoza-Fonseca* battle had come to a real head, we might have seen some decisions clarifying—for good or ill[295]—some of the fundamental issues surrounding *Chevron*. But the process by which the *Chevron* framework insinuated itself

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agency's new construction of the same term); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (acknowledging the lower court had incorrectly applied a different framework than that of *Chevron*).

293. *See* United States v. Mead Corp., 533 U.S. 218, 240–43 (2001) (Scalia, J., dissenting) (arguing the Court further complicated *Chevron* by construing it to effectually implement "th'ol' 'totality of the circumstances' test"); Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1464 (2005) (positing *Mead* and *Barnhart v. Walton*, 535 U.S. 212 (2002), as offering two alternatives for interpreting *Chevron*, with courts left to choose between the two).

294. *See* Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 218 n.4 (2009) (proposing that an agency's reasonable interpretation can prevail without requiring the Court to inquire whether Congress had directly spoken to the contested issue).

295. *See Mead Corp.*, 533 U.S. at 239 (Scalia, J., dissenting) (refuting as not actually a step forward the majority's clarification of when agency interpretations fit within the framework of *Chevron*); *see also* Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 295 (2009) (Scalia, J., concurring in part and concurring in the judgment) (labeling *Mead Corp.*'s complication of the *Chevron* framework application as an "irrational fillip").

into the law effectively guaranteed a search for canonical decisions would fail.

What about reference to the underlying goals and purposes of *Chevron*? That would be effective if there were consensus about those goals and purposes, but there is not. What is the *Chevron* doctrine trying to accomplish? Is it trying to make the best guess about congressional intent regarding allocation of interpretative authority?[296] Is it reflecting that, in a post-delegation-doctrine world, most inquiries that look like statutory interpretation are really policy determinations?[297] Is it about making judicial review simpler, even though courts never said that openly? All of the above? The underlying rationale(s) for *Chevron* remain obscure, again partly because of its origins.

We do not propose any particular method for resolving questions about *Chevron* methodology. We simply point out that the *Chevron* decision itself is a dead end. We think it ought to be a dead letter as well.

296. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 454–55 (1987) (Scalia, J., concurring in the judgment) (arguing that the Court frequently misinterprets *Chevron*).

297. *See* Ashton v. Pierce, 716 F.2d 56, 61–62 (D.C. Cir. 1983) (interpreting congressional intent in favor of a policy to protect children from lead-based paint).

BEYOND THE USUAL SUSPECTS: ACUS, RULEMAKING 2.0, AND A VISION FOR BROADER, MORE INFORMED, AND MORE TRANSPARENT RULEMAKING

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TABLE OF CONTENTS

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INTRODUCTION

In an ideal world, administrative agencies would develop regulations in an informal rulemaking process that would be transparent and efficient and that included broad input from the public, or an entity advocating for the public, as well as the regulated community. Instead, critics assert that the informal rulemaking process is opaque[1] and is dominated by regulated entities and industry groups, rather than public interest groups.[2] The process does not encourage a dialogue among the commenters or between the commenters and the agency.[3] Indeed, regulated entities are frequently strategic in the timing of their comments, withholding comment until the end of the comment period when it will be difficult for other commenters to respond to their input.[4] Further, critics complain that comments have little impact on the content of regulations adopted by agencies.[5] In addition, the process is time-consuming and costly for agencies.[6]

Although the Administrative Procedure Act (APA) only imposes minimal public participation requirements on the informal rulemaking process,[7]

1. *See* Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L.J. 893, 896 (2006); *cf.* Cynthia R. Farina et al., *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 PACE L. REV. 382, 384–86 (2011) (noting that although rulemaking substantially affects the general public, very few "take advantage of their right to review the information" and their "right to comment").

2. *See* Steven J. Balla, *Public Commenting on Federal Agency Regulations: Research on Current Practices and Recommendations to the Administrative Conference of the United States*, ADMIN. CONFERENCE OF THE U.S., 1 n.5 (Mar. 15, 2011), *available at* http://www.acus.gov/wp-content/uploads/downloads/2011/04/COR-Balla-Report-Circulated.pdf; Farina et al, *supra* note 1, at 423–24; Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 245–67 (1998); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 128–38 (2006) (evidencing the higher and more active participation of non-public interest groups).

3. *See* Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 436–37 (2004) (characterizing the participatory nature of the public as nonexistent); *cf.* Balla, *supra* note 2, at 1 (arguing that comments lack weight and do not sway agencies).

4. *See* Farina et al., *supra* note 1, at 418–19 (contending that savvy participants delay comments favorable to their respective positions); Balla, *supra* note 2, at 30–32 (noting that the latter days of the comment period had the most comments).

5. *See* Balla, *supra* note 2, at 1 n.7 (citing William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66, 66–80 (2004)).

6. *See* Noveck, *supra* note 3, at 436 (discussing the reality that despite the public's right to be involved, the public is passive and the process is overwhelming to agencies).

7. *Id.* at 438, 449. The Administrative Procedure Act (APA) requires agencies to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation" and to "incorporate in the rules adopted a concise general statement of their basis and purpose." 5

broader, more informed, and more transparent public participation in rulemaking could provide significant benefits to agencies, as well as the public. First, broader and more informed public participation should produce "better" rules in that the rules are more rational and defensible because the agencies receive data and identify issues that they might not otherwise have considered adequately.[8] Broader, more informed, and more transparent public participation also increases the accountability of agencies and should instill a sense of legitimacy in the final rules that they adopt.[9] Further, the public and the regulated community are more likely to understand[10] and accept agencies' rules and are "less likely to challenge them when [they have] been heavily involved in the decisionmaking process and feel[ ] that the agency has listened to, and addressed, [their]

U.S.C. § 553(c) (2006). Critics argue, though, that the law does not provide a framework for effective public participation. *See* Noveck, *supra* note 3, at 438, 449 (suggesting that the APA does not create meaningful opportunities for the public to participate in the rulemaking process); *see also* Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 2010 WIS. L. REV. 297, 317–23 (noting that while numerous federal laws provide for "public participation" or "public involvement," few provide concrete definitions for those terms or frameworks to facilitate effective public participation).

8. *See* Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695, 702–07, 735 (2007) (intimating that agencies have narrow views and that the public may offer innovative ideas that the agencies overlooked); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 402 (2007) (advocating a focus on regulatory beneficiaries rather than regulated entities); Noveck, *supra* note 3, at 458–59 (rationalizing that broad participation promotes improving, even in a minor fashion, a proposed rule). Agencies would be able to review data from a broad range of experts, rather than simply relying on the regulated community, and could more readily access "local knowledge," which Professor Cynthia Farina describes as "the first-hand experience of those who deal directly with the objects and targets of rulemaking." Farina et al., *supra* note 1, at 423–26. Professor Bill Funk is less optimistic about the benefits of broader public participation, wondering whether "it [is] realistic to think that ordinary people with jobs to do, families to attend to, and lives to lead will be able to provide helpful information to an agency engaged in a rulemaking." Bill Funk, *The Public Needs a Voice in Policy. But Is Involving the Public in Rulemaking a Workable Idea?*, CPR BLOG (Apr. 13, 2010), http://www.progressivereform.org/CPRBlog.cfm?idBlog=F74D5F86-B44E-2CBB-ED1507624B63809E.

9. *See* Johnson, *supra* note 8, at 703; Noveck, *supra* note 3, at 436; *see also* Balla, *supra* note 2, at 1 (citing the APA as advancing a "participatory environment"); Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 ADMIN. L. REV. 277, 289 (1998) (reiterating the importance of public input); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 202 (1997).

10. *See* Nina A. Mendelson, Foreword, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1344 (2011).

concerns."[11] Even if broader, more informed, and more transparent public participation in the rulemaking process does not eliminate challenges to agencies' rules, it provides agencies with more information about the level of support for, or opposition to, those rules during their development.[12] The public also derives clear benefits from broader, more informed, and more transparent participation. A reformed process would be more democratic,[13] strengthen individual autonomy,[14] and reduce the opportunity for agency "capture[ ] by the regulated community or other special interest groups."[15] Under a pluralist or civic republican vision of agencies, public participation is an essential check on the broad congressional delegation of policymaking authority to agencies.[16]

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11. Johnson, *supra* note 8, at 735; *see also* David L. Markell, *Understanding Citizen Perspectives on Government Decision Making Processes as a Way to Improve the Administrative State*, 36 ENVTL. L. 651, 677–78 (2006) (proposing that irrespective of a negative outcome, a person is more likely to accept it if the procedural process was fair); Noveck, *supra* note 3, at 459 (averring the notion that public participation encourages rule compliance).

12. Even though agencies do not promulgate rules based on a popular vote, *see infra* note 115 and accompanying text, agencies may find this information useful in determining how to prioritize the development and enforcement of rules and how to react to concerns voiced by Congress regarding regulatory proposals. *See* Farina et al., *supra* note 1, at 428–29 (employing Department of Transportation (DOT) as an example of how the rulemaking process assisted it in addressing issues the public had raised).

13. *See* Johnson, *supra* note 8, at 735 (advancing the benefits of direct participation by citizens); Mendelson, *supra* note 10, at 1343 (suggesting the rulemaking process curbs agencies from overreaching); Noveck, *supra* note 3, at 459 (promoting public consultation as an egalitarian doctrine); *see also* Mathew D. McCubbins & Daniel B. Rodriguez, *When Does Deliberating Improve Decisionmaking?*, 15 J. CONTEMP. LEGAL ISSUES 9, 13–14 (2006) (advocating a deliberative process).

14. *See* Johnson, *supra* note 8, at 735 (emphasizing the fundamental notion of self-governance); Noveck, *supra* note 3, at 458 (advocating the public's right to be independent).

15. Johnson, *supra* note 8, at 703.

16. While agencies were once viewed as mere "transmission belts," applying their technical expertise to well-defined statutory questions, most academics have long recognized that Congress delegates broad policymaking authority to agencies. *See* Mendelson, *supra* note 10, at 1347 (intimating the headless fourth branch of the federal government as possessing extensive, often uninhibited, statutory power). As Professor Nina Mendelson explains, in a pluralist model of agency decisionmaking, when Congress has not constrained an agency's decisionmaking, the agency's decision is democratic "to the extent the agency hears [from] and considers, [even reconciles,] a wide variety of interests." *Id.* at 1349–50. Under a civic republican model, without congressional constraints, an agency's decision is legitimate "to the extent it facilitates and responds to democratic deliberation." *Id.* at 1350. While pluralist theorists view the public interest as an "aggregation of preferences of stakeholder[s]," civic republican theorists view the "public interest as the result of a democratic dialogue in which citizens fully disclose their interests and are open to hearing others' reasons and revisiting their own views." *Id.* at 1350–51. Under either model, though, broad, informed, and transparent public participation contributes to a democratic process. *Id.* at 1351.

Broader, more informed, and more transparent public participation is not, however, costless. Reforms are likely to make the rulemaking process more expensive and less efficient for agencies, even though they could provide the significant benefits outlined above.[17]

This Article examines two avenues of rulemaking reform that could yield broader, more informed, and more transparent rulemaking. First, the Article focuses on "e-rulemaking" efforts and the migration of the informal rulemaking process to the Internet.[18] So far, those efforts have been slow and have provided marginal improvements in public participation, as the preexisting process has simply been moved online instead of adapted to fit the new medium.[19] The next generation of e-rulemaking proposals (Rulemaking 2.0) is more ambitious, but may result in significant costs and delays in the rulemaking process if implemented on a wide scale.[20] At the same time that agencies are implementing technological changes in the rulemaking process, a resurrected Administrative Conference of the United States (ACUS) has issued recommendations for structural changes to the informal rulemaking process, including encouraging agencies to provide adequate time for public comments, to post comments in a timely manner, to use reply comment periods (where appropriate), and to provide the public with guidance regarding effective commenting.[21] ACUS has also issued recommendations regarding e-rulemaking that are designed to reduce resource demands on agencies when adopting rules through electronic means.[22] However, ACUS does not recommend any changes to the APA[23] and, on the whole, the Conference's recommendations are relatively modest.[24] It is likely, therefore, that the benefits that they produce will be similarly modest. More significant reforms are necessary to achieve broader, more informed, and more transparent public participation.

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17. *See infra* Parts IV.B., VI.B.

18. *See infra* Part III.

19. *See infra* note 89 and accompanying text.

20. *See infra* notes 215–222 and accompanying text.

21. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (ACUS) RECOMMENDATION 2011-2 *Rulemaking Comments*, 3–5 (June 16, 2011) [hereinafter ACUS RECOMMENDATION 2011-2], *available at* http://www.acus.gov/wp-content/uploads/2011/10/Recommendation%202011-2%20(Rulemaking%20Comments).pdf.

22. *Id.*

23. *See id.* at 2 (commenting that the APA's comment procedures are "fundamentally sound").

24. *See infra* Parts IV–V.

I. BROADER PARTICIPATION

A. Who Participates and Who Could Participate?

In the vast majority of informal rulemaking proceedings, very few persons or organizations submit comments. Occasionally, however, proposed rules will generate significant public comment. For instance, approximately 95,000 comments were submitted for a 1991 rule addressing Medicare physician fees and over 250,000 comments were submitted for a 1997 rule addressing standards for organic products.[25] More recently, hundreds of thousands of comments were submitted for "revisions to the Federal Communications Commission's [ ] rules on the concentration of media ownership, an [Environmental Protection Agency (EPA)] rulemaking on mercury emissions," and a United States Forest Service rule that banned "road construction in wilderness areas."[26] But those rulemakings are the exception rather than the rule. Studies of rulemaking proceedings of several different agencies over several different time periods have consistently disclosed that fewer than thirty-five comments are submitted for most rules.[27]

Regulated entities, rather than regulatory beneficiaries or members of the public at large,[28] usually submit the very few comments that are submitted in most rulemaking proceedings. For instance, "[a] study of . . . significant EPA hazardous waste rules from 1989 to 1991 found that industry filed nearly 60 percent of all the comments" on the rules and

25. *See* Balla, *supra* note 2, at 25–26 (rationalizing that these extensive comments indicate the nature of the investment that stakeholders have in the rules).

26. Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 954 (2006); *see also* Mendelson, *supra* note 10, at 1345 (noting that 670,000 comments were submitted on the United States Fish and Wildlife Service's rule regarding the listing of the polar bear as a threatened species under the Endangered Species Act).

27. *See, e.g.*, Coglianese, *supra* note 26, at 950 (study of seventy-two hazardous waste rules issued by the Environmental Protection Agency (EPA) in 1989 found an average of twenty-five comments for the nine "significant" rules and six comments for the others); Golden, *supra* note 2, at 250–64 (1998) (study of eleven rules issued by EPA, the National Highway Traffic Safety Administration, and the Department of Housing and Urban Development between 1992 and 1994 found a median of twelve comments per rule); West, *supra* note 5, at 68 (study of forty-two rules issued by fourteen agencies in 1996 found a median of thirty-three comments per rule); *see also* Balla, *supra* note 2, at 25–26 (study of 463 actions completed by DOT during 1995–1997 and 2001–2003 found a median of thirteen comments per rule). Steven Balla found similar results when he examined all of the rules that were published in the Federal Register between January 1, 2011 and February 14, 2011. *Id.* at 26–27.

28. *See* Mendelson, *supra* note 10, at 1357; Noveck, *supra* note 3, at 457.

"individual citizens submitted only about 6 percent."[29] Other studies revealed a similar lack of participation by individual citizens.[30]

For all of the reasons outlined above, it would be beneficial to broaden the scope of persons and entities that are commenting on rules and participating in the rulemaking process. As Professor Cynthia Farina notes, the new information that agencies could acquire through broader participation includes "local knowledge . . . disinterested expert input—data and other knowledge from experts beyond those produced by interested regulatory parties; [ ] [and] better vetted comments."[31] Broader participation should lead to "vigorous conflicts between interest groups that draw out the most important issues and test the reliability of key facts."[32]

Some critics express skepticism that additional commenters will raise issues or points that existing commenters have not raised or that the agency has not already considered.[33] With regard to comments that address the public interest, Professor Stuart Minor Benjamin notes that since agencies are supposed to act in the public interest, one would presume that "the agency itself may have thought of the points that the additional individual participants would make."[34] Benjamin and others also question whether agencies are truly interested in soliciting public comments from anyone by the time a rule has reached the proposed rulemaking stage, or whether the agency has already decided most of the important issues regarding the rule based on conversations with regulated entities prior to the proposed rulemaking stage.[35] Signals that agencies send regarding their openness to comments play some role in limiting public participation in rulemaking, but there are a wide variety of barriers to broader public participation.

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29. Coglianese, *supra* note 26, at 951.

30. *See* Johnson, *supra* note 8, at 735 n.205. There are, however, some rulemakings that have generated significant numbers of comments from ordinary citizens, just as there are some rulemakings that have generated significant numbers of comments though most do not. *See* Coglianese, *supra* note 26, at 952–53.

31. Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 407 (2011) (internal quotation marks omitted).

32. Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 41 ENVTL. L. REP. NEWS & ANALYSIS 10,732, 10,733 (2011).

33. *See* Benjamin, *supra* note 1, at 911.

34. *Id.*

35. *Id.* at 912–13. Similarly, Professor Beth Noveck argues that

> [t]he APA's spare public consultation provisions have institutionalized the deep-seated belief that the public, especially unorganized individuals or small interest groups, is an irritant—the pea to the agency's princess—unduly influencing and burdening the expert who alone possesses the knowledge and impartial sangfroid to govern in the public interest.

See Noveck, *supra* note 3, at 450 (footnotes omitted).

B. Barriers to Broader Public Participation

One of the most significant barriers to broader public participation in rulemaking is a lack of information. In some cases, nonparticipants may not be aware that an agency is conducting a rulemaking on an issue that impacts them and that they can get involved in the process.[36] In many cases, though, nonparticipants lack information about the substance of the agency's proposed rulemaking or the issues surrounding the rulemaking that they need in order to make informed comments on the proposal.[37] Regulated entities, on the other hand, have that information readily available.[38] The technocratic tone of agency rulemaking may also intimidate potential commenters who are not regulated entities, convincing them that they lack the expertise to provide worthwhile comments.[39] Nothing in the APA requires agencies to provide broader notice of their proceedings or reach out to broader constituencies to facilitate participation.[40]

While a lack of information may present a barrier to broader participation, so too can information overload. The sheer volume of information provided to agencies and accessible to the public in some cases may overwhelm potential commenters and discourage them from providing any comment in the rulemaking process.[41] Professor Wendy Wagner

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36. *See* Farina et al., *supra* note 31, at 417–18; Johnson, *supra* note 8, at 735; Noveck, *supra* note 3, at 452. Although agencies issue press releases about important rulemakings and communicate directly with major regulated entities, associations, and advocacy groups regarding those rulemakings, those efforts often do not reach many affected individuals and entities. *See* Farina et al., *supra* note 31, at 417–18. Even when potential commenters are aware that an agency is developing a rule, they may not understand how the process works or how to provide effective comments. *Id.* at 417.

37. *See* Johnson, *supra* note 8, at 735; Noveck, *supra* note 3, at 457.

38. *See* Mendelson, *supra* note 10, at 1358; Noveck, *supra* note 3, at 457.

39. *See* Noveck, *supra* note 3, at 454.

40. *See* Bingham, *supra* note 7, at 317–23.

41. *See* Farina et al., *supra* note 31, at 418; *see also* Wagner, *supra* note 32, at 1351–53. Professor Wagner points out that the voluminous submissions of regulated entities are

> bulging with undigested facts . . . and include redundancies and peripheral issues that must be culled out; discussions pitched at too specialized a level or demanding an unreasonable level of background information . . . ; and discussions delving into very intricate details, many of which are of trivial significance.

Id. at 1335. She notes that

> [p]luralistic processes integral to administrative governance threaten to break down and cease to function when an entire, critical sector of affected interests drops out due to the escalating costs of participation. Instead of presiding over vigorous conflicts between interest groups . . . , the agency may stand alone, bracing itself against a continuous barrage of information from an unopposed, highly engaged interest group.

argues that the structure of the APA and judicial interpretations of the requirements of the Act encourage regulated entities to flood agencies with information to gain control over the process.[42] She notes that administrative proceedings lack the filters that exist in judicial and other proceedings.[43]

Resource limitations are another barrier to participation. Frequently, potential commenters may lack the financial resources, technical resources, or time to provide effective input on agency rulemaking.[44] Similarly, as expected under classical collective action theory, many potential commenters may not be sufficiently motivated to get involved in the rulemaking process due to the costs of participation or may decline to provide comments based on the hope that they can "free ride" on the comments of someone else.[45]

As noted above, some potential commenters may choose not to participate in the rulemaking process because they feel that their comments are unlikely to influence the agency to make changes to the proposed rulemaking. In some cases, the skepticism arises because the commenters misunderstand the nature of the rulemaking process and believe that their

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Id. at 1332.

42. *See* Wagner, *supra* note 32, at 1353–55. Professor Wagner refers to the phenomenon as "information capture." *Id.* at 1329. She notes that administrative law principles encourage excessive commenting because persons who intend to challenge agency rulemakings must raise any concerns that will be the subject of later challenges during the rulemaking process and there are no restrictions on the size, number, detail, or technicality of issues that comments can raise. *Id.* at 1355–65. She also notes that the requirement that agencies provide a concise general statement of the basis and purpose for their rules, coupled with the judicial "hard look" standard of review, leads agencies to create very detailed and technical records of decisions that address the comments raised in minute detail. *Id.* at 1355–62. She argues that such a rule may be "more likely to escape rigorous judicial scrutiny and . . . discourage thinly financed parties from taking on the rule as a litigation project." *Id.* at 1352. She also suggests that because courts limit the changes that an agency can make to a rule between proposed and final rulemaking by requiring that the final rule be a "logical outgrowth" of the proposed rule, agencies tend to engage regulated entities and other readily identifiable interested parties prior to the proposed rulemaking, in a non-transparent manner "even though this might defeat the idea of ensuring balanced and vigorous participation by a diverse set of interest groups." *Id.*

43. Professor Wagner notes that while courts frequently limit the pages, margins, and font size for briefs and limit the time allocated for oral arguments, administrative law places no such filters on the comments provided in the rulemaking process. *Id.* at 1330–31.

44. *See* Johnson, *supra* note 8, at 735; Mendelson, *supra* note 10, at 1357–58; Noveck, *supra* note 3, at 455–58.

45. *See* Mendelson, *supra* note 10, at 1358; s*ee also* Coglianese, *supra* note 26, at 966–67. In the regulatory context, regulated entities tend to be more concentrated and incur fewer costs to organize collectively while regulatory beneficiaries are diffuse and, therefore tend to incur substantial costs to organize collectively. *See* Mendelson, *supra* note 10, at 1358.

comments are votes and that the agency should make a decision based on the will of the majority. When an agency adopts a rule that runs counter to the popular will, commenters who were involved in the process may be reluctant to take the time to express their views in future proceedings.[46] Even if persons have not submitted comments in prior proceedings that they felt were ignored, they may be reluctant to participate in the rulemaking process if they believe that the agency is "captured" by regulated entities,[47] or that commenting is futile because the agency has already made up its mind on the direction it plans to take in a rule by the time the rule reaches the proposed rulemaking stage.[48] Agencies frequently foster these perceptions among commenters by soliciting input from regulated entities and a small group of interested parties prior to issuing proposed rules.[49]

II. EFFECTIVE PARTICIPATION

A. What Types of Comments Do Commenters Submit and How Effective Are These Comments?

Decades ago, Professor E. Donald Elliott wrote: "Notice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions—a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues."[50] As noted above, agencies frequently solicit input from regulated entities and other interest groups prior to, or outside of, the informal rulemaking process.[51] Cynics might argue, therefore, that public comments have very little impact on the development of agency rules, and that the real decisionmaking process lacks transparency.

However, because this Article is examining reforms of the rulemaking

46. *See* Mendelson, *supra* note 10, at 1346, 1373. Professor Mendleson notes that federal agencies finalized rules that ran counter to the overwhelming weight of public comments in rulemakings regarding restrictions on snowmobile use in Yellowstone National Park, jet ski use in Assateague National Seashore, and media ownership limits imposed by the Federal Communications Commission (FCC). *Id.* at 1364–65; *see also* Farina et al., *supra* note 31, at 430–32 (describing the manner in which an electronic rulemaking pilot project incorporated voting as a means to engage participants).

47. *See* Benjamin, *supra* note 1, at 913; Noveck, *supra* note 3, at 456.

48. *See* Mendelson, *supra* note 10, at 1368–69; Noveck, *supra* note 3, at 452, 455; Wagner, *supra* note 32, at 1352.

49. *See* Benjamin, *supra* note 1, at 912; Mendelson, *supra* note 10, at 1369; Noveck, *supra* note 3, at 457.

50. *See* E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992).

51. *See* Noveck, *supra* note 3, at 457; Mendelson, *supra* note 10, at 1369.

process to expand public participation and make it more effective, it proceeds from a premise that agencies can be, and will be, influenced by comments raised during the informal rulemaking process. After all, the APA requires agencies to consider "the relevant matter presented" in the informal rulemaking proceedings and to support final rules with "a concise general statement of their basis and purpose."[52] The D.C. Circuit has stated that "[c]onsideration of comments as a matter of grace is not enough. It must be made with a mind that is open to persuasion."[53] Furthermore, in his research that formed the basis for ACUS's recent recommendations on public commenting, Steven Balla cited several rulemakings where public comments had a significant outcome on the shape of the final rule.[54] To determine how the process might be reformed to provide opportunities for broader and more effective public participation, it is useful to examine the type of comments that agencies typically receive during the rulemaking process and to identify which comments are likely to have the greatest impact on agencies' decisionmaking.

Agencies tend to be more responsive to comments from regulated entities and to other "repeat players" in the rulemaking process because they have the type of information that the agencies need to develop their rules and they are the entities that are most likely to sue if they are disappointed with the final rules.[55] In most rulemaking proceedings, when regulated entities, trade associations, and similarly interested parties submit comments, the comments tend to address scientific and technical issues and the commenters often provide data and analyses to support their comments.[56] Agencies tend to give such comments significant weight in determining the substance of the final rule[57] because they recognize that these commenters are more likely to challenge their decision in court if they adopt a rule that these commenters oppose[58] and because they recognize that courts will likely invalidate their rule under "hard look" or "arbitrary and capricious" review if they do not adequately address the issues raised in

52. 5 U.S.C. § 553(c) (2006).

53. Advocates for Hwy. & Auto Safety v. Fed. Hwy. Admin., 28 F.3d 1288, 1292 (D.C. Cir. 1994) (alteration in original) (citation omitted) (internal quotation marks omitted).

54. *See* Balla, *supra* note 2, at 33.

55. *Id.* at 33–35. Balla notes, though, that it is often difficult to attribute specific changes in a regulation to specific comments raised by participants in the comment period. *Id.* at 35.

56. *See* Wagner, *supra* note 32, at 1351–53.

57. *See* Mendelson, *supra* note 10, at 1362; Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 414 (2005); *see also* Balla, *supra* note 2, at 33–34.

58. *See* Mendelson, *supra* note 10, at 1370.

these comments.[59] Agencies will accord similar deference to comments that raise legal issues, as the agency's final rule could be invalidated on the grounds that it is *ultra vires*, "arbitrary and capricious," or otherwise illegal.[60] It is not surprising that agencies consider the potential for litigation in designing their final rules. For years, scholars, journalists, and government officials have asserted that more than 80% of the rules that EPA issues every year are challenged in court.[61]

While regulated entities, trade associations, and similar interested parties submit comments that tend to address scientific and technical issues, laypersons, or persons or entities outside of the cohort identified above, frequently submit comments that raise issues relating to values and policy. To the extent that commenters raise such issues, agencies tend to give those comments significantly less weight.[62] This is true regardless of the volume of comments in support of a specific value or policy position.[63]

Professor Nina Mendelson suggests that there are several reasons why agencies are reluctant to give much weight to "value-laden" comments. First, she notes that agencies frequently attempt to resolve most of the major policy- or value-laden issues prior to the notice of proposed rulemaking so that it will not be necessary to make fundamental changes to a rule after it is proposed, as the agency would have to begin the rulemaking process over if the final rule were not deemed to be a "logical outgrowth" of the proposed rule.[64] Second, she notes that it is easier for agencies to reject value-laden comments and to provide less explanation for those decisions under applicable standards of judicial review than it is to reject or give short shrift to technical or scientific comments.[65] Third, she

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59. *See id.*; Wagner, *supra* note 32, at 1351–53.

60. *See* Mendelson, *supra* note 10, at 1360.

61. *See* Johnson, *supra* note 9, at 287; Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1296 (1997) (including, as an appendix, a bibliography of citations to the 80% figure). My own empirical research of EPA rulemakings finalized between 2001 and 2005 found that 40% of the significant rules finalized during that time period were challenged in court and 75% of the "economically significant" rules were challenged. *See* Stephen M. Johnson, *Ossification's Demise? An Empirical Analysis of EPA Rulemaking from 2001–2005*, 38 ENVTL. L. 767, 785 (2008) [hereinafter Johnson, *Ossification's Demise?*).

62. *See* Mendelson, *supra* note 10, at 1362; *see also* Balla, *supra* note 2, at 33–34.

63. *See* Mendelson, *supra* note 10, at 1363. Professor Mariano-Florentino Cuéllar argues, though, that based on the broad delegation of authority in many statutes, agencies frequently can make a broad range of policy decisions, so that most policy or "value-laden" comments raise issues that could fit within the agencies' legal authority. *See* Cuéllar, *supra* note 57, at 414.

64. *See* Mendelson, *supra* note 10, at 1368–69.

65. *Id.* at 1370. Even when there are significant numbers of value-laden comments, courts do not view rulemaking as a process in which "the majority of commenters prevail by

notes that since most value-laden comments are submitted by laypersons, agencies often feel that it is less likely those commenters will challenge the agency's decision in court than if the comments were submitted by regulated entities.[66] Finally, she suggests that resource constraints may encourage agencies to give minimal attention to responding to value-laden comments.[67] Even if agencies are persuaded by the policy- or value-laden comments, they are reluctant to admit that their decision was based on those factors, and, eschewing transparency, will frequently justify their decision based on other scientific, technical, or legal bases.[68]

B. Barriers to Effective Commenting

To the extent that persons other than regulated entities, trade associations, and similar repeat players engage in the commenting process, they face several barriers to providing effective comments. Obviously, the reluctance of agencies to give serious weight to comments that address values and policy issues presents a major barrier to laypersons and persons who do not routinely participate in the rulemaking process in formulating comments that will influence the outcome of the process.

Since agencies will tend to focus more heavily on scientific, technical, and legal comments, information barriers can prevent laypersons and non-repeat players from submitting influential public comments, just as those barriers may prevent them from participating in the process at all.[69] Unlike regulated entities, laypersons and persons who do not routinely participate in the rulemaking process often lack knowledge about (1) many of the issues that the agency is considering in developing its rules, (2) the information and data that the agency is relying on in developing its rules, (3) the limits of the agency's discretion in formulating its rules, and even (4) the process by which the agency makes its rules.[70] This information deficit makes it difficult for those persons to submit the scientific, technical, or legal comments that carry the most weight with agencies, and to provide the data and studies to support those types of comments.[71]

Similarly, just as financial limitations may prevent persons other than regulated entities, trade associations, and similar repeat players from

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the sheer weight of numbers." *Id.*

66. *Id.*

67. *Id.* at 1371.

68. *See* Benjamin, *supra* note 1, at 908; Mendelson, *supra* note 10, at 1373.

69. *See supra* notes 36–38.

70. *See* Farina et al., *supra* note 31, at 395, 417–18; Johnson, *supra* note 8, at 735; Noveck, *supra* note 3, at 452, 455, 457–58.

71. *See* Noveck, *supra* note 3, at 457 ("Most public comments are of little value and overburden the regulator with excessive paperwork.").

participating in the commenting process, those limits will prevent them from formulating, or hiring experts to formulate, the scientific, technical, and legal comments that carry the most weight with agencies.[72]

Those financial and information barriers are exacerbated when regulated entities engage in information capture by overloading agencies with data, studies, and comments in the rulemaking process.[73]

The structure of the commenting process also reduces the transparency of the process and the effectiveness of comments, regardless of whether the comments are provided by regulated entities, repeat players, or laypersons. The public comment period could, in theory, provide an opportunity for a dialogue and interchange between commenters and the agency, as well as among commenters. This could improve the accuracy of the information provided to agencies and identify areas of consensus among participants and the agency.[74] However, that has rarely happened in the past.[75] Until the evolution of e-rulemaking, in most cases, commenters were not even aware of the issues raised by other commenters unless they examined the official docket in a records room of an agency office.[76] Furthermore, many commenters wait until the last minute of the comment period to submit comments, so that no other commenters will have an opportunity to respond to those comments.[77] Finally, due to the adversarial relationship between agencies and some parties, commenters may take extreme positions when submitting comments, even though they may be satisfied with a more moderate position in the final rule.[78]

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72. *See supra* notes 44–45.

