ARTICLES

STATUTORY INTERPRETATION OR PUBLIC ADMINISTRATION: HOW *CHEVRON* MISCONCEIVES THE FUNCTION OF AGENCIES AND WHY IT MATTERS

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ABSTRACT

By its Chevron *doctrines, the Supreme Court reconceived the core function of administrative agencies as statutory construction, modeled on the judicial process, instead of the actual legal function of public administration, which is operational implementation of statutory programs. Since statutory construction by tradition lies within the domain of the courts, the Court's reconception of administrative work transferred sources of law on judicial review and administrative procedure from institutionally savvy statutes, principally the Administrative Procedure Act (APA) and enabling acts, to the Court's own judge-made canons. Because those canons are founded on a false paradigm of public administration as statutory construction, they have had pernicious effects, including reshaping agency procedures in ways that frustrate values of public administration, promoting excessive amounts of judge-made law on the meaning of regulatory statutes, and minimizing judicial oversight of administrative work for basic rationality. After decades of relentlessly using* Chevron*'s tests designed for "statutory construction" to supervise*

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the operational acts of public bureaucracies that are charged with the substantially different task of "carrying out" statutory programs, the Supreme Court last Term decided several cases that break from Chevron*'s misconception. The Court revived the framework of judicial review from the formative, pre-*Chevron *era, when the APA dominated judicial review. That development is heartening. The earlier framework is more attuned to the actual legal function of public administration and it relies on the comparative institutional strengths of agencies and courts. The statutory framework of the APA works better than the judge-made* Chevron *canons of the Supreme Court, and it is, after all, the scheme that Congress enacted into law. Statutes are the way out.*

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INTRODUCTION

Through its *Chevron* doctrines, the Supreme Court reconceived the core function of administrative agencies as statutory construction, modeled on the judicial process, instead of the actual legal function of public administration, which is operational implementation of statutory programs. Because statutory interpretation traditionally lies within the domain of the judiciary, that category error led the Court to displace institutionally savvy

statutes, chiefly the Administrative Procedure Act (APA), in favor of the Court's own judge-made norms about standards of judicial review and administrative procedures for that court-sounding work. *Chevron* marks a tipping point in the history of judicial review, not just for the standard by which it is best known—the degree of deference it affords administrative actions—but also for its seismic shift from statutes to judge-made canons as the authoritative sources of law on administrative review and administrative procedure.

Beginning with *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[1] in 1984 and continuing steadily for over two decades through *National Cable & Telecommunications Ass'n v. Brand X Internet Services* in 2005,[2] the Supreme Court has used a paradigm that typical, mainstream public administration is the same activity as statutory construction. Unlike courts, however, agencies do not exist to issue disinterested and authoritative interpretations of statutes based on strictly legal processes. As organizations of public administration, agencies are charged with *carrying out* statutory provisions—that is, with implementing public policies through operational programs. Administrative rules represent interstitial, provisional, operational applications that can be, and often are, altered as agency expertise evolves and political currents shift. Accordingly, agencies by law use institutional processes that involve controls by the political branches. They have mechanisms for public input and accountability that advance bureaucratic and management objectives and rely on technical expertise. While statutory factors are part of the administrative process, the business of public bureaucracies is not the same as the business of the courts to interpret statutes in cases or controversies.

The statutory standards of review that Congress enacted in the APA and various enabling acts, which were the dominant sources of law in the pre-*Chevron* era, treat the administrative function as substantially different from the judicial role, not as essentially equivalent. Rather than merging the distinct roles of courts and agencies into a universe of judicial review that is all statutory construction all the time, those statutes facilitate review that is more attuned to the sometimes overlapping, but fundamentally different, missions and processes of those two types of governmental institutions when they work with statutes. Before *Chevron*, courts tended to use the statutory standard of arbitrary and capricious review and its close kin, the substantial evidence test, for oversight of most agency "carrying out" actions—that is, for review of quintessential administrative implementation of statutory programs. This standard of review emphasized

1. 467 U.S. 837 (1984).
2. 545 U.S. 967 (2005).

judicial techniques of oversight that suited the administrative, implementing function, such as assessing the fullness of an agency's administrative record, its consideration of statutory factors, and the quality of its reasoning. The pre-*Chevron* courts did not assess administrative action as if it were a judicial-style exercise in text-parsing and a neutral perusal of legislative history. Indeed, in express terms, the APA and enabling acts counsel against overzealous framing of issues as so-called questions of law or questions of statutory interpretation. Yet this is precisely what the judge-made canons of *Chevron* relentlessly promoted for over two decades.

The doctrines of *Chevron*, applicable when an agency "construes a statute," effected a kind of mission creep as courts came to use them in virtually all cases of judicial review of agency action. This confusing paradigm—that agency implementation is synonymous with statutory construction—was the springboard by which the Supreme Court came to fashion its own doctrines on standards of review and its own norms about agency procedures, irrespective of the statutory requirements of the APA and various organic acts. Under the Court's false syllogism in its *Chevron* doctrine, administrative actions are "statutory interpretation"; statutory interpretation ultimately lies within the domain of the judiciary; and therefore, the Court may determine what administrative or judicial processes govern those binding administrative "interpretations."

The displacement of statutes as the source of law is now nearly complete for standards of judicial review, and it is moving along apace with respect to administrative procedures. Perpetuation of the *Chevron* regime threatens to unravel the framework of the APA, which prescribed a distinct institutional process for public administration, such as: advance notice of bureaucratic action through publication; broad rights of participation for affected interests; the development of a full, technical administrative record on which agencies base their actions; and agenda-setting by the contemporaneous occupants of the political branches. Far from being a counter-*Marbury v. Madison*,[3] the *Chevron* case and its progeny are at root a *Marbury* in administrative law. While these cases counsel deference to the agencies in some circumstances, they are firm in the view that the

3. 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); s*ee, e.g.*, Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2580, 2583-84 (2006) [hereinafter Sunstein, *Beyond* Marbury] (describing *Chevron* as even more than a "'counter-*Marbury*' for the Executive Branch"); *see also* Elizabeth Garrett, *Step One of* Chevron v. Natural Resources Defense Council, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 56 (John F. Duffy & Michael Herz eds., 2005) (explaining that *Chevron* served as a "'counter-*Marbury*' for the regulatory state").

Court, not statutes, determines the nature of judicial oversight of public administration, including the standards of review and requisite administrative procedures.

Founded on a misconception that administrative work is statutory construction, the judge-made *Chevron* doctrines have had pernicious effects. First, by turning nearly every challenge on judicial review into a question of law as a matter of "statutory interpretation," the Supreme Court's *Chevron* doctrines likely generate more, not less, judge-made ossification of statutes than the APA regime that they displaced. Second and conversely, the distorted paradigm that agency action is statutory construction makes it difficult for the courts to review and assess agency action for the qualities expected of sound administration, that is, for rational and reasonable decision-making based on a full administrative record and on the inputs that are characteristic of public administration, not of neutral and independent courts. Third, the view that developed under *Chevron*—that agencies and courts are involved in an equivalent and shared project of statutory construction—makes it harder for the courts to allocate decision-making responsibilities between courts and agencies based on their comparative institutional strengths. The Court is blinded to its own important institutional role in the complex web of government institutions that comprise the regulatory state. Certain types of challenges to administrative work, albeit a narrow category, require resolution by the distinct features of the constitutional courts.

After decades mired in the Court's increasingly elaborate and confusing *Chevron* canons, last Term the Supreme Court broke from *Chevron*'s methodology in several key administrative law decisions, including *Zuni Public School District No. 89 v. Department of Education*,[4] *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*,[5] *Long Island Care at Home, Ltd. v. Coke*,[6] and *Massachusetts v. EPA*.[7] These recent decisions may well signal a return to the APA's more institutionally-attuned approach to judicial review. They build upon a recent practice in the lower federal courts of using something like the arbitrary and capricious test in a hybrid formulation of *Chevron* and the

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4. 127 S. Ct. 1534, 1541 (2007) (deferring to the agency largely on the grounds that the issue was a "specialized interstitial matter" for the agency and that the rule was reasonable, hence lawful, eschewing *Chevron*'s classic methodology).

5. 127 S. Ct. 1513, 1520 (2007) (finding that an agency "implementation" is reasonable, hence lawful, instead of formally following *Chevron*'s two step approach).

6. 127 S. Ct. 2339 (2007) (finding a Labor Department rule lawful because the statutory gap was one for the agency to fill, and the rule was not unreasonable).

7. 127 S. Ct. 1438, 1444 (2007) (using the arbitrary and capricious test to assess an agency's denial of a petition for rulemaking); *see also* Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559, 1572-73 (2007) (deciding the preemptive effect of the National Bank Act without using *Chevron*'s framework).

APA.[8] The APA is based on a fundamentally sound paradigm of public administration, and it has the added virtue that it was enacted into law. A return to the APA's framework of comparative institutional competence would help rescue the law on judicial review from its current *Chevron* morass.

Part I of this Article describes the core legal function of administrative agencies to "carry out" statutory responsibilities. It explains how the legally established carrying-out function of public administration differs from "statutory interpretation." It traces the evolution of the Court's understanding of the administrative function from the formative decades of the APA, when the carrying-out model dominated judicial review, to the *Chevron* era, when the model became one of statutory construction. Part II describes how that misunderstanding of the administrative function creates dysfunctions in the legal doctrines. Judge-made norms displaced statutes as sources of law, and those judge-made canons are both overly intrusive in declaring the meaning of statutes and overly indifferent to the administrative reasonableness of operational programs by public bureaucracies. Part III describes the superiority of the APA's scheme of judicial review, which seeks to separate and not to merge the institutional roles of court and agency, and to assign responsibilities to one or the other based on comparative institutional strengths. Governing statutes assign agencies and courts different constituent roles in the overall regulatory enterprise. Finally, this Article sees recent decisions of the Supreme Court as breaking with *Chevron*'s methodology in ways that may presage a return to the earlier, more institutionally savvy approach.

I. *CHEVRON*'S FALSE PARADIGM OF ADMINISTRATIVE WORK

Agencies are bureaucracies of public administration. They are charged with implementing statutes and with running and planning the policies that stem from those statutes. Their operational mission is to carry out statutory programs, not to perform judicial-style statutory interpretation.[9] While

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8. *See, e.g.*, M. Elizabeth Magill, *Step Two of* Chevron v. Natural Resources Defense Council, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 85, 93-96 (John F. Duffy & Michael Herz eds., 2005) (stating that courts sometimes conduct *Chevron*'s step two analysis in a way similar to the APA's arbitrary and capricious review); Richard Murphy et al., *Judicial Review in* DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 2004-2005 101 (Jeffrey S. Lubbers ed., 2006); Richard J. Pierce, Jr., *How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss*, 59 ADMIN. L. REV. 197, 201 (2007) (citing circuit court demands for reasonable administrative decision-making).

9. While legal doctrines of judicial review necessarily rely on paradigms of administrative functions, agencies are not monolithic. They have varying legal structures and different kinds of tasks, as well as varying internal cultures and historic practices.

similarities exist between public administration and the exercise of judicial power—both types of work give meaning to statutes—agencies have a distinctly different function than courts.

A. The Legal Function of Public Administration to "Carry Out" Statutory Programs

Authorizing language in enabling acts typically grants an agency authority to take administrative action "for the purpose of *carrying out the provisions* of" the enabling act;[10] "to *carry out the purposes*" of a particular statute;[11] "for *carrying into effect* of the various provisions" of an act;[12] or "as public convenience, interest, or necessity requires[,] . . . [m]ake such regulations *not inconsistent with law* as it may deem necessary . . . *to carry out* the provisions" of the relevant Act.[13] Other enabling acts describe the administrative function with slightly different formulations, but to the same effect: authorizing the administrator to "*carry*[] *out his functions*"[14] or to "issue appropriate rules and regulations to govern the *carrying out* of the *agency's responsibilities* under [the] Act."[15] Those carrying-out responsibilities centrally include execution and enforcement,[16] as well as planning, implementing, and managing regulatory programs. The essentially *operational* character of public administration is especially clear in the enabling act at issue in *Zuni Public School District.*[17] There, the authorizing statute provides that the Secretary of Education, "in order to *carry out* functions otherwise vested in the Secretary by law or by delegation of authority pursuant to law[,] . . . is authorized to make . . . rules and regulations *governing the manner of operation of, and governing the applicable programs administered by*, the Department."[18]

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10. 15 U.S.C. § 46(g) (2000) (emphasis added) (Federal Trade Commission); *see also* 16 U.S.C. §§ 669i, 777i (2000) (Secretary of the Interior) ("for carrying out the provisions"); 23 U.S.C. § 315 (2000) (Secretary of Transportation); 47 U.S.C. § 201(b) (2000) (Federal Communications Commission).

11. 16 U.S.C. § 701 (2000) (emphasis added) (Department of Interior).

12. 25 U.S.C. § 9 (2000) (emphasis added) (Bureau of Indian Affairs); *see also* 30 U.S.C. § 75 (2000) (Bureau of Land Management) ("for carrying into effect the provisions").

13. 47 U.S.C. § 303(f) (2000) (emphasis added) (radio); *see also* 19 U.S.C. § 66 (2000) (Secretary of Treasury) ("in carrying out the provisions").

14. *See, e.g.*, 19 U.S.C. § 1336(i) (2000) (emphasis added) (Presidential Customs classifications).

15. 42 U.S.C. § 4128 (2000) (emphasis added) (federal financial assistance agencies); *see also* 8 U.S.C. § 1103(a)(3) (2000) (Attorney General) ("for carrying out his authority").