73. *See supra* note 43.

74. *See* Balla, *supra* note 2, at 14.

75. *Id.* at 1 n.6; Noveck, *supra* note 3, at 436–37.

76. *See* Balla, *supra* note 2, at 14; *see also* Jeffrey S. Lubbers, *A Survey of Federal Agency Rulemakers' Attitudes About E-Rulemaking*, 62 ADMIN. L. REV. 451, 454 (2010); Mendelson, *supra* note 10, at 1345–46; Benjamin, *supra* note 1, at 908.

77. *See* Balla, *supra* note 2, at 30. Reviewing several rulemakings by DOT and the Animal and Plant Health Inspection Service, Steven Balla found that one-third of all of the comments filed for the rules were filed on the last three days of the comment periods, and one-fifth of the comments were filed on the last day of the comment periods. *Id.* at 30–31. Most of the comments addressing technical issues and providing analytical data were provided near the end of the comment periods. *Id.* at 31–32. Balla also found that one-fifth of the comments were filed within the first few days of the comment period, since "[s]ubmitting information at the outset of comment periods offers interested parties the opportunity to influence the nature of the arguments and evidence that are subsequently filed by other stakeholders and ultimately considered by agency decisionmakers." *Id.* at 31.

78. *See* Noveck, *supra* note 3, at 456.

III. EFFECT OF INITIAL E-RULEMAKING EFFORTS ON PUBLIC PARTICIPATION

Congress and the federal government began to address some of the barriers to public participation outlined above by launching e-rulemaking initiatives. Congress passed the E-Government Act of 2002 to increase transparency and access to government.[79] In the Act, Congress delegated to the Office of Management and Budget (OMB) the obligation to implement e-rulemaking.[80]

E-rulemaking has been defined as "the use of digital technologies in the development and implementation of regulations before or during the informal rulemaking process."[81] The centerpiece of the e-rulemaking system implemented at the federal level is Regulations.gov, a website where agencies post notices of proposed and final rulemaking, as well as background information about those rules. Regulations.gov also provides a forum for the public to post comments about the rules and read the comments posted by others.[82] All of that material can now be searched with one click of a mouse, and over 90% of agencies post their regulatory material on the website.[83] While Regulations.gov provides public access to the regulatory materials, the backbone of the federal e-rulemaking system is the Federal Docket Management System (FDMS), a website that is restricted to agency staff, where agencies are required to maintain electronic dockets for all of the materials related to rulemakings.[84]

Although several agencies implemented some forms of electronic rulemaking before Congress passed the E-Government Act,[85] the federal

79. Pub. L. No. 107-347, 116 Stat. 2899 (2002) (codified at 44 U.S.C. §§ 3601–3606 (2006)).

80. *Id.* § 206. The Office of Management and Budget (OMB) delegated authority for e-rulemaking to EPA's Office of Environmental Information. *See* Noveck, *supra* note 3, at 467.

81. *See* ACUS RECOMMENDATION 2011-2, *supra* note 21, at 1 (footnote omitted) (internal quotation marks omitted).

82. *See* REGULATIONS.GOV, http://www.regulations.gov (last visited Feb. 10, 2013). The E-Government Act requires agencies to accept comments electronically, see E-Government Act, Pub. L. No. 107-347, § 206(c), 116 Stat. at 2899, and requires that the government establish a website to provide access to material in electronic dockets for each rulemaking. *Id.* § 206(d). Regulations.gov also provides for e-mail notification and an RSS feed. *See* Bingham, *supra* note 7, at 314.

83. ACUS RECOMMENDATION 2011-2, *supra* note 21, at 2.

84. FDMS.GOV, http://www.fdms.gov (last visited Feb. 10, 2013); *see also* ACUS RECOMMENDATION 2011-2, *supra* note 21, at 1. In addition, electronic docketing significantly reduces costs for agencies. *Id.* at 2.

85. *See* Farina et al., *supra* note 31, at 402–03; *see also* Noveck, *supra* note 3, at 472 (noting that DOT managed its dockets electronically beginning in 1995 and the agency has made those dockets available on the Internet since 1997).

government has centralized and standardized e-rulemaking with Regulations.gov and the FDMS.[86] Although e-rulemaking could also encompass "hosting public meetings online or using social media, blogs, and other web applications to promote public awareness of and participation in regulatory proceedings,"[87] or efforts to reach out and provide compliance assistance to regulated entities,[88] most of the federal efforts thus far have focused on moving the paper processes of notice-and-comment online, instead of adapting and transforming the processes to take advantage of the tools provided by technology.[89]

Although the e-rulemaking efforts so far have been evolutionary rather than revolutionary, e-rulemaking could reduce many of the barriers to the broader, more effective, and more transparent public participation outlined above. First, e-rulemaking addresses the information deficit problem outlined above by making the rules, the rulemaking process, and supporting information that agencies rely upon in *developing* rules more accessible to the public.[90] The information is much easier to find and to search when it is accessible on the Internet than when it is stored in records rooms in agency offices.[91] In addition, agencies can increase the scope of notice provided regarding rules through the use of technology.[92] E-rulemaking reduces another barrier to public participation by reducing the cost of participation.[93] Government agencies also benefit from those cost savings.[94]

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86. *See* Bingham, *supra* note 7, at 314; Noveck, *supra* note 3, at 434. Over 170 rulemaking entities in fifteen cabinet departments, independent agencies, and commissions use the Federal Docket Management System (FDMS) and Regulations.gov. *See* Bingham, *supra* note 7, at 314. However, agencies are prohibited from developing more sophisticated databases and consequently the new federal system has been criticized, at times, as the "lowest common denominator." *Id.* Critics also lament the lack of transparency and public participation in development of the federal e-rulemaking system. *See* Noveck, *supra* note 3, at 434.

87. *See* ACUS RECOMMENDATION 2011-2, *supra* note 21, at 1.

88. *See* Noveck, *supra* note 3, at 492.

89. *Id.* at 466, 474; *see also* Bingham, *supra* note 7, at 314. Professor Noveck complains that e-rulemaking notices do not "enrich the information with links to other data or put it within the social context of rulemaking practice." *See* Noveck, *supra* note 3, at 474. She also notes that nothing in the design of the e-rulemaking process "reduces regulatory capture, fosters less adversarial posturing or encourages better informed participation or greater representation of those who are not participating in the process." *Id.* at 479.

90. *See* Benjamin, *supra* note 1, at 899; Johnson, *supra* note 9, at 304; Lubbers, *supra* note 76, at 453; *see also* Bridget C.E. Dooling, *Legal Issues in E-Rulemaking*, 63 ADMIN. L. REV. 893, 896 (2011).

91. *See* Noveck, *supra* note 3, at 473–74.

92. *See* Lubbers, *supra* note 76, at 453.

93. *See* Johnson, *supra* note 9, at 299–300.

94. *See* Dooling, *supra* note 90, at 896 (noting that a recent report estimated $30 million cost savings over five years).

Reducing the notice, information, and cost barriers should make it easier for persons to become aware of, understand, and provide comments on rules.[95]

The early e-rulemaking efforts have also made it easier for persons to find, read, and respond to the comments raised by others by making them accessible and searchable online during the comment period.[96] While this should improve the quality of comments, and could lead to a more collaborative process for developing rules in the long term,[97] e-rulemaking efforts alone cannot prevent commenters from submitting comments at the end of the comment period when it is difficult for anyone else to rebut or respond to the comments. Finally, e-rulemaking can make it easier for the public to receive notice of the final rules that are adopted and to monitor implementation of the rules.[98]

While the early e-rulemaking efforts have reduced barriers to participation to some degree, critics argue that the changes have done little to increase the diversity of commenters in the rulemaking process or to increase the number of comments submitted to agencies.[99] Based on his review of several empirical studies of rulemaking after the launch of Regulations.gov, Professor Cary Coglianese concluded that e-rulemaking efforts have not increased the number of comments submitted in most rulemaking proceedings.[100] Although a few recent proceedings have generated significant numbers of comments from individuals rather than regulated entities or other repeat players, Professor Coglianese and others point out that prior to e-rulemaking it was not unusual to find significant

95. *See* Johnson, *supra* note 9, at 304; Coglianese, *supra* note 26, at 945.

96. *See* Benjamin, *supra* note 1, at 898; Lubbers, *supra* note 76, at 453–54; Mendelson, *supra* note 10, at 1345.

97. *See* Lubbers, *supra* note 76, at 454; Benjamin, *supra* note 1, at 896–97.

98. Lubbers, *supra* note 76, at 453–54; *see* Benjamin, *supra* note 1, at 895–96.

99. *See* Benjamin, *supra* note 1, at 933; Coglianese, *supra* note 26, at 949. *But see* Cuéllar, *supra* note 57, at 414 (finding that comments from the public make up the vast majority of comments about some rulemakings since the launch of e-rulemaking); Lubbers, *supra* note 76, at 465 (noting that 72% of federal rulemakers surveyed in Professor Lubbers's study *felt* that e-rulemaking had led to an increase in public comments).

100. *See* Coglianese, *supra* note 26, at 952–54, 956–58. Coglianese cites (1) a study by Ioana Munteanu and J. Woody Stanley of seventeen DOT rulemakings in which the researchers concluded that most DOT rulemakings continued to receive only a few public comments after the launch of electronic docketing; (2) a study by John de Figueiredo of FCC proceedings, in which Professor de Figueiredo concluded that in 99% of the proceedings, the e-filing opportunity did not seem to cause an increase in individual or interest group participation in the proceedings; and (3) a study by Steven Balla and Benjamin Daniels of 450 DOT rules issued before and after the introduction of DOT's online rulemaking system, in which the researchers found that the patterns of commenting were roughly the same before and after the launch of online rulemaking. *Id.* at 956–58.

numbers of comments from individuals in isolated rulemaking proceedings.[101] Professor Coglianese argues that while e-rulemaking efforts have lowered some barriers to broader participation,

> it takes a high level of sophistication to understand and comment on regulatory proceedings. Moreover, even though information technology lowers the absolute cost of submitting comments to regulatory agencies, it also dramatically decreases the costs of a wide variety of entertainment and commercial activities that are much more appealing to most citizens.[102]

Professor Beth Noveck proposes an alternative explanation for the minimal increase in commenting. She suggests that the e-rulemaking efforts thus far have not reduced information barriers for most citizens because the rulemaking information is not well organized or easy to find. As a result, most citizens still lack information about the rulemaking process and how to engage in the process.[103]

Critics also complain that e-rulemaking has done little to improve the quality of public comments. Empirical studies of e-rulemaking demonstrate that most comments by individuals do not advance new arguments or data and that most comments from individuals are form letters or form letters with a few additional sentences but no new rationales, data, or arguments.[104] Based on a survey of federal agency officials engaged in rulemaking, Professor Jeffrey Lubbers found that 60% of the respondents indicated that they received the same amount of comments containing new useful information or arguments under e-rulemaking as they did before the launch of e-rulemaking.[105] In addition, half of the respondents indicated that e-rulemaking led to an increase in the number of comments that provide only opinions without supporting facts or arguments.[106] To some extent, agencies may be missing out on opportunities to increase the quality

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101. *Id.* at 952–53; Benjamin, *supra* note 1, at 933.

102. Coglianese, *supra* note 26, at 943–44.

103. *See* Noveck, *supra* note 3, at 474–75; *see also* Bingham, *supra* note 7, at 314–15 (noting criticism of the design of the FDMS); Farina et al., *supra* note 31, at 403. Federal agency officials, however, remain positive about the power of e-rulemaking to inform and educate the public. In a survey of federal agency officials engaged in rulemaking, Professor Lubbers found that 59% of the respondents indicated that e-rulemaking made it easier to conduct proactive notification and outreach to the public by maintaining targeted mailing lists of persons interested in selected aspects of rulemaking and 74% of the respondents indicated that e-rulemaking made it easier to disseminate information relevant to the agency's proposed rulemaking "so as to generate more informed commenters." *See* Lubbers, *supra* note 76, at 460–61, 476.

104. *See* Benjamin, *supra* note 1, at 934; Coglianese, *supra* note 26, at 952–53 (discussing findings of Cuéllar, see *supra* note 57).

105. Lubbers, *supra* note 76, at 465–66.

106. *Id.* at 466.

of public comments because e-rulemaking efforts thus far have done little to facilitate dialogue among commenters or between commenters and the agency during the comment period. As noted previously, though, some critics question whether individuals have any useful information to add to the rulemaking process.[107]

Many of these criticisms suggest that early e-rulemaking efforts have not improved the rulemaking process in ways that it was hoped that they might. Some critics go further, though, and argue that e-rulemaking efforts have created bigger problems for the rulemaking process. For instance, as noted above, to the extent that there has been an increase in citizen participation in individual rulemakings during the e-rulemaking era, it has tended to be limited to the submission of form letters. Critics of e-rulemaking argue that the new technologies have transformed the rulemaking process into a "notice and spam" process by making it too easy for individuals to submit public comments.[108] Interest groups can provide form letters on their websites that potentially tens or hundreds of thousands of persons can electronically copy and submit online to agencies in the rulemaking process.[109] This practice exacerbates the "information overload" problem identified above.[110] The flood of comments increases the cost and time that it takes for agencies to review and respond to comments.[111] Although the multitude of e-form letters will contain mostly duplicative comments, agencies can only discover the limited value of those additional comments by reviewing them.[112] In addition, agencies may be less responsive to comments when the volume of comments is too great.[113] Critics also argue

107. *See, e.g.,* Funk, *supra* note 8; *see also* Benjamin, *supra* note 1, at 910–12 (arguing that regulated entities and repeat players in the rulemaking process, or the agencies themselves, are likely to have identified and considered most, if not all, of the issues and arguments that would be raised by individual citizens).

108. *See* Coglianese, *supra* note 26, at 958; Dooling, *supra* note 90, at 899–900; Noveck, *supra* note 3, at 441; Johnson, *supra* note 8, at 735 n.206.

109. *See* Noveck, *supra* note 3, at 442.

110. *See supra* notes 41–43; *see also* Jeffrey S. Lubbers, *The Transformation of the U.S. Rulemaking Process—For Better or Worse*, 34 OHIO N. U. L. REV. 469, 481 (2008); Noveck, *supra* note 3, at 442.

111. *See* Farina et al., *supra* note 31, at 408–09; Lubbers, *supra* note 76, at 455; Noveck, *supra* note 3, at 479–80.

112. *See* Noveck, *supra* note 3, at 442–43. Professor Lubbers notes that agencies will rely increasingly on software to process the multitude of comments, potentially leading to "an arms race between well-financed computer-generated comment machines on one hand, and computer-aided comment-sorters in the agencies, on the other." Lubbers, *supra* note 110, at 479.

113. *See* Noveck, *supra* note 3, at 479–80. Professor Lubbers's survey of federal rulemakers suggests that despite the "tendency toward more opinionated and more similar comments, most rulemakers . . . reported that e-rulemaking has not caused them to place

that the public will criticize agencies and view them as anti-democratic if they adopt rules or policies in rules that run counter to the majority view expressed by commenters in the rulemaking process.[114] The rulemaking process is not designed as a democratic process to be decided based on a vote of the citizens, yet public misunderstanding of the process and opposition to the outcome of the process can be exacerbated when agencies ignore the clearly expressed sentiments of overwhelming majorities of commenters.[115] As noted above, when commenters feel that their comments are not being adequately considered, they are more likely to oppose agencies' rules and less likely to participate in future rulemaking proceedings.[116]

Critics also complain that, to the extent that there is a "digital divide," wherein segments of society effectively lack access to the Internet, relying on the Web as a participation tool intensifies the inequity created by that divide and disadvantages persons that do not have access to the Internet.[117] In a 2009 report on "The Internet and Civic Engagement," the Pew Internet and American Life Project concluded that, "just as in offline politics, the well-off and well-educated are especially likely to participate in online activities that mirror offline forms of engagement."[118] In the short term, persons who lack Internet access may still participate in the rulemaking process off-line, as they did prior to the launch of e-rulemaking. As agencies add more value to the online experience, though, it may be necessary to find ways to provide access to that experience to persons who lack access to the Internet. Regardless of the reforms implemented in the rulemaking process, agencies need to rely on a broad mix of tools, so that no one is foreclosed from participation in the process.

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less 'value on the comments by the average citizen.'" Lubbers, *supra* note 76, at 467.

114. *See* Mendelson, *supra* note 10, at 1346, 1359.

115. *Id.*

116. *See supra* notes 11, 46, and accompanying text.

117. *See* Johnson, *supra* note 9, at 305–10.

118. Aaron Smith et al., PEW INTERNET & AM. LIFE PROJECT, THE INTERNET AND CIVIC ENGAGEMENT 1 (2009), *available at* http://www.pewinternet.org/~/media/Files/Reports/2009/The%20Internet%20and%20Civic%20Engagement.pdf. However, the 2010 report also concluded that patterns of online usage are evolving rapidly and that African-Americans and Latinos were "significantly more likely than whites to consider government use of social media as helpful and informative." Aaron Smith et al., PEW INTERNET & AM. LIFE PROJECT, GOVERNMENT ONLINE 6 (2010), *available at* http://www.pewinternet.org/~/media//files/reports/2010/PIP_Government_online_2010_with_topline.pdf

IV. ACUS RECOMMENDATIONS REGARDING COMMENTS IN RULEMAKING

While early e-rulemaking efforts have had limited success in achieving broader, more effective and more transparent public participation in rulemaking, federal agencies and ACUS continue to explore rulemaking reforms to achieve those goals. Last year, ACUS issued a "Recommendation on Rulemaking Comments" to identify a series of "best practices" designed to increase "public participation and improve rulemaking outcomes more effectively."[119] First, to promote more effective public comments, ACUS recommended that the federal government consider publishing and posting on Regulations.gov a document that explains what types of comments are most beneficial and identifies "best practices" for persons submitting comments.[120] Second, ACUS recommended that agencies set comment periods "that consider the competing interests of promoting optimal public participation while ensuring that the rulemaking is conducted effectively," and that the comment periods should generally be at least sixty days long for "significant" rulemakings.[121] Third, ACUS recommended that agencies post all comments, whether received electronically or in paper format, on Regulations.gov in a timely manner.[122] Further, ACUS recommended that agencies, "[w]here appropriate, . . . make use of reply comment periods or other opportunities for receiving public input on submitted comments, after all comments have been posted."[123] The Conference also made

119. ACUS RECOMMENDATION 2011-2, *supra* note 21, at 2.

120. *Id.* at 3. The recommendation also suggests that individual agencies can publish supplements to the effective commenting guidelines, which should be published on Regulations.gov and other venues. *Id.*

121. *Id.* For rulemakings that are not "significant," ACUS recommends a minimum thirty-day comment period. *Id.*

122. *Id*. at 3.

123. *Id.* at 4. ACUS and the Office of Management and Budget (OMB) made similar recommendations in the past. *See* ACUS RECOMMENDATION 76-3, *Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking*, 41 Fed. Reg. 29,653, 29,655 (July 19, 1976) (recommending a second comment period in proceedings in which comments or the agency's responses thereto "present new and important issues or serious conflicts of data"); ACUS RECOMMENDATION 72-5, *Procedures for the Adoption of Rules of General Applicability*, 38 Fed. Reg. 19,782, 19,792 (July 23, 1973) (recommending that agencies consider providing an "opportunity for parties to comment on each other's oral or written submissions"); CASS R. SUNSTEIN, OFFICE OF INFO. & REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, M-11-10, EXECUTIVE ORDER 13563 IMPROVING REGULATION AND REGULATORY REVIEW 2 (2011) *available at* http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf (noting that Executive Order 13,563 "seeks to increase participation in the regulatory process by allowing interested parties the opportunity to react to (and benefit from) the

recommendations regarding anonymous comments,[124] late comments,[125] and stale comments.[126] ACUS did not believe, however, that it was necessary to make any changes to the APA and did not believe that agencies should be required to adopt all of the recommendations as uniform practices.[127]

A. Benefits of ACUS Recommendations

While the ACUS recommendations are unlikely to promote broader public participation in rulemaking, several of the recommendations could improve the quality of public comments and facilitate more effective commenting. For instance, the "effective commenting" guidelines that ACUS recommends could help laypersons develop comments that go beyond simply making value or policy statements.[128] Similarly, the recommendations for timely posting of comments and reply comments could facilitate the development of a dialogue between the agency and commenters and among commenters that is frequently lacking. This could improve the information available to agencies by facilitating "vetting" of the public comments.[129]

In the e-rulemaking era, agencies have been criticized at times for failing to post comments that they receive, either electronically or in print, on Regulations.gov in a timely manner.[130] For comments that are received in print, the delays are frequently attributable to the time it takes to route the

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comments, arguments, and information of others during the rulemaking process itself").

124. ACUS recommended that agencies establish and publish policies regarding the submission of anonymous comments. ACUS RECOMMENDATION 2011-2, *supra* note 21, at 4. ACUS did not, however, take any position regarding whether agencies should prohibit anonymous comments. Based on a survey of rulemakings of twenty-five agencies, Steven Balla concluded that there was a significant split in agency practices, as ten agencies required commenters to provide information about their identities, while fifteen agencies did not. *See* Balla, *supra* note 2, at 22–23.

125. ACUS recommended that agencies adopt and publish policies on late comments, provide notice to the public about such policies, and apply the policies consistently. ACUS RECOMMENDATION 2011-2, *supra* note 21, at 4. ACUS also indicated that agencies could adopt policies that disfavor late comments and only consider such comments to the extent practicable. *Id.*

126. ACUS recommended that agencies closely monitor their rulemaking dockets and consider the use of mechanisms to refresh the rulemaking record, including supplemental notices of proposed rulemaking, when the agencies believe that the circumstances surrounding the rulemaking have materially changed or the rulemaking record has otherwise become stale. *Id.* at 5.

127. *Id.* at 2.

128. *See infra* notes 169–73, and accompanying text.

129. *See infra* notes 130–134, and accompanying text.

130. *See* Dooling, *supra* note 90, at 905 n.43.

comments to the appropriate agency staff, scan the comments into electronic form, and upload the comments into the electronic docket for the rulemaking.[131] In other cases, regardless of whether the comments are received electronically or in paper, there are delays in uploading comments to the electronic docket for a rulemaking because the agency must determine whether the comments contain any confidential or private information or trade secrets that should not be made public.[132] Regardless of the reasons for the delays in posting comments, the longer it takes for the agency to post comments, the less time commenters have to respond to those comments during the comment period. Consequently, ACUS recommended that agencies adopt and announce policies for posting comments they receive within a specified number of days, although ACUS did not recommend a specific number of days.[133] If agencies comply with the recommendation, it will increase opportunities for commenters to review and respond to the comments posted by others during the comment period.[134]

By minimizing the ability of commenters to strategically wait until the end of the comment period to submit comments, and by encouraging commenters to avoid extreme comments in the initial comment period, ACUS's recommendation for reply comment periods could also increase opportunities for a dialogue during the comment period. Reply comment periods are additional comment periods that extend beyond the closing date of the initial comment period for a proposed rulemaking.[135] They are generally shorter than the initial comment period and may only extend for about a week or two.[136] Although there are a few situations where reply comment periods are required by law,[137] in most cases there is no legal requirement for agencies to provide these additional opportunities for public participation and, in practice, they are used infrequently.[138]

131. *Id.* at 905.

132. Although DOT generally posts comments submitted electronically within eight hours and the FCC generally posts such comments within twenty-four hours, to the extent that agencies screen comments before posting them, there will be delays in posting even for comments that are submitted electronically. *See* Balla, *supra* note 2, at 15; Dooling, *supra* note 90, at 907.

133. *See* ACUS RECOMMENDATION 2011-2, *supra* note 21, at 3.

134. *See* Balla, *supra* note 2, at 14.

135. *Id.* at 9.

136. *Id.* at 11.

137. *See, e.g.*, 42 U.S.C. § 7607(d)(5) (2006); 15 U.S.C. § 2605 (c)(3)(A) (2006).

138. *See* Balla, *supra* note 2, at 10 (reporting that a review of Federal Register notices between 2008 and 2011 revealed that ten agencies utilized reply comment periods during that time frame, although the majority of the proceedings in which they were utilized were conducted by the FCC).

Generally, when agencies provide reply comment periods, they limit the focus of comments that are acceptable in the reply comment period to comments that address issues raised in the initial comment period.[139] Consequently, commenters can respond, positively or negatively, to comments posted during the original comment period, even those filed at the end of the comment period.[140] In theory, because all of the comments submitted during the initial comment period will be subject to public review and comment, commenters should have less incentive to articulate indefensible, extreme positions in comments during the initial comment period[141] and should have less incentive to wait until the end of the initial comment period to submit their comments.

While ACUS's recommendations could, therefore, improve the quality of public comments, the recommendations are modest. As noted above, while ACUS encourages agencies to adopt policies for the timely posting of comments, it does not recommend a specific amount of time within which comments should be posted.[142] Similarly, while ACUS expresses approval for reply comment periods, it indicates that agencies should make use of them "where appropriate," without providing further guidance regarding when they would be appropriate.[143] In addition, with regard to all of its recommendations, ACUS stresses that "different agencies have different approaches to rulemaking and . . . individual agencies [should] decide whether and how to implement" the recommendations.[144]

B. Costs of ACUS Recommendations

Although ACUS's recommendations, if implemented by agencies, have the potential to improve the quality of public comments, they also impose some costs on agencies and the rulemaking process. First, depending on the nature of the rulemaking and the types of comments received, a policy that requires agencies to post all comments received on Regulations.gov within a very short time frame could impose significant resource demands on an agency.[145] Before posting comments online, agencies must ensure

139. Without such limits, rather than waiting for the end of the initial comment period to submit comments, strategic commenters might wait until the end of the reply comment period to submit comments.

140. Balla, *supra* note 2, at 9–12.

141. *Id.* at 12.

142. *See* ACUS RECOMMENDATION 2011-2, *supra* note 21, at 3.

143. *See id*. at 4.

144. *Id.* at 2.

145. *See* Balla, *supra* note 2, at 19; *see also* Dooling, *supra* note 90, at 908 (noting that "screening 10,000 comments for two minutes each accounts for over 333 staff hours, or $8200 . . . [excluding] any time taken to redact comments").

that posting does not disclose confidential information, trade secret information,[146] copyrighted information, or information that violates the Privacy Act.[147] Agencies must also determine whether and how to post information that may be viewed as obscene or threatening by some.[148] Reply comment periods could also create additional resource demands for agencies because without sufficient filters they provide additional opportunities for regulated entities to engage in "information capture," overloading agencies with additional data, studies, and comments.[149] Creating effective commenting guidelines will be less resource intensive for agencies, but will require additional resources that agencies are not currently allocating to the rulemaking process.

Just as some of ACUS's recommendations may increase the resource demands on agencies, they may also increase the potential for legal challenges to the rules adopted by agencies or to actions taken by agencies during the process. First, if agencies do not divert sufficient resources to screening comments prior to publication on Regulations.gov, it is more likely that agencies may inadvertently disclose material that is legally protected from disclosure and thus be sued for such disclosure.[150] Further, to the extent that extended comment periods and reply comment periods exacerbate the information overload on agencies, it is more likely that agencies may fail to adequately respond to all of the issues raised in the

146. While various laws impose stringent penalties for disclosing confidential or trade secret information, it is not clear that agencies have a legal obligation to screen the comments submitted for such information if the persons submitting it have not identified the material as protected. *See* Dooling, *supra* note 90, at 913.

147. *Id.* at 909. However, many agencies did not screen and redact commenters' submissions when the submissions were only accessible in physical reading rooms, and many still do not screen and redact submissions even though they will be accessible online. *Id.* at 907–08. Although the Privacy Act prohibits disclosure of various types of personal information, it allows disclosure with the written consent of the individual to whom the information pertains. *Id.* at 909.

148. *Id.* at 915. At the same time, agencies are wary of screening comments too rigorously for fear of violating the First Amendment's guarantees. *Id.* at 915.

149. *See* Balla, *supra* note 2, at 12–13.

150. Some agencies do not screen comments and hope that they can avoid liability by relying on the notice to commenters placed on the Regulations.gov website, which provides that everything that commenters submit in a comment will be made available online. *See* Dooling, *supra* note 90, at 910–11. It is not clear, however, whether agencies have a legal obligation to monitor the content of the public comments that are automatically uploaded to Regulations.gov. *Id.* at 908. As an alternative to screening comments before posting, agencies could allow commenters to post their comments directly and provide a link on the comment page where readers could flag comments that contained inappropriate content. *Id.* at 915–16. Agencies could subsequently redact material that they determine should not be posted publicly.

rulemaking proceeding.[151] Similarly, to the extent that extended comment and reply comment periods raise issues that lead agencies further away from proposed rules, it is more likely that rules adopted by agencies at the end of the process might be challenged on the grounds that they are not a "logical outgrowth" of the proposed rules.[152]

ACUS's recommendations might also increase the length of the rulemaking process. While the recommendations for a minimum thirty- or sixty-day comment period and for reply comment periods will increase opportunities for public participation and should improve the quality of public comments, they will also increase the time that it takes to issue a final rule.[153]

Finally, if implemented, the recommendations could significantly increase the cost of rulemaking and the likelihood of judicial challenges. Furthermore, the likelihood of successful judicial challenges or the time that it takes to finalize rules could exacerbate the ossification of the rulemaking process and encourage agencies to make fewer rules, instead implementing policies through more informal means.[154]

V. ACUS RECOMMENDATIONS REGARDING E-RULEMAKING

In addition to the "Recommendation on Rulemaking Comments," in 2011 ACUS also issued a "Recommendation on Legal Issues in E-Rulemaking."[155] Standing alone, the recommendation will do little to

151. *See supra* notes 41–43 and accompanying text.

152. Courts have generally interpreted the APA to require that the final rule an agency adopts through notice-and-comment rulemaking be a "logical outgrowth" of the proposed rule. *See, e.g.*,Prometheus Radio Project v. FCC, 652 F.3d 431, 449 (3d Cir. 2011); Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 626 F.3d 84, 94–95 (D.C. Cir. 2010); Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007).

153. *See* Balla, *supra* note 2, at 10 (noting that, despite an internal memorandum encouraging their use, DOT has not increased the use of reply comment periods because agencies have incentives to develop regulations quickly and reply comment periods have the potential to greatly increase the time it takes to promulgate rules).

154. For several decades, academics and policymakers have argued that agencies increasingly avoid notice-and-comment rulemaking because of the frequency of judicial challenges to the rules and because procedures imposed by courts, Congress, and the Executive Branch have ossified the rulemaking process. *See* Johnson, *Ossification's Demise?*, *supra* note 61, at 768. Many factors are blamed for the "ossification" of rulemaking, including judicial interpretation of the rulemaking provisions of the APA, the procedural requirements imposed by the Regulatory Flexibility Act, the Small Business Regulatory Enforcement Fairness Act and similar laws, and the review procedures imposed by the Executive Branch through Executive Order 12,866 and a variety of executive orders addressing takings, federalism, and children's health protection, among other topics. *Id.* at 769.

155. *See* ACUS RECOMMENDATION 2011-2, *supra* note 21.

broaden the scope of public participation, facilitate more effective commenting, or ensure a more transparent process. Since e-rulemaking and the e-rulemaking reforms discussed later in this Article can promote those goals, however, the recommendation can advance the goals by making e-rulemaking more efficient.

One of the issues that ACUS addressed in the recommendation is the "notice and spam" issue. As noted above, in a few high profile rulemakings, organizations and interest groups have mobilized e-mail campaigns to flood agencies with hundreds of thousands of form letter comments that are nearly identical.[156] Processing, reviewing, and responding to those comments requires substantial agency resources. In its recommendation, ACUS concluded that the APA "does not require agencies to ensure that a person reads each one of multiple identical or nearly identical comments" and recommended that agencies "consider whether . . . they could save substantial time and effort by using reliable comment analysis software to organize and review public comments."[157] ACUS also addressed some of the commenting issues mentioned in the preceding section of this Article, recommending that agencies explore procedures for (1) flagging inappropriate or protected content in comments; (2) allowing persons to indicate that their comments contain confidential or trade secret information; and (3) taking action regarding inappropriate or protected content, or confidential or trade secret information in public comments.[158]

ACUS also outlined several recommendations for electronic docketing. First, ACUS noted that the APA provides agencies with the flexibility to use electronic records instead of paper records and that in many cases agencies are not required to retain paper copies of the materials that have been converted into electronic forms.[159] ACUS also recommended that agencies include in their electronic dockets a descriptive entry or photograph for every physical object that is submitted during a comment period.[160] Additionally, ACUS suggested that agencies' electronic dockets should include all studies and reports on which the rulemaking proposal draws.[161]

As with the recommendations on commenting, ACUS concluded that the APA did not need to be amended to address any legal issues created by

156. *See* Coglianese, *supra* note 26, at 954.

157. *See* ACUS RECOMMENDATION 2011-2, *supra* note 21, at 4. ACUS also recommended that agencies work together to share their experiences and best practices regarding the software that they use. *Id.*

158. *Id.* at 5.

159. *Id.*

160. *Id.* at 6.

161. *Id.*

e-rulemaking.[162] ACUS was careful to note, though, that agencies may face other legal issues in e-rulemaking when they use wikis, blogs, and other technologies to solicit public input, and that ACUS's recommendations did not address those issues, which "warrant[s] further study."[163]

A. Benefits and Costs of ACUS's Recommendations

Although ACUS's "Recommendation on Legal Issues in E-Rulemaking" will only indirectly promote the goals of broadening the scope of public participation and making it more effective and transparent, the recommendation is not likely to raise any concerns raised by the "Recommendation on Rulemaking Comments." Unlike the rulemaking comments recommendation, the comment analysis software and the elimination of retention and storage of paper comments proposed in the e-rulemaking recommendation hold out the promise of reducing, rather than increasing, agency resources used in rulemaking. Additionally, there is little in the recommendation that would increase the length of the rulemaking process.[164] Finally, the recommendation is not likely to increase the likelihood of legal challenges, unless the software that agencies choose to process comments is ineffective and causes agencies to ignore comments because they were flagged as identical or repetitive.[165]

VI. RULEMAKING 2.0 REFORMS

While ACUS's recommendations on rulemaking comments and e-rulemaking could play a minor role in broadening public participation in rulemaking and making it more effective and transparent, the next generation of e-rulemaking reforms are likely to have a much greater impact. Unlike early e-rulemaking efforts that simply created an electronic version of the paper process used for notice-and-comment rulemaking, the "Rulemaking 2.0" reforms aim to take advantage of new technologies to transform the notice-and-comment process into a more social and collaborative process.[166]

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162. *Id.* at 3.

163. *Id.* at 3–4.

164. After all, many agencies are already making supporting documents and analyses available as part of the rulemaking process through Regulations.gov. The recommendation that agencies describe or include a photograph of physical objects in the e-docket should not delay the rulemaking process for long.

165. Further, litigation risks should be reduced by the recommendation to the extent that agencies implement its suggestions to flag inappropriate or protected content and confidential or trade secret information and to take action when such information is included in public comments. *Id.* at 5–6.

166. *See* Farina et al., *supra* note 31, at 406; Noveck, *supra* note 3, at 435–37, 471–72.

Some of the e-rulemaking reforms that have been suggested or implemented focus on providing broader notice about proposed and final rules and how to get involved in the rulemaking process. For instance, agencies have already begun to use RSS feeds to push information about rules and events in the rulemaking process to interested subscribers.[167] Similarly, agencies are increasing the use of social media, like Facebook and Twitter, in addition to the agencies' own websites, as tools for informing the public about proposed and final rules and the rulemaking process.[168]

Many agencies are also providing, along with notices of proposed rulemaking, guidelines on how to write effective comments along the lines of the ACUS recommendation.[169] Those guidelines frequently encourage commenters to (1) identify any expertise that the commenter may have and whether the commenter is speaking on behalf of anyone else; (2) provide clear reasons for the position taken in the comments; (3) provide data and scientific justifications with the comments, if possible; (4) avoid making value statements or expressing general support for policy positions; and (5) be aware of any legal limits on the scope of the agency's authority in developing the rule.[170] The guidelines also generally encourage commenters to clearly identify the issues upon which they are commenting and the portion of the proposed rule to which their comments are directed and to focus the comments on issues that are within the scope of the proposed rule.[171] Most guidelines also encourage commenters to be

167. *See* Noveck, *supra* note 3, at 477–78. Professor Noveck notes that dissemination of final rules should take advantage of new technologies in the same way as dissemination of proposed rules, and she argues that agency compliance should be indexed and easily searchable. *Id.* at 493.

168. *See, e.g.*, Fed. Commc'ns Comm'n, FACEBOOK, http://www.facebook.com/FCC (last visited Jan. 29, 2013); U. S. Envtl. Prot. Agency, FACEBOOK, http://www.facebook.com/EPA (last visited Jan. 29, 2013).

169. Noveck, *supra* note 3, at 485; s*ee* Fed. Commc'ns Comm'n , *Rulemaking Process at the F.C.C.*, FCC ENCYLOPEDIA, http://www.fcc.gov/encyclopedia/rulemaking-process-fcc (last visited Jan. 29, 2013) [hereinafter FCC]; NOAA Fisheries Serv., Alaska Reg'l Office, *Tips for Submitting Effective Public Comments*, *available at* http://www.fakr.noaa.gov/prules/effectivecomments.pdf (last visited Jan. 29, 2013) [hereinafter NOAA]; U.S. Dep't of Transp., *The Informal Rulemaking Process*, http://regs.dot.gov/informalruleprocess.htm (last visited Jan. 29, 2013) [hereinafter DOT]; U.S. Food & Drug Admin., *The Importance of Public Comment to the FDA*, http://www.fda.gov/Drugs/ResourcesForYou/Consumers/ucm143569.htm (last visited Jan. 29, 2013) [hereinafter FDA]. Interest groups have also developed effective commenting guidelines for their members. *See, e.g.*, Nat'l Bus. Aviation Ass'n, *NBAA Member Resource: Writing Comments to Federal Regulatory Proposals*, http://www.nbaa.org/advocacy/rulemaking-comments.pdf (last updated March 2009).

170. *See, e.g.*, NOAA, *supra* note 169; FCC, *supra* note 169; DOT, *The Informal Rulemaking Process*, *supra* note 169.

171. NOAA, *supra* note 169, at 5; DOT, *supra* note 169.

professional and respectful in their comments rather than combative.[172] Finally, the guidelines stress to commenters that rules are not developed based on the will of the people and that submitting comments is not the same as voting on a rule.[173]

Other e-rulemaking reforms focus on making it easier for the public to understand the rules and the issues surrounding the rules. For instance, Professor Beth Noveck suggests that agencies should post proposed and final rules in "plain English," or at least provide alternative versions of rules online.[174] One version could include the full text of the agencies' proposal, targeted to sophisticated users, and another version could include a plain English summary of the proposal, targeted to less experienced users.[175] She also suggests that agencies should divide rules into smaller segments for commenting so that users will be able to focus more easily on issues that concern them and limit their input to those issues, and she suggests that agencies could include, in their rules, a list of specific questions upon which they are seeking feedback.[176] In addition, she suggests that the website that provides access to rulemakings should organize rules by subject matter so that persons can find them more easily, that the rules should be indexed in a manner that makes them much easier to search, and that attachments should be posted in a standard format that can be read by most users without downloading several software programs.[177]

Further e-rulemaking reforms focus on promoting collaboration and dialogue during the comment period. Some proposals are fairly straightforward, such as providing for "threaded" comments in online rulemaking that allow commenters to reply to each other's comments during the comment period with the replies being visually linked to the comments referenced.[178] Reformers have also proposed a mechanism whereby persons could approve of comments posted by others, similar to "liking" content in Facebook, or whereby persons could rate comments posted by others on a scale, perhaps from one to ten.[179] Professor Noveck

172. NOAA, *supra* note 169, at 6; DOT, *supra* note 169.

173. *See* NOAA, *supra* note 169, at 3; Council on Envtl. Quality, *A Citizen's Guide to NEPA: Having Your Voice Heard*, December 2007, *available at* http://ceq.hss.doe.gov/nepa/Citizens_Guide_Dec07.pdf.

174. Noveck, *supra* note 3, at 475–77.

175. *Id.*

176. *Id.* at 477, 484–85; *see also* Fred Emery & Andrew Emery, *A Modest Proposal: Improve E-Rulemaking by Improving Comments*, ADMIN. & REG. LAW NEWS, Fall 2005, at 8 (noting that "agencies don't do an effective job at inviting comments").

177. Noveck, *supra* note 3 at 482, 486.

178. *See* Benjamin, *supra* note 1, at 899–900; Noveck, *supra* note 3, at 484, 489.

179. *See* Benjamin, *supra* note 1, at 900; Farina et al., *supra* note 31, at 443–44; Noveck, *supra* note 3, at 439–40.

even suggests that the rulemaking website could include mapping tools that would create charts and graphs to quantify comments on, or support for, various portions of a rule or issues in a rule.[180] Reformers have also suggested that blogs and wikis could be used as an adjunct to the rule development process.[181]

A good example of a Rulemaking 2.0 project encompassing many of these reform proposals is "the Regulation Room."[182] The Regulation Room is a rulemaking pilot project administered by the Cornell eRulemaking Initiative (CeRI), in cooperation with the United States Department of Transportation (DOT).[183] The Regulation Room online rulemaking website is not a government site, and the project is not directed by the federal government.[184] The Regulation Room has been used with a DOT rulemaking proposal to ban texting by commercial motor vehicle drivers and a rulemaking proposal addressing airline passenger rights.[185] For those rulemakings, DOT provided an advance copy of the notice of proposed rulemaking to CeRI.[186] Prior to the notice, the students and faculty at CeRI divided the proposed rule into several different topics and posted summaries of each topic, along with the language of the rule, on the Regulation Room website.[187] CeRI also added hyperlinks to statutes, regulations, and various secondary sources cited in the rulemaking.[188]

Prior to the publication of the notice of proposed rulemaking, CeRI then engaged in outreach to stakeholder groups that it identified in conjunction with the agency, encouraging the groups, through the use of social media and otherwise, to get involved in the rulemaking process.[189] When the notice of proposed rulemaking was published in the Federal Register and made available online at Regulations.gov and the DOT website, the notice informed the public that CeRI was administering the Regulation Room pilot project in conjunction with the rulemaking.[190] Persons who went to the Regulation Room website were able to submit comments on sections of the rule or the whole rule and CeRI staff moderated communications on the website, policed inappropriate content, and asked and answered

180. *See* Noveck, *supra* note 3, at 440, 491; *see also* Farina et al., *supra* note 31, at 406.

181. *See* Farina et al., *supra* note 31, at 406.

182. *See* Cornell eRulemaking Initiative (CeRI), REGULATION ROOM, http://regulationroom.org/ (last visited Jan. 29, 2013).

183. *See* Farina et al., *supra* note 31, at 396.

184. *Id.* at 397.

185. *Id.* at 398.

186. *Id.* at 412–13.

187. *Id.*

188. *Id.* at 413.

189. *Id.* at 416–17.

190. *Id.* at 398.

questions from commenters.[191] CeRI hopes that the moderation of the site will facilitate discussion and collaboration among the commenters.[192]

CeRI staff also mentored effective commenting on the site.[193] In addition to providing commenters, at the outset, with a document that describes how to write an effective comment,[194] CeRI staff flagged specific comments submitted during the comment period as "Recommended."[195] The staff was not endorsing the views espoused in those comments, but was identifying the comments as effective. As the administrators of the project note on the website, "[C]omments are Recommended not for what they say, but for how they say it: they give reasons, bring in information, consider alternatives, show that the writer is trying to consider the issue from all sides, etc."[196] The CeRI staff continued to engage in outreach to actively solicit stakeholders to participate in the process during the comment period. Translation of the rulemaking materials, moderation of the commenting process, and outreach to stakeholders are all very time consuming and resource intensive.[197] It is important to stress, though, that all of those activities were carried out by students and faculty in CeRI, and there was limited communication with agency officials after the comment period began.[198]

At the end of the comment period for the proposed rules, the CeRI staff prepared a summary of the comments provided to the Regulation Room for everyone who participated in the Regulation Room to review.[199] After the summary was reviewed, CeRI staff submitted the summary as a comment in the official rulemaking record.[200] This is necessary because the Regulation Room is simply an adjunct to the official rulemaking proceeding. Comments submitted to the Regulation Room are not directly submitted to DOT.

In some ways, the Regulation Room process and similar e-rulemaking

191. *Id.* at 413–14.

192. *Id.* at 397.

193. *Id.* at 414.

194. *See* CeRI, *The Regulation Room, Learn More,* http://www.regulationroom.org/learn-more/ (last visited Feb. 10, 2013). The guidance is similar to the guidance provided on many agency websites. Specifically, the guidance encourages commenters to provide data and examples to support comments, explain positions in an organized and rational manner, and adopt a civil tone. *Id.* It also asks commenters to recognize both the limits on the agency's legal authority when commenting and that commenting is not voting. *Id.*

195. *See* Farina et al., *supra* note 31, at 414.

196. *See* CeRI, *supra* note 194.

197. *See* Farina et al., *supra* note 31, at 416–17.

198. *Id.* at 413.

199. *Id.* at 414.

200. *Id.*

reforms resemble negotiated rulemaking. Just as in negotiated rulemaking, proponents of e-rulemaking reforms envision stakeholders engaging in a dialogue with each other and the agency and collaborating on developing a rule.[201] Similarly, just as in negotiated rulemaking, e-rulemaking reformers stress the importance of identifying stakeholders and actively soliciting their input in the rulemaking process.[202] However, the reformed e-rulemaking process differs from negotiated rulemaking in important ways. In negotiated rulemaking, collaboration occurs early in the process, before a rule is proposed for public comment, whereas in e-rulemaking collaboration occurs during the comment period after the rule has been proposed.[203] Furthermore, in negotiated rulemaking, the agency plays an active role in the pre-notice collaboration, working toward developing a consensus proposal, whereas the agency plays a more passive, reactive role in e-rulemaking, and there is usually no express goal of achieving consensus.[204]

A. Benefits of Rulemaking 2.0 Reforms

The e-rulemaking reforms outlined above could facilitate broader, more effective, and more transparent public participation in rulemaking in several ways. First, the reforms make it easier for more people to become aware that rulemaking processes are occurring and to understand how to get involved in those processes.[205] In the Regulation Room project, for

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201. *Id.* at 418–21. Professor Jeffrey Lubbers vividly describes the shortcomings of the traditional process, unreformed by negotiated rulemaking or e-rulemaking as follows:

> The dynamics of this process tend to encourage interested parties to take extreme positions in their written and oral statements—in pre-proposal contacts as well as in comments on any published proposed rule. They may choose to withhold information they view as damaging. A party may appear to put equal weight on every argument, giving the agency little clue as to the relative importance it places on the various issues. There is usually little willingness to recognize the legitimate viewpoints of others. . . . What is lacking is an opportunity for the parties to exchange views and to focus on finding constructive, creative solutions to problems.

Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 S. TEX. L. REV. 987, 991 (2008) (footnote omitted).

202. Farina et al., *supra* note 31, at 419–22.

203. *See* Benjamin, *supra* note 1, at 922–24.

204. *Id.* However, in describing the Regulation Room project, Professor Cynthia Farina, one of its developers, noted that "we will eventually extend facilitative moderation to a collaboration phase, in which moderators experiment with formats and methods for building areas of consensus. DOT is especially interested in possible consensus building." *See* Farina et al., *supra* note 31, at 415.

205. For instance, more than 90% of the persons who participated in the Regulation Room project for the DOT airline passengers' rights rulemaking indicated that they had not previously participated in the federal rulemaking process. *See* Farina et al., *supra* note 31, at

instance, organizers worked with agencies to identify a broad range of stakeholders that would likely be affected by proposed rules and invited those stakeholders to participate in the process.[206] In addition, the organizers provided notice of the rulemaking process through Twitter and Facebook and monitored other social networks and blogs to identify groups that might be affected by, or interested in, the rulemaking, posting notices about the proceedings in the comment sections of those blogs and networks.[207] They continued to monitor the involvement of the stakeholder groups and encourage groups to participate throughout the rulemaking process.[208] The new methods of outreach supplement, rather than replace, existing tools. In the Regulation Room project, for instance, agencies continued to rely on the conventional media, such as newspapers, television, and radio, as well as lists of interested parties maintained by the agencies, to publicize rulemakings.[209]

The e-rulemaking reforms also make it easier for the public to understand proposed rules and the process by providing background information about the rules and clear explanations of the process.[210] In addition, the reforms can greatly improve the quality of commenting by providing, through the effective commenting guidelines, clear information

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206. *Id.* at 420–21. For the DOT proposal to ban texting by commercial drivers, the organizers of the Regulation Room identified and contacted more than 100 groups that might have an interest in the rulemaking by e-mail and then by phone. *Id.* at 422.

207. *Id.* at 421–22. The organizers of the Regulation Room project estimate that they provided notice to more than a quarter of a million people as part of their outreach plan for the DOT rule on texting. *Id.* at 420. Professor Cynthia Farina notes, though, that the organizers "quickly lose[ ] control of the message as users redistribute it." Farina et al., *supra* note 1, at 395. She also notes that there are limits to the effectiveness of "viral" transmission of notice via social networking when the comment period for a rule is limited to sixty days. Farina et al., *supra* note 31, at 416.

208. Farina et al, *supra* note 31, at 422. Although the organizers of the project tried to solicit input from competing stakeholders on a variety of issues, they were not always successful in prompting participation by those stakeholders. *Id.* at 426–27 (describing the refusal of organizations representing pilots, flight attendants, and other airline employees to provide comments on the airline passengers' rights rulemaking).

209. *Id.* at 422–23. In the DOT rulemaking on airline passenger rights, a significant number of commenters visited the Regulation Room website after they received news about the rulemaking from an article in the Washington Post and other newspapers. *Id.* at 422–23. Professor Farina also noted, though, that "a focused group of stakeholders . . . can leverage the power of social networking to disseminate a call to action." Farina et al., *supra* note 1, at 411. In the airline passengers' rights rule, for instance, although only about 4.5% of the visits to the Regulation Room website originated from Facebook or Twitter, almost 18% of the comments addressing the peanut allergy issue in the rulemaking originated from Facebook. *Id.* at 412.

210. *See supra* notes 174–177 and 187–188.

about the nature of public commenting and the types of comments that are most helpful to agencies.[211] Furthermore, the reforms hold out the promise of reducing the barriers created by information overload. Organizers of the Regulation Room project attempted to make rulemakings significantly easier to understand by providing plain English translations of the rules and background materials, dividing the rules into several parts for commenting, and providing moderators to address questions from commenters.[212]

Finally, e-rulemaking reformers argue that the interactive nature of commenting in the reformed process will positively reinforce commenters and stimulate broader public participation.[213] Ideally, new and more

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211. *See* Farina et al., *supra* note 31, at 427; *see also supra* notes 169–173. Professor Farina noted, though, that visitors to the Regulation Room viewed such materials infrequently and "users spent considerably less time on [those] pages than the site-wide average." *See* Farina et al., *supra* note 31, at 427. She also hypothesized, based on the commenting pattern in the airline passengers rule of persons concerned about peanut allergies, that "single issue" commenters are not likely to spend much time reviewing educational materials provided with a rulemaking. *Id.* at 428–29.

212. *See supra* notes 187–188. *See also* Farina et al., *supra* note 31, at 435–40. The organizers of the Regulation Room project divided the texting rule into seven parts and divided the airline passengers' rights rules into ten parts. *Id.* at 436–37. As Professor Farina noted, proponents argue that "targeted commenting" "encourage[s] commenters to focus on specific aspects of the proposal rather than making global, generalized comments; [and] it might even inspire . . . specific suggestions for alternative language." *Id.* at 435. Regarding the plain English translations of rules, Professor Farina noted, "According to national statistics, about half of Americans read at no more than the eighth grade level [which is why] . . . the recommended readability level for government publications and other text written for broad public consumption is no higher than 8.0 on the Flesch-Kincaid scale (in which units correspond to grade levels)." *Id.* at 438. The organizers of the Regulation Room project incorporated translations of the texting and airline passengers' rights rules in the project because the Flesch-Kincaid score for DOT's notice of proposed rulemaking for the texting rule was 15.0 (third year of college) and the score for the airline passengers' rights rule was 17.8 (first year of post-graduate education). *Id.* at 438. The translations supplement, but do not replace, the official agency notices. *Id.* at 439–40.

213. *See* Benjamin, *supra* note 1, at 902. Professor Farina describes the moderation that takes place in the Regulation Room project as follows:

> Moderators may encourage a user to give reasons for a stated position, ask her to provide support for fact assertions and sources for data claims, or challenge her to suggest an alternative for a proposal being criticized. They may suggest relationships between what two commenters have said, or encourage a commenter to address a different part of the rule that seems relevant to the point she has just made. They also help lower the barriers of information complexity by pointing commenters to other materials on the site.

Farina et al., *supra* note 31, at 433. She notes that moderator comments designed to elicit further information or discussion generated responsive comments between sixty and seventy percent of the time. *Id.* at 434. She also notes that data regarding the percentage of commenters who made more than one comment in the Regulation Room rulemakings and the percentage of multiple commenters who commented on more than one issue indicate

educated commenters will provide information that would not have otherwise been provided to agencies. However, even if the commenters do not provide any new information, an increase in the volume of commenters raising the same issues might provide valuable information to agencies regarding the intensity of public sentiment on various issues.[214]

B. Costs of Rulemaking 2.0 Reforms

Despite those potential benefits, e-rulemaking reforms have generated criticism on a wide range of issues. First, some of the proposed reforms could be quite expensive, resource intensive, and time consuming if implemented on a wider scale.[215] Imagine, for instance, the resources required to translate every rule and all of the background information for every rule into plain English, to segment the rules into separate parts, and to moderate discussion about the rules during the comment period. Similarly, imagine the resources required to engage in the level of public notice utilized for the Regulation Room project for every rulemaking. In addition, the reforms open up new avenues for litigation, as opponents of rules may challenge the translations of rules and segmentation of rules, or argue that comments made in blogs or by moderators are part of the rulemaking record to be considered by agencies in issuing final rules.[216]

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that participants in the Regulation Room rulemakings are very engaged in the rulemaking process. *Id.* at 440–42.

214. *See* Benjamin, *supra* note 1, at 905–06.

215. *See* Farina et al., *supra* note 31, at 443–45; Benjamin, *supra* note 1, at 903.

216. *See* Farina et al., *supra* note 31, at 445. If agencies provide translations of rules, as the organizers of the Regulation Room have done, to make the rule accessible, they run the risk of mischaracterizing the rule or misleading commenters, which could lead to challenges that the agency failed to provide adequate notice or opportunity for comment, see 5 U.S.C. § 553 (2006), or that the final rule was not a logical outgrowth of the plain English version of the rule. *See supra* note 152. This may happen even if agencies include disclaimers with the plain English translations that indicate that the translations do not substitute for the formal language being proposed by the agency. Furthermore, if agencies conduct online discussions or moderate blogs during the comment period, persons who participate in the dialogues or blogs may consider their comments to be part of the rulemaking record, regardless of any disclaimers provided by agencies, and may challenge agencies' rules if the agencies do not adequately respond to any comments raised in the online dialogues or blogs. *See* Bingham, *supra* note 7, at 315; Farina et al., *supra* note 31, at 445–46; Peter M. Shane, *Empowering the Collaborative Citizen in the Administrative State: A Case Study of the Federal Communications Commission*, 65 U. MIAMI L. REV. 483, 498 (2011). Bridget Dooling, however, argues that the APA requirement that agencies give interested persons an opportunity to participate in rulemaking "through submission of written data, views or arguments" does not create an obligation for agencies to include, as comments on rules, statements made in blogs or online dialogues. *See* Dooling, *supra* note 90, at 924–25 (emphasis omitted). In addition to those issues, e-rulemaking raises several other legal issues that could spur litigation. As

Furthermore, the increase in comments on rules will lead to an increase in the time that it takes agencies to consider and adequately respond to comments in order to avoid litigation.[217] All of those increased costs, resource demands, and increased litigation risk could further ossify the rulemaking process and encourage agencies to issue fewer rules and make more decisions informally, outside of the rulemaking process.[218]

At a minimum, the reforms could slow down the rulemaking process significantly, delaying the implementation of rules that could provide significant health, safety, or environmental benefits. Critics contend that the e-rulemaking reforms will be as ineffective in the long term as negotiated rulemaking, which similarly promised a more open, transparent, and collaborative rulemaking process.[219] Despite that promise and congressional efforts to encourage the process,[220] negotiated rulemaking has been used infrequently because it is very resource and time intensive[221] and

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Professor Jeffrey Lubbers notes, those issues include unauthorized disclosure of copyrighted material, disclosure of information that could compromise security, disclosure of private information, and censorship of information. *See* Lubbers, *supra* note 110, at 480–81. ACUS also identified many of these issues in its recommendation on the legal issues in e-rulemaking. *See* ACUS RECOMMENDATION 2011-2, *supra* note 21, at 5. In his survey of federal regulators, Professor Lubbers discovered that regulators' concerns about those issues have increased as agencies have adopted e-rulemaking procedures. *See* Lubbers, *supra* note 76, at 463–64.

217. *See* Lubbers, *supra* note 110, at 481; Benjamin, *supra* note 1, at 904–05. As commenters raise more issues and alternatives in the rulemaking proceeding, agencies must be diligent to review and respond to those issues and alternatives in order to avoid judicial invalidation of their decisions under the hard look application of the arbitrary and capricious standard. *See* Benjamin, *supra* note 1, at 916–17. As Professor Benjamin notes, "[I]f [an] agency receives a hundred thousand comments, it may simply miss a good argument presented in one of them. . . . Just one such failure can be fatal to a regulation." *Id.* at 917-18. Professor Benjamin recognizes, though, that if the new participants in the rulemaking process are simply making the same comments and raising the same issues as persons who would otherwise have been involved in the process, the cost and resource burdens on agencies can be reduced through the use of software to identify repetitive comments. *Id.* at 904–05; *see also* Dooling, *supra* note 90, at 901–02.

218. *See* Benjamin, *supra* note 1, at 910. Congress, courts and the Executive Branch have imposed so many procedural requirements on rulemaking that most academics and policymakers agree that the rulemaking process has become ossified. *See* Lubbers, *supra* note 110, at 470–73; Johnson, *supra* note 154, at 768–70; Stephen M. Johnson, *Junking the "Junk Science" Law: Reforming the Information Quality Act*, 58 ADMIN. L. REV. 37, 61 (2006). Professor Jeffrey Lubbers noted that federal agencies published 48% fewer final rules and 61% fewer proposed rules in 2005 than they did in 1979. *See* Lubbers, *supra* note 110, at 473.

219. *See* Benjamin, *supra* note 1, at 922–24; *see also supra* notes 201–204 and accompanying text.

220. *See* Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561–70 (2006).

221. A 1995 report found that EPA spent almost $100,000 per negotiated rulemaking proposal, including costs for convening, facilitation, analysis, travel and per diem, and

it may neither reduce the potential for litigation of the rules adopted through the process nor speed up the rulemaking process.[222]

Critics are also concerned about the ways that agencies might respond to an increase in public participation due to the e-rulemaking reforms. Some are concerned that increases in the volume of comments on an issue spurred by reforms may pressure agencies to make more decisions based on the will of the people rather than based on agency expertise and statutory mandates.[223] Others are concerned that if agencies appear to ignore the will of the people—as expressed by the volume of comments on a particular issue—the public will stop participating in the rulemaking process or may lose faith in the democratic legitimacy of the agency decisionmaking process.[224] Some critics fear that a more transparent e-rulemaking process will lead to more oversight and potential pressure on agencies from Congress and the White House.[225]

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consultants. *See* Lubbers, *supra* note 201, at 997.

222. *See* Benjamin, *supra* note 1, at 922–23; Coglianese, *supra* note 26, at 944. In theory, rules developed through a negotiated rulemaking process should be adopted more quickly than other rules after the notice of proposed rulemaking is issued and should be less likely to be challenged because the negotiated rules were developed by consensus of all of the major stakeholders who would be affected by the rules. *See* Benjamin, *supra* note 1, at 922–23; Farina et al., *supra* note 1, at 418–19; Lubbers, *supra* note 201, at 987. Sixty-three negotiated rulemaking committees were created by agencies between 1991 and 1999 to develop rules, but only twenty-two committees were created between 2000 and 2007. *See* Lubbers, *supra* note 201, at 996. In addition, almost 68% of the committees created between 2000 and 2007 were created due to statutory mandates, compared to only 36.5% of the committees created between 1991 and 1999. *Id.* The data suggest that since 2000 most agencies have stopped using negotiated rulemaking voluntarily. *Id.* Professor Jeffrey Lubbers, though, challenges the assertions that negotiated rulemaking does not speed up rulemaking or reduce judicial invalidation of rules. *Id.* at 1003. He suggests that several other factors have contributed to the demise of negotiated rulemaking, including (1) the disbanding, for over a decade, of ACUS, a major supporter of negotiated rulemaking; (2) the lack of enthusiasm of OMB for the process; and (3) the applicability of the Federal Advisory Committee Act to the process. *Id.* at 996–1001.

223. *See* Lubbers, *supra* note 76, at 455–56, 481; Benjamin, *supra* note 1, at 924–25; Farina et al., *supra* note 31, at 409. If agencies adopted that approach, though, it would not be surprising to see a significant increase in efforts by regulated entities to engage in "astro-turfing" public relations campaigns, manufacturing "grass roots" support for their positions in the form of "public" comments. *See* Jonathan C. Zellner, Note, *Artificial Grassroots Advocacy and the Constitutionality of Legislative Identification and Control Measures*, 43 CONN. L. REV. 357, 361 (2010) (discussing "Astroturf" lobbying in another context).

224. *See* Benjamin, *supra* note 1, at 903, 921; Noveck, *supra* note 3, at 448, 454.

225. *See* Benjamin, *supra* note 1, at 913–14; Lubbers, *supra* note 110, at 481. Professor Benjamin suggests that if e-rulemaking makes the rulemaking process more transparent and more citizens participate in the process, more citizens may lobby Congress regarding rules or issues raised in rules, which may lead to greater Congressional oversight. *See* Benjamin, *supra* note 1, at 914. He is somewhat skeptical, though, that increased lobbying by citizens

In addition to those concerns, some critics argue that e-rulemaking reforms could skew the pool of participants in the commenting process by disproportionately focusing on outreach efforts through the Web.[226] Others are skeptical that any of the e-rulemaking reforms will increase public participation in the rulemaking process because most members of the public will continue to lack any interest in participating even if they are educated and informed about the process.[227]

VII. ALTERNATIVE PATHS

The reforms suggested by ACUS and the "Rulemaking 2.0" e-rulemaking reforms outlined above may have very different impacts on the informal rulemaking process. As described above, the ACUS recommendations on commenting and the legal issues involved in e-rulemaking are very modest, and ACUS encourages agencies to take various actions "where appropriate," recognizing that agencies can choose to implement none of the recommendations.[228] Even if agencies adopt all of ACUS's recommendations, it is unlikely that the changes implemented by agencies will lead to significantly broader participation, although the proposals could improve the quality of public commenting and promote a dialogue during the comment period on rules.[229] While the benefits of ACUS's recommendations are modest, the costs are also modest. Although some of the proposals could increase the resources or time required to adopt rules through informal rulemaking or could increase the potential for litigation involving those rules, the increased risks appear to be small.[230]

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will lead to increased action by Congress. *Id.* at 914. Regarding Executive oversight, as e-rulemaking reforms make the rulemaking process more transparent to citizens, they will also make it more transparent to the White House and several commentators have speculated that the President may become more involved in agencies' decisionmaking. *See, e.g.*, Lubbers, *supra* note 110, at 481–82.

226. This could exacerbate problems relating to the "digital divide," to the extent that it still exists. *See supra* notes 117–118 and accompanying text.

227. *See* Benjamin, *supra* note 1, at 902; Coglianese, *supra* note 26, at 943. Professor Coglianese noted that EPA's online dialogue on revisions to its public involvement policy primarily attracted government officials and attracted very few "ordinary citizens." *Id.* at 961–62. He acknowledged, though, that an online forum that DOT's Federal Motor Carrier Safety Administration created to address the development of a strategic plan for the agency attracted many comments from commercial truck drivers and others who normally did not participate in the agency's rulemaking proceedings. *Id.* at 962–63. However, Coglianese stressed that the scale of public involvement in both proceedings was very modest. *Id.* at 964.

228. *See supra* notes 143–144 and accompanying text.

229. *See supra* notes 128–141 and accompanying text.

230. *See supra* notes 145–154, 164–165 and accompanying text (discussing the risks of potential delays).

While the potential benefits and costs of ACUS's recommendations are modest, the costs and benefits of the "Rulemaking 2.0" e-rulemaking reforms may be significant. As noted above, those e-rulemaking reform proposals could substantially broaden the scope of possible participation in the rulemaking process and could facilitate more effective commenting and a more transparent process.[231] At the same time, though, the reforms have a far greater potential than the ACUS recommendations to increase the cost and length of rulemaking, increase the likelihood of litigation, ossify the rulemaking process, and delay the implementation of rules.[232]

It may be possible, however, to capture the benefits of those "Rulemaking 2.0" reforms while avoiding the costs by limiting the implementation of the reforms. Instead of applying the e-rulemaking reforms to all rules adopted by agencies through informal rulemaking, the reforms could be applied to a subset of rules adopted by agencies. The two most natural choices would be to limit the use of the reformed e-rulemaking process to "significant regulatory actions"[233] or to rules where agencies intend to issue an "advanced notice of proposed rulemaking" (ANPR).[234]

It would make sense to apply the reformed e-rulemaking procedures to "significant regulatory actions" because those rules are likely to have greater impacts on stakeholders than other rules, or are more likely to raise novel legal or policy issues than other rules, while relatively few of the rules

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231. *See e.g.*, *supra* notes 205–214 and accompanying text (discussing the potential effects of the Regulation Room project).