16. *See, e.g.*, 47 U.S.C. § 151 (2000) ("[T]he Federal Communications Commission . . . shall execute and enforce the provisions of this chapter.") (internal quotations omitted).

17. 127 S. Ct. 1534 (2007).

18. 20 U.S.C. § 1221e-3 (2000) (emphasis added).

The administrative function is an operational, policy-implementing role, in which an agency typically chooses from among a variety of possible solutions to a particular set of specialized problems or challenges. The agency may set bureaucratic implementing standards of a type quite foreign to the work product of a court when it interprets a statute in a case or controversy. That policy-implementing function of agencies often produces actions or rules—like the bubble rule in the *Chevron* case itself—that have qualities essential to interstitial bureaucratic application and enforcement, such as multiple part tests, specific performance standards, and detailed compliance commands. These are characteristic of the carrying-out function of a public bureaucracy and not of a judicial holding about the meaning of a statute.

B. The Administrative Function as Policy Implementation in the Formative Years of the APA

In the formative years of the APA, judicial review doctrines tended to respect the policy or technical implementing function that was distinctly the work product of institutions of public administration. Landmark cases of judicial review in the pre-*Chevron* era, such as *Citizens to Preserve Overton Park, Inc. v. Volpe*,[19] *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,[20] and the pre-APA case of *NLRB v. Hearst Publications, Inc.*,[21] all involved agency actions that implemented statutory provisions in operational ways that are classic for public administrative bodies. Courts generally called this administrative work mixed law and policy, or application of law to facts, or policy development. In *Overton Park*, the Department of Transportation issued an informal order that its routing of a highway through a park was the only "feasible and prudent" option.[22] In *State Farm*, the National Highway Traffic Safety Administration revoked, by rulemaking, passive automobile restraints under an act that authorized the agency to make standards that are "practicable" and "meet the need for motor vehicle safety."[23] In *Hearst*,

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19. 401 U.S. 402, 405, 421 (1971) (remanding where Secretary of Transportation's proposed highway running through a park conflicted with statute that required routing around parks where "feasible and prudent").

20. 463 U.S. 29, 33-34 (1983) (involving a judgment by the National Highway Traffic Safety Administration that its revocation of passive occupant restraints was consistent with the National Traffic and Motor Vehicle Safety Act's mandate that safety standards "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms"). National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381, 1392(a) (repealed 1994).

21. 322 U.S. 111, 131 (1944) ("[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.").

22. *Overton Park*, 401 U.S. at 405.

23. *State Farm*, 463 U.S. at 33-34.

the National Labor Relations Board determined by adjudication that the statutory term "employee" in a federal labor law applied to newsboys, who in other contexts were deemed independent contractors.[24] In each case, the agency undertook some form of quintessentially administrative action in order to effectuate a statutory program, through evolving, iterative, or practical applications based on inputs that are characteristic of public administration. Those inputs included: technical assessments of on-the-ground facts; expert predictions; the policy views of administrators and staff; input from the public, especially from affected interests; political influence and control from the White House and the current Congress; the agency's own understanding of the statutory provisions of its organic act; and the practical needs of the bureaucracy to manage and enforce a statutory program.

While those agency actions were similar to the countless actions that now fall under *Chevron*'s spell, the courts did not call those earlier actions "statutory construction." The courts sometimes labeled the actions policy implementations, applications of law to fact, mixed questions of fact and law, or mixed policy and law matters. The standard of judicial review that the courts applied to those commonplace actions of public administration was the arbitrary and capricious test of § 706 of the APA, or its close kin, the substantial evidence test.[25] Those APA standards provide that courts shall review agency actions for their basic rationality and reasonableness, and not de novo, because the work is entitled to respect as the actions of other lawfully established government bodies and because agencies have a different mission and process from the courts.[26] Section 706, as applied by courts, thus tended to focus on features relevant to the soundness of an agency's work as a government institution of administration and enforcement—not as an institution whose job matches that of a court. Judicial review in that formative era tended to examine such factors as: whether the administrative record was adequately developed with technical and expert materials; whether the agency engaged in an act of reasoned decision-making; and whether the agency considered all of the relevant factors, including but not limited to, whether the agency gave a proper meaning to the statutory text.

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24. *Hearst Publ'ns*, 322 U.S. at 114; *see also* Am. Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 529-30 (1981) (using the substantial evidence test to assess whether OSHA's cottondust standard properly implemented the statutory word "feasible" in the Occupational Safety and Health Act).

25. 5 U.S.C. § 706(2)(A), (E) (2000).

26. *See* United States v. Bean, 537 U.S. 71, 77 (2002) ("[T]he 'arbitrary and capricious' test in its nature contemplates review of some action by another entity, rather than initial judgment of the court itself.").

To the extent that administrative agencies necessarily work with statutory text when taking bureaucratic action, the courts tended to use the arbitrary and capricious test to assess whether an agency's application of its statutory terms in a particular matter was lawful. That is to say, courts treated a broader range of issues on review in the pre-*Chevron* world—even some that in a sense are administrative interpretations of statutes as administrative implementation—and courts subjected them to the standard of the APA that ensures rational administrative decision-making. Courts did not cabin those typical administrative actions into a special realm of so-called questions of law or statutory construction.[27] For example, in restating the practice of arbitrary and capricious review in the mid-1980s, the Section of Administrative Law of the American Bar Association noted that courts would set aside and find an abuse of discretion in any agency action in which the agency failed to consider factors that the federal statute required it to consider.[28] The ABA's accompanying report acknowledged that this is "a *kind* of statutory construction,"[29] but courts tended not to treat mixed matters of agency implementation as "pure" questions of law or pure statutory interpretation. Likewise, when summing up the Supreme Court's 1983 Term, the *Harvard Law Review* noted that courts had tended to use the APA's § 706's standard of arbitrary and capricious review "in closely scrutinizing agency reasoning, records, and *interpretation of statutes*."[30]

Administrative law casebooks and treatises of the 1960s and 1970s, and most of the major Supreme Court cases of that era reveal the prevalence of the arbitrary and capricious, abuse of discretion standard, or the similar substantial evidence test of the APA for reviewing administrative action. In 1980, Professor Kenneth Culp Davis observed that the federal courts had established "a consensus in favor of the arbitrary-capricious test for review of informal action, including rulemaking."[31] Indeed, in *State Farm*, the

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27. *See* Section of Administrative Law, American Bar Association, *A Restatement of Scope-of-Review Doctrine*, 38 ADMIN. L. REV. 235, 235 (1986) (stating that the grounds for reversal includes when "the agency has relied on factors that may not be taken into account under, or has ignored factors that must be taken into account under," a federal statute, and when "[t]he action rests upon a policy judgment that is so unacceptable as to render the action arbitrary"); Ronald M. Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239, 250, 252 (1986) [hereinafter Levin, *Scope-of-Review*] ("The 'relevant factors' test of *Overton Park* should be understood as referring to factors that the agency is required to consider by virtue of a statute . . . ."); *see also* Schweiker v. Gray Panthers, 453 U.S. 34, 36 (1981) (stating that the issue was "whether the federal regulations that permit States to 'deem' income in this manner are arbitrary, capricious, or otherwise unlawful," and using statutory factors as part of that inquiry).

28. *A Restatement of Scope-of-Review Doctrine*, *supra* note 27, at 235; *see also Am. Textile Mfrs. Inst.*, 452 U.S. at 540 ("We must measure the validity of the Secretary's actions against the requirements of that Act.").

29. Levin, *Scope-of-Review*, *supra* note 27, at 250 (emphasis added).

30. *Leading Cases of the 1983 Term*, 98 HARV. L. REV. 87, 247 (1984) (emphasis added).

31. *See* KENNETH CULP DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 29.01-2, at 284 (Supp. 1980) (observing that federal courts tend to use arbitrary and capricious test

Supreme Court equated the universe of informal notice-and-comment rulemaking under § 553 of the APA with judicial review pursuant to an arbitrary and capricious standard.[32]

To be sure, § 706 does envision a realm of issues that are questions of law, including questions of statutory construction.[33] Yet the textual command of § 706 clearly indicates that issues of statutory interpretation comprise a mere subset of the range of possible administrative matters on review. They are not the whole universe as later reframed in the *Chevron* era. Section 706 provides that only "to the extent necessary" and only "when presented" shall a court decide issues of statutory construction, questions of constitutional interpretation, or questions of law.[34] That phrasing counsels the judiciary to exercise restraint and to avoid a broad sweep for so-called issues of statutory construction. A similarly restrained approach to judicial review is also apparent in the provisions of many enabling acts that authorize agencies to "carry out" their statutory responsibilities so long as they do so in a manner "*not inconsistent*" with law.[35] In both contexts, the statutory texts counsel against review that would foster needless declarations about the meaning of statutes. Instead, the focus of judicial oversight under the APA is on review of administrative actions for their reasonableness, that is, for whether acts of public bureaucracies are arbitrary and capricious or lacking in substantial evidence as acts of operational implementation by public administrators.

In cases that truly present questions of law necessary to decision within the meaning of the APA, whether a canon of binding deference to agencies would ever be appropriate under the APA is something that the academic literature has debated elsewhere.[36] Such a canon might well be unwise,

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for review of informal rulemaking); *see also* KENNETH CULP DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 29.01-2, at 665 (1976).

32. *See* Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41 (1983) (stating that the relevant statute indicated that the agency was to promulgate the motor vehicle standards at issue using informal rulemaking procedures and concluding that the Court could only set aside the standards if they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

33. *See* 5 U.S.C. § 706 (2000) ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.").

34. 5 U.S.C. § 706.

35. *See supra* notes 10-18 and accompanying text.

36. For certain kinds of questions of law, the courts used a rational basis test, similar to an unreasonableness test, that asked whether the agency's action—its manner of executing the law—had a rational basis or was reasonable. *See* DAVIS, *supra* note 31, ADMINISTRATIVE LAW OF THE SEVENTIES § 29.01-2, at 289 (Supp. 1980) ("In many or most cases, a statement that courts set aside administrative interpretations of law only for unreasonableness is fairly accurate. . . ."); *see also* Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n, 390 U.S. 261, 272 (1968) (stating an agency's statutory interpretation is entitled to the Court's deference, "and will be affirmed if it has a 'reasonable basis in

even if not contrary to the APA's express text. The point here is that in the formative decades of the APA, most agency work was treated as operational, implementing work subject to judicial review for reasonableness. It was not treated as if it were statutory construction.

C. Chevron*: The Administrative Function Becomes "Statutory Interpretation"*

Chevron and its progeny moved the category of so-called "questions of law" or statutory construction deep into the domain of the mainstream policy implementation and operational work of administrative institutions. Like the rulemakings in *State Farm*,[37] *Sierra Club v. Costle*,[38] and others of that era, the Environmental Protection Agency's (EPA) rule in *Chevron* was quintessentially administrative in its substance and function. The bubble rule was an iterative, evolving bureaucratic implementation of policy under the Clean Air Act, using that distinctly administrative mixture of law, politics, expertise, and management that is characteristic of so many administrative rulemakings. In its rule, the EPA did not find a fixed, permanent legal meaning in statutory text, nor did it use orthodox legal materials or judicial-style methodology. Under instructions from newly-elected President Reagan to reduce regulatory burdens and complexities, the EPA changed its view about the types of new sources that would trigger federal permitting requirements in areas of the country where air quality fell below federal standards.[39] The EPA's new bubble rule allowed the states, somewhat at their option, to treat all pollution-emitting devices within a plant located in a non-attainment area as if a single "bubble" encased the plant.[40] The EPA's reasons and basis for the rule, published in the Federal Register, are typical of the administrative implementing function. The EPA described the rule's objectives in bureaucratic terms: to reduce the complexity of the regulatory program (consistent with the instructions of the incumbent Administration) by shifting from a dual

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law'") (quoting NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 131 (1944)); United States v. Vogel Fertilizer Co., 455 U.S. 16, 24 (1982) (reviewing a Department of Treasury regulation implementing statutory definition with an unreasonableness standard); Gray v. Powell, 314 U.S. 402, 413 (1941) (holding in a pre-APA case that when a court reviews an agency's application of a statutory term to undisputed facts, it should review for rationality); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 558 (1985); Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 4 (1983) (discussing how courts frequently deferred to agencies in statutory interpretation where there was a rational basis).

37. *State Farm*, 463 U.S. 29 (1983).

38. 657 F.2d 298, 410 (D.C. Cir. 1981) (holding that an EPA rule under the Clean Air Act was reasonable and not arbitrary and thus was lawful).

39. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 712 (codified as amended at 42 U.S.C. §§ 7401-7671 (2000)).

40. 46 Fed. Reg. 50,766, 50,766-67 (Oct. 14, 1981) (codified at 10 C.F.R. pts. 51-52).

definition of source to the new bubble concept in the non-attainment program and to promote intra-agency coordination with related programs that the EPA administered under the Clean Air Act.[41] The agency's published statement also described the EPA's scientific and technical conclusions that the bubble rule would promote modernization of plants and thereby reduce emissions of pollutants. It included expert predictions by the agency about the rule's impact on progress toward attainment of air quality standards, and it described the agency's public policy concerns about the impact of federal mandates on the states, as well as the EPA's "legal argument" about the outside parameters of the Act.[42] The legal argument was largely a rebuttal to various commenters' arguments that the EPA lacked discretion to issue the rule based on the statutory structure and legislative history of the Clean Air Act.[43] In addition, the EPA's statement noted that the content of the rule reflected the views of interested persons gleaned during the comment period, and that the rule had gone through regulatory review at the Office of Management and Budget, the office that supervises administrative action for its compatibility with White House policies.