232. *See supra* notes 222–217 and accompanying text (discussing the potential negative consequences to e-rulemaking).

233. A "significant regulatory action" is defined by the OMB in Executive Order 12,866 as:

> [A]ny regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

Exec. Order No. 12,866, 3 C.F.R. 638 (1993).

234. Agencies are not required to issue advanced notice of proposed rulemakings (ANPRs) for any rule, but will issue them when they are seeking input on questions or approaches relating to a rulemaking prior to drafting a proposed rule for public comment. *See* Ronald M. Levin, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 33 (2002) (detailing some agency considerations in issuing an ANPR); Barbara H. Brandon & Robert D. Carlitz, *Online Rulemaking and Other Tools for Strengthening Our Civil Infrastructure*, 54 ADMIN. L. REV. 1421, 1465–66 (2002) (discussing the potential merits of issuing an ANPR).

adopted by agencies each year are "significant regulatory actions."[235] Similarly, it would make sense to apply the reformed e-rulemaking procedures to rules where agencies intend to issue an ANPR because agencies generally issue an ANPR when they are affirmatively seeking earlier and broader input before they develop the language for a rule and issue a notice of proposed rulemaking.[236] The percentage of agency rules that include ANPRs is also very small.[237] Thus, in both cases, the e-rulemaking reforms would be limited to a small universe of rules, but they would be applied to rules that would seem to be particularly good candidates for the broader, more effective, and more transparent public participation that the reforms could generate.

As an alternative to either of those approaches, it might make sense to encourage agencies to implement the new Rulemaking 2.0 e-rulemaking reforms, but give agencies discretion to determine when to use those processes, based on the consideration of various criteria. Congress took this approach when it passed the Negotiated Rulemaking Act of 1990 to promote the last great informal rulemaking experiment.[238] Several of the criteria that Congress encouraged agencies to consider in deciding whether to engage in negotiated rulemaking would seem to be relevant to an agency's choice to engage in Rulemaking 2.0 processes, including consideration of (1) the number of identifiable interests that will be significantly affected by the rule, (2) whether the process will unreasonably delay issuance of the rule, and (3) whether the agency has adequate resources to support the process.[239]

Other academics have provided their own suggestions with regard to the next generation of e-rulemaking reforms. Like others, Professor Stuart Minor Benjamin is critical of the standardization and uniformity in the first generation of federal e-rulemaking, and he argues that future federal efforts

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235. Fewer than 4% of the final rules issued by EPA between 2001 and 2005 were "significant" rules triggering OMB review under Executive Order 12,866. *See* Johnson, *supra* note 154, at 770. John Graham, the former Administrator of the Office of Information and Regulatory Affairs within OMB, estimated that only about 7.5% of the rules initiated by all federal agencies each year are "significant" rules. *See* John D. Graham et al., *Managing the Regulatory State: The Experience of the Bush Administration*, 33 FORDHAM URB. L.J. 953, 983 (2006) (emphasizing the focus of OIRA oversight).

236. *See supra* note 234.

237. In 2011, for instance, federal agencies issued fifty-eight ANPRs, compared to 852 notices of proposed rulemaking. These results are based on the following searches in the Federal Register (FR) database of Lexis: (1) "Action: Advance Notice of Proposed Rulemaking" & date (after 1/01/2011 & before 12/30/2011); and (2) "Action: Notice of Proposed Rulemaking" & date (after 1/01/2011 & before 12/30/2011).

238. *See supra* note 220.

239. *See* Lubbers, *supra* note 201, at 990–91.

should loosen the reins and allow agencies to engage in more experimentation with a variety of new e-rulemaking tools.[240] Benjamin envisions individual federal agencies as "laboratories of democracy," stepping into the vacuum created by the lack of state-level experimentation, the normal "laboratories of democracy."[241] However, he advocates narrow experimentation by agencies.[242] Benjamin writes:

> Although the data on e-rulemaking are discouraging, they are also incomplete. Our experience with the current experiments is fairly brief, and broader changes (such as wikis and reputation-based systems) have not been attempted. . . . [I]t could be . . . that merely allowing citizens to e-mail agencies changes fairly little, whereas creating opportunities for meaningful collaboration with or rating by individuals will present points and data that agencies would not otherwise receive.[243]

Benjamin sees another important benefit to e-rulemaking experiments by agencies, noting that:

> [E]-rulemaking initiatives may give policymakers valuable information about the rulemaking process. . . . If, for example, e-rulemaking increases the

240. *See* Benjamin, *supra* note 1, at 898–99.

241. *Id.* at 898. A few states have adopted rudimentary systems for online commenting on proposed rules. *See, e.g.*, Fla. Dep't of State, Div. of Library & Info. Servs., *Florida Administrative Weekly and Florida Administrative Code*, http://www.flrules.org (last visited Jan. 30, 2013) (allowing online submission of public comments on Florida administrative regulations); N.Y. Dep't of State, Div. of Admin. Rules, *NYS Register*, http://www.dos.ny.gov/info/register.htm (last visited Jan. 30, 2013) (allowing online submission of public comments on New York administrative regulations); N.J. Dep't of Envtl. Regulation, *Rules and Regulations—Comment on DEP Regulation*, http://www.nj.gov/dep/rules/comments/ (last visited Jan. 30 2013) (allowing online submission of public comments on administrative regulations issued by New Jersey's Department of Environmental Protection). More States may do so, though, in light of the release in 2010 of the Revised Model State Administrative Procedure Act, which includes a few provisions to encourage agencies to make rulemaking materials available online. *See* REVISED MODEL STATE ADMIN. PROCEDURE ACT (2010), *available at:* http://www.uniformlaws.org/shared/docs/state%20administrative%20procedure/msapa_final_10.pdf. Section 201 of the Model Act requires the State agency that publishes the Administrative Code or Bulletin to make the official record of a rulemaking that is filed with the publishing agency available on the Web. *Id.* § 201. Section 202(a) of the Model Act requires agencies to publish proposed rules, final rules, and a summary of regulatory analyses for each rule on the Web. *Id.* § 202(a). The Model Act does not require agencies to make rulemaking dockets accessible online or to accept public comments electronically, but Section 302 of the Model Act requires agencies to make a rulemaking record for each rule available on the Internet. *Id.* § 302.

242. *See* Benjamin, *supra* note 1, at 936. Benjamin argues that the costs of many of the e-rulemaking proposals are too high and the benefits too uncertain to justify across-the-board implementation of the proposals at this time. *Id.* at 938.

243. *Id.* at 936.

> quantity and quality of citizen participation in the commenting process, but these increases have no impact on agencies' behavior, that fact will suggest that agencies' decisions are not affected by those comments and instead are influenced by other inputs. This result would be disappointing to e-rulemaking proponents, but it might be useful for those trying to understand how agencies work—and in particular the degree to which they are captured by powerful entities. . . . The outcome that would most likely produce benefits greater than the costs would arise if it appeared that the additional participation resulting from new e-rulemaking initiatives did have a positive impact on the agency. In those circumstances, e-rulemaking would thus not only change agency behavior for the better but also provide valuable evidence about agency decisionmaking.[244]

Professor Beth Noveck agrees that agencies, policymakers, and academics can learn much from e-rulemaking experiments, and she argues that the Office of Management and Budget should measure and quantify the success of new e-rulemaking initiatives as they are implemented.[245] Specifically, she proposes that OMB examine the extent to which e-rulemaking experiments increase the number and diversity of participants in the rulemaking process, increase the deliberative quality of comments, increase agency satisfaction with the process, increase compliance with rules, decrease the time spent to process comments received, decrease the time required to conduct public participation, and decrease litigation, among other factors.[246] In addition, Professor Noveck proposes an Executive Order on E-Rulemaking Planning that would require agencies to develop citizen participation plans for e-rulemaking, develop metrics with OMB to evaluate the success of the plans, and submit reports outlining the implementation of those plans.[247] As part of her proposal, OMB would provide financial support and technological assistance for the agencies' plans.[248]

In addition to e-rulemaking reforms and the ACUS recommendations, academics and policymakers have other proposals to foster broader, more informed, and more transparent public participation. Almost a decade ago, EPA adopted a "public involvement policy" that could facilitate broader and more informed public participation if it were adopted more broadly across federal agencies.[249] The policy applies to a variety of EPA programs

244. *Id.* at 936–37.

245. *See* Noveck, *supra* note 3, at 510–11 (detailing potential metrics OMB could use in evaluating the success of e-rulemaking).

246. *Id.*

247. *Id.* at 514–15.

248. *Id.*

249. *See generally* U.S. ENVTL. PROTECTION AGENCY, EPA-233-B-03-002, PUBLIC INVOLVEMENT POLICY OF THE ENVIRONMENTAL PROTECTION AGENCY (2003), *available at*

and activities, including the promulgation of "significant" regulations, and requires the agency to create public involvement plans for actions, and make public involvement a centerpiece of the process.[250]

The policy outlines the seven basic steps for public involvement in any activity, which are:

1. Plan and budget for public involvement activities;
2. Identify the interested and affected public;
3. Consider providing technical assistance to the public to facilitate involvement;
4. Provide information and outreach to the public;
5. Conduct public consultation and involvement activities;
6. Review and use input and provide feedback to the public; and
7. Evaluate public involvement activities.[251]

Regarding identification of the interested and affected public, the policy encourages the agency to partner with community groups and external organizations to publicize activities and to use "comprehensive or creative means that consider the community structure, languages spoken, local communications preference and the locations . . . where the community regularly congregates."[252] The policy stresses the need to involve members of the public at an early stage in the process "before making decisions" and to "[m]ake every effort to tailor public involvement programs to the complexity and potential for controversy of the issue, the segments of the public affected, [and] the time frame for the decision."[253]

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http://www.epa.gov/publicinvolvement/policy2003/finalpolicy.pdf. The policy stresses the value of public involvement in improving agency decisionmaking, enhancing the deliberative process, promoting democracy and civic engagement, and building public trust in government. *Id.* at 1. EPA's goals for public involvement include:

> Learn[ing] from individuals and organizations representing various public sectors and the information they are uniquely able to provide (community values, concerns, practices, local norms, and relevant history, . . . potential impacts on small businesses or other sectors . . .)[;] [s]olicit[ing] assistance from the public in understanding potential consequences of technical issues[; and] . . . [u]nderstand[ing] the goals and concerns of the public . . . .

Id. at 2.

250. *Id.* at 1–3. The policy stresses the importance of making the decisionmaking process "open and accessible to all interested groups, including those with limited financial and technical resources, English proficiency, and/or past experience participating in environmental decisionmaking." *Id.* at 1. The policy, however, "is not a rule, is not legally enforceable, and does not confer legal rights or impose legal obligations." *Id.* at 3.

251. *Id.* at 6.

252. *Id.* at 8–9. The policy also stresses the need to "[u]se public input to develop options that facilitate resolution of differing points of view." *Id.* at 3.

253. *Id.* at 2–3. The policy also stresses the need to distribute outreach and educational

The policy also suggests that EPA should use "questionnaires or surveys to find out levels of awareness and the need for tailored public education and outreach" in the decisionmaking process, and encourages EPA to "develop information and educational programs so all levels of government and the public have an opportunity to become familiar with the issues, technical data and relevant science behind the issues."[254] Closely related to the educational goal, the policy suggests that EPA should "[c]onsider providing technical or financial assistance to the public to facilitate public involvement."[255]

Although other federal agencies have not adopted similarly broad public involvement policies, President Obama stressed the importance of public participation in agency decisionmaking by issuing a memo to federal agencies on the day after his inauguration, directing them to use information technologies to increase transparency, participation, and collaboration in their decisionmaking.[256] Two years later, President Obama issued Executive Order 13,563, which stressed the importance of public participation and an open exchange of ideas and required agencies to ensure that regulations are "accessible, consistent, written in plain language, and easy to understand."[257] The order required agencies to provide timely online access to rulemaking dockets in an open format that can be easily searched and downloaded,[258] and encouraged agencies, *before* issuing a notice of proposed rulemaking, to seek the views of those who are likely to be affected by the rulemaking.[259]

While EPA's public involvement policy and the President's executive order play a role in facilitating broader, more informed, and more transparent public participation, they will not overcome all of the barriers outlined above. Professor Cary Coglianese is skeptical that reforms of the rulemaking process alone will be sufficient to overcome the educational barriers to public participation in many rulemakings.[260] He argues that the technological barriers to public involvement pale in comparison to the

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materials as early in the process as possible. "The more complex the issue and greater the potential for controversy and misunderstanding, the earlier the agency should distribute the materials." *Id.* at 13.

254. *Id.* at 8–9, 11.

255. *Id.* at 9–11.

256. *See* Memorandum on Transparency and Open Government, 74 Fed. Reg. 4685, 4685 (Jan. 26, 2009). President Obama stressed the importance of those principles to strengthen democracy, ensure the public trust, and promote efficiency and effectiveness in government. *Id.*

257. *See* Exec. Order No. 13,563 § 1(a), 76 Fed. Reg. 3821 (Jan. 21, 2011).

258. *Id.* § 2(b).

259. *Id.* § 2(c).

260. *See* Coglianese, *supra* note 26, at 965–66.

educational barriers. As he notes:

> Participating in a rulemaking process requires, at a minimum, understanding that regulatory agencies make important decisions affecting citizens' interests, as well as knowing about specific agencies and the new rules they propose. Yet regulatory agencies receive little attention in civics education at nearly every level, and the media generally neglect regulatory policymaking. As a result, the average citizen, who already shows a declining involvement in politics, simply does not know a great deal about regulatory agencies or the policy issues underlying specific rulemakings.[261]

Perhaps, therefore, it is important to incorporate instruction about agencies and the regulatory process into civics education classes in primary and secondary schools, to strengthen the focus on those topics in college courses, and to engage in a concerted effort to focus media attention on the administrative process and the role of citizens in the process at times other than when an agency issues a controversial rule. Even if the public had a deeper understanding of the regulatory process, though, Professor Coglianese notes that "[i]f Congress delegates rulemaking authority at least partly because certain issues are so complex or technical that they require agency expertise, then the policy issues in rulemakings will tend systemically to be ones that are harder, rather than easier, for citizens to understand."[262]

Although Professor Coglianese may be correct that it could be very difficult to provide sufficient background and education to the public to enable them to provide highly technical or expert comments on many rulemakings, Professor Nina Mendelson argues that agencies should give more weight to the values- and policy-based comments that citizens *can* provide in most rulemakings.[263] Professor Mendelson argues that public commenting communicates the public's preferences in a more concrete context than voting and enables agencies to hear from many more members of the public than it could consult outside of the rulemaking process.[264] Professor Mendelson also argues that public comments are less

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261. *Id.* (footnote omitted). Professor Coglianese notes that it is difficult for many persons to even find regulatory information online, let alone to understand it. *Id.* To support that assertion, he describes a 2004 study involving two dozen students in Harvard's Kennedy School of Government, in which the students could only locate half of the rulemaking dockets that they were instructed to find. *Id.*

262. *Id.*

263. *See* Mendelson, *supra* note 10, at 1346 (stating that given the democratic claims for rulemaking, discounting valuable citizen comments is "deeply problematic").

264. *See id.* at 1372 (extolling the benefits of public commenting, including more targeted suggestions, high levels of public participation, and the collection of viewpoints from a diverse array of people).

likely to be controlled by interest groups or political groups.[265] Further, when agencies ignore values- or policy-based comments, they are more likely to bury those issues in the resolution of scientific or technical issues and undermine the transparency of the rulemaking process.[266]

While Professor Mendelson acknowledges that agencies should not make decisions based solely on the will of the people, she argues that agencies should pay close attention to values- and policy-based comments when they are particularly numerous, raise an issue that is relevant under the agency's statutory authorization, and are coherent and persuasive, especially if they point in a direction different from that considered by the agency.[267] In fact, she suggests that it might make sense to require elevation of issues to a higher level within the Executive Branch when there are significant volumes of comments submitted on the issue.[268] She also suggests that Congress could include provisions in laws that require agencies to take specific actions in response to such comments.[269] However, she is reluctant to advocate for a change in the standards of judicial review to require agencies to give "adequate consideration" to values-based comments, since judges might decide such issues based on political pressures or personal preferences.[270] Instead, she argues that judicial review of these matters should be "limited to requiring agencies to give *some* acknowledgment of significant views expressed through lay comments, and courts should then defer to the content of any subsequent response from the agency."[271] Ultimately, Professor Mendelson asserts that self-regulation within the Executive Branch might be the best way for agencies to address values- and policy-based comments.[272] She proposes that "[b]y internal agency rule, guidance, or executive order, agencies could commit to weigh layperson

265. *See id.* at 1373 (comparing how individuals vote and how congressional members may vote).

266. *See id.* (positing that disregarding large numbers of valuable comments undermines the democratic process and the agency's candor, which discourages participation).

267. *See id.* at 1374–75 ("The reality . . . is that agencies are already fully engaged in deciding value-laden questions. For those decisions to be legitimate, we must be able to understand them as democratically responsive, and public comment can be an important source of information on the values agencies must weight or balance.").

268. *Id.* at 1377 (reasoning that elevating an issue with a significant number of comments in a rulemaking would promote transparent discussion among high-level officials).

269. *See id.* at 1378 (suggesting that judicial enforcement might be an option for lay commenting that reaches a certain threshold).

270. *See id.* at 1378–79 (cautioning that judges would likely be ill-equipped to evaluate adequate response issues with respect to value-laden comments given the political implications).

271. *Id.* at 1379.

272. *See id.* (asserting that self-regulation within the Executive Branch would be the most straightforward way to accomplish accountability).

comments in a particular way or to conduct additional proceedings if layperson comments suggest that the public does not support the balance of values proposed by the agency."[273]

Rather than ignoring or simply tolerating values- and policy-based public comments in the rulemaking process, Professor Mendelson suggests that agencies should affirmatively seek out such input.[274] Specifically, she suggests that agencies could include more focused questions in their notices of proposed rulemaking, as well as using more advanced notices of proposed rulemaking to solicit values- and policy-based input before publishing a proposed rule.[275]

Wendy Wagner has suggested some of the most interesting and revolutionary proposals to reform the rulemaking process to encourage broader, more informed, and more transparent public participation. She is especially concerned about the "information capture" techniques employed by regulated entities that frustrate broader participation.[276]

Wagner proposes addressing the problem by having courts adopt a sliding scale of judicial review.[277] Under this approach, considerable deference will be afforded if a diverse and balanced group of affected persons participated in the rulemaking process, or if one person or group challenging the rule dominated the rulemaking process. An agency's rule will be reviewed under a hard look standard if the person challenging the rule lacked sufficient resources or specialized knowledge to participate vigorously in the rulemaking process.[278]

Wagner argues that this approach to judicial review would give agencies

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273. *Id.*

274. *See id.* at 1380 (encouraging agencies to engage with comments, even lay comments, seriously).

275. *See id.* at 1377–78 (detailing procedural steps agencies could take to encourage useful input from the public commenting process); *see also* Emery & Emery, *supra* note 176, at 8–9 (suggesting that in a notice of proposed rulemaking, agencies should provide "a list of questions they have and issues they want commented on" for efficiency purposes, even though this might shut out some potentially useful information by narrowing the focus of the inquiry). Asking commenters to focus on a specific list of questions and issues may be more efficient for agencies and may reduce the instances in which commenters are disappointed because agencies ignored comments that the agencies felt were outside the scope of the rulemaking. However, agencies might shut out some potentially useful information by narrowing their focus of inquiry to a list of questions and issues to be addressed during the comment period.

276. *See* Wagner, *supra* note 32, at 10,732–33 (cautioning that "information capture" techniques can inundate an agency with excessive information).

277. *See id.* at 10,736 (calling attention to the necessity of changing the standard of judicial review).

278. *See id.* (describing the benefits of adopting a sliding scale of judicial review, which would help alleviate participatory imbalances).

incentives "to reach out and engage groups that are likely to be underrepresented in the rulemaking process."[279] Some of her other suggestions focus on reforming the rulemaking process itself, instead of the standard of review. For instance, she proposes that government intermediaries, whether ombudsmen, advocates, or others, could be appointed to represent, in the rulemaking process, "significantly affected interests that might otherwise be under-represented in rulemakings."[280] Similarly, she proposes that the government could subsidize participation in rulemakings in which groups representing the diffuse public would be underrepresented.[281]

Alternatively, she argues that restrictions on the amount of information that participants can submit in the rulemaking process, similar to the restrictions imposed in judicial proceedings, would lead to more balanced engagement by all affected interests.[282] Finally, she proposes that agencies could develop a draft of a rule before the proposed rulemaking stage by convening a "small team of . . . policy wonks" within the agency who would develop the draft without *any* input by *any* stakeholders.[283] The draft would then be subject to peer review or review by an advisory committee, but the agency staff would not be required to modify the draft based on input from the review process.[284] Wagner argues that this "policy-in-the-raw" approach would allow agency staff to be more innovative and creative in the planning stages and evaluate alternatives in light of the statutory goals, rather than based on pressure from stakeholders or higher level decisionmakers in the agency itself.[285]

Although many of Professor Wagner's proposals could promote broader, more informed, and more transparent public participation in rulemaking, it is unlikely that the courts or Congress are ready for such significant transformations in the rulemaking process. Indeed, it may not even be wise to make such sweeping changes apply to all rulemakings because the costs of providing government advocates, funding citizen involvement, or cutting

279. *See id.* at 10,737 (acknowledging that it will be difficult, at times, to determine whether a rulemaking process was imbalanced).

280. *See id.* (conceding that such a proposal could be quite expensive).

281. *See id.* (distinguishing subsidized rulemaking as a more moderate approach to encouraging balanced engagement).

282. *Id.* at 10,738 (proposing specifically that page and volume limits could be imposed on submissions, or that participants could be required to verify the reliability of data presented and to supply supporting analyses for critical facts included in the submissions).

283. *See id.* (stating that, ideally, this team would not even be aware of pressures from stakeholders, litigation concerns, or other legal risks).

284. *See id.* (clarifying that there would be no judicial reprimand for disregarding suggestions made during this review).

285. *Id.*

off the submission of data and input from stakeholders at an arbitrarily selected limit may outweigh the benefits of those reforms for many rulemakings.[286]

Change comes slowly for the informal rulemaking process. ACUS's recommendations are modest, and while they may provide only modest benefits, they should impose only modest costs. Many of the proposals by academics outlined above might lead to broader, more informed, and more transparent public participation, but for the time being, they are simply words on the pages of academic journals. In the short term, therefore, the Rulemaking 2.0 e-rulemaking reforms hold out the greatest promise for transformation of the rulemaking process. The Internet may still change everything, as I hypothesized over a decade ago.[287] However, even the Rulemaking 2.0 reforms must be implemented on a limited basis to avoid imposing costs that drive the rulemaking process toward greater ossification, causing delays and leading agencies to adopt more policies through guidance documents and other forms of shadow law.

286. *Cf.* Benjamin *supra* note 1, at 936–38 (reasoning that modest experimentation with e-rulemaking would be worth the costs, if for no other reason than to conduct a complete, in-depth study of e-rulemaking, which has yet to be undertaken).

287. *See generally* Johnson, *supra* note 9 (identifying the many ways in which the Internet will change the rulemaking process).

COMMENT

HARD TO WATCH: HOW AG-GAG LAWS DEMONSTRATE THE NEED FOR FEDERAL MEAT AND POULTRY INDUSTRY WHISTLEBLOWER PROTECTIONS

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TABLE OF CONTENTS

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INTRODUCTION

Many Americans choose blissful ignorance when it comes to learning how meat makes it to their dining table,[1] but, in the case of factory farm meat and poultry production, what you do not know can, and often does, hurt you.[2] This tendency to avert one's eyes has allowed concentrated animal feeding operations (CAFOs),[3] slaughterhouses, and meatpacking facilities to raise livestock for human consumption largely free from public scrutiny[4] and has led to the passage of so-called "ag-gag" laws[5] in an increasing number of states.[6] These laws are not explicitly targeted at silencing existing employees but focus instead on deterring activists from

1. *See* DAVID KIRBY, ANIMAL FACTORY xiii (2010) (describing the tendency to avoid the reality of meat production as "willful ignorance").

2. *See, e.g.*, CTR. FOR DISEASE CONTROL & PREVENTION, CS218786-A, CDC ESTIMATES OF FOODBORNE ILLNESS IN THE UNITED STATES (2011) [hereinafter CDC ESTIMATES], *available at* http://www.cdc.gov/foodborneburden/PDFs/FACTSHEET_A_FINDINGS_updated4-13.pdf (estimating that in the United States an average of 48,000,000 (one in six) people become ill, 128,000 are hospitalized, and 3,000 die due to foodborne illness each year).

3. Concentrated Animal Feeding Operations (CAFOs) are "'agricultural operation[s] where animals are held in reserve and raised in confined situations.'" Julie Follmer & Roseann B. Termini, *Whatever Happened to Old Mac Donald's Farm . . . Concentrated Animal Feeding Operation, Factory Farming and the Safety of the Nation's Food Supply*, 5 J. FOOD L. & POL'Y 45, 51 (2009) (quoting U.S. Environmental Protection Agency (EPA), National Pollutant Discharge Elimination System (NPDES), *Animal Feeding Operations*, http://cfpub.epa.gov/npdes/home.cfm?program_id=7 (last updated Feb. 16, 2012)).

4. *See* David Sirota, *States Shush Corporate Critics: From Factory Farms to Home Foreclosures, State Governments Are Helping Hide Corporate Wrongdoing*, SALON (Apr. 4, 2012, 11:45 AM), http://www.salon.com/2012/04/04/states_shush_corporate_critics/ (detailing several recent state-level legislative efforts aimed at hindering industry transparency).

5. *See* Mark Bittman, *Who Protects the Animals?*, N.Y. TIMES, Apr. 26, 2011, http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/ (using the term "ag-gag law" for legislation criminalizing unauthorized recordings in agricultural facilities).

6. Dan Flynn, *Five States Now Have 'Ag-Gag' Laws on the Books*, FOOD SAFETY NEWS (Mar. 26, 2012), http://www.foodsafetynews.com/2012/03/five-states-now-have-ag-gag-laws-on-the-books/.

working undercover to expose violations. The laws display the covert status quo of the meat and poultry industry and suggest evidence of violations to which legitimate employees are exposed. While the recently enacted Food Safety Modernization Act[7] (FSMA) was a strong step toward updating regulations originally prompted when Upton Sinclair's *The Jungle*[8] exposed repulsive slaughterhouse practices in 1906,[9] the legislation's regulatory reach falls short of the change that the American food safety system requires.

The FSMA's primary shortcomings are its sole focus on the Food and Drug Administration (FDA) and its exclusion of meat and poultry production from regulation.[10] For example, the Act provides whistleblower protections for private food industry employees who report activities that present public safety hazards.[11] However, this applies only to FDA-regulated industries; people central to meat and poultry production—CAFO, slaughterhouse, and meatpacking employees—are not afforded these protections.[12] The U.S. Department of Agriculture (USDA) has regulatory jurisdiction over meat and poultry production, primarily through the Food Safety and Inspection Service (FSIS),[13] and Congress has not provided a law comparable to the FSMA for this largely parallel industry.[14] This regulatory gap exists despite risks of foodborne illness outbreaks and more prevalent concerns about animal health within USDA

7. FDA Food Safety Modernization Act (FSMA), Pub. L. No. 111–353, 124 Stat. 3885 (2011) (codified in scattered sections of 21 U.S.C.).

8. UPTON SINCLAIR, THE JUNGLE (See Sharp Press 2003).

9. *See* Nat'l Meat Ass'n v. Harris, 132 S. Ct. 965, 968 (2012); Sinclair, *supra* note 8, at 126–27 (depicting the unsanitary, rat-infested meat production process in Chicago's stockyards as well as worker efforts to disguise spoiled meat for sale to consumers).

10. *See* RENÉE JOHNSON, CONG. RESEARCH SERV., R40443, THE FDA FOOD SAFETY MODERNIZATION ACT (P.L. 111-353), at Summary (2011) (noting that the FSMA applies only to FDA jurisdiction).

11. *See* FSMA § 402, 124 Stat. at 3968 (including Department of Labor (DOL) involvement).

12. *See* Eileen Starbranch Pape, Comment, *A Flawed Inspection System: Improvements to Current USDA Inspection Practices Needed to Ensure Safer Beef Products*, 48 HOUS. L. REV. 421, 446, 450–51 (2011) (recognizing that whistleblower protections would be one of several suitable steps to ensure that beef production adequately prevents against the spreading of *E. coli*).

13. *See About FSIS: Agency History*, U.S. DEP'T OF AGRIC., http://www.fsis.usda.gov/About_FSIS/Agency_History/index.asp (last modified Jan. 7, 2013).

14. *See* Debra M. Strauss, *An Analysis of the FDA Food Safety Modernization Act: Protection for Consumers and Boon for Business*, 66 FOOD & DRUG L.J. 353, 375–76 (2011) (stating that the momentum from FSMA passage should be used to regulate excluded industries); *see also* Foodborne Illness Reduction Act of 2011, S. 1529, 112th Cong. (2011) (proposing legislation aimed at enhancing meat and poultry industry oversight).

industries than within FDA industries.[15]

In the absence of a safety net for meat and poultry production whistleblowers, FSIS inspectors serve as the only check on production,[16] which does not permit the level of surveillance required to make a practical difference in oversight and accountability.[17] Ag-gag laws work to thwart the efforts of activists who recognize this regulatory shortfall and work undercover to record livestock abuse and unsanitary processing conditions.[18] While the laws vary in scope and penalty, they all operate to lessen transparency of an integrally public industry and raise serious concerns about what their supporters have to hide. As the arduous passage of the FSMA demonstrates,[19] a complete food safety regulatory overhaul may be far off. Nonetheless, there are mechanisms available—both supported by a recent Supreme Court interpretation of FSIS power and falling within the current USDA facility inspection authority—that would add a great deal of transparency without weighing too heavily on agencies involved.

This Comment recommends that the USDA, through its existing power, promulgate and enforce whistleblower protections as a condition for facility inspection across the entire meat and poultry production industry to ensure

15. *See* Strauss, *supra* note 14, at 368 (describing risks involved with excluding the United States Department of Agriculture (USDA)).

16. *Cf.* Dennis R. Johnson & Jolyda O. Swaim, *The Food Safety and Inspection Service's Lack of Statutory Authority to Suspend Inspection for Failure to Comply with HACCP Regulations*, 1 J. FOOD L. & POL'Y 337, 337–40 (2005) (noting that Food Safety and Inspection Service (FSIS) inspections are required for meat and poultry facilities to operate and that inspections will only be suspended when "cleanliness of the facility is so far below standards that the product may be implicated").

17. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-686T, HUMANE METHODS OF HANDLING AND SLAUGHTER: PUBLIC REPORTING ON VIOLATIONS CAN IDENTIFY ENFORCEMENT CHALLENGES AND ENHANCE TRANSPARENCY 1–2 (2008) [hereinafter U.S. GOV'T ACCOUNTABILITY OFFICE] (detailing a statement by Lisa Shores, Director of Resources and Environment at the Government Accountability Office, finding that FSIS does not have adequate funding or staff to engage in consistent and accountable reporting); *see also* Caroline Smith DeWaal, *Food Safety Inspections: A Call for Rational Reorganization*, 54 FOOD & DRUG L.J. 453, 454 (1999) (finding that, under the regulatory framework, "food safety problems can slip through the cracks of agency jurisdiction"); Anastasia S. Stathopoulos, Note, *You Are What Your Food Eats: How Regulation of Factory Farm Conditions Could Improve Human Health and Animal Welfare Alike*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 407, 434–36 (2010) (arguing that FSIS inspection is flawed due to lack of statutory authority to regulate CAFOs and livestock prior to slaughter).

18. Cody Carlson, *The Ag Gag Laws: Hiding Factory Farm Abuses from Public Scrutiny*, THE ATLANTIC (Mar. 20, 2012, 9:06 AM), http://www.theatlantic.com/health/archive/2012/03/the-ag-gag-laws-hiding-factory-farm-abuses-from-public-scrutiny/254674/.

19. *See generally* Strauss, *supra* note 14, at 355–58 (describing the FSMA's political battles).

that the American food supply remains competitive, safe, and healthy for workers, consumers, and livestock. Though whistleblower protections should ultimately be provided through comprehensive legislation similar to the FSMA, the recommended regulatory addition will serve as a step in the right direction until larger employee-rights reform takes place. These changes would enhance the current food safety regulatory landscape, which this Comment will review in Part I. Next, Part II delves into the whistleblower protections currently unavailable in factory farm meat and poultry production and discusses common concerns in factory farming and trends in the industry's workforce. Part III describes the recent increase in state ag-gag laws and how these laws highlight both the secrecy of meat and poultry production and the corresponding need for federal whistleblower protections. Finally, Part IV recommends that the USDA promulgate rules requiring whistleblower protections through industry-led Employee Protection Plans (EPPs) as an additional condition for facility inspection. American farming impacts public safety,[20] national security,[21] environmental welfare,[22] and animal health.[23] While ag-gag laws are just one example of major meat producers working to continue operating under protected conditions, these laws demonstrate that employees courageous enough to stand up against serious labor, environmental, and animal law violations ought to be protected from retaliation.

I. OVERVIEW OF EXISTING FOOD SAFETY REGULATORY STRUCTURE

From the standpoint of a consumer without a background in the area of food regulation, it may seem counterintuitive that a law devoted to food safety modernization[24] would exclude meat and poultry production. However, a historic overview of food safety prior to the FSMA's passage sheds some light on why this regulatory hole continues to exist. The American food safety system is a regulatory thicket. It involves over fifteen

20. *See generally* Eva Merian Spahn, Note, *Keep Away from Mouth: How the American System of Food Regulation Is Killing Us*, 65 U. MIAMI L. REV. 669 (2011).

21. *See* Caroline Smith DeWaal, *Food Safety and Security: What Tragedy Teaches Us About Our 100-Year-Old Food Laws*, 40 VAND. J. TRANSNAT'L L. 921, 923 (2007) (discussing how bioterrorism threats led to updating food safety laws after the September 11, 2001 terrorist attacks).

22. *See How Do CAFOs Impact the Environment?*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/region7/water/cafo/cafo_impact_environment.htm (last updated May 22, 2012) (describing the negative side effects of ill-managed waste from CAFOs).

23. *See generally* Stathopoulos, *supra* note 17, at 410–13 (detailing the suffering and poor living conditions of animals raised for meat and poultry supply).

24. *See generally* FSMA, Pub. L. No. 111–353, 124 Stat. 3885 (2011) (codified in scattered sections of 21 U.S.C.).

agencies with varied mandates and numerous other bodies at the state and local levels.[25] In fact, this regulatory intersection led the Government Accountability Office to recently designate food safety as a high-risk area on which the Executive and Legislative Branches should focus reform efforts.[26]

While this complexity is not unique to food safety,[27] the primary agencies involved in this area—the USDA and FDA—are similar in subject coverage, yet distinct in procedure and mandate. The USDA regulates livestock and meat production, including primarily poultry, cattle, and hogs, while the FDA regulates nearly all other food, drugs, and supplements.[28] Given the array of grocery products available in the American marketplace, these items inherently intersect. Idiosyncratic overlaps in responsibility can take place when, for example, a single production plant produces chicken broth (FDA-regulated) and beef broth (USDA-regulated).[29] This leads to varied regulatory expectations for food producers and their employees, particularly considering that FDA inspections occur far less frequently than USDA inspections.[30] Though this type of overlap is less common than proponents of regulatory reform may suggest,[31] it represents other underlying issues that have fueled recommendations for the creation of a single food safety agency made by many in the past.[32]

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25. *See, e.g.*, Michael R. Taylor, *Preparing America's Food Safety System for the Twenty-First Century—Who Is Responsible for What When It Comes to Meeting the Food Safety Challenges of the Consumer-Driven Global Economy?*, 52 FOOD & DRUG L.J. 13, 18–20 (1997) (providing numerous examples of the mixed safety mandates at the state and federal level); Nathan M. Trexler, Note, *"Market" Regulation: Confronting Industrial Agriculture's Food Safety Failures*, 17 WIDENER L. REV. 311, 317–18 (2011) (describing the history and fragmentation of the American food safety system); Note, *Reforming the Food Safety System: What If Consolidation Isn't Enough?*, 120 HARV. L. REV. 1345, 1349–50, 1354 (2007) (identifying the parties involved in regulating food safety, including numerous agencies and over 3,000 state and local bodies).

26. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 12.

27. *See* Jody Freedman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1134–35 (2012) (describing similar overlap in the finance and border control sectors).

28. *See* Note, *supra* note 25, at 1349 (describing the respective jurisdictions of the USDA and FDA).

29. *Cf. id.* at 1350, 1355–56 (comparing the regulations for other related products similarly).

30. *See* DeWaal, *supra* note 17, at 454–55 (describing how the FDA inspects plants only in response to an outbreak suspicion while USDA staff continuously inspects plants).

31. *See* Note, *supra* note 25, at 1355 (explaining that though overlap on particular products takes place, this duplication occurs in approximately 2% of production facilities—or roughly 1,450 plants).

32. *See* DeWaal, *supra* note 17, at 457–58 (raising issues such as food import and technological innovation that prompted support for a proposed legislative overhaul in 1999).

Congress created the USDA and FDA under distinct statutes passed in response to distinct societal concerns.[33] The USDA largely promulgates regulations pursuant to the Federal Meat Inspection Act (FMIA),[34] Poultry Products Inspection Act (PPIA),[35] and Humane Methods of Slaughter Act of 1978.[36] While these acts and the regulations developed thereunder have changed incrementally since 1907,[37] the USDA inspection mandate has not been overhauled since the start of federal involvement in the industry.

The USDA's regulatory control over meat and poultry production depends largely on FSIS and its nearly 7,800 facility inspectors.[38] Inspectors are responsible for reviewing livestock directly before and after slaughter to look for signs of animals being unfit for the human food supply.[39] In 1997, the USDA abandoned its original "sight, touch, and smell"[40] inspection method and adopted the Hazard Analysis Critical Control Point (HACCP) system.[41] Rather than relying on sensory review by inspectors, the HACCP system focuses on industry involvement, enhances record keeping, and addresses critical points in the production process that lead to the highest risks of contamination.[42] In practice, HACCP has largely reduced the role of FSIS inspectors and has enabled deceptive record keeping and less industry transparency.[43] Despite efforts

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But see Note, *supra* note 25, at 1366 (arguing that combining agencies is not a panacea for problems that exist).

33. *See* Note, *supra* note 25, at 1348 (indicating that the predecessors to the FDA and USDA went through an adversarial period in the early 1900s); Stathopoulos, *supra* note 17, at 439 (noting USDA's conflicted mandate to both promote and regulate agriculture).

34. Federal Meat Inspection Act (FMIA), 21 U.S.C. §§ 601–95 (2006).

35. Poultry Products Inspection Act (PPIA), 21 U.S.C. §§ 451–72 (2006 & Supp. II 2009).

36. Humane Methods of Slaughter Act of 1978 (HMSA), 7 U.S.C. §§ 1901–07 (2006).

37. *See* Johnson & Swaim, *supra* note 16, at 340–44 (describing eras of regulatory adjustment).

38. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 4, 8–10 (asserting that a decrease in the number of FSIS employees occurred despite an increase in budget and meat production and that the USDA stated that this was due to facility consolidation).

39. The Hazard Analysis Critical Control Point (HACCP) inspection system is currently used. *See, e.g.*, Pape, *supra* note 12, at 435–42 (discussing the HACCP system and its flaws); 9 C.F.R. pt. 417 (2012).

40. Pape, *supra* note 12, at 434.

41. *See* 9 C.F.R. pt. 417 (detailing HACCP guidelines); Pape, *supra* note 12, at 435.

42. *See* Pape, *supra* note 12, at 436–38 (providing an overview of HACCP system principles).

43. *See* Katherine A. Straw, Note, *Ground Beef Inspections and* E. Coli *O157:H7: Placing the Needs of the American Beef Industry Above Concerns for the Public Safety*, 37 WASH. U. J.L. & POL'Y 355, 364 (2011) (describing how the change in FSIS's role from inspecting livestock to reviewing records has weakened the agency's role); *see also* Pape, *supra* note 12, at 439 (affirming that industry negotiations diluted the impact of HACCP). *But see Hearing to Review*

to bolster food safety nationwide,[44] the current regulatory framework has allowed large-scale meat and poultry producers to slip out the back door. HACCP, the heralded advance in meat inspection, has actually removed inspectors and public reporting. Additionally, the number of inspectors has dropped while meat production and the USDA budget have increased.[45]

Aside from the questioned strength of HACCP, FSIS power has been found to preempt state efforts to regulate in the area of meat production facility operations.[46] In early 2012, the Supreme Court held that FSIS regulations preempted a California law that regulated an area of livestock slaughter and sale within the scope of the FMIA.[47] However, meat and poultry producers have also successfully challenged FSIS enforcement actions independently.[48] This varied level of impact suggests that, while FSIS has prominence over state meat and poultry regulation, its power over individual companies exists in a somewhat fragile balance. Against this backdrop, and when considering the redundancy in agency jurisdiction, it is easy to understand how food safety regulations have largely only adapted in response to crisis or tragedy[49] and how legislation as vast as the FSMA was passed without impacting the meat and poultry industries.

II. WHISTLEBLOWER PROTECTIONS, THE CORPORATE MEAT PRODUCTION INDUSTRY, AND ITS WORKFORCE

The simultaneous evolution of more factory meat and poultry

Federal Food Safety Systems at the U.S. Department of Agriculture: Hearing Before the Subcomm. on Livestock, Dairy, and Poultry of the H. Comm. on Agric., 111th Cong. 52–53 (2009) [hereinafter *Livestock Hearing*] (statement of Michael L. Rybolt, Director, Scientific and Regulatory Affairs, National Turkey Federation) (urging that HACCP is an advanced and largely successful food safety inspection system).

44. *See, e.g.*, FSMA, Pub. L. No. 111-353, 124 Stat. 3885 (2011); President Barack Obama, Weekly Address (Mar. 14, 2009), *available at* http://www.whitehouse.gov/the_press_office/Weekly-Address-President-Barack-Obama-Announces-Key-FDA-Appointments-and-Tougher-F (announcing the creation of a multi-agency effort to coordinate regulatory mandates and improve food safety).

45. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 8–10.

46. *See* Nat'l Meat Ass'n v. Harris, 132 S. Ct. 965, 975 (2012) (stating the FMIA "expressly preempts" the challenged California law); *see also infra* Part IV.B. (discussing the preemption issue).

47. *Nat'l Meat Ass'n*, 132 S. Ct. at 970–71, 975.

48. *See* Johnson & Swaim, *supra* note 16, at 361–68 (comparing three successful industry challenges). *But see Livestock Hearing*, *supra* note 43, at 5, 19 (statement by Alfred V. Almanza, Administrator, FSIS) (noting that FSIS oversees approximately 6,200 facilities each year and providing context for how many enforcement actions remain unchallenged).

49. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 12 (stating that food regulation "evolved piecemeal, typically in response to particular health threats or economic crises").

production and less industry transparency should raise questions for everyone impacted by large-scale American meat suppliers,[50] particularly because employees in this industry are not provided with whistleblower protections. The need to advance the rights of employees through rule promulgation becomes clear when considering (1) the whistleblower protections recently provided in the FSMA, (2) health and environmental concerns present in the meat and poultry industry, and (3) the vulnerability of the industry's workforce.

A. Where Meat is Not Food: The FSMA and Existing Federal Whistleblower Protections

As mentioned above, the complexity of food safety in the United States may explain how the USDA and meat regulations were left out of the FSMA. Less clear, though, is how food-producing entities have been exempt from providing whistleblower protections for so long. Federally enforced protections are common in areas where conditions are unsafe,[51] stakes are high in the event of violations,[52] or a workforce is particularly vulnerable and unable to address violations without protection from retaliation.[53] Employees supporting meat and poultry production in the United States fall into all of these categories,[54] yet they have no assurance against retaliation if they report violations that jeopardize the American food supply.

The FSMA includes whistleblower protections for FDA-regulated industries.[55] While it is unclear how the whistleblower protections will

50. *See, e.g.*, Spahn, *supra* note 20, at 714 (contending that food producers owe a higher duty of care to consumers); Trexler, *supra* note 25, at 321–22 (arguing that production secrecy should end because, unlike other consumer markets, everyone must purchase food).

51. *See, e.g.*, 15 U.S.C. § 2622 (2006) (empowering the Secretary of Labor to enforce whistleblower protections in the toxic substances industry); 42 U.S.C. § 5851 (2006) (providing whistleblower protections for nuclear energy industry employees); U.S. DEP'T OF ENERGY, OFFICE OF ECON. IMPACT & DEV., DOE G 442.1-1, EMPLOYEE CONCERNS PROGRAM GUIDE (1999) [hereinafter U.S. DEP'T OF ENERGY] (introducing the Employee Concerns Program for Department of Energy (DOE) contractors and subcontractors).

52. *See, e.g.*, 12 U.S.C. § 5567 (Supp. V 2012) (providing whistleblower protections in the financial industry).

53. *See* Whistleblower Protection Act, 5 U.S.C. §§ 1211–19, 1221–22, 3352 (2006 & Supp. V 2012) (providing whistleblower protections for federal employees who report federal government violations).

54. *See infra* Part II.C.

55. FMSA, Pub. L. No. 111–353, § 402, 124 Stat. 3885, 3968–71 (2011) (codified in scattered sections of 21 U.S.C.). *See generally* Steve Karnowski, *New Food Safety Law Contains Little-Noticed Whistleblower Protection*, HUFFINGTON POST (Feb. 11, 2011, 3:09 AM), http://www.huffingtonpost.com/2011/02/11/food-safety-law-protects-

operate as promulgated regulations,[56] the fact that USDA-regulated industries are exempt from offering such protections will present serious problems in areas that receive double surveillance.[57] Additionally, the exclusion of factory meat production signals a troubling double standard: worker protections are required to bolster food safety, yet the people who raise, slaughter, and pack meat and poultry remain unprotected.

B. Meat and Poultry Production: An Overview of Common Major Concerns

Factory-farmed livestock has an immense presence in our food system[58] and has generated a great deal of research. Many recent studies have focused on the environmental impact of factory farming.[59] As demand for meat in the United States and abroad has increased,[60] so too has the size of CAFOs.[61] Containment structures look like stretched airplane hangars and can hold up to 1,000 cattle for beef production, 700 cattle for dairy production, 2,500 hogs weighing more than 250 pounds each, or 125,000 chickens for broiling.[62] Confined living conditions make livestock susceptible to disease and death, so antibiotics are used to keep animals

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whistleblowers_n_821989.html (reporting that the FMSA covers a range of activities).

56. The FDA released proposed regulations in January 2013. *See* Stephanie Strom, *F.D.A. Offers Broad New Rules to Fight Food Contamination*, N.Y. TIMES, Jan. 4, 2013, http://www.nytimes.com/2013/01/05/business/fda-offers-rules-to-stop-food-contamination.html?hpw&_r=0 (describing rules proposed two years after the FSMA's passage); *see also* Dina ElBoghdady, *Food-Safety Rules in Limbo at Office of Management and Budget*, WASH. POST, May 2, 2012, http://www.washingtonpost.com/business/economy/food-safety-rules-in-limbo/2012/05/02/gIQAhs0ZxT_story.html (describing the uncertainty caused by delays in finalizing the rules).

57. *See supra* Part I.

58. *See* Gabriela Steier, Note, *Externalities in Industrial Food Production: The Costs of Profit*, 9 DARTMOUTH L.J., Fall 2011, at 163, 172 (stating that the majority of meat and poultry is factory farmed).

59. *See, e.g.*, KIRBY, *supra* note 1, at 35–36 (describing a river turned orange due to CAFO runoff).

60. *See* Lincoln Cohoon, Note, *New Food Regulations: Safer Products or More Red Tape?*, 6 J. HEALTH & BIOMEDICAL L. 343, 349–50, 364–66 (2010) (discussing USDA constraints despite a growing industry); Twilight Greenaway, *Meatifest Destiny: How Big Meat Is Taking over the Midwest*, GRIST (June 25, 2012, 6:48 AM), http://grist.org/factory-farms/meatifest-destiny-how-big-meat-is-taking-over-the-midwest/ (discussing the increase in U.S. meat exports to China).

61. *See* Greenaway, *supra* note 60. CAFOs largely fall under the Environmental Protection Agency's regulatory jurisdiction. *See generally Animal Feeding Operations – Compliance and Enforcement*, ENVTL. PROT. AGENCY, http://www.epa.gov/oecaagct/anafocom.html (last updated June 27, 2012) (including guidance for complying with CAFO regulations).

62. *See* Follmer & Termini, *supra* note 3, at 52 (describing the size designations of CAFOs).

eating and growing to a size suitable for slaughter.[63] And with thousands of confined, eating animals comes a near-unimaginable amount of animal waste.[64] In the natural environment, pasture-raised animals' waste transforms into fertilizer and rarely presents issues related to fecal and urine concentration. However, CAFOs keep animal waste in "lagoons" or lake-sized cesspools.[65] These lagoons can be up to 120,000 square feet and give off an unbearable odor.[66] Exposure to the gases lagoons emit has been tied to severe health problems[67] and can also have a devastating impact on surrounding waterways,[68] local wildlife,[69] and property values.[70]

In addition to focusing on the environmental impact of factory farming, many researchers devote attention to the dismal living conditions that poultry, hogs, and cattle endure before being slaughtered and shipped to supermarkets and restaurants around the world. Livestock raised and slaughtered in factory production schemes are packed into containers so small that they are often unable to turn around or spread their wings.[71] Animals often live standing in their own feces, with little exposure to fresh air or sunlight and no ability to act on instinct, making them anxious and depressed.[72] To prevent the inevitable fighting that occurs with so many

63. *See* Stathopoulos, *supra* note 17, at 416–20 (explaining that the concoction of ingredients fed to livestock can include hormones, antibiotics, waste from chicken coops called "poultry litter," dirt, plastic, arsenic, and even remains of other animals); Pape, *supra* note 12, at 427–28 (adding to the issue of industry overlap by noting that the FDA regulates animal feed).

64. *See* Stathopoulos, *supra* note 17, at 413–14 (documenting the immense animal waste farms produce).

65. *See* KIRBY, *supra* note 1, at 4 (depicting a flight above a CAFO and the stench as it was approached); Stathopoulos, *supra* note 17, at 413–15 (detailing the toxicity of lagoons).

66. *See* KIRBY, *supra* note 1, at 4; Stathopoulos, *supra* note 17, at 414 (quoting Jeff Tietz, *Boss Hog*, ROLLING STONE, Dec. 14, 2006, at 89).

67. *See* Stathopoulos, *supra* note 17, at 414 (stating that lagoon toxins are connected to "asthma, bronchitis, diarrhea, heart palpitations, headaches, depression, nosebleeds, and brain damage").

68. *See id.* at 415 (illustrating the potential for extreme pollution should a lagoon rupture or leak).

69. *See, e.g.*, KIRBY, *supra* note 1, at 35–36 (describing the fish kills in a river due to CAFO waste).

70. *See id.* at 31 (stating that air pollution results in economic depression in areas near CAFOs).

71. *See* Lynn M. Boris, Note, *The Food-Borne Ultimatum: Proposing Federal Legislation to Create Humane Living Conditions for Animals Raised for Food in Order to Improve Human Health*, 24 J.L. & HEALTH 285, 290–91 (2011) (describing the evolution of pathogens due to animals living in confinement). *But see* KIRBY, *supra* note 1, at 33 (acknowledging that some cattle farms allow animals outside).

72. *See, e.g.*, Michael Pollan, *An Animal's Place*, N.Y. TIMES MAG., Nov. 10, 2002, http://www.nytimes.com/2002/11/10/magazine/10ANIMAL.html (describing these

animals in containment, many operators remove the beaks of poultry and tails of cattle and hogs.[73]

In slaughterhouse facilities, efficiency is the top priority.[74] Undercover video that ultimately led to the nation's largest beef recall[75] documented slaughterhouse workers beating, dragging, and striking animals with electric prods to make them stand when they could not do so on their own.[76] Other videos showed workers gruesomely killing cattle that had suffered frostbite by hitting them with picks and shovels.[77] In the fast pace of the processing plant, the line does not stop moving, and animals may start to be processed while still alive.[78] The breadth of animal abuse that takes place throughout the factory meat and poultry production process is beyond the scope of this Comment, but the legal and societal importance of inhumane animal treatment and the impact it has on people exposed to it are nothing to ignore, particularly in the context of those animals that sustain us.[79]

Perhaps most often, and reasonably so, research surrounding factory farm improvements is devoted to lessening debilitating and often deadly foodborne illnesses presented by pathogens and bacteria found in factory

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confined and filthy living conditions, and the tendency for pigs—highly intelligent animals—to become depressed as a result of their confinement).

73. *See* Stathopoulos, *supra* note 17, at 412–13 (addressing the removal of beaks and tails as a way to prevent fighting and infection caused by animal anxiety, yet acknowledging that "stubs" resulting from removal often lead to infection).

74. *See* Taylor, *supra* note 25, at 387 (suggesting that regulators share the goal of efficiency with industry); Straw, *supra* note 43, at 356–57 (illustrating hesitation by the factory farming industry to adopt regulations that will slow production).

75. The video was released by the Humane Society of the United States (HSUS) through the work of an undercover activist. Andrew Martin, *Largest Recall of Ground Beef Is Ordered*, N.Y. TIMES, Feb. 18, 2008, http://www.nytimes.com/2008/02/18/business/18recall.html. This individual would be subject to criminal penalty under a number of pending ag-gag laws. *See infra* Part III.

76. *See generally* Martin, *supra* note 75 (describing the undercover video that spurred the recall of 143 million pounds of ground beef and noting that the exposed company has since closed).

77. *See generally* Bittman, *supra* note 5 (discussing a video taken undercover at E6 Cattle Company and describing the problem with ag-gag laws deterring the collection of such footage).

78. ERIC SCHLOSSER, FAST FOOD NATION 171 (2002).

79. *See* Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1333 n.* (2000) ("[T]he cruel treatment of animals seems to me one of the great unaddressed legal problems of our time."); *cf. Continuing Problems in USDA's Enforcement of the Humane Methods of Slaughter Act: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight and Gov't Reform*, 111th Cong. 38–39 (2010) [hereinafter *HMSA Hearing*] (statement of Dean Wyatt, Supervisory Public Health Veterinarian, FSIS) (discussing mistreatment he experienced after trying to enforce against violations).

farm products.[80] As mentioned above, factory-raised animals require a great deal of unnatural assistance to survive until slaughter.[81] The effects of antibiotics, hormones, and unsound animal feed[82] are all passed through to humans at consumption. While the presence of harmful bacteria can be alleviated with proper cooking, more serious side effects are less understood. Primary areas of concern include humans' developing resistance to antibiotics, contracting mad cow disease, and falling ill to *E. coli* or even cancer.[83] Exposure to these health risks connects to the environmental and animal health aspect of the factory farm problem; each area perpetuates the worsening of other conditions. Likewise, stronger regulation to alleviate any of the problems above would necessarily improve other areas. For example, restrictions on livestock containment or antibiotic use would lessen the impact of harmful animal waste. As ag-gag laws display, now more than ever, effective alerts regarding any of these violations must come from within the facilities.

C. By the Lagoons and on the Line: The Meat and Poultry Production Workforce

If the conditions outlined above are difficult to swallow, one should try to imagine an eight-hour shift in such a setting. Workers in CAFOs, slaughterhouses, and meatpacking facilities are constantly exposed to these repugnant and dangerous conditions. Employees at CAFOs work amidst the harmful noxious gases and under constant stress of maintaining contained animals.[84] Slaughterhouse and meatpacking employees are in particularly worrisome roles.[85] From guiding animals toward slaughter and stunning them as they enter the facility to sawing carcasses apart and trimming meat along a fast assembly line, much of factory slaughtering is still done by hand.[86] The pace is fast and constant, and the work is

80. *See* CDC ESTIMATES, *supra* note 2 (documenting the prevalence of foodborne illnesses transmitted through food).

81. Of course, many animals do not survive until slaughter. *See* Stathopoulos, *supra* note 17, at 412 (providing data regarding the high rate of death before slaughter).

82. *See* sources cited *supra* note 63.

83. *See, e.g.*, Stathopoulos, *supra* note 17, at 420–33 (reviewing various health problems connected with additives in livestock diets and treatment, including: increases in antibody problems due to antibiotic exposure; increased rates of breast, prostate, and colon cancer due to consuming the growth hormone rBGH used in dairy production; and increased risks of contaminated meat and poultry due to fast processing that increases the presence of fecal matter on meat).

84. *See supra* Part II.B.

85. *See generally* Jennifer Dillard, Note, *A Slaughterhouse Nightmare: Psychological Harm Suffered by Slaughterhouse Employees and the Possibility of Redress Through Legal Reform*, 15 GEO. J. ON POVERTY L. & POL'Y 391 (2008) (discussing the traumatic nature of slaughterhouse work).

86. *See id.* at 395–98 (reviewing the psychological trauma impacting factory farm

gruesome yet monotonous.[87] Severe injuries and even death are constant threats when working in close quarters with heavy machinery, sharp knives, and fatigue for long hours.[88] Workers have been urged to leave injuries unreported, so as not to alert federal regulators, and may be rewarded if they stay silent.[89] For injuries that are reported, collecting worker's compensation can be difficult without a legal infrastructure that requires accountability on the part of employers.[90]

Minority populations belonging to low socioeconomic classes comprise a large proportion of the factory meat and poultry production workforce.[91] Recent immigrants pour into factory farming communities willing to take the work, no matter how gruesome.[92] It has been reported that the least desirable job in slaughter facilities—the overnight cleaning crew—often belongs to illegal immigrants who lack both bargaining power and the ability to speak out about violations for fear of deportation.[93] Currently, there are few avenues to learn about such conditions in factory farming aside from employee accounts; the few glimpses available show that these workers bear an incredible burden to bring consumers an affordable product.[94]

III. SOMETHING TO HIDE: THE RECENT SURGE IN AG-GAG LAWS ACROSS THE UNITED STATES

Several states have recently passed or considered passing laws that restrict individuals' abilities to document factory farm violations by

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workers).

87. *See* SCHLOSSER, *supra* note 78, at 171 (describing a "sticker's" job as being to "stand in a river of blood, being drenched in blood, slitting the neck of a steer every ten seconds or so" for eight-and-a-half hours).

88. *See id.* at 172–73 (describing the scene in a slaughter facility).

89. *See id.* at 175 (stating that workers who refrained from reporting injuries were rewarded with temporary, more-desirable positions).

90. *See id.* at 178–86 (documenting the difficulty that union members at meat production plants experience in maintaining bargaining power with employers).

91. *See, e.g.*, Greenaway, *supra* note 60 (describing an influx of immigrants to a rural Illinois town—home to a Cargill plant—as the "sacrifice generation," those willing to work in awful conditions to provide for their children); SINCLAIR, *supra* note 8 (detailing hardships of European immigrant populations in the Chicago stockyards of the early 1900s).

92. *See* Greenaway, *supra* note 60.

93. *See* SCHLOSSER, *supra* note 78, at 176–78 (illustrating the task of using a hot temperature, high pressure hose to clean slaughter remnants from facilities and the gruesome deaths that occur when untrained workers clean machinery, and stating that Occupational Safety and Health Administration fined one company only $480 for each death).

94. *See generally id.* at 169–90; Dillard, *supra* note 85 (revealing the life of slaughterhouse workers and the psychological trauma they face).

criminalizing these efforts. The laws vary in scope and projected impact, but all are aimed at shielding corporate farming operations from scrutiny that occurs when undercover recordings of farm conditions are made public.[95] Three states passed legislation resembling ag-gag laws between 1990 and 1991,[96] but there has been a resurgence of efforts to introduce more exacting legislation across the country.

The pieces of legislation passed in Kansas, North Dakota, and Montana[97] take the form of advanced trespassing restrictions. While the laws differ slightly in penalty range,[98] each prohibits those without an owner's consent from entering facilities to use video and audio recording devices.[99] These recording restrictions are incorporated with other prohibitions on crimes such as setting animals free and destroying property.[100]

In 2011 and 2012, there was an influx of ag-gag legislation proposed across the country; after twenty years of inactivity in the area, eleven state legislatures introduced such bills. Laws were passed in Utah and Iowa in early 2012 and were considered in Minnesota, New York, Indiana, Tennessee, Illinois, Nebraska, Florida, Pennsylvania, and Missouri that same year.[101] Together, these states comprise over 30% of the total agricultural output in the United States.[102] Common provisions in the proposed laws include time limits on turning over legally obtained

95. *See, e.g.*, Jennifer Viegas, *Factory Farming Videos Prompt 'Ag-Gag' Bills*, DISCOVERY NEWS (Jan. 31, 2012, 11:11 AM), http://news.discovery.com/animals/factory-farming-videos-120131.html (providing an overview of ag-gag legislation).

96. KAN. STAT. ANN. §§ 47-1825 to -1828 (2011); MONT. CODE ANN. §§ 81-30-101 to -105 (2011); N.D. CENT. CODE §§ 12.1-21.1-01 to -05 (2012).

97. As of 2004, these states comprise 6.56% of the total U.S. agriculture output. *See Agriculture Receipts: Total*, STUFFABOUTSTATES.COM, http://stuffaboutstates.com/agriculture/index.html (last updated Jan. 5, 2011).

98. *See* KAN. STAT. ANN. § 47-1828 (allowing for treble damages); MONT. CODE ANN. § 81-30-105 (delineating fines or jail time depending on the damage valuation); N.D. CENT. CODE § 12.1-21.1-04 (allowing varied levels of felony offenses for violators).

99. *See* KAN. STAT. ANN. § 47-1827(c)(4); MONT. CODE ANN. § 81-30-103(2)(e); N.D. CENT. CODE § 12.1-21.1-02(6).

100. *See* KAN. STAT. ANN. § 47-1827(a)–(b); MONT. CODE ANN. § 81-30-103(2)(a); N.D. CENT. CODE § 12.1-21.1-02(1)–(2).

101. *See* IOWA CODE ANN. § 717A.3A (West 2012); UTAH CODE ANN. § 76-6-112 (West 2012); S. 1246, 2011 Leg., Reg. Sess. (Fla. 2011); H. 5143, 97th Gen. Assemb., Reg. Sess. (Ill. 2012); S. 184, 117th Gen. Assemb., 2d Reg. Sess. (Ind. 2012); H.R. 1369, 2011 Leg., 87th Sess. (Minn. 2011); S. 695, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012); H. 1860, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012); Leg. 915, 102d Leg., 2d. Sess. (Neb. 2012); S. 5172, 2011-2012 Leg., Reg. Sess. (N.Y. 2011); S. 1596, 2012 Gen. Assemb., Reg. Sess. (Pa. 2012); S. 3460, 2012 Gen. Assemb., Reg. Sess. (Tenn. 2012).

102. *See Agriculture Receipts: Total*, STUFFABOUTSTATES.COM, http://stuffaboutstates.com/agriculture/index.html (last updated Jan. 5, 2011).

recordings to law enforcement,[103] restrictions on the reproduction or dissemination of documentation,[104] and limits on gaining employment under false pretenses.[105]

Utah and Iowa enacted similar ag-gag laws in early 2012.[106] The Iowa law prohibits committing "agricultural production facility fraud" by barring people from accessing facilities under false pretenses.[107] This law includes separate restrictions stating that people may not seek employment with the intent of committing fraud and must report any such person to authorities.[108] As opposed to the majority of ag-gag legislation, this bill does not include language specifically prohibiting recordings, but instead focuses on barring the presence of people who may have a motive to "commit[ ] . . . fraud."[109]

The passage of Iowa's law sets a troubling precedent for industry involvement in lawmaking as well as the polarization that occurs when framing ag-gag opposition as an issue based solely on animal rights.[110] Supporters suggest that the laws protect farmers from illegal interference

103. *See, e.g.*, Leg. 915 §§ 28-1017(2)–(3), 102d Leg., 2d. Sess. (Neb. 2012) (including details of how reports must be filed within a particular timeframe); *see also* Joseph Jerome, *'Ag-Gag' Laws Chill Speech, Threaten Food Supply*, AM. CONSTITUTION SOC'Y BLOG (Apr. 17, 2012), http://www.acslaw.org/acsblog/%E2%80%98ag-gag%E2%80%99-laws-chill-speech-threaten-food-supply (showing that a supporter of time limits feels that without immediate release, documentation does not prevent further violations, but fulfills a less effective vendetta against the industry).

104. *See, e.g.*, H. 5143, 97th Gen. Assemb., Reg. Sess. §§ 4.3, 4.5 (Ill. 2012) (prohibiting those who receive documentation of violations from distributing the information); H.R. 1369, 2011 Leg. 87th Sess., §§ 3(1)–4(2) (Minn. 2011); S. 3460, 2012 Gen. Assemb., Reg. Sess. §§ 39-13-609(a)–(b) (Tenn. 2012).