The administrative process for setting the bubble rule was one of bureaucratic implementation to meet administrative goals. It was not an exercise in statutory construction as practiced by the courts, nor did it function as such. The bubble rule was not a permanent, fixed declaration of statutory meaning based on the text of the Clean Air Act or the intent of the Congress that had enacted the legislation. Like most administrative action, the agency had changed course in the past, and with proper process, might do so again in the future.[44]

If the Court in *Chevron* had treated the agency's action as administrative implementation subject to the arbitrary and capricious standard like so many other judicial review cases of the time, the Court might well have concluded that materials in the administrative record were sufficient for the Court to find that the EPA had engaged in a reasonable, accountable, non-arbitrary decision-making process and, therefore, that its action should

41. *Id.* at 50,767.
42. *Id.* at 50,767-70.
43. *Id.* at 50,769-70.
44. Because of the Clean Air Act's State Implementation Plans (SIPS) process, in which each state agency designs a mix of pollution controls to satisfy the EPA that local regions are making appropriate progress toward attainment of federal air quality standards, the EPA stated that the states had discretion in choosing whether or not to adopt the bubble rule in current or future SIPS. *Id.* at 50,769; *see also id.* at 50,767.

not be set aside. But as others have noted, the *Chevron* opinion did not even mention the APA's standards of review for agency rulemaking or the analogous scope of review provisions of the Clean Air Act.[45]

Instead, the Court started what was to become its consistent practice of ignoring the standards of applicable statutes in favor of its own version of judicial review. The Court called this bubble rule an exercise in "statutory construction,"[46] suggestive of a legal process for affixing permanent meaning to statutory text based on judicial-style methodologies. It established a new two-part test for judicial review premised on its categorization of the administrative work as statutory construction. The Court wrote that when a court reviews an agency's construction of a statute, the first question the court must answer is whether Congress has addressed "the precise question at issue."[47] At step one, the court determines whether there is clear congressional intent on the precise question by using traditional tools of the judicial process. Then, "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."[48] At this second step, if the agency's construction is reasonable, the court should defer to it.

The Supreme Court's *Chevron* opinion collapsed an understanding of the administrative action at issue in *Chevron*, a provisional policy rule for the future with operational, political, and technical purposes and effects, into a misleading rubric of agency "statutory interpretation" or "construction of the statute." In so framing the issue on review, the majority opinion (like many post-*Chevron* cases) relied in part on mere dictum from an outlier case that the Court decided in 1974, *Morton v. Ruiz*.[49] There, the Bureau of Indian Affairs (BIA) relied upon an unpublished sheaf of bureaucratic guidance when it refused to give welfare benefits to an unassimilated Indian who was living near, but not on, a Navajo reservation.[50] In an opinion by Justice Blackmun that was long on the equities but short on specific holdings, the *Ruiz* Court disapproved of the agency's order, either

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45. 42 U.S.C. § 7607(d)(9)(A) (2000); *see* United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

46. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 840 (1984) (presenting the issue as whether the EPA's decision to allow states to treat pollution emitting sources within the same industrial complex as within a single bubble is based on a permissible interpretation of the statutory term "stationary source").

47. *Id.* at 842.

48. *Id.* at 843. For interesting behind-the-scenes accounts of how the *Chevron* decision came to pass, see Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, *in* ADMINISTRATIVE LAW STORIES 399-428 (Peter L. Strauss ed., Foundation Press 2006); Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 ENVTL. L. REP. 10,606, 10,613 (1993).

49. 415 U.S. 199 (1974).

50. *See id.* at 213.

because it did not like the agency's ad hoc process of denying benefits to Mr. Ruiz without using notice-and-comment rulemaking to set benefits criteria, or because the guidance document that the agency had relied upon was not even published, or perhaps substantively, because the majority thought that the agency's view of its statutory mandate might be arbitrary.[51] The *Ruiz* Court's opining about statutory "gap filling" by agencies[52] was a mere mention in a long opinion principally devoted to critiquing irregularities in the BIA's efforts to bind Mr. Ruiz absent proper procedures.[53] It did not, as *Chevron* did some ten years later, convert review of the substance of an agency's administrative work into a simple conceit that the administrative action was statutory construction and should be reviewed as such by the Court.

When the decision was announced in 1984, *Chevron* did not immediately register as a watershed case on judicial review.[54] In successive Terms, however, the Supreme Court signaled *Chevron*'s importance by invoking its methodology in other major decisions.[55] Then for several years the *Chevron* test germinated uneasily alongside the APA's arbitrary and capricious test in the lower federal courts. Which standard of review governed? Were there now two parts to judicial review of mainstream agency action (as well as two parts to *Chevron*): one test for those "statutory construction" aspects that are present to a greater or lesser extent in virtually all administrative implementation, and another test of arbitrariness, to be applied to all those other inputs and outputs that make up public administration?

Chevron's methodology proved highly seductive. Welcomed by the courts and the government, it soon displaced the prevailing methods of judicial review. By the early 1990s, *Chevron*'s *sub silentio* premise—that agency implementation should be reviewed as statutory construction—had

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51. *See id.* at 232-35.

52. *See id.* at 231 ("The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.").

53. *See id.* ("Assuming, *arguendo*, that the Secretary rationally could limit the 'on or near' appropriation to include only the smaller class of Indians who lived directly 'on' the reservation plus those in Alaska and Oklahoma, the question that remains is whether this has been validly accomplished."). To the extent that the Court's dictum implies anything about the scope of review, it seems to suggest that review for arbitrariness would be appropriate.

54. *See, e.g.*, Ronald M. Levin, *Administrative Discretion, Judicial Review, and the Gloomy World of Judge Smith*, 1986 DUKE L.J. 258, 270 (1986) [hereinafter Levin, *Administrative Discretion*] (mentioning *Chevron* for the proposition that Presidential policymaking is entitled to deference).

55. *E.g.*, Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc., 470 U.S. 116, 125 (1985) (citing *Chevron* to support deference based on rational statutory construction); *see* Kenneth W. Starr, *Judicial Review in the Post*-Chevron *Era*, 3 YALE J. ON REG. 283, 288-89 (1986) (noting that the Supreme Court applied the *Chevron* analytical framework to three significant cases in the two years following *Chevron*).

spread to infect judicial review of a wide range of multifarious, bread-and-butter agency actions, from very particular applications in informal orders to broad exercises of policy-making in agency rulemakings. Counsel, especially at the Justice Department,[56] pitched their arguments more and more on the prongs of that judicial canon, most likely, as others have suggested, because *Chevron*'s mechanical, two-step formula seemed to promise better outcomes for the government (a promise that has not been fully realized).[57] It is easy to surmise that appellate judges, Justices, and their law clerks were tiring of the sometimes tedious and often far flung review of large and technical administrative records for reasonable and sound decision-making under arbitrary and capricious review. In any event, judicial review departed from the APA as the source of law and came to rest almost exclusively on the judge-made canons for statutory construction that the Court developed in the *Chevron* case and its progeny.

Nearly twenty years after *Chevron*, judicial review under the APA's standard of arbitrariness practically vanished. In four recent periods, 1998-1999, 2000-2001, 2002-2003, and 2004-2005, the chapter on judicial review in the American Bar Association's Annual Developments in Administrative Law did not highlight a single administrative action that the Supreme Court reviewed under the arbitrary and capricious standard of the APA or an enabling act. All of its notable Supreme Court cases on scope of review related to *Chevron*'s canons for so-called agency interpretations of statutes.[58] In their recent empirical study, Professors Thomas J. Miles and Cass R. Sunstein collected sixty-nine Supreme Court cases decided between 1989 and 2005 in which the Supreme Court applied the *Chevron* framework to agency "interpretations of law."[59] By contrast, during that

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56. *See* Merrill, *supra* note 48, at 422 (positing that "Justice Department lawyers, perceiving the advantages of *Chevron*'s expanded rule of deference to administrative interpretation, became persistent and eventually successful proselytizers for use of the *Chevron* standard").

57. *See infra* note 91 (finding that the government's success rates are not significantly affected by a court's application of *Chevron*'s doctrines).

58. *See* Michael Herz, *Judicial Review*, *in* DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 1998-1999 45-68 (Jeffrey S. Lubbers ed., 2000); William S. Jordan III et al., *Judicial Review*, *in* DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 2000-2001 65-85 (Jeffrey S. Lubbers ed., 2002); Mark Seidenfeld et al., *Judicial Review*, *in* DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 2002-2003 93-114 (Jeffrey S. Lubbers ed., 2004); Murphy et al., *supra* note 8, at 77-106.

59. *See* Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 825 (2006) (concluding that of the eighty-four cases in the Supreme Court that reviewed "agency interpretations of law" between 1989 and 2005, the Court used the *Chevron* framework to decide sixty-nine of those cases). Professors Miles and. Sunstein also surveyed cases from 1990 to 2004 in the federal courts of appeals in which judges reviewed interpretations of law by two agencies—the EPA and the NLRB. They collected 253 cases that met these criteria. The courts of appeals used a *Chevron* framework in all but twenty-six of those cases. Similarly, for the

same fifteen to twenty year post-*Chevron* period, the number of cases in which the Supreme Court treated agency action as administrative implementation and applied the APA's arbitrary and capricious test was markedly low, likely no more than two or three.[60]

In the dozens of *Chevron* cases that the Supreme Court decided in recent decades, the underlying administrative actions comprise a wide range of distinctly administrative work. Many, if not most, of the actions on review comprise the same mixture of fact, policy, and law application that in pre-*Chevron* days the courts treated as agency implementation and reviewed under the APA's default arbitrariness standard. That range is illustrated by the nitpicking administrative application in *United States v. Mead Corp*.[61] to the robust policy rulemaking of *Brand X*.[62] In *Mead*, the Supreme Court treated an informal order of the Customs Service as an "exercise of statutory construction" subject to judge-made canons of review for statutory interpretation and not to the arbitrary and capricious standard of the APA for administrative action,[63] even though, as the Court acknowledged, the agency there did not "ever set out with a lawmaking pretense."[64] In administering tariff statutes, the Customs Service in *Mead* issued an informal letter order to the Mead Corp., one of roughly 10,000 to 15,000 informal letter rulings issued per year by Customs Headquarters and forty-six regional offices, which applied the tariff schedule's category of "diaries . . . bound" to Mead's ring-fastened day planners, instead of the

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fifteen year period between 1985 and 2000, the Supreme Court itself has noted that it decided over twenty-five cases of judicial review under *Chevron* and the framework of "statutory construction." United States v. Mead Corp., 533 U.S. 218, 230 nn.11-12 (2001).

60. An interesting and more recent example is the Court's use of the Clean Air Act's standard of "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 42 U.S.C. § 7607(d) (9)(A) (2000), to review an agency's denial of a petition for rulemaking in *Massachusetts v. EPA*, 127 S. Ct. 1438, 1459 (2007). There the majority concluded, the "EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change." *Id.* at 1463. The arbitrary and capricious standard has also survived for a narrow category of cases in which an agency has reversed policy. In *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005), the Court wrote that the arbitrary and capricious test of the APA is the standard courts use for situations in which an agency changes course, in conjunction with application of the *Chevron* test. An unexplained inconsistency may be grounds for setting aside agency action. This is a somewhat strange relic for the arbitrary and capricious test, as the *Chevron* case itself involved a change of policy because of the election of a new President, and the Court did not require any special scrutiny of that reversal. The Court also used an arbitrary and capricious standard to decide the lawfulness of an EPA stop work order countermanding a state permit in *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 496-502 (2004).

61. 533 U.S. 218 (2001).

62. *Brand X*, 545 U.S. 967 (2005).

63. 533 U.S. at 221 (declining to give the action binding *Chevron* deference, but invoking deference according to the factors in *Skidmore v. Swift*, 323 U.S. 134 (1944), a pre-APA case that involved a private right of action, not judicial review of agency action).

64. *Id.* at 233.

tariff category, "other."[65] By the Customs Service's regulations, its informal letter rulings applied only to the specific, identified articles to which it was addressed, they were revocable without notice, and "no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter."[66] This particular agency action was a classic example of a bureaucratic "carrying out" of the statutory tariffs; it was as specific and iterative as the orders of the agencies in *Overton Park* and *Hearst*. The action did not affix a permanent meaning to the statute; it was an incremental, one-off application of a narrow statutory category to a named party's product. Yet consistent with the *Chevron* rhetoric and oblivious to the APA, the Court treated this action as "statutory construction" and applied the Court's own judge-made doctrines for reviewing questions of law.[67]

Near the other end of the spectrum of administrative action, the Supreme Court in *Brand X* reviewed a broad deregulatory ruling of the Federal Communications Commission (FCC) as "statutory construction" under *Chevron*.[68] The declaratory ruling in *Brand X* was complex, highly technical, and based on the same administrative factors as those in *State Farm* and other typical agency rulemakings. The ruling was a product of the agency's view of its statutory mandate, its evolving expert judgment about current, highly complex communications issues, input from affected interests, and new policy at the Commission on account of recent Presidential appointments.[69] Not only did the *Brand X* majority label this deeply administrative action "statutory construction," but the Supreme Court also reached back and affixed that misnomer to the National Highway Traffic Safety Administration's (NHTSA) rulemaking in *State Farm*, calling that rulemaking on passive restraints an "agency interpretation"[70] of the statute, although the *State Farm* majority had not.