105. *See, e.g.*, H. 5143, 97th Gen. Assemb., Reg. Sess. §§ 4.3, 4.5 (Ill. 2012); H.R. 1369, 2011 Leg., 87th Sess., §§ 3–4(2) (Minn. 2011); H. 1860, 96th Gen. Assemb., 2d Reg. Sess. §§ 578.660, 578.672 (Mo. 2012); Leg. 915, 102d Leg., 2d. Sess. § (3) (Neb. 2012) (disallowing seeking employment under false pretenses).

106. IOWA CODE ANN. § 717A.3A (West 2012); UTAH CODE ANN. § 76-6-112 (West 2012).

107. IOWA CODE ANN. § 717A.3A(1).

108. *See id.* § 717A.3A(3)(a) (presenting a twist on a law perceived as anti-whistleblower: those aware of a potential whistleblower must themselves "blow the whistle").

109. Violators may be charged with varied misdemeanor offenses. *See id.* § 717A.3A(2)(a)–(b).

110. *Cf.* O. Kay Henderson, *Branstad Says "Ag Gag" Law Protects Iowa Farmers*, RADIOIOWA.COM (Mar. 5, 2012), http://www.radioiowa.com/2012/03/05/branstad-says-ag-gag-law-protects-iowa-farmers-from/ (including the Iowa Governor's understanding of bill opponents as "people who don't believe anybody should eat meat and . . . want to release livestock . . . ."); *HMSA Hearing*, *supra* note 79, at 3 (statement of Rep. Jim Jordan) (describing animal welfare groups' efforts as "offensive and deplorable").

with operations,[111] and agriculture industry leaders have both influenced Iowa legislators and also urged passage of similar bills elsewhere.[112] This industry influence is particularly problematic given the opposition to the bill shown by Iowa citizens in a 2011 survey.[113]

Utah's legislature passed its ag-gag law in March 2012.[114] The law defines the new crime of "agricultural operation interference" as knowingly recording images or sound, either in person or with a device planted within a facility.[115] This law does not include prohibitions on gaining employment under false pretenses but instead focuses more on whether a facility owner consented to documentation generally.[116]

As these two ag-gag laws were developing, state and national leaders from Iowa and Utah had varying opinions on the passage of the FSMA, which included whistleblower protections for FDA-regulated industries. Utah Representative Bill Wright vehemently opposed the FSMA and has made efforts to exclude Utah from its application.[117] By contrast, U.S. Senator Tom Harkin of Iowa has widely supported the need for FDA industry whistleblower protections.[118] Despite Senator Harkin's

111. *See, e.g.*, Henderson, *supra* note 110 (reporting that the Iowa governor supports the bill to protect farmers from "people doing illegal, inappropriate things").

112. *See, e.g.*, *HF 589*, THE IOWA LEGISLATURE, http://coolice.legis.iowa.gov/Cool-ICE/default.asp?Category=Lobbyist&Service=DspReport&ga=84&type=b&hbill=HF589 (last visited Jan. 31, 2013) (listing the lobby groups connected to the legislators that voted both against and in support of the ag-gag legislation); Dan Flynn, *Iowa Approves Nation's First 'Ag-Gag' Law*, FOOD SAFETY NEWS (Mar. 1, 2012), http://www.foodsafetynews.com/2012/03/iowa-approves-nations-first-ag-gag-law/ (showing that Monsanto Co. and large agriculture groups supported passage).

113. *See* Jennifer Jacobs, *Survey Finds Iowa Voters Oppose Prohibiting Secret Animal-Abuse Videos*, DES MOINES REGISTER (Mar. 22, 2011, 9:10 AM) http://blogs.desmoinesregister.com/dmr/index.php/2011/03/22/survey-finds-iowa-voters-oppose-prohibiting-secret-animal-abuse-videos/ (showing that only 21% of Iowa respondents, in a poll paid for by the HSUS, supported the bill).

114. *See* Robert Gehrke, *Herbert Signs So-Called 'Ag-Gag' Bill*, SALT LAKE TRIB., Mar. 20, 2012, http://www.sltrib.com/sltrib/politics/53758916-90/animal-bill-brown-farm.html.csp (discussing the Utah law and its opposition).

115. *See* UTAH CODE ANN. § 76-6-112(2) (West 2012).

116. *Id.* § 76-6-112(2)–(3). Section 76-6-112(2)(b), however, could be interpreted as a ban on gaining employment under false pretenses. *Id.* § 76-6-112(2)(b) (stating that a person is guilty of agricultural operation interference if the person "obtains access to an agricultural operation under false pretenses").

117. *See* Strauss, *supra* note 14, at 363; *see also* Robert Gehrke, *Proposal Would Exempt Utah Food from Federal Regulation*, SALT LAKE TRIB., Feb. 7, 2011, http://www.sltrib.com/sltrib/politics/51177864-90/bill-farmers-fda-federal.html.csp (framing Representative Wright's opposition as a state's rights and anti-regulation concern).

118. *See* Strauss, *supra* note 14, at 363 (quoting Senator Harkin as supporting the FSMA protections: "Unless workers are free to speak out without fear of retaliation, we might never

congressional support for the FSMA,[119] Iowa's ag-gag law was passed before the Act's regulations were promulgated.

Proponents of ag-gag legislation argue that the laws are necessary to keep activists from misrepresenting the factory farming industry with footage that is presented out of context to scare the American public.[120] Other supporters have suggested that barring outside documentation protects animals and products from contamination that can come from outsiders entering facilities without authorization.[121] Even considering these arguments, ag-gag laws send a message that states enacting such legislation have something to hide from the American public, a portrayal harmful to responsible farmers in impacted states.[122] The laws operate as a deterrent for what has historically been the most effective way to expose violations on factory farms.[123] By criminalizing these actions and framing the opposition as extreme, the only individuals left to expose violations are those who can legally witness infractions: the workers themselves.

IV. THE USDA SHOULD PROMULGATE RULES THAT REQUIRE MEAT AND POULTRY INDUSTRY FACILITIES TO PROVIDE EMPLOYEE PROTECTION PLANS AS A CONDITION FOR INSPECTION

The high public health and environmental risks presented by factory

learn about threats to public safety until it's too late").

119. *See* Karnowski, *supra* note 55 (describing Senator Harkin as an FSMA leader).

120. *See* Jerome, *supra* note 103 (quoting an Iowa Representative who argues that distributing such information is seen by some as a politically motivated action meant only to cast a misunderstood industry in a bad light). *But see HMSA Hearing*, *supra* note 79, at 11 (statement of Lisa Shames, Director, Natural Resources and the Environment, GAO) (reporting that over half of USDA inspectors at large plants feel video surveillance in facilities would be useful).

121. *See* Rod Swoboda, *Iowa 'Ag-Gag' Bill Signed Into Law*, AM. AGRICULTURALIST (Mar. 3, 2012), http://farmprogress.com/story-iowa-ag-gag-bill-signed-law-0-57755 (documenting an Iowa bill supporter who cited preventing outside contamination as the bill's objective). *But see* Stephanie Armour, *'Industrial Terrorism' of Undercover Livestock Videos Targeted*, BLOOMBERG BUSINESS WEEK (Feb. 21, 2012), http://www.businessweek.com/news/2012-02-21/-industrial-terrorism-of-undercover-livestock-videos-targeted.html (reporting results from a study showing that media stories about animal welfare cause meat sales to drop).

122. *See* Mark Bittman, *Banned from the Barn*, N.Y. TIMES OPINIONATOR (July 5, 2011, 11:19 PM), http://opinionator.blogs.nytimes.com/2011/07/05/banned-from-the-barn/ (presenting an overview of Iowa farms that offer an example of healthy meat farming). *See generally HMSA Hearing*, *supra* note 79, at 72–74 (statement of Bev Eggleston, Owner, Ecofriendly Foods LLC) (offering information on an exemplary producer).

123. *See HMSA Hearing*, *supra* note 79, at 51 (stating that an FSIS inspector could neither cease operation nor effectively enforce against inhumane slaughtering at a veal production plant until the HSUS leaked video footage documenting violations); Armour, *supra* note 121 (discussing recent recalls spurred by released undercover videos).

farming[124] and the currently fragile enforcement power of FSIS prove that federal regulators should not police the meat and poultry industry alone.[125] Instead, and in line with the current industry-led regulatory format, FSIS should promulgate rules that require whistleblower protection schemes as an additional condition for facility inspection.

A. FSIS Has Authority to Require Whistleblower Protections from Meat and Poultry Facilities

Although FSIS has acknowledged that it was not explicitly granted the authority to provide comprehensive whistleblower protections,[126] the existing agency authority provides room for more subtle antiretaliation mechanisms. Congressional findings included at the outset of both the FMIA and the PPIA convey intent to prevent the adulteration of meat and poultry products intended for human consumption. The findings state, "It is essential in the public interest that the health and welfare of consumers be protected by assuring that [meat and poultry] products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged."[127] These findings precede a broad grant of authority given to the USDA to regulate the meat and poultry producers that might jeopardize this goal.[128] Furthermore, Supreme Court jurisprudence

124. *See supra* Part II.B.

125. *See* Johnson & Swaim, *supra* note 16, at 361–68 (describing three successful cases against FSIS); *HMSA Hearing*, *supra* note 79, at 4–5 (statement of Rep. Dennis Kucinich) (depicting the shortfalls of FSIS inspection displayed by a GAO investigation). *But see* Nat'l Meat Ass'n v. Harris, 132 S. Ct. 965, 967 (2012) (affirming the regulatory power and preemption of FSIS). *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-487T, HUMANE METHODS OF SLAUGHTER ACT: WEAKNESSES IN USDA ENFORCEMENT (2010) (reporting the discussion on FSIS enforcement of the HMSA by GAO's Director of Natural Resources and Environment, Lisa Shames).

126. *See* Pathogen Reduction; Hazard Analysis and Critical Control Point (HACCP) Systems, 61 Fed. Reg. 38,806, 38,822 (July 25, 1996) (stating that HACCP regulations do not provide whistleblower protections because the FMIA and PPIA did not explicitly grant this authority); *see also* Sharlene W. Lassiter, *From Hoof to Hamburger: The Fiction of a Safe Meat Supply*, 33 WILLAMETTE L. REV. 411, 457–60 (1997) (recommending that meat industry workers be provided with whistleblower protection and *qui tam* litigation rights to strengthen the HACCP mission)*; HMSA Hearing*, *supra* note 79, at 23 (statement of Jerold Mande, Deputy Under Secretary for Food Safety, USDA) ("[W]histleblowers play an honored role in our democracy. It takes great courage to speak out about potential mismanagement or waste by something as big and as powerful as the U.S. Government.").

127. FMIA, 21 U.S.C. § 602 (2006) (meat and meat food products); PPIA 21 U.S.C. § 451 (2006) (poultry products).

128. *See* 21 U.S.C. §§ 451, 602 (concluding findings by stating that "regulation by the Secretary and cooperation by the States . . . are appropriate . . . to protect the health and welfare of consumers").

suggests that FSIS statutory interpretation and regulations should be granted deference when they reasonably further an enabling statute's mandate,[129] particularly if they advance public safety.[130]

Additionally, FSIS is granted more concrete authority by the PPIA and FMIA to enhance the inspection and safety mechanisms used at meat and poultry production facilities.[131] For example, the FMIA states, "The Secretary of Agriculture may utilize existing authorities to give high priority to enhancing and expanding the capacity of the [FSIS] to conduct activities to . . . enhance the ability of the Service to inspect and ensure the safety and wholesomeness of meat and poultry products."[132] Pursuant to this power, the USDA is responsible for designing and enforcing regulations for inspection.[133] The USDA has already promulgated a number of regulations standardizing facility inspection.[134] For example, two current inspection conditions—the implementation of valid Sanitation Operating Procedures (SOPs)[135] and HACCP plans[136]—were promulgated pursuant to FSIS's enabling statutes rather than explicit statutory requirements.[137]

Facility operations rely on the FSIS inspection power, and if a facility does not meet stated conditions, inspection will be suspended.[138] Federal inspection is required for continued meat production, so a suspension effectively shuts down facility operations.[139] This action is the strongest penalty FSIS has at its disposal in the event of violations.[140] Within its

129. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 845 (1984) (holding that courts must defer to reasonable statutory interpretation by agencies in the event that congressional intent is broad and inexplicit).

130. *See* United States v. An Article of Drug . . . Bacto-Unidisk . . . , 394 U.S. 784, 792 (1969) (predating *Chevron* and acknowledging the need for deference to the FDA's interpretation of an enabling statute where "such regulation is desirable for the public health").

131. PPIA, 21 U.S.C. §§ 456, 463(a)–(b); FMIA, 21 U.S.C. §§ 608, 621, 679c.

132. 21 U.S.C. § 679c(a)(1).

133. *See id.* §§ 603–06 (granting the USDA authority to inspect meat entering the food supply).

134. *See supra* Part I.

135. *See generally* 9 C.F.R. pt. 416 (2011) (detailing Sanitation Operating Procedures (SOPs)—industry-led plans that meet minimum standards for guaranteeing sanitary conditions in meat and poultry facilities as a condition for facility inspection).

136. *See id.* § 304.3(b)–(c) (imposing conditions that facilities must meet for inspection to take place).

137. *See* Pathogen Reduction; Hazard Analysis and Critical Control Point (HACCP) Systems, 60 Fed. Reg. 6,774, 6,824 (Feb. 3, 1995) (describing FSIS's interpretation of its legal authority to regulate inspections with additional requirements).

138. *See* Johnson & Swaim, *supra* note 16, at 357–60 (detailing the FSIS power to suspend or withdraw inspection in case of HACCP or SOP violations).

139. *Id.* at 356.

140. *See id.* at 356–60 (reviewing the enforcement powers available to FSIS).

existing authority to add conditions for inspection, FSIS could include an additional requirement for employee protection. As an extension of the HACCP and SOP model, whistleblower protections could be added so long as they are both promulgated under the Agency's delegated responsibility of "enhancing and expanding the capacity of the [FSIS]"[141] and also pursuant to the USDA's discretion in adding regulations under the FMIA and PPIA.

Moreover, it is not unheard of for agencies to promulgate employee protection mechanisms independent from an explicit statutory mandate. A number of regulatory mechanisms have been used in recent years to bolster offshore drilling oversight, for example.[142] This includes the establishment of Safety and Environmental Management Systems (SEMS), which are comprehensive, industry-led plans mandating minimum safety protocols and contingency plans for offshore operations.[143] The original framework for the SEMS rule has been finalized,[144] but the most potent comparison comes from a recently proposed addition. The Department of the Interior's Bureau of Ocean Energy Management, Regulation, and Enforcement[145] has proposed that employee protection requirements be added to the finalized SEMS mandate.[146] Proposed additions include providing a Stop Work Authority for any and all employees or

141. 21 U.S.C. § 679c(a) (2006).

142. The 2010 Deepwater Horizon offshore rig explosion in the Gulf of Mexico spurred this increase in regulation. *See* Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Safety and Environmental Management Systems, 75 Fed. Reg. 63,610, 63,610 (Oct. 15, 2010) (codified at 30 C.F.R. pt. 250). Though the nature of the Gulf explosion adds an exigent element to the changes, increased regulations were still promulgated within existing authority and not pursuant to legislative mandates. *See id.* (noting that the Gulf explosion underlies additional regulation); *see also* Offshore Oil and Gas Worker Whistleblower Protection Act of 2010, H.R. 5851, 111th Cong. (2010) (proposing whistleblower protection for offshore oil and gas employees).

143. Safety and Environmental Management Systems (SEMS), 30 C.F.R. §§ 250.1900–.1929 (2012) (guiding regulated entities on how to implement Safety and Environmental Management Systems (SEMS)).

144. *Id.* §§ 250.1900–.1929. *But see* Sandra Snyder, *BOEMRE's Final SEMS Rule Substantially Modifies the Original Proposal, Inviting Legal Challenge*, ENERGY LEGAL BLOG (Oct. 6, 2010, 2:00 PM), http://www.energylegalblog.com/archives/2010/10/06/3231 (discussing the opportunities for challenge presented by the finalized SEMS regulations).

145. The Bureau of Ocean Energy Management, Regulation, and Enforcement—formerly the Minerals Management Service—is undergoing a large-scale reorganization. *See* Press Release, U.S. Dep't of the Interior, Salazar Divides MMS's Three Conflicting Missions: Establishes Independent Agency to Police Offshore Energy Operations (May 19, 2010), *available at* http://www.doi.gov/news/pressreleases/Salazar-Divides-MMSs-Three-Conflicting-Missions.cfm.

146. Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Revisions to Safety and Environmental Management Systems, 76 Fed. Reg. 56,683, 56,684 (Sept. 14, 2011) (to be codified at 30 C.F.R. pt. 250).

contractors.[147] Stop Work Authority programs would enable employees to cease a specific task without fear of reprisal if they deem an imminent risk or danger to be present.[148] Proposed changes would also require offshore operators to issue reporting guidelines through which employees can address unsafe work conditions.[149] The functionality of the SEMS and its proposed additions offer an example of an agency responding to a public safety risk by promulgating employee protection mechanisms pursuant to its general preexisting authority. Though the employee protections have not been finalized, the very proposal of the SEMS rule demonstrates that an agency has interpreted its power to include adding employee protections.

Opponents to the USDA's power to promulgate employee protections may suggest that the FSMA's whistleblower provisions for food producers complicate the case for authority.[150] The Act's exclusion of the USDA could be framed as Congress intending to prevent similar protections in the meat and poultry industry. However, the fragmented historical development of FDA and USDA regulations as well as the recent introduction of a bill for a Foodborne Illness Reduction Act, which includes USDA whistleblower protections similar to those in the FSMA, dilutes this argument.[151] Considering this history, and the agency's authority, it is reasonable to interpret the FMIA and PPIA as delegating the USDA power to promulgate regulations that promote public safety by protecting employees' ability to draw attention to violations that threaten food safety.

147. *Id.*

148. *Id.* at 56,686.

149. *Id.* at 56,685, 56,687.

150. *See* FSMA, Pub. L. No. 111–353, § 402, 124 Stat. 3885, 3968–71 (2011) (providing guidelines for employees who feel they have been retaliated against for reporting violations). Congressional leaders have also acknowledged federal inspector whistleblowers who have exposed FSIS inspection shortfalls. *See HMSA Hearing*, *supra* note 79, at 61 (statement of Dean Wyatt, Supervisory Public Health Veterinarian, FSIS) (receiving thanks from Rep. Dennis J. Kucinich for Wyatt's "put[ting] [his] career on the line just to do the right thing"); s*ee also* GovAcctProjTV, *WWYW #32: Highlights from GAP's Food Whistleblower Conference*, YOUTUBE (Apr. 7, 2011), http://www.youtube.com/watch?v=15Cw7kOIffk (including an expert panelist reporting that, though weakened by negotiation, whistleblower protections were a major victory for the FSMA).

151. *See supra* Part II; Foodborne Illness Reduction Act of 2011, S. 1529, 112th Cong., § 201(a)(1) (2011) (proposing adding section 270(c)(1) to the Department of Agriculture Reorganization Act of 1994 to provide USDA employee protections); *see also* Karnowski, *supra* note 55 (reporting that according to Government Accountability Project's legal director, the FSMA bill sponsors left out USDA industries to avoid political obstacles).

B. FSIS Requirements Would Likely Preempt State Ag-Gag Laws: The Impact of National Meat Ass'n v. Harris

The January 2012 Supreme Court case *National Meat Ass'n v. Harris*[152] challenged a California law that prohibited the sale of nonambulatory livestock by measures more stringent than those laid out by FSIS.[153] In a unanimous decision, the Supreme Court upheld the preemptive effect of the federal regulation and struck down the state law.[154] The Court held that FMIA's preemption clause is broad, noting, "[The California law] reaches into the slaughterhouse's facilities and affects its daily activities. And in so doing, [the law] runs smack into the FMIA's regulations."[155] This holding strongly supports the proposition that state-led efforts (through ag-gag laws or otherwise) to prevent whistleblower protections would be preempted by FSIS regulations in this area. Additionally, it is unclear whether the standard of "reach[ing] into the slaughterhouse's facilities and affect[ing] its daily activities"[156] would ever allow states to effectively impact USDA-regulated facilities if overlap with FSIS power were possible.

The *National Meat Ass'n* decision also holds that agency preemption falls within the FMIA's language. The Court found, "The FMIA contains an express preemption provision . . . [stating] '[r]equirements within the scope of this [Act] with respect to *premises, facilities and operations of any establishment* at which inspection is provided . . . may not be imposed by any State.'"[157] Given the clear delegation of inspection power to FSIS, it would be challenging for states to implement facility requirements for employee protections without infringing on the FMIA's scope.[158]

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152. 132 S. Ct. 965 (2012).

153. *Id.* at 975.

154. *Id.*

155. *Id.* at 974. *See also* FMIA 21 U.S.C. § 678 (2006) (including the FMIA's preemption clause). It also states:

> Requirements within the scope of this chapter [on meat inspection] with respect to premises, facilities and operations of any [inspected] establishment . . . which are in addition to, or different than those made under this chapter may not be imposed by any State . . . except that any such jurisdiction may impose recordkeeping and other requirements within the scope of section 642 of this title, if consistent therewith, with respect to any such establishment. . . . [This] shall not preclude any State . . . from making requirement or taking other action, consistent with this chapter; with respect to any other matters regulated under this chapter.

Id.

156. *Nat'l Meat Ass'n*, 132 S. Ct. at 974.

157. *See id.* at 969 (quoting 21 U.S.C. § 678) (emphasis added).

158. Opponents to FSIS's enforcing whistleblower protections could point to successful industry challenges to suspension actions as a sign that FSIS has questionable impact. *See* Johnson & Swaim, *supra* note 16, at 361–68 (summarizing three cases in which FSIS has lost

Ag-gag law supporters may counter this assumption of preemption by noting that some ag-gag laws do not directly impact daily facility operations. As discussed above, ag-gag laws vary a great deal, and those that are tailored specifically to antifraud and employment prerequisites may have a stronger case to avoid federal preemption because the FMIA and PPIA are more closely aligned with slaughter practices than personnel concerns.[159] For example, a court's review of an ag-gag law that explicitly exempts legitimate employees may face a more complicated review. However, federal preemption is sharper in the case of ag-gag laws that are vague and that encompass actions by legitimate employees.[160] It follows that a state law impacting the actions and concerns of employees exposed to FSIS violations could be viewed as "reach[ing] into the slaughterhouse's facilities and affect[ing] its daily activities."[161] Additionally, this opposing argument is weakened by provisions in the FMIA that provide standards for record keeping, surveillance, and mislabeling of products, which could be interpreted as broadening the Act's scope to cover state laws that impact information about slaughter facilities more generally.[162]

Ag-gag supporters may also argue that the last clause of the FMIA's preemption provision leaves room for debate about states legislating in this area independently.[163] However, this language is unclear and provides unstable grounds for an exception; the clause is unlikely to support a preemption challenge because the ag-gag laws are designed to insulate and protect facility workings from scrutiny, clearly impacting operations. While questions regarding preemption for certain ag-gag provisions are legitimate, the Supreme Court has noted that the FMIA's preemption clause "sweeps widely,"[164] and this will likely guide courts to find that laws impacting facility employees are within the scope of the FMIA and PPIA.[165]

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when industry contested suspensions). *But see id.* at 360 (stating that FSIS has enforced hundreds of actions).

159. *See supra* Part III.

160. This is the case with Missouri's proposed law. *See infra* notes 175–76 and accompanying text.

161. *Nat'l Meat Ass'n*, 132 S. Ct. at 974.

162. *See, e.g.*, FMIA, 21 U.S.C. § 642 (2006) (providing FMIA's record keeping rule, which, notably, is a possible exception to the Act's preemption clause, as states may be able to legislate in this area if they are doing so more stringently than the FMIA permits).

163. *See* 21 U.S.C. § 678 ("This chapter shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this chapter; with respect to any other matters regulated under this chapter.").

164. *Nat'l Meat Ass'n*, 132 S. Ct. at 970.

165. The argument for federal preemption also correlates with the support for USDA's authority to promulgate protections. If FSIS's ability to add employee protections is deemed appropriate pursuant to the FMIA and PPIA, then state laws that overlap in this area

Following *National Meat Ass'n*, ag-gag laws should not thwart the effort to add whistleblower protections or measures that impact facility operations. Additionally, these measures should take place at the federal level to be effective.[166]

C. FSIS Should Require Whistleblower Protections Through Employee Protection Plans

Current conditions for inspection include verification that facilities are operating under minimum standards to ensure safe and healthy food production.[167] A measure should be added to these conditions that relates to antiretaliation plans for workers who expose violations to the USDA, facility management, or other outside parties.

Like the HACCP systems[168] and SOPs currently required of meat and poultry facilities, comprehensive EPPs should be an additional condition for federal inspection. Procedurally, these Plans could follow the organizational structure already required for SOP implementation, which will reduce the need for added infrastructure or training.[169] Industry-led Plans will also encourage meat and poultry producers to take a leading role in protecting their employees and to retain the independence that SOP and HACCP requirements currently allow.

The Department of Energy's (DOE's) Employee Concerns Program provides a useful model.[170] The DOE program includes the right of

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necessarily fall within the scope of both enabling acts. More plainly, if the USDA is able to regulate issue *x*, issue *x* clearly falls within the scope of the agency's enabling acts. *See supra* Part V.A.

166. States could still create regulations to monitor meat and poultry production for intrastate use and commerce pursuant to each state's distinct regulatory structure. *But see* HARRISON WELLFORD, SOWING THE WIND 5–6 (1972) (discussing the historical lag in state compliance with meat and poultry inspection norms when products did not enter interstate commerce).

167. *See supra* notes 135–36, and accompanying text.

168. *See* Hana Simon, Comment, *Food Safety Enforcement Enhancement Act of 1997: Putting Public Health Before the Meat Industry's Bottom Line*, 50 ADMIN. L. REV. 679, 696–97 (1998) (noting that provisions of this Act regarding mandatory notification should have also incorporated whistleblower protections in response to the HACCP system's lessening FSIS involvement).

169. *See* 9 C.F.R. §§ 416.11–.17 (2012) (detailing the implementation, maintenance, record keeping, and federal agency verification required of valid SOPs).

170. The DOE program was promulgated pursuant to explicit statutory requirements for employee protections. *See* 42 U.S.C. § 5851 (2006) (providing DOE employee protection mechanisms). While it is not an example of authority for the USDA regulating employee protection, the DOE program's comprehensive and industry-led model serves as a useful framework for those agencies with inherent authority to provide similar programs. *See generally* U.S. DEP'T OF ENERGY, *supra* note 51 (providing guidelines for the processing of

nuclear energy employees to express concerns, a process for notifying employees of their rights, and procedures that must be followed when employees express concerns.[171] In fact, the DOE has had success in implementing other alternative employee grievance procedures in the area of nuclear power,[172] an industry arguably comparable to the food industry in importance, inspection rate, and risk posed to society if ineffectively monitored.

Following the DOE model, EPPs should prioritize internal resolution of employee problems, but provide external avenues for employees who feel they have been or will be retaliated against for speaking out about facility violations. EPPs will be enhanced by including accountability measures, such as annual employee notification procedures, clear postings of employee rights in facilities, an employee hotline, and a grievance tracking system to monitor repeated violators.[173] In addition, EPPs should provide a private right of action for employees in the event that their concerns are not addressed or employers retaliate by forcing demotion, job loss, or other maltreatment.[174]

In the event of an employee exercising his or her right to sue through an EPP in ag-gag states, an employee might be subject to criminal charges depending on the ag-gag legislation in effect. While ag-gag law supporters claim that the charges should only impact workers who gained employment under false pretenses, the legal difference may be difficult to decipher in some cases. For example, under Missouri's proposed law,[175] if an employee filed a suit through her EPP private right of action guarantee because she had repeatedly witnessed a violation and was unable to seek remedy internally, she could simultaneously be charged for "willfully . . .

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concerns expressed by nuclear energy sector employees, contractors, and subcontractors).

171. U.S. DEP'T OF ENERGY, *supra* note 51.

172. *See* Jonathan Brock, *Full and Fair Resolution of Whistleblower Issues: The Hanford Joint Council for Resolving Employee Concerns, A Pilot ADR Project*, 51 ADMIN. L. REV. 497, 528–29 (1999) (explaining the strength and success of a joint council system in alleviating whistleblower concern at the Hanford Nuclear site); *see also* 42 U.S.C. § 5851 (describing the employee protection powers granted to the DOE). *But see* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HEHS-97-162, NUCLEAR POWER SAFETY: INDUSTRY CONCERNS WITH FEDERAL WHISTLEBLOWER PROTECTION SYSTEM 11–15 (1997) (describing concerns of energy industry leaders with federal whistleblower programs).

173. Each of these components, along with a detailed process for addressing concerns, is included in the Department of Energy's model. *See* U.S. DEP'T OF ENERGY, *supra* note 51, at 4–8.

174. *Cf.* Richard Moberly, *Protecting Whistleblowers by Contract*, 79 U. COLO. L. REV. 975, 988 (2008) (discussing the need for employee contracts to include a private right to sue to bolster whistleblower protection beyond what tort and statutory laws currently provide).

175. S. 695, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012); H. 1860, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012).

[p]roduc[ing] a record which reproduces an image or sound occurring at the facility."[176] This employee, who was not hired under false pretenses, would be committing a crime by simply documenting an industry violation because Missouri's bill does not specify who is covered by the restrictions. This conundrum is the essence of what is at stake with ag-gag laws, particularly should the laws become engrained before EPP requirements are promulgated.[177]

The FSIS role in the EPP scheme will be to review internal procedures, monitor EPP implementation, and support employees who are unable to address their concerns about violations internally. As with HACCP and SOP violations, facilities will be subject to corrective actions, agency verification, and inspection suspension or withdrawal.[178] While other methods exist to bolster the rights of workers and whistleblowers,[179] incorporating EPPs as a condition of federal inspection falls within FSIS's existing power, follows the trend of industry autonomy in regulations, allows FSIS oversight while adding accountability, and protects workers and the food supply. Each of these steps should be welcomed as further legislative advances are pursued.[180]

While there are strong arguments for large-scale food safety regulatory overhaul,[181] requiring whistleblower protections through EPPs across the meat and poultry production spectrum will only assist agency efforts to progress and collaborate with industry leaders. The protections will combat the dangerous precedent ag-gag laws have set and offer support to employees in one of our nation's most dangerous sectors.[182] If, as supporters argue, ag-gag laws are meant to prevent public misrepresentation yet preserve the rights of workers to sound the alarm

176. S. 695, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012); H. 1860, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012).

177. Ag-gag law supporters urge that the laws target only people who have sought employment with the intent of leaking harmful information, and these laws should not impact existing employees. *See, e.g.*, IOWA CODE ANN. § 717A.3A (West 2012) (focusing on criminalization for seeking employment under false pretenses). The language of other legislation does not draw this line so clearly. *See supra* Part IV.

178. *See* 9 C.F.R. § 416.15 (2012) (corrective actions for SOP violations); *id.* § 417.3 (corrective actions for HACCP violations); *id.* § 417.8 (agency verification requirement).

179. There are benefits of including antiretaliation clauses in employee contracts as another method to protect corporate whistleblowers. This may be effective for the meat and poultry industries that use employee contracts, but perhaps not for the industry workforce as a whole. *See supra* Part II.C. *See generally* Moberly, *supra* note 174, at 988 (arguing that employee contracts should provide a private right to action).

180. *See generally* Foodborne Illness Reduction Act of 2011, S. 1529, 112th Cong. (2011).

181. *See supra* note 32 and accompanying text.

182. *See supra* Part III.C.

where necessary, these protections will only strengthen this effort. As an industry that is both public and personal for consumers, meat and poultry production should be transparent, healthy, and safe, not only for consumers, but also for the workers risking everything to provide these cornerstone commodities.

CONCLUSION

Factory farming plays a role in public safety, food integrity, the environment, the economy, animal health, and national security. Yet ag-gag laws are permitting secrecy in this industry. When documenting farming industry violations becomes a crime, the public loses its ability to monitor factory farms and farm operators can escape accountability. Requiring whistleblower protections through EPPs as an additional condition for FSIS inspection should be the first step toward preventing such injustices.

To balance the entire food safety regulatory system, the USDA should be granted the same authority that was provided to the FDA in the FSMA. Congress should also support the passage of the Foodborne Illness Reduction Act to provide comprehensive and standardized food industry whistleblower protections.[183] But the meat and poultry industry faces a number of immediate challenges in providing Americans with a safe food supply. Illness outbreaks, environmental hazards, and animal welfare concerns show that the current system is in dire need of additional oversight and accountability. As immediate legislative overhaul is unlikely, requiring EPPs in meat and poultry production facilities will greatly improve worker and food safety while consumers wait and work for large-scale changes.