The treatment of agency actions as questions of law in *Mead* and *Brand X* illustrates the remarkable transformation of the paradigm of agency work from the pre-*Chevron* years—when the Court would have treated analogous acts of public administration as informal administrative policy implementation subject to review under the APA's standard of arbitrariness[71]—to the distorted reality of *Chevron* where the Court deems interstitial administrative applications to be questions of law subject to the

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65. *Id.* at 224-25.
66. 19 C.F.R § 177.9(c) (2000).
67. *See Mead*, 533 U.S. at 227-28, 234-35 (applying the factors of *Skidmore*).
68. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).
69. *See infra* note 83 and accompanying text.
70. *Brand X*, 545 U.S. at 981.
71. *See supra* notes 25-32 and accompanying text.

Court's own norms of judicial review.[72] This mislabeling of administrative work now pervades cases and commentary.[73] Professor Jerry Mashaw, in a nuanced article, refers to agencies as "the primary official interpreters of federal statutes."[74] He describes many different types of agency work as statutory construction, from major policy action like the passive restraint rulemaking in *State Farm* to the highly particular implementations of the Clean Air Act in State Implementation Plans (SIPS), even as he identifies distinctly administrative norms and practices in those tasks.[75] Only recently have there been any significant efforts to critique this false paradigm of the basic administrative function. Professor Richard Pierce objected to the terminology in a recent article,[76] and this past Term's administrative law cases use it less often,[77] as discussed below in Part III.

D. Fallacies of Chevron*'s Vision of Public Administration as Statutory Construction*

The Court's labeling of administrative work as statutory construction has obscured the distinct carrying-out role of public bureaucracies.[78] Unlike the judiciary, agencies implement their enabling acts with a combination of expertise, practicality, interest-group input, and political will—not with a strictly legal, neutral, judicial-style methodology that would be principally attentive to the text and structure of the legislation as well as the views of the enacting Congress.

The structure and features of agencies match their carrying-out function. As bureaucratic organizations, agencies are designed to have a "will," an agenda that guides their actions, including their actions to implement

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72. *Brand X*'s revisionist description of the agency's action in *State Farm* is consistent with a dominant trend. The Supreme Court now describes the Wage and Hour Division's action in the early case of *Skidmore* v. *Swift* as "statutory construction," though the *Skidmore* Court more aptly described the agency's Interpretive Bulletin as government "policies . . . made in pursuance of official duty, based upon more specialized experience and broader investigations and information," in short, "[g]ood administration of the Act." 323 U.S. 134, 139-40 (1944).

73. *See, e.g.*, Peter L. Strauss*, When the Judge is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321 (1990); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006) [hereinafter Sunstein, Chevron *Step Zero*]; *see also* Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676 (2007); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893 (2004); Adrian Vermeule, Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003) [hereinafter Vermeule, Mead *in the Trenches*]; *cf.* Pierce, *supra* note 8.

74. *See* Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 503 (2005).

75. *See id.* at 529-30 n.67.

76. *See generally* Pierce, *supra* note 8.

77. *See* Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc., 127 S. Ct. 1513 (2007); Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 127 S. Ct. 1534 (2007).

78. *See supra* notes 10-18 and accompanying text.

statutes. When agencies take action such as the rulemaking in *State Farm* or the declaratory ruling in *Brand X*, they do so with a mindset or a purpose that is an essential aspect of the administrative process. As Judge Leventhal wrote, not only is the notion of *tabula rasa* completely inappropriate in administrative rulemaking, "[i]t would be the height of absurdity, even a kind of abuse of administrative process, for an agency to embroil interested parties in a rulemaking proceeding, without some initial concern" that the agency needed to remedy something.[79] The White House may set these strategic objectives[80] or the current Congress may shape them,[81] as illustrated in the underlying facts of *Chevron*, *State Farm*, *Brand X* and other cases. The APA's requirement in § 553 that an agency must publish the "purpose" of a rule in the Federal Register confirms the forward-looking, purposeful nature of administrative rulemaking.[82] These purposes and agendas shape the kind of meaning that agencies give to statutes when they undertake their carrying-out functions. Agencies are not neutral, court-like organizations that merely have "judgment."[83] Yet the moniker "statutory construction" brings with it powerful connotations of a disinterested body parsing statutory text in search of a fixed meaning about the intent of a prior, enacting Congress. It is misleading to apply that term to the generic work of public bureaucrats.

In addition to acting purposefully to advance an often political agenda, a core feature of the carrying-out function of public administration is its central reliance on expertise or technical know-how. Expert staff, including scientists, doctors, engineers, social workers, economists, and other technical policy people shape the outputs of administrative actions.

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79. Ass'n of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1176 (D.C. Cir. 1979) (Leventhal, J., concurring). Those agendas are published periodically in the agency's Regulatory Agenda, Regulatory Plans and the Unified Agenda.

80. *See generally* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

81. *See generally* Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006).

82. 5 U.S.C. § 553(c) (2000).

83. *See* Brief for the Federal Petitioners at 40, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (Nos. 04-277 & 04-281); Reply Brief for Cable-Industry Petitioners at 27, *Brand X Internet Servs.*, 545 U.S. 967 (2005) (Nos. 04-277 & 04-281). In its brief on the merits in the Supreme Court, the FCC urged the Court not to adopt a rule that would require the agency to opine about the "meaning of a statute" on the demand of a court that found itself grappling with a private cause of action under a regulatory statute that the agency administers. While such a practice might appear to be solicitous of administrative agencies, the FCC understood that it ran afoul of the administrative process. The FCC argued against any doctrine that would require the agency to act "precipitously" or to jump to a "rash" implementation of administrative policy in order to meet the needs of the courts in a private case or controversy. The FCC had declined to submit a view on the statutory issue some years earlier, when the Ninth Circuit was considering the case of the private right of action that became precedent for that circuit in the *Brand X* controversy.

Management and enforcement objectives are also critical. A perspective that conflates the administrative process with statutory construction obscures those factors.

Moreover, the specific procedures that agencies must use to formulate substantive rules are distinctly suited to the goals of public administration and are far different from the judicial process for deciding cases or controversies. The statutory procedures for agencies advance the values of *public administration*. These values include: accountability to the current members of the political branches through direct review by the White House and the Congress; fairness to affected interests through advance notice; broad rights of participation in the rulemaking process; regularity of process and transparency; the use of expertise to run programs; the development of a full administrative record to ensure reasonable decision-making; and enforcement and management norms.[84] Furthermore, in public administration, special interests often have a powerful influence on the content of final rules through submission of comments, meetings with the regulators, membership on Advisory Committees, or even more directly, through negotiation of a consensus rule under the Negotiated Rulemaking Act. The *Chevron* conceit—that administrative output is a process of "statutory construction," which courts should review as such—ignores the special-interest haggling that influences the content of much administrative action.

The highly dissimilar approaches of agencies and courts in effectuating statutory provisions are readily apparent in the documents that each must prepare to explain its work. By law, the APA requires agencies to publish the "basis" of a final rule,[85] which like the supplemental statement published by the EPA for the bubble rule in *Chevron*, typically includes: a summary of the agency's policy views; a summary of the technical evidence amassed in the record; the agency's responses to comments by affected interests; its legal arguments about how its policy carries out specific statutory provisions; the views of related government entities including the states and the White House's Office of Management and Budget; and management issues, including enforcement concerns. In the proceedings that led to *Brand* X, for example, the FCC described the basis of its declaratory ruling about Internet providers by referencing statutory goals, the Commission's own policies to minimize regulatory burdens, and its understanding of the current needs of different technologies.[86] These

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84. *See, e.g.*, Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 547 (D.C. Cir. 1983) (noting some of those values for informal rulemaking under the APA).

85. 5 U.S.C. § 553(c) (2000).

86. *See* Brief for the Federal Petitioners, *supra* note 83, at 11. The Commission said its action was "guided by several overarching principles," including the statutory goal of encouraging "the deployment on a reasonable and timely basis of advanced

grounds for agency implementation are quite different from the rationales found in judicial opinions that give fixed meaning to statutes, which instead use orthodox legal analysis, relying on factors such as the plain meaning of the text, statutory structure, legislative history from the enacting Congress, and perhaps the meaning of other related federal statutes.

An agency's legal authority extends only to carrying out responsibilities consistent, or at least "not inconsistent," with statutory provisions. Fundamentally, an act of public administration must lie within the range of implementation options that are lawful under a particular regulatory statute. But the way in which an agency approaches even the distinctly legal or statutory aspect of much of its work as an institution of public administration is quite different from the way in which a court would work with that same statute to decide a case or controversy. Operating not unlike in-house counsel in other organizations, agency lawyers who are charged with analyzing proposed administrative action for conformity with the agency's legal boundaries, often in the Office of General Counsel, tend to serve the policy people up to and including the Administrator, not the other way around. As employees of the agency, the legal staff operate in a role that is sympathetic to the administrative agenda and responsive to the organizational hierarchy. Government lawyers may well be experts in the sense that they have highly specialized knowledge and institutional memory of the regulatory program, but they are not neutral—at least not neutral in the sense of the structural impartiality of judges. They conduct legal analysis about an agency's range of implementation choices with a pony in the race, even with respect to the distinctly legal inputs of administrative rulemaking, such as the marshalling of statutory text, use of legislative history, and attention to statutory structure.[87] Agency lawyers are advocates for the agency's agenda by design and not by dysfunction.

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telecommunications capability to all Americans" and the Commission's policy goal of minimizing "regulatory uncertainty" and "unnecessary and unduly burdensome regulatory costs" in order to foster "investment and innovation" in broadband services. The Commission also sought to create "a rational framework for the regulation of competing services that are provided via different technologies" and to develop "an analytical approach that is, to the extent possible, consistent across multiple platforms." *Id.* (internal citations omitted).

87. *See, e.g.*, Philip Heymann & Esther Scott, *Taking on Big Tobacco: David Kessler and the Food and Drug Administration*, Case Studies in Public Policy & Management, Case No. 120-96-1349.3, (abridged) (Harvard University, John F. Kennedy School of Government 1997), *available at* http://www.ksgcase.harvard.edu/ (explaining how the FDA came to initiate its rulemaking on tobacco); *cf.* E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 2 (2005) (discussing how *Chevron* may have affected the EPA by lessening the role for lawyers and enhancing the role of policy staff).

For example, consider the work of the General Counsels of the EPA on the issue of the agency's statutory authority to regulate carbon dioxide, a greenhouse gas, under the Clean Air Act. Under President Clinton, two General Counsels of the EPA concluded that the Clean Air Act authorized the agency to regulate greenhouse gas emission standards to address global warming.[88] A short time later, the General Counsel of the EPA under President George W. Bush reached the opposite conclusion.[89] Even though the agency's legal opinion pertained to statutory text and legislative history, the agency's institutional role and agenda influenced the agency's judgment. That quality is fundamental to institutions of public administration, and it should be reflected in legal doctrines about methods of judicial review. Courts and agencies do not give meaning to statutes in fungible ways.

Because agency action is subject to judicial review, agency lawyers often try to anticipate how a court might approach a challenge to the agency's implementation of a statutory term or provision.[90] To do so, aspects of an agency's record may mimic judicial methodology. But this form of reasoning in the shadow of the courts is not indigenous to the administrative process itself, nor is it the core function of administrative agencies. The refrain that agencies are the primary statutory constructors has obscured the reality that agencies carry out statutes with policy agendas, with expertise, with bureaucratic management objectives, with direct input from special interests and under express political direction. Judicial-style legal analysis of the intent of the enacting Congress is not a natural by-product of the administrative process.

II. THE PERNICIOUS EFFECTS OF THE COURT'S CATEGORY ERROR ABOUT PUBLIC ADMINISTRATION

Through repeated application of the *Chevron* test to the range of mainstream administrative actions over the past couple of decades, the Supreme Court has managed to massage the distinct institutional features and missions of administrative work from a core function of policy implementation into a paradigm of statutory construction. Though often touted as a message to the courts to lighten up on agency policy, *Chevron*'s

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88. *See* Jennifer S. Lee, *EPA Says It Lacks Power to Regulate Some Gases,* N.Y. TIMES, Aug. 29, 2003, at A17, *available at* http://query.nytimes.com/gst/fullpage.html?res=9A02E1DB1F39F93AA1575BC0A9659C8B63.

89. Massachusetts v. EPA, 127 S. Ct. 1438, 1450 (2007) (stating that the agency's current position was "contrary to the opinions of its former general counsels").

90. Pierce, *supra* note 8, at 202-03 (observing that agencies will try to predict judicial application of *Chevron* to proposed regulations to minimize the chance of judicial reversal).

two-part test has effected little change in the government's rate of success on judicial review according to most academic studies.[91] It has, however, had other pernicious effects on doctrines of administrative law.

A. Displacing Statutes as Sources of Administrative Law

By branding mainstream administrative implementation actions, such as the policy rules or applications in *State Farm*, *Mead*, and *Brand* X, with the misnomer "statutory construction," the Court subtly shifted the locus of the governing law on judicial review from the APA and various enabling statutes to its own judge-made canons. The activity known as "statutory construction"—as opposed to "public administration"—is an activity that traditionally lies within the domain of the courts. Thus the Supreme Court's new conception of standard administrative work enabled the Court to resort to judicial prerogatives when deciding how that judicial-sounding task should be undertaken by government agencies, irrespective of statutes such as the APA and other enabling acts that govern the scope of judicial review and the requirements for administrative procedures.

The Supreme Court self-consciously invoked this rationale in the *Chevron* decision itself. There the Court grounded its judge-made, two-part test for deference to agencies explicitly upon its traditional judicial prerogatives to make the rules about proper ways of construing statutes, writing that the "judiciary is the final authority on issues of statutory construction."[92] This may explain why the *Chevron* Court, like many judicial review cases that followed in its wake, failed even to cite the statutory framework of judicial review in the APA or applicable enabling acts. The Supreme Court reiterated its traditional authority over methods of statutory construction more recently in *Gonzales v. Oregon*, where the majority wrote that *Chevron*'s deferential canons of judicial review are incidental to "the courts' role as interpreter of laws."[93] Judge Posner, in

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91. *See* Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 30 (1998) (finding a post-*Chevron* affirmance rate of 73% in 1995-96); Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1039 (finding an affirmance rate of 70.9% of pre-*Chevron* cases and an affirmance rate of 75.5% post-*Chevron* in 1988); *see also* Miles & Sunstein, *supra* note 59, at 825-27 (analyzing thousands of *Chevron* cases and concluding that the expectation that *Chevron* would eliminate policy judgments by judges has not been realized). Perhaps, as Kenneth Culp Davis wrote before *Chevron*, judicial verbiage about the standard of review does not really matter; the judges will do what the judges will do. 5 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE, § 29:13, at 390 (2d ed. 1984).

92. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc. 467 U.S 837, 843 n.9 (1984).

93. 546 U.S. 243, 255 (2006); *see also* Bureau of Alcohol, Tobacco and Firearms v. Fed. Labor Relations Auth., 464 U.S. 89, 98 n.8 (1983) ("When an agency's decision is premised on its understanding of a specific congressional intent . . . it engages in the quintessential judicial function of deciding what a statute means."); Fed. Election Comm'n

Krzalic v. Republic Title Co., phrased the point somewhat differently, but to the same effect, when he wrote that *Chevron* "bestowed" upon agencies a "judicial prerogative of statutory construction."[94]

Chevron and its progeny misstate the core function of public administration and misconstrue the legal authority for the administrative implementation of statutory programs. The administrative authority to set a bubble rule, to apply a tariff schedule to the Mead Corporation, and to issue rules about Internet service providers in *Brand X* or passive automobile restraints in *State Farm,* is authority delegated by Congress to agencies as institutions of public administration and it is subject to governing statutes, principally the APA. Mainstream, bread-and-butter administrative action is public implementation of statutory programs. It is neither power delegated to agencies by the courts, nor despite some difficult areas of overlap, is it the same as the courts' work of statutory construction in the context of a case or controversy.

This category error—the recasting of agency work as derivative of the work of the courts—is the conceptual blunder that launched the judicial "administrative-law improvisation project"[95] on doctrines of judicial review. It started in earnest with the *Chevron* decision and the Court advanced and developed it over successive decades. While the *Chevron* test speaks in terms of deference to legislative intent, the one thing that can be said with certainty is that the Court itself is setting the rules. In this respect, *Chevron* is not counter to *Marbury* but is its analog.

When the Court treats mainstream administrative work as equivalent to statutory construction, it unmoors agencies and the courts not only from the statutes that govern judicial review but also, as we see with *Mead*, from other statutes that mandate specific procedures for validly binding administrative action. Yet the APA specifically directs the courts to enforce those statutory procedural requirements.[96] Because the *Chevron* cases presume that even quintessential administrative implementation is statutory construction, they reason that the judiciary, and not the APA, is the authority that should decide which administrative procedures are

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v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981) (declaring that "the courts are the final authorities on issues of statutory construction").

94. 314 F.3d 875, 881 (7th Cir. 2002) (commenting that this "judicial prerogative" enables the court to fashion a requirement that the agency engage in somewhat formal procedures for adopting regulations).

95. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1014 (2005) (Scalia, J., dissenting). When coining that phrase, Justice Scalia was referring to the majority opinion in *United States v. Mead Corp.*, 533 U.S. 218, (2001), which limits *Chevron*'s binding deference. However, the Court's improvisation project did not begin with *Mead*; it started with *Chevron*.

96. 5 U.S.C. § 706(2)(D) (2000) ("The reviewing court shall . . . hold unlawful and set aside agency action . . . found to be . . . without observance of procedure required by law.").

necessary in order to give binding effect to that mainstream agency action of "statutory construction." Thus, we see the federal courts setting their own requirements for administrative procedures irrespective of the express procedural requirements in the APA and enabling acts. This is truly a disheartening development in administrative law.

The displacement of procedural statutes has initially taken place in opinions in which the Supreme Court majority expresses concern about administrative process values, at least as the Court sees them.[97] In *Mead*, a bare majority held that the agency's informal letter ruling was not entitled to *Chevron*-style binding deference because it did not emerge from sufficiently rigorous administrative procedures; yet the reasoning of the majority and the protests of the dissent give one pause. The majority opinion framed the question on review as an issue of statutory construction, and once so framed, it followed that the judiciary should determine which agency procedures could bear the weight of binding deference. Given the informal nature of the agency's procedures in that case, the Court answered: not binding *Chevron* deference but *Skidmore* deference.[98] *Mead* implicitly presumes that since the Custom Service's action is "statutory construction," the Court may disregard the APA's procedural requirements and set its own judge-made standards.

In *Krzalic v. Republic Title Co.*, Judge Posner made the *Mead* assumptions explicit.[99] That case, a private right of action treated by the Seventh Circuit as akin to a case of judicial review, involved an informal policy bulletin issued by the federal Amicus, the Department of Housing and Urban Development (HUD). In deciding not to give the bulletin binding deference under *Chevron*, Judge Posner reasoned, "If an agency is to assume the judicial prerogative of statutory interpretation that *Chevron* bestowed upon it, it must use . . . something more formal, more deliberative, than a simple announcement . . . . A simple announcement is too far removed from the process by which courts interpret statutes to earn deference."[100] The Seventh Circuit did not rely on the APA, which clearly would not permit such informal guidance to bind private parties. Thus, it is no surprise that two other circuits came to a different conclusion about the

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97. *See Mead*, 533 U.S. at 234-39; *see also Brand X*, 545 U.S. at 1003-05 (Breyer, J., concurring) (discussing *Mead*); *id.* at 1005-20 (Scalia, J., dissenting).

98. *See Mead*, 533 U.S. at 234-39 (rejecting *Chevron* deference and applying *Skidmore*); Skidmore v. Swift & Co., 323 U.S. 134 (1944). *Skidmore*, however, was not a case of judicial review of agency action.

99. 314 F.3d 875 (7th Cir. 2002).

100. *Id.* at 881 (internal citations omitted).

deference that courts should afford the same informal agency bulletin.[101] No longer is the APA or the organic act authoritative law for determining the legal effect of agency action.

Now the Justices themselves engage in free-wheeling debate about their own rules of proper administrative process for agency action. Justice Scalia would find some agency documents—briefs, position papers, any "agency position" that plainly has the "approval of the agency head"[102]—binding on private parties through the courts as statements of law or statutory construction in a case of judicial review, even though Congress by statute expressly took pains to ensure that agencies may take binding action only when they use specified procedures designed to promote administrative values such as public participation, accountability, and development of a technically rich record. Other Justices disagree, but base their disagreements on their own assessments of process values, not on the express procedural requirements of the APA or enabling acts. Responding to criticism from Justice Scalia in cross talk about *Mead* in *Brand X*, Justice Breyer seemed to concede that on judicial review the judiciary may set the rules about process for so-called statutory construction. In a concurring opinion he wrote, "Thus, while I believe Justice Scalia is right in emphasizing that *Chevron* deference may be appropriate in the absence of formal agency proceedings, *Mead* should not give him cause for concern."[103] Likewise, in *Christensen v. Harris County*, he opined, "Justice Scalia may well be right that the position of the Department of Labor, set forth in both brief and letter, is an 'authoritative' agency view that warrants deference under *Chevron*."[104] While the Justices may disagree about exactly what level of formality is required in order to give agency action binding effect under *Mead* and *Chevron*, surprisingly little discord exists at the Court over its dismissal of the APA as the source of law for administrative procedures.

Likewise, commentators have uncoupled administrative action from the procedural mandates of the APA, as exemplified by a comment of Professor Cass Sunstein: "Even when an agency's decision is not preceded

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101. *See* Heimmermann v. First Union Mortgage Corp., 305 F.3d 1257, 1261 (11th Cir. 2002) ("Because the power to issue interpretations is expressly delegated in [the Act], the [statement of policy] carries the full force of law. As a result we give deference to [it]."); Schuetz v. Banc One Mortgage Corp., 292 F.3d 1004, 1012 (9th Cir. 2002) (holding that "deference is due even though HUD's Policy Statements are not the result of formal rulemaking or adjudication").

102. *Brand X*, 545 U.S. at 1015 n.10 (Scalia, J., dissenting); *see also Mead*, 533 U.S. at 257 (Scalia, J., dissenting) ("Any resolution of the ambiguity by the administering agency that is authoritative—that represents the official position of the agency—must be accepted by the courts if it is reasonable.").

103. *Brand X*, 545 U.S. at 1003-05 (Breyer, J., concurring).

104. 529 U.S. 576, 596 (2000) (Breyer, J., dissenting).

by formal procedures, there is no reason to think that courts are in a better position than agencies to resolve statutory ambiguities."[105] There may be no reason, unless one considers that Congress legislated something else. The APA details the procedures that public bureaucracies must use if their implementing actions are to determine private rights and responsibilities in a binding way.[106] *Chevron*'s universal conceit that mainstream agency work is statutory construction has transformed an administrative carrying-out project, delegated to agencies by enabling acts and governed by Congress's specific procedural statutes, into a court-like activity where the judiciary fashions its own version of proper administrative process.

How strange this new procedural landscape could become. When private parties are brought into the regulatory net of an agency, administrative law judges may not treat informal administrative bulletins as binding law because they lack what the APA requires in the way of procedures for that kind of effect. On judicial review, however, the courts well might dub that same material binding on private persons as statements of "statutory meaning." In addition, consider that the courts might give binding effect to a brief, signed by an Administrator, that has neither gone through notice and comment nor been published in the Federal Register. That would be an extreme detour from the statutory requirements of the APA and its process values for public administration.

The continuing irrelevance of the APA that was triggered by *Mead* and *Chevron*'s own internal logic has become all too evident in recent decisions of the federal courts of appeals. In *Air Brake Systems, Inc. v. Mineta*,[107] the Sixth Circuit faced the question of whether three letters written by the Chief Counsel of the NHTSA, which expressed Counsel's views that petitioner's brake system did not conform to safety standards, were reviewable as final agency action. Under settled APA doctrine, the question whether an agency action is final, and therefore reviewable, turns on whether the action has "legal consequences" and determines rights and obligations.[108] In *Air Brake Systems*, the court of appeals answered that question neither by asking whether the APA would allow binding legal consequences to flow from the Counsel's letters (it would not), nor by asking whether under the organic act the Counsel's advisory letters could

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105. Sunstein, *Beyond* Marbury, *supra* note 3, at 2603. *See generally* Vermeule, Mead *in the Trenches*, *supra* note 73; Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005).

106. *Cf.* Krzalic v. Republic Title Co., 314 F.3d 875, 882 (7th Cir. 2002) (Easterbrook, J., concurring) (noting that in a private cause of action, the views of an agency may be binding only when the agency exercises its delegated responsibilities as the APA requires. "Otherwise the Administrative Procedure Act . . . would be a dead letter").

107. 357 F.3d 632 (6th Cir. 2004).

108. *Id.* at 638 (citing Bennett v. Spear, 520 U.S. 154, 177-78 (1997)).

determine private rights and obligations (they could not), but rather by asking whether the judge-made canons of *Mead*, et al., would afford binding *Chevron* deference to those letters by the Chief Counsel. The court of appeals concluded, through its own assessment, that the letters were too tentative and informal to qualify for *Chevron* deference, but the issue was no longer a matter governed by the APA.[109] Similarly, in *Northwest Ecosystem Alliance v. United States Fish & Wildlife Service*, the Ninth Circuit determined that an agency Policy Statement that did not follow the statutory procedures for informal rulemaking under the APA was nonetheless entitled to have full binding effect.[110] The court explained that the procedures that the agency elected to use were, in the court's judgment, comparable to those required by statute, and using the principles of *Mead,* the court deemed them adequate to support lawfully binding agency action.

This trend is potentially quite pernicious. The Supreme Court's recent approach to administrative procedure, while purportedly rooted in deference to the legislative branch, is nothing of the sort. Its approach is remarkable for its disregard of statutes that were enacted with specific procedural requirements for lawful public administration. Moreover, it is hard to square the Court's recent approach with the central holding of *Vermont Yankee* that the courts may not devise procedures for agencies based on the judiciary's own view of proper administrative process but instead must respect the choices made by Congress.[111] None of this can be reconciled with the APA's specific mandate that a reviewing court shall "hold unlawful and set aside agency action . . . found to be . . . without observance of procedure required by law."[112] The Supreme Court's pervasive misconception that administrative action is equivalent to its own project of statutory construction renders the APA increasingly irrelevant as the authoritative source of law on administrative procedures.

Ironically, the holding of the case whose dictum gave birth to *Chevron*'s discussion of agency "gap filling" in statutes, *Morton v. Ruiz*, is now threatened with deep-sixing by its own offspring. If anything, *Morton v. Ruiz* stood for the proposition that unpublished desk drawer material about benefits coverage could not be used to bind Mr. Ruiz, a private person, and that the APA decidedly made it the court's job to force the agency to use the procedures that the statute required: "The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative

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109. *Id.* at 642-49 (applying *Mead*).
110. 475 F.3d 1136, 1142 (9th Cir. 2007).
111. *See* Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 547-49 (1977) (declaring that courts should "not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good").
112. 5 U.S.C. § 706(2)(D) (2000).

policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations."[113] But now under judge-made *Chevron* doctrines, the prospect is very real that "secret" unpublished agency red tape, perhaps when signed by an agency head, is "statutory construction" that the Court may use to bind private persons. Because mainstream agency action is not statutory construction, but rather public administration, the judge-made norms that the Court fashions for administrative processes do not match the values for administrative functions that were settled by Congress in the APA and organic statutes.