In 2002, columnist Michael Pollan suggested a simple, yet drastic change to eradicate irresponsible factory farming: "[M]aybe all we need to do to redeem industrial animal agriculture in this country is to pass a law requiring that the steel and concrete walls of the CAFO's and slaughterhouses be replaced with . . . glass. If there's any new 'right' we need to establish, maybe it's this one: the right to look."[184] With the recent ag-gag law resurgence and the simultaneous decrease in industry transparency, Pollan's suggestion rings true now more than ever.

183. *See generally* Foodborne Illness Reduction Act of 2011, S. 1529, 112th Cong. (2011).
184. Pollan, *supra* note 72.

RECENT DEVELOPMENT

YOU'RE HOT AND THEN YOU'RE COLD: WHY ICE SHOULD ALLOW STATES TO COMMENT ON SECURE COMMUNITIES

MARCELLA COYNE*

TABLE OF CONTENTS

INTRODUCTION

In 2008, the United States Department of Homeland Security (DHS), through its component Immigration and Customs Enforcement (ICE), introduced the Secure Communities program into fourteen jurisdictions.[1]

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1. *Secure Communities*, U.S. DEP'T OF HOMELAND SEC., http://www.ice.gov/

Through this program, local law enforcement share fingerprints of arrestees with the Federal Bureau of Investigation (FBI), which then forwards them to ICE.[2] As stated by ICE, the program is in place to identify criminal aliens for deportation and has been expanded to include 3,000 jurisdictions since 2008.[3] ICE derives its authority to enforce federal immigration law from the 2002 Homeland Security Act that created DHS.[4]

According to memoranda of agreement between state and local communities and DHS, and DHS statements regarding the program, states and local communities understood participation in Secure Communities to be voluntary.[5] Several states with large urban immigrant populations, including Massachusetts, Illinois, and New York, attempted to opt out or reject the program.[6] In addition to program costs,[7] states have expressed concerns about the effectiveness of the program.[8] States have also pointed out that the program disintegrates the fabric of community policing by creating distrust of law enforcement, which in turn compromises public safety.[9] In fact, several organizations that criticize Secure Communities on

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secure_communities/ (last visited Feb. 2, 2013) [hereinafter DHS WEBSITE].

2. *Id*.

3. *Id*. (explaining that the Department of Homeland Security (DHS) prioritizes removal of the most dangerous criminal aliens).

4. *See* Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135, 2192 (codified as amended in scattered sections of 6 U.S.C.); *see also* Exec. Order No. 13,286, 68 Fed. Reg. 10,619 (Mar. 5, 2003) (amending past executive orders and transferring responsibilities previously held by other agencies, including Immigration and Naturalization Services (INS), to DHS in an effort to centralize information).

5. *See* Shankar Vedantam, *No Opt-Out for Immigration Enforcement*, WASH. POST, Oct. 1, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/09/30/AR2010093007268_pf.html (discussing a Sep. 7, 2010 letter from Homeland Security Secretary Janet Napolitano to Congress regarding Secure Communities that largely reinforced the perception that the program was voluntary).

6. Chip Mitchell, *States May Have to Re-adopt Deportation Program*, WBEZ91.5 (Aug. 17, 2011), http://www.wbez.org/story/2011-08-17/states-may-have-re-adopt-deportation-program-90768.

7. *See, e.g.*, Elise Foley, *Secure Communities Costs Los Angeles County More Than $26 Million a Year: Report*, HUFFINGTON POST, (Aug. 23, 2012, 2:53 PM), http://www.huffingtonpost.com/2012/08/23/secure-communities-los-angeles_n_1824740.html (explaining that the high cost of the program is largely the result of jails holding undocumented immigrants an average of twenty days more than they otherwise would). Detainers issued by Immigration and Customs Enforcement (ICE) are supposed to last only forty-eight hours. *See id.*

8. Antonio Olivo, *Illinois Withdraws from Federal Immigration Program*, CHI. TRIB., May 5, 2011, http://articles.chicagotribune.com/2011-05-05/news/ct-met-state-dream-act-0505-20110504_1_illegal-immigrants-numbersusa-dream-act.

9. *See* Kirk Semple, *Cuomo Ends State's Role in Checking Immigrants*, N.Y. TIMES, June 1, 2011, http://www.nytimes.com/2011/06/02/nyregion/cuomo-pulls-new-york-from-us-fingerprint-checks.html; Mitchell, *supra* note 6.

the grounds that it undermines public safety refer to it as "S-Comm,"[10] perhaps identifying the program's official title, Secure Communities, as a misnomer, because it does not in fact make communities more "secure."

Nonetheless, DHS officials announced that the states' participation in Secure Communities is mandatory and scheduled full implementation in all jurisdictions by 2013.[11] Prior to the announcement by DHS and ICE officials that the Secure Communities program was and has always been mandatory, many states and private organizations believed the program to be voluntary.[12] This belief was partially founded on a letter to Congress from DHS department head Janet Napolitano explaining that states that wished to opt out of the program could contact ICE, as well as statements by other ICE officials that DHS was amenable to removing jurisdictions from the program deployment plan.[13] Additionally, in 2011, DHS revoked all memoranda of agreement with local jurisdictions signed under the previous administration,[14] which would seem to indicate that the memoranda of agreement were at least unclear on this point. While DHS has stated that its authority to impose the program on the states is congressionally mandated,[15] it has yet to detail the constitutional source of this authority.

This is not to say that DHS has not attempted to address state concerns about the program. It has emphasized prosecutorial discretion,[16] and it has

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10. *See, e.g.*, Judith A. Greene, *The Cost of Responding to Immigration Detainers in California*, JUSTICE STRATEGIES, 1 (Aug. 22, 2012), http://www.justicestrategies.org/sites/default/files/publications/Justice%20Strategies%20LA%20CA%20Detainer%20Cost%20Report.pdf.

11. DHS WEBSITE, *supra* note 1.

12. Vedantam, *supra* note 5.

13. *Id.*; Letter from Janet Napolitano, U.S. Sec'y of Homeland Sec., to the Honorable Zoe Lofgren, Chairwoman, Subcomm. on Immigration, Citizenship, Refugees, Border Sec. & Int'l Law (Sept. 7, 2010), *available at* http://personal.crocodoc.com/yzmmKP#redirect.

14. Tara Bahrampour, *Immigration Authority Terminates Secure Communities Agreements*, WASH. POST, Aug. 7, 2011, http://www.washingtonpost.com/local/immigration-authority-terminates-secure-communities-agreements/2011/08/05/gIQAlwx80I_story.html (stating that ICE Director John Morton sent letters to state governors terminating the memoranda of agreement "to avoid further confusion" over whether Secure Communities was mandatory).

15. DHS WEBSITE, *supra* note 1.

16. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., FEA NO. 306-112-002b, PROSECUTORIAL DISCRETION: CERTAIN VICTIMS, WITNESSES, & PLAINTIFFS (2011), http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf. It is against ICE policy to initiate removal proceedings against those known to be "immediate" victims or witnesses of crime, particularly victims of domestic violence. *Id.* However, there is still a possibility that victims of domestic violence could be detained by ICE through Secure Communities. *Id.* It should be noted that the prosecutorial discretion, not an executive order, is also the basis of the Deferred Action for Childhood Arrivals

created a mechanism to file civil rights complaints.[17] In fact, ICE Director John Morton established a Secure Communities task force in June 2011 to address the concerns of state and local officials.[18] However, several task force appointees later resigned, including retired Sacramento police chief Arturo Venegas Jr., because they could not endorse the task force's final report.[19] Furthermore, DHS has never issued any proposed rules regarding the program, nor has it applied any other form of rulemaking. Thus, the only way state actors accountable to the public can oppose Secure Communities is to publicly disavow it or pass laws designed to limit its effect.[20]

This Article explores the DHS's authority to make state participation in Secure Communities mandatory without giving state and local officials a formal opportunity to affect its implementation. It also explains why, as a matter of policy, DHS should give state and local communities a voice in how the program is run. Part I discusses how Secure Communities operates, and presents recent statistics on deportation proceedings that have

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program announced in June 2012. U.S. DEP'T OF HOMELAND SEC., EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN (2012), http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf. This program allows children under the age of sixteen who lacked the requisite intent to illegally enter the country and who meet certain criteria to apply for work permits and deferred action on their immigration status, at least temporarily preventing their removal from the United States. *Id.*

17. U.S. DEP'T OF HOMELAND SEC & U.S. IMMIGRATION & CUSTOMS ENFORCEMENT., SECURE COMMUNITIES COMPLAINTS INVOLVING STATE OR LOCAL LAW ENFORCEMENT AGENCIES (2011), http://www.ice.gov/doclib/secure-communities/pdf/complaint protocol.pdf (setting out how DHS will manage civil rights complaints involving state and local law enforcement).

18. Julia Preston & Sarah Wheaton, *Meant to Ease Fears of Deportation Program, Federal Hearings Draw Anger*, N.Y. TIMES, Aug. 25, 2011, http://www.nytimes.com/2011/08/26/us/politics/26immig.html.

19. Paloma Esquivel, *Report Criticizes Deportation Program, Urges Changes*, L.A. TIMES, Sept. 16, 2011, http://articles.latimes.com/2011/sep/16/local/la-me-secure-communities-20110916. Several of the other task force members, including representatives of the AFL-CIO, stated they could not endorse the final report of the task force. *Id.* Mr. Venegas explained that he did not think "it went far enough" and that "people will still get into the system that shouldn't be there." *Id.*

20. *See, e.g.*, Cindy Chang, *Pelosi, California Democrats Urge Gov. Brown to Sign Trust Act*, L.A. TIMES BLOG, (Sept. 13, 2012, 3:16 PM), http://latimesblogs.latimes.com/lanow/2012/09/nancy-pelosi-california-democrats-trust-act-jerry-brown.html (describing a proposed bill that would limit local law enforcement's ability to cooperate with federal immigration agencies); Ben Prawdzik, *Deportation Program Remains Controversial*, YALE DAILY NEWS, Sept. 10, 2012, http://www.yaledailynews.com/news/2012/sep/10/secure-communities-leads-to-mexican-nationals/ (describing how Connecticut Governor Dan Malloy stated that the state would determine whether to honor each ICE detainment request "on a case-by-case basis" (internal quotation marks omitted)).

resulted from the program. Part II addresses whether and how DHS can impose the program on the states constitutionally. Part III discusses whether Secure Communities is a rule[21] that should have been subjected to notice-and-comment rulemaking procedures before being imposed. Part IV sets forth reasons Secure Communities should be subjected to notice-and-comment rulemaking as a matter of policy. Finally, the Article concludes by stating that notice-and-comment rulemaking is a good way for DHS to maintain the legitimacy of the program and restore public faith in its enforcement policies.

I. BACKGROUND

A. The Creation of Secure Communities and How It Operates

Executive authority to run the Secure Communities program was established pursuant to congressional authorization in 2002.[22] However, while commencement of the program was authorized in 2002, funds were not appropriated for it until 2008.[23] Congress conditioned the monies so that none of the funds made available for the program would be used until the Committees on Appropriations for the House and the Senate received an expenditure plan from the Secretary of Homeland Security.[24] The funds were originally appropriated to expand the Criminal Alien Program (CAP),[25] through which ICE identifies incarcerated criminal aliens in federal and state prisons for deportation upon completion of their sentences.[26] Soon after the funds were appropriated for the program, ICE formally submitted its plan, dubbed Secure Communities, to Congress.[27] The following year, $1,000,000,000 was set aside for ICE to "identify aliens

21. *See generally* Administrative Procedure Act, 5 U.S.C. §§ 551, 553 (2006).

22. *See* 8 U.S.C. § 1722 (2006) (establishing an interoperable law enforcement and intelligence electronic data system that contains information on aliens and provides access to information in the law enforcement and intelligence communities "relevant to determine . . . [the] deportability of an alien").

23. *See* Consolidated Appropriations Act, 2008, Pub. L. No. 110–161, 121 Stat. 1844, 2050–51 (2007) (setting aside $200,000,000 to "improve and modernize" methods to identify aliens that have been convicted, sentenced to imprisonment, and can be deported).

24. *Id.* (laying out that the expenditure plan was to include, among other things, a strategy for identifying criminal aliens and the establishment of a removal process for criminal aliens).

25. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, SECURE COMMUNITIES CRASH COURSE 4 (2009), http://www.ice.gov/doclib/foia/secure_communities/securecommunitiespresentations.pdf [hereinafter CRASH COURSE].

26. U.S. DEP'T OF HOMELAND SECURITY, CRIMINAL ALIEN PROGRAM, http://www.ice.gov/criminal-alien-program/ (last visited Feb. 2, 2013).

27. CRASH COURSE, *supra* note 25, at 4.

convicted of a crime, and who may be deportable."[28] In 2009, David J. Venturella, Executive Director of Secure Communities, stated to Congress that "local law enforcement officials, as well as the local governments, can opt out of participating . . . . [I]t is not a mandatory program, it is certainly voluntary."[29]

Seven jails originally participated in the Secure Communities pilot program.[30] The program later expanded, operating at over 100 locations by October 2009.[31] Consistent with federal law, state and local communities signed memoranda of agreement in conjunction with the program's implementation.[32] In a 2010 statement about Secure Communities, ICE Director John Morton, informed Congress that the memoranda of agreement were being revised to "ensure that all of our . . . partners are using the same standards in implementing the 287(g) program."[33]

However, ICE describes Secure Communities as merely "complementary" to any "on the ground" ICE programs operating pursuant to a memorandum of agreement in a state or local jurisdiction.[34] Under what ICE describes as "287(g) programs," state or local law enforcement officials voluntarily enter into an agreement with ICE to exercise immigration enforcement authority in their jurisdiction on behalf

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28. Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110–329, 122 Stat. 3574, 3659 (2008) [hereinafter Consolidated Security Act].

29. *Dep't of Homeland Sec. Appropriations for 2010: Hearings Before the H. Subcomm. on Homeland Sec. of the H. Comm. on Appropriations*, 111th Cong. 994 (2009) [hereinafter *DHS 2010 Appropriations Hearings*] (statement of David J. Venturella, Executive Director of Secure Communities, ICE) (responding to the question of what is expected of local law enforcement in the booking process).

30. Kevin Krause, *Database IDs Immigrants*, DALL. MORNING NEWS, Nov. 13, 2008, at 5B.

31. CRASH COURSE, *supra* note 25, at 4.

32. *See* 8 U.S.C. § 1357(g) (2006) (specifying that when a state official performs a function of an immigration officer at the expense of the state, it must be pursuant to a written agreement between the State and the Attorney General); *see also* Consolidated Security Act, *supra* note 28, 122 Stat. at 3659 (referring to the formation of agreements consistent with § 287(g) of the Immigration and Nationality Act, as codified in 8 U.S.C. § 1357(g) (2006)); *cf. Dep't of Homeland Sec. Appropriations for 2011: Hearings Before the H. Subcomm. on Homeland Sec. of the H. Comm. on Appropriations*, 111th Cong. 247–48 (2010) [hereinafter *DHS 2011 Appropriations Hearings*] (statement of John Morton, Assistant Secretary of ICE) (stating that by January 31, 2010, ICE had signed "287(g) program agreements with law enforcement agencies in 71 jurisdictions in 26 states").

33. *DHS 2011 Appropriations Hearings*, *supra* note 32, at 248 (statement of John Morton, Assistant Secretary of ICE).

34. CRASH COURSE, *supra* note 25, at 18.

of ICE.[35] DHS was later prompted to announce that it was terminating all memoranda of agreement between DHS and jurisdictions made in conjunction with the Secure Communities program "to avoid further confusion" as to the voluntariness of the program,[36] that may have arisen due to misidentification of the program by the states as a voluntary 287(g) program.

The first step in the Secure Communities process begins when a local law enforcement agent (LEA) makes an arrest.[37] An arrestee is usually fingerprinted as part of the booking process. After the arrestee is fingerprinted, the LEA submits the fingerprints to the FBI's Criminal Justice Information Services Division (CJISD) database to retrieve the criminal history of the arrestee.[38] Through the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) program, the fingerprints are automatically checked against the Automated Biometric Identification System (IDENT).[39] US-VISIT is a program through which the FBI furnishes DHS with fingerprints and other criminal history information.[40]

If a positive identification for the fingerprints is found in the US-VISIT database, a request for analysis is automatically sent to the Law Enforcement Support Center (LESC) of ICE.[41] The LESC analyzes relevant information from the positive identification, such as the nature of the crime leading to arrest, the arrestee's criminal history, and the arrestee's current immigration status, and applies immigration law.[42] ICE then uses its discretion to notify the LEA of the arrestee's immigration status and to

35. *See id*.

36. Bahrampour, *supra* note 14 (stating ICE reported that Director John Morton sent a letter to state governors terminating the agreements). State confusion regarding the voluntariness of the Secure Communities program may have stemmed in part from the fact that the early memoranda or agreement were comparable to those used for the voluntary 287(g) programs.

37. CRASH COURSE, *supra* note 25, at 6 (providing a flow chart which models the process).

38. *See id.*; *see also DHS 2010 Appropriations Hearings*, *supra* note 29, at 948 (identifying all of the information sharing databases and their respective agencies that provide information sharing to state and local law enforcement).

39. *DHS 2010 Appropriations Hearings*, *supra* note 29, at 948–49.

40. *Partners*, FBI BIOMETRIC CTR. OF EXCELLENCE, http://www.biometriccoe.gov/partners.htm (last updated Aug. 1, 2012) (describing the United States Visitor and Immigrant Status Indicator Technology program as a mechanism that facilitates information sharing between federal agencies to improve national border security by determining who is a security risk).

41. CRASH COURSE, *supra* note 25, at 6.

42. *Id.*

provide instruction for detainment.[43] The LEA then takes the appropriate action upon instruction from ICE.[44] Appropriate action may consist of holding the arrestee for forty-eight hours until ICE can take the arrestee into custody.[45] However, some state officials and public interest groups have noted that individuals are sometimes held for weeks under ICE detainers.[46]

Even before Secure Communities was implemented, any person arrested and booked at a state or local jail was fingerprinted and the fingerprints were run against the FBI's CJISD database.[47] The FBI began research on technologies for automated fingerprint matching as early as 1967 and by 1994 began developing the Integrated Automated Fingerprint Identification System, which became operational in 1999.[48] Indeed, the FBI has long recognized the need for information sharing and cooperation between FBI, state, and local officials to increase the effectiveness of law enforcement.[49] The reality is, without information sharing between the FBI and state and local law enforcement, both federal and state law enforcement agencies would lose valuable resources that protect United States citizens on a day-to-day basis.[50]

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43. *See id.*

44. *Id.*

45. Andrew Joseph, *Deportations Miss Mark, Foes Say*, THE OREGONIAN, Oct. 7, 2011, *available at* 2011 WLNR 20409007 (stating that under the Secure Communities program arrestees for whom a match is found in DHS databases must be detained by local law enforcement to cooperate with ICE.)

46. *See* Greene, *supra* note 10, at 2 (noting that the average length of stay for people released from the Los Angeles County Jail to ICE custody was 32.3 days); *see also* Foley, *supra* note 7 (stating that at ICE's request, jails are holding suspected undocumented immigrants twenty days longer than they normally would without Secure Communities).

47. *See DHS 2010 Appropriations Hearings*, *supra* note 29, at 948 (explaining that the process to check immigration status prior to Secure Communities required that a local police officer take the initiative to contact ICE agents separately).

48. *Biometrics in Government Post-9/11: Advancing Science, Enhancing Operations*, NAT'L SCI. & TECH. COUNCIL 8–11 (2008), http://www.biometrics.gov/Documents/Biometrics%20in%20Government%20Post%209-11.pdf (summarizing the historical timeline of the use of "biometrics" among federal law enforcement agencies such as the Federal Bureau of Investigation (FBI)). "Biometrics" refers to "the measurement and analysis of unique physical or behavioral characteristics" such as fingerprints. *See Biometrics Definition*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/biometrics (last visited Feb. 2, 2013).

49. *See* J. Edgar Hoover, *The United States Bureau of Investigation in Relation to Law Enforcement*, 23 J. CRIM. L. & CRIMINOLOGY 439, 440–41 (1932) (recognizing that "actively friendly relations" between the FBI and local police officials result in "mutual aid and assistance" and such relations are important to state and local law enforcement efforts and federal law enforcement efforts alike).

50. *See generally id.* (discussing the successes of information sharing, including fingerprint

B. The Outcomes of Secure Communities

According to ICE, a record number of criminal aliens have been removed from the United States since October 2008.[51] Between October 2008 and October 2011, the number of convicted criminal aliens removed by ICE increased by 89%, while the number of aliens without criminal records who were removed dropped by 29%.[52] ICE credits these trends to the implementation of Secure Communities.[53]

According to ICE, in fiscal year 2012, the percentage of criminal aliens removed slightly outpaced the percentage of aliens removed for other immigration violations.[54] ICE's numbers did not state what percentage of the aliens included in the other immigration categories were discovered under the Secure Communities program.[55] Aliens removed for noncriminal violations include recent illegal entrants and re-entrants, immigration fugitives, and those who do not have any criminal convictions.[56]

In fiscal year 2010, Secure Communities produced more than 248,000 alien matches.[57] The number of matches for fiscal year 2011 surged to 348,000.[58] In just the first eight months of 2012, 395,081 alien matches were produced.[59]

ICE categorizes criminal aliens into "Level 1," "Level 2," and "Level 3," with Level 1 representing the criminal offenders who have committed "aggravated felonies"[60] such as murder, rape, and sexual abuse of

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sharing, in apprehending criminals across state lines and recommending an increase in information sharing at the international level).

51. *See* DHS WEBSITE, *supra* note 1.

52. *Id.*

53. *Id.*

54. *See Secure Communities*, U.S. DEP'T HOMELAND SEC., http://www.ice.gov/removal-statistics/ (last visited Feb. 2, 2013) (showing that 55% of aliens deported in fiscal year 2012 were criminal aliens, while 45% were removed for other immigration violations or concerns).

55. *See id.* (specifying that the numbers included individuals removed for whom there was no record of a criminal conviction in the FBI database, but not whether they were removed as a result of the Secure Communities program).

56. *See id.*

57. *Secure Communities IDENT/IAFIS Interoperability Monthly Statistics Through September 30, 2011*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, 1 (2011), http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2011-to-date.pdf.

58. *Id.*

59. *Secure Communities Monthly Statistics Through August 31, 2012 IDENT/IAFIS Interoperability*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, 2 (2012), http://www.ice.gov/doclib/foia/sc-stats/nationwide_interop_stats-fy2012-to-date.pdf [hereinafter *ICE Statistics Through August 2012*].

60. *See, e.g.*, *id.*; *see also* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, CIVIL

children.[61] However, under the Immigration and Nationality Act (INA), aggravated felonies that render any alien removable also include many offenses that are normally considered to be only misdemeanors for United States citizens.[62] Loose descriptions of offenses listed under the definition of "aggravated felonies" contribute to the inconsistent categorization of offenses committed by citizens versus noncitizens.[63]

The other two categories are primarily composed of those who have committed misdemeanors.[64] Level 2 offenders include aliens convicted of any felony or three or more misdemeanors—crimes that are punishable by less than one year in jail.[65] Level 3 offenders include aliens convicted of any crime that is punishable by less than one year in jail.[66] Thus, Level 1 primarily involves crimes against persons, Level 2 primarily involves crimes against property (such as larceny and fraud), and Level 3 extends to all other crimes.[67]

In fiscal year 2009, 14,482 aliens were removed pursuant to matches in Secure Communities databases.[68] Of those 14,482, non-criminal

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IMMIGRATION ENFORCEMENT: PRIORITIES FOR THE APPREHENSION, DETENTION, AND REMOVAL OF ALIENS (2011), http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf [hereinafter CIVIL IMMIGRATION ENFORCEMENT].

61. *See* Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43) (2006) (listing murder, rape, and sexual abuse of a minor, among others crimes such as drug trafficking, and certain crimes of violence and theft); *see also* CIVIL IMMIGRATION ENFORCEMENT, *supra* note 60, at 2 (specifying that Level 1 offenders are aliens convicted of aggravated felonies under §1101(a)(43)); *ICE Statistics Through August 2012*, *supra* note 59, at 55.

62. *See* 8 U.S.C. §§ 1101(a)(3), 1182(a)(9)(A)(i) (defining aliens as those who are not citizens or nationals of the United States, and classifying aliens convicted of aggravated felonies and ordered removed as inadmissible to the United States and ineligible for visa waivers if, after lawful admittance to the country, they committed an aggravated felony); *cf.* Vashti D. Van Wyke, Comment, *Retroactivity and Immigrant Crimes Since* St. Cyr*: Emerging Signs of Judicial Restraint*, 154 U. PA. L. REV. 741, 749 nn.45 & 47 (2006) (explaining that under the definition of an aggravated felony in § 1101(a)(43), any alien, legal or illegal, may be removed for misdemeanors and low-level offenses such as petty larceny).

63. *See generally Aggravated Felonies and Deportation*, TRAC IMMIGRATION (June 9, 2006), http://trac.syr.edu/immigration/reports/155/ (discussing how the broad language of the Immigration and Nationality Act (INA) with respect to offenses that make an alien "deportable" has caused widespread disagreement among courts making determinations as to whether an offense is an aggravated felony).

64. *Cf.* DHS WEBSITE, *supra* note 1 (stating that over time the percentage of serious offenders removed through Secure Communities will increase, while those convicted of misdemeanors will decrease).

65. *ICE Statistics Through August 2012*, *supra* note 59, at 55.

66. *Id.*

67. *See* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC.: SECURE COMMUNITIES TALKING POINTS 2 (2010), *available at* http://www.ice.gov/doclib/foia/secure_communities/talkingpointsjanuary122010.pdf.

68. *Secure Communities IDENT/IAFIS Interoperability Monthly Statistics Through April 30,*

immigration violators constituted 3,753 of the aliens removed, which is 392 more than the 3,361 Level 1 criminal offenders removed.[69] Furthermore, 5,835 of the aliens removed were Level 3 offenders.[70] In the first eight months of fiscal year 2012, 76,555 aliens were removed as a result of Secure Communities, with the increase due in large part to the massive expansion of Secure Communities from eighty-eight jurisdictions to 1,479.[71] Of those 76,555, 17,288 were noncriminal immigration violators, and 21,296 were Level 3 offenders who had not committed aggravated felonies.[72] Accordingly, a total of 38,584 of the aliens removed as result of a match in the database were either non-criminal immigration violators or had not been convicted of aggravated felonies or multiple misdemeanors—15,985 more than the number of Level 1 offenders who had been convicted of aggravated felonies.[73]

ICE's statistics through August of fiscal year 2012 divides aliens removed for noncriminal immigration violations into three categories: "ICE fugitives," "prior removals and returns," and "EWIs, visa violators, and overstays."[74] Of those three categories, aliens categorized as "prior removals and returns" had the highest removal rates of those removed for noncriminal immigration offenses from fiscal years 2009–2012.[75] Those with prior removal and returns are defined as aliens who either had a previous removal case or a confirmed return.[76] The category with the second highest removal rate is "EWIs, visa violators, and overstays."[77] "EWIs" refer to those aliens who entered the country without inspection.[78] Finally the category with the lowest removal rates is "ICE Fugitives."[79] "ICE Fugitives" refer to those aliens who did not comply with a final

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2011, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, 2 (2011), http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2011-feb28.pdf.

69. *Id.*

70. *Id.*

71. *ICE Statistics Through August 2012*, *supra* note 59, at 2.

72. *See id.*

73. *Id.*

74. *Id.*

75. *Id.* (providing that "prior removals and returns" constituted 2,426 removals in fiscal year 2009, 9,010 removals in fiscal year 2010, 13,638 removals in fiscal year 2011, and 11,632 removals through August of fiscal year 2012).

76. *Id.*

77. *Id.* (showing that "EWIs, visa violators, and overstays" constituted 951 removals in fiscal year 2009, 2,607 removals in fiscal year 2010, and 4,156 removals in fiscal year 2011, and 3,676 removals up through August of fiscal year 2012).

78. *Id.*

79. *Id.* (reflecting that 294 "ICE fugitives" were removed in fiscal year 2009, 1,513 were removed in fiscal year 2010, 2,375 were removed in fiscal year 2011, and 1,980 were removed through August of fiscal year 2012.).

removal order, deportation, or exclusion.[80]

II. CONSTITUTIONAL AUTHORITY TO IMPOSE A FEDERAL PROGRAM ON THE STATES

The constitutional inquiry into the authority of an agency to implement federal programs that affect the states without their consent is what is known as "the anti-commandeering doctrine."[81] This doctrine was established by the Supreme Court in *Printz v. United States*,[82] in which the Court invalidated a provision of the Brady Handgun Violence Prevention Act that required state officers to conduct background checks on prospective gun purchases. The anti-commandeering doctrine provides that "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."[83] It also establishes that the federal government cannot "issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[84]

In its decision, the Court relied extensively on its precedent in *New York v. United States*,[85] in which it held that a provision of Congress's Low-Level Radioactive Waste Policy Act violated the Tenth Amendment by directing the states to either regulate generators and disposers of waste or to accept ownership of the waste themselves.[86] Moreover, the *Printz* Court explicitly rejected any justification for imposing a federal regulatory program on the states under the Article II powers of the Executive Branch and the

80. *Id.*

81. *See, e.g.*, Ann Althouse, *The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231, 1232 (2004); *see also* Daniel Booth, Note, *Federalism on ICE: State and Local Enforcement of Federal Immigration Law*, 29 HARV. J.L. & PUB. POL'Y 1063, 1073 (2006).

82. 521 U.S. 898, 935 (1997).

83. *Id.* at 925.

84. *Id.* at 935 (explaining that the federal government cannot circumvent the anti-commandeering doctrine, which prohibits it from imposing federal regulatory programs on the states or state officials by conscripting state officers directly).

85. *See generally id.* at 920–35 (discussing the historical record set forth in *New York v. United States*, 505 U.S. 144 (1992), and delineating the historical support for the principle that the federal government was meant to govern individuals and not states, and that the Constitution intentionally set forth a form of government that divided the concentration of power between the federal government and the states).

86. *See* 505 U.S. 144, 176–77, 188 (1992) ("Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two.").

Supremacy Clause.[87] The Court noted that the President's Article II responsibility[88] could not be "effectively transfer[red] . . . to thousands of [state officers]"[89] and explained that the Supremacy Clause commands that state officers comply only with the Constitution and laws made "in pursuance" of the Constitution.[90]

The Court further explained that even if a federal act removes policymaking discretion from the states, it can "worsen[ ] the intrusion upon state sovereignty" since it "reduc[es] [states] to puppets of a ventriloquist Congress."[91] Additionally, the Court pointed out that "even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects."[92]

The Court later distinguished between federal regulation that "seek[s] to control or influence the manner in which States regulate private parties," which is subject to the anti-commandeering doctrine, from federal regulation of "state activities," which is not subject to the anti-commandeering doctrine.[93] The Court clarified that regulation of state activities that does not require states to enact laws or regulations or require state officials to assist in the enforcement of federal statutes regulating private individuals, is governed by its precedent in *South Carolina v. Baker*.[94] In *Baker*, the Court noted the principle that "a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect."[95]

Congress delegated its authority to execute immigration and

87. 521 U.S. at 922–25.

88. U.S. CONST. art. II, § 3 (providing that the President "shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States").

89. *Printz*, 521 U.S. at 922.

90. *See id.* at 924 (rejecting the dissent's argument that Article VI of the Constitution, which requires that both federal and state officers support the Constitution and the laws of Congress, in conjunction with the Supremacy Clause, make laws enacted by Congress binding on state officers).

91. *Id.* at 928.

92. *Id.* at 930 (citing Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1580 n.65 (1994)).

93. Reno v. Condon, 528 U.S. 141, 150 (2000) (explaining that a law restricting states from disclosing a driver's personal information without the driver's prior consent did not violate the anti-commandeering doctrine).

94. *Id.* at 150–51.

95. South Carolina v. Baker, 485 U.S. 505, 514–15 (1988) (holding that a tax provision denying federal income tax exemptions for interest earned on certain state government bonds was constitutional).

naturalization law[96] to the President through passage of the INA.[97] Despite the new challenges posed to immigration and border security by the modern ascension of terrorism, the federal government cannot—out of necessity—go beyond the Constitution by compelling the states to act for it.[98] Moreover, as at least one circuit court has noted, under *Printz*, Congress cannot "hinge [a] state's right to regulate in an area that the state has a constitutional right to regulate on the state's participation in a federal program."[99]

On the surface, it seems the states would be hard-pressed to challenge the authority of DHS under the *Printz* doctrine. Secure Communities does not "compel the States to enact or enforce" a federal regulatory program by legislative or executive action.[100] Under the program, states are not required to take any action to implement Secure Communities; state and local law enforcement merely trigger operation of the program when, and if, they decide to share the fingerprints of the arrestee they have booked. Nor does the program "issue directives requiring the States to address particular problems nor command the States' officers . . . to administer or enforce a federal regulatory program."[101] State and local police enforcement do not communicate with DHS directly when they share fingerprints with the FBI.[102] Furthermore, fingerprint sharing with the FBI is consistent with pre-existing standard operating procedures for booking arrestees.[103]

However, since the program requires state and local law enforcement to change standard operating procedures[104] if they wish to impede

96. U.S. CONST. art. I, § 8, cl. 4 (granting Congress the power to "establish an uniform Rule of Naturalization").

97. *See generally* 8 U.S.C. §§ 1101–1357 (2006).