B. Upsetting the Distinct Statutory Roles for Courts and Agencies

Having taken control from the APA, how has the Court built a new structure of judicial review that is less wise than the old? Measured solely by its overall impact on the success rate of the government, *Chevron* seems to have had little or no effect.[114] Nevertheless, the *Chevron* canons have had corrosive collateral effects that the APA framework largely avoids. The *Chevron* doctrines prompt too much judge-made law about the meaning of regulatory statutes, displacing the administrative function, and they generate too little examination of the reasonableness of public administration.

1. Chevron *Step One: Too Much Judge-Made Law on the Meaning of Regulatory Statutes*

Chevron's framework encourages judge-made ossification of regulatory statutes more than the APA framework that it displaced. Because of their lasting impact through stare decisis,[115] and because they can be broad and abstract, judicial holdings that find fixed meaning in regulatory statutes can deprive agencies of needed flexibility to change course in the future. Judicial precedent about statutory meaning may unwittingly prevent an agency from adjusting its policy to implement the views of an incumbent Administration or from responding usefully to changes in its enforcement needs or other developments on the ground. However, not all judicial ossification is bad. Some types of issues on review do require a clear and fixed judicial declaration of the meaning of statutory provisions, with stare decisis effect, and § 706 of the APA contemplates the use of the judicial

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113. Morton v. Ruiz, 415 U.S. 199, 232 (1974).
114. *See supra* note 91.
115. *See generally* Neal v. United States, 516 U.S. 284, 295 (1996) (explaining that stare decisis requires the Court to adhere to precedent, absent any "intervening statutory changes").

process for those types of questions of law necessarily presented.[116] Nonetheless, a standard of review that encourages ossification of statutes by the courts and that needlessly narrows the range of implementation options for administrative agencies should be avoided.[117]

Chevron is known as a doctrine of deference and thus, it is often assumed that the doctrine prevents excessive judicial ossification of regulatory statutes.[118] A closer look at step one of the *Chevron* test belies that understanding. Because the courts treat virtually all quintessential administrative action—including policy implementation and application of law to facts—as "statutory construction," and because the first step of *Chevron* requires a reviewing court to make a threshold finding on the meaning of the statute using traditional judicial tools,[119] all cases of judicial review under *Chevron* produce a de novo judicial holding about statutory meaning based solely on orthodox judicial methods. That judicial holding may declare that the statutory terms are, legally speaking, ambiguous, or it may declare a precise meaning of the legislative terms as found by the court. Both types of holdings impact the future of regulatory programs by establishing judicial precedent about the meaning of regulatory statutes. The constraint on subsequent administrative policy from judicial ossification occurs when a court concludes that judicial tools of statutory construction reveal precise statutory meaning.

Chevron likely has increased that type of output of judge-made law on the precise meaning of statutes. When the government loses under the *Chevron* framework, it tends to lose at step one, on the ground that the court itself, using its traditional tools of statutory construction de novo, has found a precise meaning in the statute.[120] Given the relatively stable rates of government wins and losses before and after *Chevron,* and given the predominance of the arbitrary and capricious method of review in the pre-*Chevron* era, it seems reasonable to conclude that the *Chevron* doctrine produces more, not less, ossification of statutes by courts.

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116. *See infra* Part III.

117. *See* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1419-20 (1992) (discussing hard look review).

118. *See, e.g.*, Sunstein, *Beyond* Marbury, *supra* note 3, at 2588 (arguing that *Chevron* combats ossification in the lower federal courts); *cf.* Michael Herz, *The Rehnquist Court and Administrative Law*, 99 NW. U. L. REV. 297, 318-22 (2004) (arguing that courts and commentators often overstate *Chevron* as a doctrine of deference).

119. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S 837, 843 n.9 (1984).

120. *E.g.*, Magill, *supra* note 8, at 86 ("[O]nce a reviewing court reaches the second step of this framework, the agency interpretation of the statute is usually sustained, often in a perfunctory way."); *see also* William R. Andersen, Chevron *in the States: An Assessment and a Proposal*, 58 ADMIN. L. REV. 1017, 1018-20 (2006) (observing the same pattern in the states).

Application of the APA's standards for judicial review leaves a lighter judicial footprint. Section 706 frames a limited category of so-called questions of law, that is, questions for which a resolution necessarily imposes the kind of ossification that *Chevron* encourages.[121] The text embraces norms of avoidance through its admonition that courts should decide questions of statutory interpretation only "to the extent . . . presented" and when "necessary to decision."[122] This reinforces the phrasing of many enabling acts that an agency's carrying-out function extends to actions "not inconsistent" with law, which allows for a wide array of administrative applications.

The default standard of arbitrary and capricious review, common in the pre-*Chevron* era, leaves a lighter judicial footprint. The setting aside of government action as arbitrary and capricious is a judgment by the court that on a particular record, with a specific rationale offered by the agency, the government has not made a case for its administration of the statutory terms in the particular manner under review. Such a holding often does not prevent an agency from taking the same action again on remand,[123] perhaps with a different rationale about statutory factors, a different factual basis, or more developed policy considerations.[124] In one empirical study of cases in the D.C. Circuit where the court remanded to the agency, including many pre-*Chevron* cases, agencies continued to pursue the challenged regulatory programs roughly 80% of the time. They used a variety of techniques to carry on as before, including supplementing the administrative record, initiating a new and similar rulemaking, or producing a reconsidered statement of basis and purpose.[125] Judicial ossification is not a prominent feature of judicial review under the APA's standard of arbitrariness, yet it is an inevitable ancillary effect of the framing of agency action as statutory construction under *Chevron*.[126]

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121. *See* 5 U.S.C. § 706 (2000) ("[T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.").

122. *Id.*

123. *See, e.g.*, Levin, *Scope-of-Review*, *supra* note 27, at 251 n.7 ("When an action is reversed under § (b)(2) [of the ABA's Restatement] because the agency's rationale is incompatible with a statute, the agency may be able, after further proceedings, to take the same action by reasoning from premises that the statute permits.").

124. *See* Section of Admin. Law & Regulatory Practice of the Am. Bar Ass'n, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 44-45 (2002) [hereinafter *A Blackletter Statement*] (noting that courts "almost always" grant agency requests for remand for further articulation of the rationale).

125. *See* William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere With Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 396 (2000) (concluding that in the pre-*Chevron* period identified, the "hard look" arbitrary and capricious standard "generally did not significantly impede agencies in the pursuit of their policy goals").

126. *See* Mead Corp. v. United States, 283 F.3d 1342, 1346-50 (Fed. Cir. 2002). On remand to the Federal Circuit, the court of appeals determined that, as a matter of law,

As regulatory programs have aged, they have become increasingly cluttered with judicial pronouncements about fixed statutory meaning, impeding the ability of agencies to respond flexibly to changed circumstances.[127] The Supreme Court recently addressed this problem in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, a particularly troublesome case in the Court's doctrinal developments on judicial review.[128] When reviewing a declaratory ruling of the FCC, the Ninth Circuit Court of Appeals had found itself bound by precedent in the circuit that had arisen some years earlier in a private right of action.[129] In that earlier case, the court of appeals had interpreted and applied the same statutory provision that the later FCC declaratory ruling administered to a different effect. That particular problem of conflicting opinions about statutory provisions can develop in any statutory scheme in which Congress creates both private rights of action and administrative powers of enforcement. This is not a problem that one can lay at the feet of *Chevron.* Mindful of other cases in the lower federal courts in which the troublesome precedent arose from judicial review of agency action and not from a private claim, the *Brand X* majority wrote its opinion expressly to govern both types of precedent.[130]

The Supreme Court held that the Ninth Circuit erred when it found itself bound by the law of the circuit and that the court of appeals should have applied the *Chevron* framework when it reviewed the FCC's ruling.[131] The majority wrote: "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[132] The Court's disruption of settled doctrine on stare decisis is unfortunate. The *Brand X* doctrine may prove to be inadministrable by the lower courts, or it may come to "drain [prior] decisions of all precedential

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ring-fastened day planners are not "diaries, bound" under the Tariff Act's schedule, but are "other" related products not subject to a tariff. *Id.* While some might blame the *Mead* Court's use of *Skidmore* instead of *Chevron* deference for this ossification, the underlying problem is the Court's framing of the issue as a question of law.

127. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1018 (2005) (Scalia, J., dissenting); Brief for the Federal Petitioners, *supra* note 83, at 18-23 (noting confusion with application of stare decisis); *see also* Petition for a Writ of Certiorari at 18-23, *Brand X*, 545 U.S. 967 (No. 04-281).

128. 545 U.S. at 982-83 (2005) (clarifying when a "prior judicial construction . . . trumps an agency construction otherwise entitled to *Chevron* deference").

129. *See Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1127-32 (9th Cir. 2003) (struggling to apply precedent from another Ninth Circuit opinion's definition of "information services" to this case), *rev'd*, 545 U.S. 967 (2005); AT&T Corp. v. Portland, 216 F.3d 871 (9th Cir. 2000).

130. *See Brand X*, 545 U.S. at 980.

131. *Id.* at 982.

132. *Id.*

value."[133] In either event, it is a convoluted solution to a problem that is largely of the Court's own making. A more straightforward approach to the problem of excessive ossification would be to return judicial review standards to the APA, which treats mainstream agency work not as statutory construction but as practical implementation subject to an abuse of discretion standard.

In addition to increasing ossification, *Chevron* undermines the role of agencies as institutions of public administration by greatly expanding the range of issues that the courts assess on review as questions of law rather than matters of public administration. To the extent that regulatory statutes deal in categories and are not self-executing, the statutes have texts that require some form of extension or application by administering or enforcing institutions.[134] Congress gave agencies an executing and administering function through language in enabling acts authorizing them to "carry out" regulatory statutes, subject to review for arbitrariness. Unlike the arbitrary and capricious review of pre-*Chevron* cases such as *State Farm* and *Sierra Club*, however, *Chevron*'s methodology plunges a reviewing court directly into judicial-style interpretive techniques that do not properly respect the different perspectives and missions of agencies when they implement statutory programs. Step one of *Chevron* requires the reviewing court to address whether the enacting Congress "directly spoke[] to the precise question at issue," an inquiry that the court is to answer using "traditional [i.e., judicial] tools of statutory construction"[135] de novo.

Agencies employ methods of implementing statutory text that are different from the courts' techniques of interpretation, yet that are legally appropriate for bureaucratic institutions of public administration. Agencies draw upon considerations such as expertise, political input from the current occupants of the political branches, public policy agendas, management and enforcement concerns, and special interest arm-wrestling. Under the APA's standard of review for arbitrariness, courts examine agency work for its reasonableness as an administrative action, not for its conformity with a baseline set by a court using classic judicial methodology.[136]

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133. New York v. EPA, 443 F.3d 880, 886 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 2127 (2007).

134. *See* Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 21 (2000) ("[A]ll new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal.") (quoting THE FEDERALIST NO. 37, at 245 (James Madison) (Isaac Kramnick ed., 1987)).

135. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 & n.9 (1984).

136. *See* 5 U.S.C. § 706 (2000).

For example, in *Brand X*, the initial question as framed by the Court under *Chevron* was whether "the ordinary meaning of the word 'offering'" as well as the "regulatory history of the Communications Act" showed the precise congressional intent.[137] The opinion begins with strictly linguistic and textual methods of interpretation that may be common for judges but less so for bureaucrats, such as resorting to standard dictionary definitions and abstract analogies.[138] Framing the case as a question of statutory construction, the Justices constructed linguistic arguments, such as whether cable companies that sell Internet services are "offering" telecommunications in the same way that car dealerships offer car components, pizza parlors offer pizza with delivery, or pet stores sell puppies with leashes.[139] That framing undermines the purposeful perspective and policy orientation of administrative agencies when they work with statutory text in developing expert policy or applying law to fact. Agencies make connections and think about features in different ways; they work with statutory terms such as "offering," "source," and "diaries, bound," with their own institutional mixture of expertise, policy, politics, and management and enforcement concerns. That policy-driven administrative process, established by statutes, should command respect from the start. The different functions of agencies versus courts and the unique ways in which each institution lawfully works with statutes mean that an agency might take entirely proper action to implement a statute, such as creating a multi-part test or a detailed performance standard, which would be unacceptable action by a court performing the judicial function of statutory construction.

Moreover, the *Chevron* framework forces a disconnect between what agencies actually do by law and how they must justify their actions to a court on review. By treating standard administrative action as statutory construction, *Chevron* requires agencies to justify their administrative actions as a faux judicial process of text parsing, dictionary definitions, and a search for a fixed intent of the enacting Congress using strictly legal methods. Instead, the actual basis for their actions likely flows from a combination of policy and expert considerations, pressures from the current Congress or White House, and bureaucratic management concerns. Not only does the false reality of *Chevron* promote quirky government briefs, but it also undermines the important effect of judicial review in promoting reasoned decision-making by agencies and in disclosing the actual

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137. *Brand X*, 545 U.S. at 989.

138. For analysis of the federal courts' increasing use of dictionary definitions as a method of interpreting statutes, see Garrett, *supra* note 3, at 58-59.

139. *Brand X*, 545 U.S. at 990-92; *id.* at 1007-11 (Scalia, J., dissenting) (arguing by analogy about the term "offer").

administrative decision-making processes to affected interests. Those values underlie the doctrine, occasionally invoked in the pre-*Chevron* years, that the courts will not consider post hoc rationalizations of agency action on review.[140] Now that *Chevron* forces agencies to pretend to be in a somewhat different business from the one that statutes construct for them, it hardly seems fair to criticize them, as Justice Scalia did with the FCC in his *Brand X* dissent, for initiating a "new regime of regulation . . . under the guise of statutory construction."[141] That guise is of the Court's making.

2. Chevron *Step Two: Too Little Judicial Oversight for Administrative Reasonableness*

While *Chevron*'s first step is too rigidly intrusive on the administrative process, its second step is too indulgent. Under *Chevron*'s second step, "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."[142] That inquiry into the reasonableness of the agency's "interpretation of the statute" is not an adequate substitute for the arbitrary and capricious review that the APA requires. As a matter of practice, the second step of the *Chevron* test bears little weight in deciding cases. Courts rarely invoke unreasonableness as a ground for setting aside agency action. Professor M. Elizabeth Magill observed a few years ago, "once a reviewing court reaches the second step of this framework, the agency interpretation of the statute is usually sustained, often in a perfunctory way."[143] Professor Orin Kerr documents a similar result in his empirical study of the federal courts of appeals for a two-year period in the mid-1990s.[144] And in the dozens of cases in which

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140. *See, e.g.*, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971) (noting that "'post hoc' rationalizations . . . have traditionally been found to be an inadequate basis for review . . . . And they clearly do not constitute the whole record compiled by the agency" for purposes of § 706 of the APA) (internal quotations and citations omitted); SEC v. Chenery Corp., 318 U.S. 80, 87 (1943) (holding in a pre-APA case that since the Commission based its decision on principles of equity, the reviewing court must make its determination on the same grounds); *see also* Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 653 (1980) (rejecting an agency's later justification for its decisions because the agency needed to justify its actions based on substantial evidence in the record).

141. *Brand X*, 545 U.S. at 1005 (Scalia, J., dissenting) (internal quotations omitted).

142. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

143. Magill, *supra* note 8, at 86; *see also* Andersen, *supra* note 120, at 1020 (observing that once an agency reaches the second step of *Chevron*, the courts usually sustain the agency's interpretation, "often in a perfunctory way").

144. *See* Kerr, *supra* note 91, at 30-31 (providing empirical data confirming that courts often uphold agencies' views where the rulemaking reaches step two of the *Chevron* test). Based upon empirical data from 1995 and 1996, Kerr concluded that where federal courts of appeals found step two of *Chevron* dispositive, the courts upheld the agencies' positions 89% of the time. *Id.* at 31; *see, e.g.*, Barnhart v. Thomas, 540 U.S. 20, 25-26 (2003) (finding that the statute was unclear at step one of *Chevron*, but then making little effort to

the Supreme Court has used the *Chevron* canons in recent decades, it is hard to find a single case in which the Court deemed the agency action unreasonable at the second step of the test.[145]

Moreover, at the second step, courts often assess the reasonableness of the agency's action as an act of statutory construction, not as an act of public administration. Accordingly, courts often use the same traditional legal tools to review reasonableness—text, statutory structure, and congressional intent—that they use at the first step of the test.[146] *Chevron*'s internal logic, which sees equivalency in the projects of agency and court, drives that repetitive methodology; *Chevron* makes clear that a court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of the agency."[147]

This under-review of administrative work for its reasonableness as bureaucratic action has unfortunate consequences for the quality of public administration. Bureaucratic action can be hasty, ill-considered, inconsistent, or arbitrary. Congress, through the APA and enabling acts, mandated a form of judicial review that would ensure that agencies act with basic rationality when they undertake their bureaucratic carrying-out function under regulatory or benefits-conferring statutes.[148] The qualities that a court might expect of sound, non-arbitrary administration might include clarity, consistency, fairness, development of a full record, and rational decision-making, but those values are not captured by *Chevron*'s formulation of its step two reasonableness review. The court neglects its

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assess the rationality of the Social Security Administration's five-part sequential process of evaluating whether claimants are entitled to disability benefits).

145. *See* Magill, *supra* note 8, at 86 (suggesting that *AT&T Corp. v. Iowa Utilities Board* might be one possible exception to the Supreme Court's consistent record of not invalidating agency construction at step two); *cf.* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 387-92 (1999).

146. *See, e.g.*, Bankers Life & Cas. Co. v. United States, 142 F.3d 973, 983 (7th Cir. 1998) ("In the second step, the court determines whether the regulation harmonizes with the language, origins, and purpose of the statute."); Magill, *supra* note 8, at 88-89 (identifying those statutory materials as the text of the act, the act's structure, legislative history, and the purpose of the act); *A Blackletter Statement*, *supra* note 124, at 38 (discussing one of the predominant approaches to step two, in which "courts regularly examine the same statutory materials relied on in step one, seeking to determine whether the statute, even if subject to more than one interpretation, can support the particular interpretation adopted by the agency").

147. *Chevron*, 467 U.S. at 844.

148. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 40-41 (1983); *see also* Am. Trucking Ass'ns, Inc. v. United States, 344 U.S. 298, 314 (1953) (holding that in order for a rule to be declared arbitrary, an agency must have "had no reasonable ground for the exercise of judgment."); Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968) (reiterating that the essential task on judicial review is to guard against "arbitrariness and irrationality in the formulation of rules for general application in the future").

supervisory role under the APA when it fails to guard against "arbitrariness and irrationality in the formulation of rules for general application in the future."[149]

There is reason to believe that *Chevron*'s methodology actually has lowered the quality of administrative decision-making on technical and expert matters, since agencies have come to expect less judicial scrutiny on those dimensions in the *Chevron* era. The doctrine relieves the pressure on agencies to develop a full, expert record and to engage in a full-bodied review of technical or expert considerations, as those administrative tasks are no longer of central concern to the courts. One commentator, Osamudia James, persuasively makes this charge—that an agency engaged in policy-making without fully considering the factual implications of its actions—about the Department of Education's rulemaking on review last Term in the *Zuni* case. Both James and M. Elizabeth Magill support a full-bodied arbitrary and capricious review in step two of *Chevron*.[150] In recent years, some lower federal courts seem to stretch the inquiry into the reasonableness of an agency's "construction of a statute" under step two of *Chevron* into something similar to an arbitrary and capricious test.[151] Likewise, last Term the Supreme Court used the arbitrary and capricious test to set aside the agency's decision in *Massachusetts v. EPA*.[152] Though the agency action was a decision not to grant a petition for rulemaking under the Clean Air Act, which is a somewhat atypical administrative action, the Court's opinion illustrates the advantages of using an arbitrary and capricious standard of review to evaluate the technical or expert aspects of an agency's work product. These technical and expert qualities are central to the work of public bureaucracies, yet they are features that are obscured by the false vision of agencies as statutory interpreters. The

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149. *Auto. Parts*, 407 F.2d at 338.

150. *See* Osamudia R. James, *Breaking Free of* Chevron*'s Constraints:* Zuni Public School District et al. v. U.S. Department of Education, 56 U. KAN. L. REV. (forthcoming Nov. 2007) (discussing the on-going debate over arbitrary and capricious review and recommending that "step-two of [*Chevron*] review should be fortified with the standards of arbitrary and capricious review"); Magill, *supra* note 8, at 93-96 (arguing that step two of *Chevron* should consist of arbitrary and capricious review); *see also* Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 127 S. Ct. 1534, 1537-38 (2007).

151. *See A Blackletter Statement*, *supra* note 124, at 38.

> Second, in addition to engaging in conventional statutory construction, or in some cases instead of engaging in it, courts at step two of *Chevron* evaluate whether the agency, in reaching its interpretation, reasoned from statutory premises in a well-considered fashion. Courts may look, for example, to whether the interpretation is supported by a reasonable explanation and is logically coherent. In this regard, the step two inquiry tends to merge with review under the arbitrary and capricious standard . . . .

Id.; *see also* Magill, *supra* note 8, at 93 (stating that when courts review the reasonableness of an agency's interpretation, their review may be similar to arbitrary and capricious review).

152. 127 S. Ct. 1438, 1463 (2007).

recent subtle doctrinal shifts in the federal courts could begin to realign judicial review methods with the framework of the APA, which more faithfully reflects the core institutional functions of public administration. Complete alignment, however, is elusive so long as the courts continue to see administrative work as statutory construction.[153]

III. REVIVING THE ACTUAL FUNCTION OF PUBLIC ADMINISTRATION IN STANDARDS OF JUDICIAL REVIEW

A. Comparative Institutional Competence and the APA

Instead of presupposing a false equivalency between court and agency, the scheme of § 706 of the APA more wisely disentangles decision-making responsibilities along institutionally appropriate lines. Under the APA, a court should ask: (1) whether the question on review is necessarily a legal question, narrowly defined and properly presented, within the special institutional competence of the court to resolve using a neutral process that involves legal techniques of textual analysis and legislative intent, with lasting effect through the application of stare decisis; or (2) is the matter within the domain of public administration, which requires flexibility in application, political responsiveness, public participation, factual development, expertise, and practical considerations of enforcement and management. The bifurcated framework of the APA's provision on scope of review is a more sensible approach to judicial review than the institutional sorting that occurs under *Chevron*, which turns on a court's perception of "gaps" or ambiguities in statutes.[154]

Using the comparative institutional strengths of courts versus agencies as criteria, a consensus might emerge regarding the types of questions that are better suited for resolution by judges in Article III courts than by public administrators. Clearly, the federal courts should decide cases that turn on interpretation of the Constitution, such as fundamental questions about

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153. In recent articles, both Professor Charles Koch and Professor Ronald Krotoszynski, Jr., write thoughtfully about various aspects of the pre-*Chevron* practice under the APA, noting some of its strengths. *See* Charles H. Koch, FCC v. WNCN Listeners Guild: *An Old-Fashioned Remedy for What Ails Current Judicial Review Law*, 58 ADMIN. L. REV. 981, 983 (2006) (describing hard-look review); Ronald J. Krotoszynski, Jr., *"History Belongs to the Winners": The Bazelon-Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action*, 58 ADMIN. L. REV. 995, 1002-04 (2006) (describing the institutionally savvy approach of Judge Leventhal).

154. Justice Breyer wrote some decades ago that allocation of responsibility should be based on "institutional capacities and strengths," which echoes the thinking of Professor Kenneth Culp Davis. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 398 (1986); *see also* 5 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 29:14, at 392 (2d ed. 1984) (writing in favor of scope of review based on "[t]he simple idea of comparative qualifications of judges and of administrators on each issue," as an approach that "would help solve many problems").

separation of powers, government structure, or federalism, and this has been the Court's practice. For example, in *Whitman v. American Trucking Ass'ns, Inc.*,[155] and *Commodity Futures Trading Commission v. Schor*,[156] the Supreme Court decided the constitutional questions de novo, although the government's briefs were undoubtedly carefully read and may have been persuasive. The stature of the judiciary as an Article III branch of government, its neutrality and structural independence, the qualifications of the judges, and the nature of the judicial process give the courts a clear comparative advantage over agencies on constitutional issues, including fundamentals about federal and state relations. A consensus about the relative superiority of the independent judiciary over public agencies may also extend to cases of statutory construction that involve the preemptive effect of federal law and norms of federalism. Thus, in two recent cases, the Supreme Court bypassed *Chevron*'s methodology when deciding the preemptive effect of federal schemes. During the 2006 Term, in *Watters v. Wachovia Bank*, the Court affirmed the preemptive effect of the federal National Bank Act, yet distanced itself from the agency's views as Amicus and from *Chevron*'s methodology.[157] Instead, the Court decided the case in favor of the federal government de novo. In the preceding Term, in *Rapanos v. United States*, the Court did not defer to a rule of the Army Corps of Engineers on the meaning of "navigable waters" under § 404 of the Clean Water Act because of the federalism concerns that infused the question.[158] Core qualities of public bureaucracies—which are mission oriented and politically directed—make agencies less appropriate venues than the courts for solving those types of conflicts between the states and the federal government.

Other types of statutory issues would also benefit from resolution by courts not agencies. These include issues that require a fixed, uniform, and stable resolution of statutory meaning using strictly legal methodology undertaken by structurally neutral and independent judges. For some issues, judicial ossification is in fact desirable and warranted by the nature of the problem. For example, consider questions about an agency's basic jurisdiction. A longstanding tenet of administrative law is the principle that

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155. 531 U.S. 457 (2001).
156. 478 U.S. 833 (1986).
157. 127 S. Ct. 1559, 1572 n.13 (2007). This case was an action brought by a bank's operating subsidiary against state regulators. It was not a case of judicial review of the federal rule; the United States participated as Amicus. Nonetheless, the district court relied upon *Chevron*'s two-part test when it deferred to government regulations that ruled that certain state laws were preempted.
158. 126 S. Ct. 2208, 2224 (2006); *see also* Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001) (suggesting that federalism issues under the Clean Water Act counsel against deference to the agency's rule about "navigable waters").

an agency's administrative discretion is confined to its statutory jurisdiction, which has outer parameters that courts should enforce. This central tenet is apparent in the APA's command that courts should set aside agency action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[159] Though sometimes a difficult principle to apply concretely in a given case, the imperative of statutory jurisdiction is a key feature of lawful administrative action; it is noted in older cases, several recent cases,[160] and even in Supreme Court dicta since *Chevron*.[161] These types of restraints on administrative action require resolution by a neutral and independent court using traditional judicial processes to find fixed meaning in statutory text with stare decisis effect.