98. *Cf.* Clinton v. City of New York, 524 U.S. 417, 452–53 (1998) (Kennedy, J., concurring) (explaining that even when employed constitutional mechanisms and principles of separation of powers are "insufficient" to address a policy issue, necessity does not "validate an otherwise unconstitutional device").

99. Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1266 (11th Cir. 2011).

100. Printz v. United States, 521 U.S. 898, 935 (1997).

101. *Id.*

102. *See supra* Part I.A.

103. *See id*.

104. *See DHS 2010 Appropriations Hearings*, *supra* note 29, at 948 (noting that through the normal booking process state and local law enforcement fingerprint all arrestees then run the fingerprints against the FBI's criminal database). Secure Communities makes immigration checks part of the regular criminal booking process. *Id*. In order to avoid triggering the fingerprint sharing aspect of Secure Communities, the arresting officer would have to choose not to process the arrestee's fingerprints in the FBI criminal database, putting the officer (or her superiors) in a position of making policy decisions.

administration of Secure Communities, this aspect of the program is unconstitutional. Secure Communities transforms the everyday police officer into a policymaker on behalf of the federal government. When police officers choose to either share or not share an arrestee's fingerprints with the FBI, a police officer is no longer simply administering state policy—he is administering federal policy. Although fingerprint sharing between state and local law enforcement and the FBI is voluntary, the program places state and local law enforcement in a policymaking position that arguably "seek[s] to control or influence the manner in which States regulate private parties."[105]

For example, if the officer decides to share the fingerprints with the FBI, the arrestee, who may have committed a relatively minor offense or no offense at all, may be identified and deported by ICE. Such arrests alienate immigrant communities, resulting in unreported crimes and potentially triggering the deportation of a victim or a witness of crime due to Secure Communities. Alternatively, if the officer decides not to share the fingerprints with the FBI, he loses valuable information about the arrestee's criminal history and outstanding warrants, and he risks releasing a dangerous criminal back into society. Therefore, if states cannot opt out of fingerprint sharing with ICE through Secure Communities, they "are still put in the position of taking the blame for its burdensomeness and for its defects,"[106] because it is action by their officials that sets the operation of Secure Communities in motion. Thus, there exists a valid constitutional challenge to the implementation of Secure Communities under the *Printz* anti-commandeering doctrine.

III. PROCEDURAL, INTERPRETIVE, OR SUBSTANTIVE: IS SECURE COMMUNITIES A RULE UNDER THE ADMINISTRATIVE PROCEDURE ACT?

If it is empowered to do so by Congress, an agency may issue substantive rules that promulgate and articulate legal standards.[107] The Administrative Procedure Act (APA) defines a rule as follows: "[T]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing

105. Reno v. Condon, 528 U.S. 141, 150 (2000).

106. *Printz*, 521 U.S. at 930.

107. *See* ANDREW F. POPPER ET. AL., ADMINISTRATIVE LAW: A CONTEMPORARY APPROACH 65–66 (2d ed. 2010) (explaining, in a broader discussion of the need for rules, that Congress is often not in the best position to articulate with precision the legal standards with which the public must comply, and that the administrative agencies to which Congress delegates rulemaking power are created to fulfill this role).

the organization, procedure, or practice requirements of an agency . . . ."[108] Rulemaking is the mechanism through which an agency formulates, changes, or repeals a rule.[109]

Under most circumstances, notice-and-comment rulemaking is required over other rulemaking procedures.[110] The purpose of notice-and-comment rulemaking is to provide "a procedure that is analogous to the procedure employed by legislatures in making statutes," because "[w]hen agencies base rules on arbitrary choices they are legislating, and so these rules are legislative or substantive."[111] When notice-and-comment rulemaking is required, a Notice of Proposed Rulemaking is published in the Federal Register and includes: "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."[112]

After notice, the agency must give any person or organization interested in the proposed rule an opportunity to participate in its rulemaking through written or oral submission of their arguments or views and the data supporting those views or arguments.[113] However, notice-and-comment rulemaking does not apply to interpretive rules, general statements of policy, rules about agency organization, procedure or practice, or if the agency for good cause finds that notice-and-comment rulemaking is "impracticable, unnecessary, or contrary to the public interest."[114] Moreover, if a rule does not fall into one of the APA exemptions, most courts will not find an exemption implicit in an agency's enabling statutes.[115] Thus, substantive rules that are not promulgated through

108. Administrative Procedure Act, 5 U.S.C. § 551(a)(4) (2006).

109. *See id*. § 551(a)(5).

110. *See id*. §§ 551(a)(4), 553 (requiring notice-and-comment rulemaking for any agency action that does not meet statutory exceptions).

111. *See* Hoctor v. USDA, 82 F.3d 165, 170–71 (7th Cir. 1996) (explaining that because a rule promulgated by the Department of Agriculture, which required an eight-foot fence for the secure containment of animals, could easily be changed to require a different height and still achieve its regulatory purpose, the concerns of thousands of animal dealers and other groups affected by the rule were legitimate and the agency was obliged to listen to them).

112. Administrative Procedure Act, § 553(b).

113. *Id*.

114. *Id*.

115. *See, e.g.*, Yale–New Haven Hosp. v. Leavitt, 470 F.3d 71, 83–86 (2d Cir. 2006) (declining to accept the Department of Health and Human Services' argument that it had implicit authority under the Medicare Act to promulgate a per se rule denying Medicare reimbursement for devices that had not received premarket approval from the Food and Drug Administration); Ninilchik Traditional Council v. United States, 227 F.3d 1186, 1193 (9th Cir. 2000) (rejecting an implied exemption to Administrative Procedure Act (APA) judicial review where Congress was silent as to APA applicability in the agency's enabling

notice-and-comment rulemaking are invalid.[116]

Various courts have held that how the agency characterizes a rule is not dispositive of whether it falls into an APA exception, rather "it is the substance of what the [agency] has purported to do and has done which is decisive."[117] However, while a "rule" and the circumstances under which an agency should initiate notice-and-comment rulemaking are statutorily defined, it is not simple to determine whether an agency action or statement is a rule.[118] Nevertheless, courts have delineated some standards, albeit somewhat "hazy" and "fuzzy,"[119] that distinguish substantive rules from rules that fall into the procedural, interpretive, or general statement of policy APA exceptions.

A substantive rule embodies "underlying policy" that "is not generally subject to challenge before the agency."[120] A rule can be characterized as substantive if it is "agency action . . . [that] encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of

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statute).

116. *Cf.* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 523–24 (1978) (recognizing that the APA generally represents what Congress intended to be the procedural minimum for courts to impose on the agency rulemaking process and rejecting a claim that an agency's enabling statute could implicitly eliminate APA requirements on notice-and-comment rulemaking in granting an agency enforcement power).

117. Tripoli Rocketry Ass'n v. U.S. Bureau of Alcohol, Tobacco and Firearms, No. 00CV0273(RBW), 2002 WL 33253171, at *10 (D.D.C. June 24, 2002) (alteration in original) (quoting Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 710 F.2d 842, 846 (D.C. Cir. 1983); *accord* Chamber of Commerce v. OSHA, 636 F.2d 464, 468 (D.C. Cir. 1980) (explaining that even if the agency regarded the rule as interpretive, the label was merely informative as to whether the rule was subject to APA exemptions).

118. *See* Lincoln v. Vigil, 508 U.S. 182, 196–97 (1993) (noting that deciding whether an agency's statement is a "rule" under the APA is a difficult exercise but declining to engage in that determination); *see also* Jacob E. Gersen, Essay, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1705 (2007) ("The distinction between legislative rules [requiring notice-and-comment rulemaking] and nonlegislative rules is one of the most confusing in administrative law.").

119. *See* Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (describing the "spectrum" between interpretive rules and substantive rules as a "hazy continuum," but stating that the purpose in distinguishing between interpretive and substantive rules is "explicating Congress' desires" from substantive content that the agency seeks to add in the exercise of its delegated authority); *see also* Gen. Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (describing the distinction between legislative (substantive) and non-legislative (non-substantive) rules as "enshrouded in considerable smog" (internal citation omitted) (internal quotation marks omitted)).

120. Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) (distinguishing a substantive rule from a general statement of policy by noting that a substantive rule can be waived or applied in a particular instance based on the adjudicated facts in an administrative proceeding).

behavior."[121] As such, substantive rules establish "a standard of conduct" that has the force of law,[122] and they significantly impact private interests by granting rights or imposing obligations on particular individuals or groups.[123]

On the other hand, a rule can be defined as interpretative if it is a "statement[ ] as to what [an] administrative officer thinks the statute or regulation means."[124] Interpretive rules are characterized as those that merely clarify or explain existing laws or regulations, are "essentially hortatory" or "instructional," and explain "particular terms."[125] The interpretive rule exception reflects the idea that when an agency's determination is "not 'what is the wisest rule,' but 'what is the rule,'" public input is not necessary.[126]

Alternatively, a rule can be defined as procedural if it merely "borrow[s] the substantive standards of the [enabling] statute and seek[s] to channel agency enforcement resources toward ferreting out violations of the statute."[127] For example, "enforcement plan[s]" that impose no new burdens on interested parties can be considered procedural.[128] Similarly, "guidelines developed by an agency to aid [its] discretion" can be characterized as either procedural or interpretive.[129] The reason such guidelines and enforcement plans are not considered substantive rules is that they do not create new law or alter statutory standards.[130] However, as courts have noted, "procedure impacts on outcomes and thus can virtually

121. Beverly Health & Rehab. Servs., Inc. v. Thompson, 223 F. Supp. 2d 73, 99 (D.D.C. 2002) (internal quotation marks omitted) (citing *Bowen*, 834 F.2d at 1047).

122. *Pac. Gas. & Elec. Co.*, 506 F.2d at 38.

123. *Bowen*, 834 F.2d at 1045.

124. *Id.*

125. *Id.*; *see* Chen Zhou Chai v. Carroll, 48 F.3d 1331, 1340–41 (4th Cir. 1995) (finding that an interim rule issued by the Attorney General to the Board of Immigration Appeals was exempt from notice-and-comment rulemaking because it did not establish a binding norm).

126. Dismas Charities, Inc. v. U.S. Dep't of Justice, 401 F.3d 666, 680 (6th Cir. 2005) (explaining that memoranda that did not engage in any policy analysis or otherwise determine which rule is better, more effective, or less burdensome were interpretive rules).

127. Beverly Health & Rehab. Servs., Inc. v. Thompson, 223 F. Supp. 2d 73, 99 (D.D.C. 2002) (quoting *Bowen*, 834 F.2d at 1057 n.4)

128. *See id.* at 100; *see also* Cal-Almond, Inc. v. USDA, 14 F.3d 429, 447 (9th Cir. 1993) (holding that a California storage requirement was a procedural rule because it was a "'legitimate means of structuring [the agency's] enforcement authority'" (quoting *Bowen*, 834 F.2d at 1055).

129. Md. Dep't of Human Res. v. Sullivan, 738 F. Supp. 555, 560 (D.D.C. 1990) (holding that the program instruction was a nonbinding rule qualifying as exempt from notice-and-comment rulemaking under the APA).

130. *See id.*

always be described as affecting substance."[131]

Finally, a rule can be defined as a general statement of policy if it is "merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications."[132] At least two courts have framed general statements of policy in terms of an agency's future intentions; a general statement of policy "is not finally determinative of the issues or rights to which it is addressed" and so "[w]hen the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued."[133]

The INA[134] is the source from which DHS derives its authority to enforce immigration laws.[135] The INA authorizes DHS and the FBI to share information with each other in furtherance of DHS's enforcement of immigration laws.[136] Furthermore, Congress directed the integration of DHS databases (formerly INS databases) that process or contain information on aliens with an electronic data system that provides DHS access to information in federal law enforcement databases "relevant to determine whether to issue a visa or to determine the admissibility or deportability of an alien."[137]

First, notwithstanding the blurriness of the distinction between substantive rules and nonsubstantive rules, the primary mechanism of the Secure Communities program—automatic forwarding of fingerprints shared by state and local police with the FBI to ICE—likely qualifies as a procedural rule exempt from notice-and-comment rulemaking. DHS is charged with enforcing immigration laws, and Secure Communities could

131. JEM Broad. Co. v. FCC, 22 F.3d 320, 326 (D.C. Cir. 1994); *see also* Tafas v. Doll, 559 F.3d 1345, 1355 (Fed. Cir. 2009).

132. Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) (likening a general statement of policy to a press release).

133. *See id.* (describing a general statement of policy as an announcement that sets out what the agency seeks to establish as policy); *see also* Dep't of Envtl. Prot. v. Cumberland Coal Res., 29 A.3d 414, 427 (Pa. Commw. Ct. 2011) (holding that the standard conditions listed on permit application forms issued by an agency were not general statements of policy because they required compliance before an application was approved).

134. *See generally* 8 U.S.C. §§ 1101–1357 (2006).

135. *See id.* § 1103 ("The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens . . . [p]rovided. . . [t]hat determination and ruling by the Attorney General with respect to all questions of law shall be controlling." (emphasis omitted)).

136. *See id.* § 1105(a) (establishing authority for the INS (absorbed by DHS in 2002) to "maintain direct and continuous liaison" with the FBI "for the purpose of obtaining and exchanging information for use in enforcing the provisions of this chapter in the interest of the internal and border security").

137. *Id.* § 1722(a).

well be described as an "enforcement plan."[138] It "borrow[s] the substantive standards"[139] of the INA and "'seek[s] to channel [the] agency enforcement resources'" allocated to it by statute "'toward ferreting out violations of the statute.'"[140] To aid its enforcement of immigration laws, DHS is authorized not only to share its information with the FBI, but to access FBI information relevant to enforcing immigration laws. Furthermore, that Congress intended this information sharing to extend to FBI databases is clear from its direction to integrate DHS electronic databases and federal law enforcement electronic databases "relevant . . . to determine the admissibility or deportability of an alien."[141]

Second, fingerprint sharing under Secure Communities could aptly be considered an interpretive rule exempt from notice-and-comment rulemaking. The announcement that Secure Communities is mandatory could easily be characterized as a clarification by DHS of "what is the rule"[142] because it simply specifies that the CJISD database is included in the electronic databases DHS may access. Furthermore, forwarding fingerprints from the CJISD database does not "establish[ ] a standard of conduct which has the force of law,"[143] rather it explains that the laws authorizing DHS to access FBI electronic databases includes the CJISD database. It does not impose a new requirement on the states to forward fingerprints to the FBI's CJISD database; such actions by the states are no less voluntary under Secure Communities than they were before.

Furthermore, previous statements by DHS officials that states can opt out of the program do not destroy the interpretive or procedural nature of DHS's subsequent announcement that Secure Communities is mandatory. An agency's determination of whether the rule is substantive, although relevant, is not controlling.[144] Thus, prior announcements by DHS representatives that arguably indicate that DHS may have previously regarded Secure Communities as a substantive rule, taken alone, do not transform Secure Communities into a substantive rule that should be subjected to notice-and-comment rulemaking.

However, because the program requires action on the part of the state or

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138. Beverly Health & Rehab. Servs., Inc. v. Thompson, 223 F. Supp. 2d 73, 100 (D.D.C. 2002).

139. *Id.* at 99 (quoting Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1057 n.4 (D.C. Cir. 1987)).

140. *Id.* (*Bowen*, 834 F.2d at 1057 n.4.)

141. 8 U.S.C. § 1722(a).

142. Dismas Charities, Inc. v. U.S. Dep't of Justice, 401 F.3d 666, 680 (6th Cir. 2005).

143. Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974).

144. Tripoli Rocketry Ass'n v. U.S. Bureau of Alcohol, Tobacco & Firearms, No. 00CV0273(RBW), 2002 WL 33253171, at *10 (D.D.C. June 24, 2002).

local law enforcement officials who send in the fingerprints and detain arrestees longer than they would otherwise be held, and because these actions are not done through a voluntary 287(g) memorandum of agreement, then at least this portion of the program requires notice-and-comment rulemaking. State and local law enforcement officials have private interests in performing their duties and requiring them to engage in a procedure they would otherwise not engage in "establishes a standard of conduct which has the force of law."[145]

For similar reasons, the use of state and local law enforcement cannot properly be described as procedure that is exempt from notice-and-comment rulemaking. While actions taken by state and local law enforcement to aid ICE in apprehending aliens may be part of an "enforcement plan,"[146] it not only imposes new burdens on state and local law enforcement, but also imposes new duties on elected state officials who are accountable to the public for policies performed by law enforcement under their watch.

Finally, the imposition of duties upon state and local law enforcement under Secure Communities does not qualify as a general statement of policy that is exempt from notice-and-comment rulemaking. The mandatory status of Secure Communities was not announced as a general statement of policy, as shown by the termination of the memoranda of agreement between DHS and the states that signed them shortly after the announcement. If making Secure Communities mandatory merely meant creating a statement of general policy to indicate a rule DHS intended to adopt in future rulemaking proceedings, terminating the memoranda of agreement would have been unnecessary. Thus, under the APA, Secure Communities most likely requires notice-and-comment rulemaking because it requires action on the part of state and local law enforcement that is not pursuant to a 287(g) memorandum of agreement.

IV. WHY NOTICE-AND-COMMENT RULEMAKING MAKES SENSE FOR THE SECURE COMMUNITIES PROGRAM

The APA represents the minimum standards for notice-and-comment rulemaking that an agency is expected to conform to; however, agencies have full discretion to grant additional procedural rights to interested parties.[147] Notice-and-comment rulemaking provides "easy access" to the

145. *See* Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1046 (D.C. Cir. 1987); *see also Pac. Gas. & Elec. Co.*, 506 F.2d at 38.

146. Beverly Health & Rehab. Servs., Inc. v. Thompson, 223 F. Supp. 2d 73, 100 (D.D.C. 2002).

147. *See* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519,

discourse about the rule among interest groups and between those groups and decisionmakers.[148] Additionally, "Notice and comment is the [means] by which the persons affected by legislative rules are enabled to communicate their concerns in a comprehensive and systematic fashion . . . ."[149] Thus, "The greater the public interest in a rule, the greater reason to allow the public to participate in its formation."[150]

Furthermore, notice-and-comment rulemaking is the mechanism through which Executive agencies are held accountable to the public.[151] Rules resulting from notice-and-comment rulemaking provide a check on the "exercise of 'unbridled' discretion by administrative agencies" and make it "easier to achieve the goals of uniformity, continuity, and clarity."[152] Rules and rulemaking further the values of efficiency, fairness, and accountability on the one hand, and a cultural distrust of government and government officials on the other.[153] Thus, the benefits of notice-and-comment rulemaking far outweigh the monetary costs.[154]

Despite the federal government's preeminent authority over immigration policy, states have increasingly taken matters into their own hands in recent years.[155] Some states, such as Arizona and Alabama, have sought to

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523–24 (1978) (discussing that, while the APA is the minimum standard by which the judiciary was meant to review agency rules and rulemaking, agencies still have full discretion to engage in notice-and-comment rulemaking if they so desire).

148. Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1560 (1992) (explaining why notice-and-comment rulemaking is one of the greatest advantages and procedural protections available in the rapidly expanding modern bureaucratic state).

149. Hoctor v. USDA, 82 F.3d 165, 171 (7th Cir. 1996) (explaining the common sense rationale behind notice-and-comment rulemaking when the interests affected are widespread and legitimate).

150. *Id*. (noting that the lawyer for the Department of Agriculture had speculated that engaging in notice-and-comment rulemaking for a rule regarding the secure containment of animals would have elicited thousands of comments).

151. *See* Peter J. Henning, Note, *An Analysis of the General Statement of Policy Exception to Notice and Comment Procedures*, 73 GEO. L.J. 1007, 1012 (1985) (stating that the purpose of the APA requirements for notice-and-comment rulemaking is to limit the lack of political accountability inherent in the administrative process).

152. POPPER ET. AL., *supra* note 107, at 66 (explaining that the value in the existence of rules is to provide the public with "participatory rights" and opportunity to challenge rules promulgated by agencies in court).

153. *See* Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 TULSA L.J. 185, 185–86 (1996) (explaining that the history of rulemaking in the legal system is characterized by conflicting social and political values in American society that are so deep-rooted that they go back to the Framers of the Constitution).

154. Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 165 (2000).

155. *See generally* Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of*

require state and local law enforcement officials to stop those they reasonably suspect are illegal aliens.[156] Other states, such as Illinois, have sought to limit cooperation with the federal government by, for example, prohibiting employers from participating in federal programs such as Employment Eligibility Verification Systems.[157] While the Supreme Court's ruling in *Chamber of Commerce v. Whiting*[158] offers some insight into the extent to which states may determine their role in enforcing immigration law, this question is still largely undefined.[159]

Not surprisingly, the public interest in Secure Communities has been enormous. Not only have immigrant rights groups objected to implementation of the program,[160] but the public has as well.[161] States have

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Immigration Reform, 62 HASTINGS L.J. 1673 (2011) (discussing the modern rise of state experimentation with immigration laws and enforcement and the uncertainty as to which state actions are preempted or unconstitutional).

156. *See* ARIZ. REV. STAT. ANN. § 11-1051(A) (Supp. 2010); H.B. No. 56, 2011 Reg. Sess., 2011 Ala. Acts 535; Julia Preston, *In Alabama, a Harsh Bill for Residents Here Illegally*, N.Y. TIMES, June 3, 2011, http://www.nytimes.com/2011/06/04/us/04immig.html. *But see* United States v. Arizona, 703 F. Supp. 2d 980, 1008 (D. Ariz. 2010), *aff'd*, 641 F.3d 339, 344 (9th Cir. 2011) (enjoining enforcement of parts of the Arizona law as preempted by federal law). The Supreme Court struck down the preliminary injunction as to the provision of the law that requires police officers who conduct a stop to validate the immigration status of the individual. Arizona v. United States, 132 S. Ct. 2492, 2509 (2012). However, the Court upheld the preliminary injunction as to the provision of the law that made failure to comply with federal alien registration requirements a state misdemeanor. *Id.* at 2503.

157. *But see* United States v. Illinois, No. 07-3261, 2009 WL 662703, at *1 (C.D. Ill. Mar. 12, 2009) (invalidating the law under the Supremacy Clause).

158. 131 S. Ct. 1968, 1987 (2011) (affirming the legality of an Arizona law employing sanctions for the unauthorized employment of illegal aliens and noting that the law took "the route least likely to cause tension with federal law" because it relies on federal definitions of who is an unauthorized alien and uses the federal government's employment status verification systems).

159. *See* Cunningham-Parmeter, *supra* note 155, at 1691 (explaining that while *Whiting* cast some light on the extent to which states may promulgate immigration laws by allowing states to employ their own immigration verification systems, the line between state and federal involvement in immigration law remains ambiguous).

160. *See, e.g.*, Dan Frosch, *In Colorado, Debate over Program to Check Immigration History of the Arrested*, N. Y. TIMES, July 29, 2010, http://www.nytimes.com/2010/07/30/us/30colorado.html (noting that immigrant rights groups in Colorado pushed to reject Secure Communities after witnessing its impact in twenty-seven other states).

161. *See supra* notes 6–8 and accompanying text for a discussion of the opposition to Secure Communities among states and local communities with large immigrant populations. *Contra* Michael Graham, Op-Ed, *Gov. Deval Patrick Ignores Real Victims*, BOS. HERALD, Aug. 25, 2011, http://bostonherald.com/news_opinion/opinion/op_ed/2011/08/gov_deval_patrick_ignores_real_victims. Massachusetts Governor Deval Patrick declined to implement Secure Communities. *Id.* He has been criticized as ignoring victims of crime committed by criminal aliens in Massachusetts, including a recent violent crime committed by illegal alien Nicolas Guaman in Milford, Massachusetts. *Id.*

challenged the program's overall effectiveness and its interference with important state interests, such as community policing.[162] State and local officials have stated that the program causes fear and mistrust of police and effectively marginalizes immigrant communities.[163] For example, Arturo Venegas[164] stated that at a task force hearing in Los Angeles he heard testimony from a woman who was arrested for selling popsicles without a license and placed into deportation proceedings through Secure Communities; he noted "the wave of fear her arrest and pending deportation has caused in her community."[165] Such "wave[s] of fear" cause victims and witnesses of crime to remain silent for fear of deportation.[166] Indeed, regardless of the intent of the administration in implementing the program, tying the threat of deportation so closely to the presence and discretion of a law enforcement officer may discourage aliens from interacting with the legal system even when doing so is in society's best interests.[167]

In fact, even for communities that have enacted "sanctuary laws," which forbid local law enforcement from enforcing federal immigration laws, fearfulness of police among immigrant communities is a huge concern.[168]

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162. *See supra* notes 6–8 and accompanying text for a discussion of the state interests affected by Secure Communities.

163. *See supra* notes 6–8 and accompanying text.

164. *See supra* note 19 and accompanying text for a discussion of Arturo Venegas' role in the task force.

165. *Task Force Report Criticizes Secure Communities*, DEPORTATION NATION, (Sept. 20, 2011), http://www.deportationnation.org/2011/09/task-force-report-criticizes-secure-communities/ (statement of Arturo Venegas) (explaining why he does not think that the recommendations by the Secure Communities task force will address the marginalization of immigrant communities and explaining his decision to resign from the task force along with other task force members).

166. *See* Michael J. Mishak, *Bill Would Let Counties Opt Out of U.S. Immigration Enforcement Program*, L.A. TIMES, May 31, 2011, http://articles.latimes.com/2011/may/31/local/la-me-immigration-20110531 (pointing out that while federal officials have stated that the purpose of Secure Communities is to increase public safety, state lawmakers have noted that the deportation of low-level offenders has caused immigrant victims and witnesses of crime to not come forward).

167. *See* Telephone Interview with Ellen S. Kief, Attorney, Law Office of Ellen S. Kief (Oct. 25, 2011). "The intent of the administration in implementing Secure Communities is not and should not be the marginalization of immigrants. . . . The government should consider the effect of law enforcement officers random[ly] stopping . . . immigrants on the streets." *Id.* "The threat of deportation discourage[s] aliens from interacting with the legal system even when doing so is in his [or] her best interest for being in compliance with the law." *Id.*

168. *See, e.g.*, Aaron Kraut, *Takoma Park's Sanctuary Policy Threatened by Secure Communities Law*, GAZETTE.NET, (Oct. 5, 2011), http://www.gazette.net/article/20111005/NEWS/710059530/0/gazette&template=gazette (quoting Takoma Park, Maryland Mayor Bruce

One police chief has stated that the sanctuary policy in his community is enormously helpful to maintaining public safety, citing a case involving the robbery of a local dry cleaner.[169] A laborer who witnessed the crime wrote the tag of a suspect's car in the dirt and gave other information to police, helping lead to an arrest.[170]

Furthermore, there is a question as to whether any United States citizens have been deported as result of fingerprint matches in Secure Communities databases.[171] As of 2009, 5,880 people identified through the program were United States citizens.[172] As of 2010, 6% of all IDENT matches identified United States citizens.[173] Recent statistics released by ICE acknowledge that some of the matches found through Secure Communities databases are United States citizens but do not specify the number of United States citizens identified through those databases.[174] Wrongful deportations of United States citizens are not isolated incidents,[175] and often involve individuals of foreign descent or with foreign surnames.[176] As

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Williams saying that when the Secure Communities program becomes mandatory in Montgomery County, the city's longstanding sanctuary policy will become largely ineffective and disrupt public safety by creating distrust of law enforcement in the immigrant community).

169. *Id.* (explaining that the rapport Tacoma Park Police Chief Ronald Ricucci and his law enforcement agency have with the immigrant community is largely due to the longstanding city sanctuary policy).

170. *Id.* (quoting Police Chief Ronald Ricucci pointing to this as illustrative of the rapport law enforcement has with the immigrant community in Takoma Park because "[t]hey see we treat everybody the same" and as a result immigrants are willing to come forward).

171. *Cf.* Julia Preston, *U.S. Identifies 111,000 Immigrants With Criminal Records*, N.Y. TIMES, Nov. 12, 2009, http://www.nytimes.com/2009/11/13/us/13ice.html (noting that Secure Communities database systems still have flaws and have identified United States citizens).

172. *Secure Communities IDENT/IAFIS Interoperability Monthly Statistics Through October 31, 2009*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, (2009), http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2009.pdf.

173. *Secure Communities Overview*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, 4 (Jan. 13, 2010), http://www.ice.gov/doclib/foia/secure_communities/securecommunities presentations.pdf (stating that since October 27, 2008, six percent of Automated Biometric Identification System (IDENT) matches had resulted in the identification of a United States citizen).

174. *See ICE Statistics Through August 2012*, *supra* note 59, at 54.

175. *See* Suzanne Gamboa, *Citizens Deported as Illegals,* FORT WAYNE J. GAZETTE, Apr. 13, 2009, at 3A (discussing how the recent crackdown on illegal immigration has led to the deportation of many United States citizens, including fifty-five in the past eight years, as documented by an Associated Press investigation).

176. *See e.g.*, Kristin Collins, *Feds Wrongly Deport Citizen Living in N.C.*, NEWS & OBSERVER, Apr. 30, 2009, http://www.newsobserver.com/2009/04/30/66184/feds-wrongly-deport-citizen-living.html (divulging that Mark Lyttle, who has a dark complexion and whose biological father is Puerto Rican, was deported to Mexico despite being born in the United

indigent noncitizens facing deportations in the United States do not have a right to appointed counsel,[177] those United States citizens that have been deported are often those with the fewest resources, such as the mentally disabled or ill, children, and the poor.[178]

Given the stakes of the interests affected by Secure Communities, there is little reason for DHS to forego notice-and-comment rulemaking before expanding the program to every jurisdiction across the fifty states. Through notice-and-comment rulemaking, every group from private immigrant advocacy groups, to states, to individual law enforcement officials and politicians, could submit comments to DHS on a level playing field. With the billions of dollars that have been invested in Secure Communities and the considerable energy expended defending it, adopting the program through a congressionally recognized procedure could only improve its implementation.

CONCLUSION

Notice-and-comment rulemaking on this program will certainly not solve the ambiguity surrounding how states may define their level of cooperation with federal immigration enforcement objectives. However, continuing to aggressively defend the Secure Communities program without giving the concerns of affected parties a fair hearing can only undermine the legitimacy of the program. Secure Communities, by all accounts, "got off to a bad start."[179] Small measures taken by DHS to alleviate public apprehension about the mandatory status of the program, such as issuing a memorandum emphasizing prosecutorial discretion and establishing a task force whose recommendations are not binding on DHS, have not gone far

States and speaking no Spanish); Marisa Taylor, *American Citizen Almost Deported—as a Russian*, MODESTO BEE, Jan. 27, 2008, at A1 (describing how Thomas Warziniack was detained despite his Southern accent and repeated claims that he was a United States citizen).

177. 8 U.S.C. § 1229a(4)(a) (2006) ("[T]he alien shall have the privilege of being represented, at no expense to the Government . . . ."); *see* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) (characterizing an immigration proceeding as civil, not criminal in nature).

178. Gamboa, *supra* note 175, at 3A; *see, e.g.*, Collins, *supra* note 176 (stating that Mark Lyttle is mentally ill and suffers from mild mental retardation); Taylor, *supra* note 176 (detailing that Thomas Warziniack was a heroin addict arrested on a drug charge before he was wrongful detained as an illegal immigrant).

179. *See* Julia Preston, *Janet Napolitano Takes on Critics of Immigration*, CAUCUS, (Oct. 5, 2011, 7:16 PM), http://thecaucus.blogs.nytimes.com/2011/10/05/janet-napolitano-takes-on-critics-of-immigration/ (recounting Janet Napolitano's description of the public response to the announcement that Secure Communities was mandatory and her acknowledgement that the administration was unclear about the parameters of the program in a speech at American University on October 5, 2011).

enough. The lack of transparency, the wide-ranging implications for public safety, the abrupt announcement that the program is mandatory, and the sudden termination of the memoranda of agreement signed by participating states have understandably aroused great mistrust. Thus, even if Secure Communities is not unconstitutional, and even if it does not require notice-and-comment rulemaking under the APA, notice-and-comment rulemaking is a good starting place for DHS to restore the program's legitimacy as an exercise of its delegated authority in the eyes of the public.