In addition, certain legal questions, even if not centrally "jurisdictional," should be resolved by the judiciary's institutional processes, with its features of neutrality, stability through stare decisis, and its distinctly legal methodology. Examples might include legal issues such as: whether a federal statute incorporates a federal standard or instead imports state common law; how different sections of a statute relate to each other; how to read one statute in light of another[162] or the contours of private rights of action.[163]

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159. 5 U.S.C. § 706(2)(C) (2000).

160. Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354 (1988); Natural Res. Def. Council v. Abraham, 355 F.3d 179 (2d Cir. 2004).

161. For example, *Mead* says that the *Chevron* framework should govern judicial review, assuming that the agency's exercise of authority "does not exceed its jurisdiction." *See* United States v. Mead Corp., 533 U.S. 218, 227 n.6 (2001) (citing 5 U.S.C. § 706(2)(C) (2000)); *see also* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1004 (2005) (Breyer, J., concurring) (suggesting that *Chevron* does not apply to an "unusually basic legal question" (citing Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004))). A recent example is *American Bar Ass'n v. FTC*, where the D.C. Circuit struck down an effort by the FTC to regulate lawyers as a profession, finding the action outside the agency's authority to regulate "financial institutions." *See* 430 F.3d 457, 465 (D.C. Cir. 2005).

162. *See, e.g.*, NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 120-22 (1944) (discussing whether state tort law governs the scope of the term "employee" in federal labor law); *Gen. Dynamics Land Sys.*, 540 U.S. at 600 (holding that an age discrimination statute does not ban discrimination against a younger person); *see also* Smith v. City of Jackson, 544 U.S. 228, 233 (2005) (construing one antidiscrimination act in light of another, without express reliance on the agency's views); INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987) ("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.").

163. Congress, by law, seems to have determined that the institutional features of the judiciary are desirable for decision-making about private rights of action. In any event the APA's standard of review section does not per se apply to private rights of action. *See, e.g.*, Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons."); *cf.* Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc., 127 S. Ct. 1513, 1519 (2007) (finding an action under § 207 of the Federal Communications Act for violations of substantive regulations promulgated by the FCC where § 207's purpose is to allow persons injured by § 201(b) violations to bring federal court damage actions). *But see* Matthew

For those kinds of legal issues—ones that are not practical, iterative, or technical administrative implementation, but are truly questions of law suited for judicial resolution—the Supreme Court might choose to establish norms about how best to consider the views of the government and what weight agency views should have in particular cases. But the Court should set those norms with a clear-eyed view of the actual function of agencies and of how agencies, as subconstitutional bureaucracies of public administration, actually work with statutes. The Court errs when it assumes that an agency's process of working with statutes is fungible with the judicial process, or that the agenda-planning, political, and iterative approach of government bureaucracies replicates the processes and constitutional legitimacy of Article III courts. Dressing up the basic administrative work of agencies as "statutory construction" gives the agencies an institutional stature that their actual legal structure and modus operandi do not support.

By merging the roles of agency and court into a shared sea of statutory construction, *Chevron* prevents courts from embracing the comparative institutional competence approach that underlies the APA and enabling acts. First, while it is generally accepted that courts should decide issues of constitutional interpretation, the *Chevron* test may actually impede full judicial attention to one central type of constitutional question in administrative law—the non-delegation doctrine. The tension between the search for gaps to support administrative constructions of statutes and the search for gaps to dispute a lawful delegation creates this impediment. For example, in *FDA v. Brown & Williamson Tobacco Corp.*,[164] the Supreme Court applied *Chevron* and determined that the agency's action contravened precise legislative intent.[165] Yet the most authentic ground for the result reached is not that Congress was clear about anything, but that precisely because the statutes were not clear, under non-delegation principles the FDA could not decide on its own to start regulating cigarettes as "drugs" or drug-delivery "devices" under the Food, Drug and Cosmetic Act. The comprehensive regulation of cigarettes seems, at least at first cut, to be the kind of issue that a democratically elected Congress should address and delegate clearly by law—not by vacuum or implication—turning as it does on major public health concerns, national norms about

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C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 95 (2005) (arguing for a stronger administrative role over private rights of action).

164. 529 U.S. 120 (2000).

165. *Id.* at 160-61.

personal choice and risky habits, and the public policy contours of an entirely new regulatory program for the significant and distinct tobacco industry.

But under *Chevron*, if the tobacco companies in *Brown & Williamson* had argued that the terms of the Food, Drug and Cosmetic Act were ambiguous or unclear on the precise issue and that constitutional and democratic norms require Congress to make the hard choices about cigarette regulation expressly by law, then the tobacco interests would have come perilously close to an involuntary slide into *Chevron*'s step two by conceding that the statute had a "gap." The result might well have been the mere rubber-stamping of administrative action that is the hallmark of the second part of *Chevron*'s test, and that is driven by the internal logic of the *Chevron* test, which treats the administrative work-product as statutory construction. Thus the industry made strained arguments that the Food, Drug, and Cosmetic Act and snippets of other statutes clearly addressed the precise issue. In embracing that approach, the Court resorted to numerous highly discredited and sloppy techniques of historical storytelling to reach a conclusion, as a matter of judicial statutory construction de novo, that Congress was not silent or ambiguous but spoke clearly on the precise issue of tobacco regulation.[166]

Further, *Chevron* prevents courts and agencies from assuming their assigned roles in the overall regulatory enterprise by its sorting of issues based on whether a statutory provision has a "gap" or is "ambiguous." This is a poor proxy for proper institutional sorting based on the comparative institutional strengths and weaknesses of agency and court. Statutes typically use categories that have gaps in the sense that they require application by administering and enforcing institutions,[167] whether court or agency. Lack of specificity is not a meaningful or useful proxy for institutional sorting in standards of review.

Moreover, this form of sorting based on gaps or ambiguities in statutes has the unfortunate effect of encouraging agencies to make strained arguments that their statutes are unclear or incoherent in order to support their administrative actions. Under *Chevron*, agencies have every incentive to argue that their organic statutes are vague or ambiguous, rather than to argue that the statute is clear and that they have taken practical, sometimes variable, and often evolving bureaucratic action to "carry out" the statutory meaning in a reasonable way. This practice distorts and undermines statutes. It is on full display in *New York v. EPA*, a recent D.C. Circuit decision in which the court of appeals chided the EPA for casting about for

166. *Id.*
167. *See* Molot, *supra* note 134.

a range of "definitional possibilities" to support the agency's myriad different claims that various terms in the Clean Air Act, including "physical change" and the word "any," could have multiple meanings and therefore were ambiguities that supported the agency's rulemaking under New Source Review in the Clean Air Act.[168] The court of appeals sensibly held the line, rejecting the EPA's multiple runs at incoherence in the statute.[169] A doctrine of judicial review that encourages the government to use its considerable expertise in the service of finding statutory gaps as a predicate for its programmatic implementation is not a sound regulatory approach.

Chevron's either-or approach sets up a false rivalry between court and agency. It eliminates the healthy opportunity for a distinctly administrative function to work alongside the judicial interpreting role. Under the *Chevron* regime, a court defers to an agency's action "*only if* the statute is silent or ambiguous,"[170] or as the D.C. Circuit said in *General Dynamics Land Systems, Inc. v. Cline*, "deference to [an agency's] statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent."[171] Despite decades of *Chevron* methodology, it is hard to find any *Chevron* cases in which the courts both used their own tools of judicial construction to find statutory intent and, having found that intent, also validated administrative implementing action on the ground that it was a non-arbitrary carrying-out of that statutory intent by an institution of public administration. Yet that model of institutional arrangements missing under *Chevron* is precisely the model that the APA and regulatory enabling acts envision. The *Hearst* case,[172] which laid the groundwork for § 706 of the APA, assigns different roles to court and agency, two different constituent institutions in the overall regulatory universe. There the Court itself interpreted the statutory term, "employee," in a new labor law de novo, as a matter of law and with stare decisis effect, to be a term that derives its meaning from federal labor policy and not from state tort laws.[173] Yet the majority opinion preserved a distinct realm for the administrative function of applying that statutory term as construed by the Court to newsboys, and

168. 443 F.3d 880, 884-87 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 2127 (2007).
169. *Id*. at 889-90.
170. *Id.* at 884 (emphasis added).
171. 540 U.S. 581, 600 (2004) (refusing to give the agency's interpretation deference because "regular interpretive method leaves no serious question, not even about purely textual ambiguity in the ADEA").
172. NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 130-31 (1944) (allocating certain questions requiring expertise to resolution by an agency, as compared to questions of statutory interpretation for a court).
173. *Id.* at 122-24, 129.

later to other types of workers.[174] The implementing function of public administration was subject to review under a standard of reasonableness, which became the arbitrary and capricious test of the APA when Congress passed the APA a few years later. Under the APA, agencies are not surrogates for courts, nor are courts surrogates for agencies.

The practice of carving out an exclusion from *Chevron*'s rules of deference for so called "major questions" could accord with an institutionally savvy approach of reserving questions for the courts that would clearly benefit from judicial as opposed to administrative process for resolution.[175] These exceptions are sometimes referred to as *Chevron* "step zero."[176] But instead of promoting baroque and elaborate exceptions to a doctrine that is centrally flawed on account of its fundamental misconception of administrative work, a better approach would be for the courts to allocate issues for decision-making along the institutional lines specified in the APA. This form of review will not completely avoid complexities in its application, but it is a much surer and wiser approach.

B. Back to the Future at the Supreme Court

Remarkably, after more than two decades in which the Supreme Court used its *Chevron* methodology relentlessly in nearly all cases of judicial review, last Term Justice Breyer penned three majority opinions that revive the more institutionally savvy approach of the formative days of the APA.[177] Restating the *Chevron* doctrine in crucial respects, Justice Breyer's opinions pull hard for a comparative institutional approach to judicial review of administrative implementation.

In *Zuni Public School District No. 89 v. Department of Education*, the Court held that a federal statutory formula, which sets forth the method that the Department of Education should use to determine whether a state's

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174. *Id.* at 130-31.

175. *See* Breyer, *supra* note 154, at 370 ("Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.").

176. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001) (specifying that "step zero" provides a choice between *Chevron*, the *Skidmore* framework, and interpreting the issue de novo); Sunstein, Chevron *Step Zero*, *supra* note 73, at 191 (defining "step zero" as the preliminary inquiry as to whether *Chevron* applies at all).

177. *See* Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 127 S. Ct. 1534, 1537-38 (2007) (analyzing the validity of a regulation interpreting a federal statute containing a method for calculating whether a state's funding manner for public schools renders disbursements equal across the state); Global Crossing Telecomms., Inc. v. Metrophones Telecomms. Inc., 127 S. Ct. 1513, 1516 (2007) (exploring the issue of whether the FCC's application of a statute to a long distance carrier's refusal to compensate payphone operators is reasonable); Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339 (2007) (finding lawful a Labor Department rule exempting certain companionship workers from requirements of the Fair Labor Standards Act).

public school funding "equalizes" expenditures among districts, permits the Department to disregard certain school districts based on the number of the district's pupils as well as on the amount of the district's per pupil expenditures.[178] Two school districts in New Mexico had challenged the agency's regulations as inconsistent with the federal statute.

The majority opinion begins by surveying the qualities that make the matter on review better suited for resolution by the administrative agency instead of the court, including that the matter on review is "the kind of highly technical, specialized interstitial matter that Congress . . . delegates to specialized agencies to decide."[179] That echoes Justice Breyer's comment during oral argument that if ever there was a matter for an agency to decide, this was it.[180] The *Zuni* opinion takes pains to highlight the administrative qualities of the agency's action, calling it iterative and emphasizing its implementing and operational function in carrying out a statutory program.[181] In his opinion, Justice Breyer avoids framing the issue simply as one of statutory construction. Having sorted the matter into the bin of the public administrator's implementing function, the opinion assesses the agency's rule for its basic reasonableness, considering a variety of factors.[182] Finding the rule reasonable, albeit on what one commentator laments was a rather sketchy administrative record,[183] the court determined in a rather perfunctory way that the statute had a *Chevron* textual ambiguity that could shelter the agency's reasonable rule.[184]

In his concurrence, Justice Kennedy chided the majority for what he called an unfortunate "inversion" of *Chevron*'s logical progression from step one to step two.[185] Justice Kennedy, along with Justice Scalia in dissent, accused the majority opinion of creating an impression that "agency policy concerns, rather than the traditional tools of statutory construction, are shaping the judicial interpretation of statutes."[186] Those observations about Justice's Breyer's methodology ring true to a certain extent: Justice Breyer did invert *Chevron*, and he did permit agency policy

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178. *See Zuni*, 127 S. Ct. at 1538.
179. *Id.* at 1536.
180. *See* Transcript of Oral Argument at 11, *Zuni Pub. Sch. Dist. No. 89*, 127 S. Ct. 1534 (No. 05-1508), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-1508.pdf.
181. *Zuni*, 127 S. Ct. at 1543 (describing the agency's action as an implementation that "carries out" the statute).
182. *See id.* at 1543-46.
183. *See* James, *supra* note 150 (stating that there was little evidence of the expertise of the Department of Education).
184. *See Zuni*, 127 S. Ct. at 1540-41.
185. *See id.* at 1551 (Kennedy, J., concurring) (suggesting that if Justice Breyer's approach continued, it would appear as if agency policies rather than traditional statutory construction tools were shaping judicial statutory interpretation).
186. *Id.*; *see also id.* at 1552 (Scalia, J., dissenting) (advocating for different techniques of statutory interpretation).

concerns rather than "traditional [i.e., judicial] tools of statutory construction" to have the starring role in his methodology.[187] However, the majority opinion is less an inversion of *Chevron* than it is an avoidance of *Chevron*'s two-step framework. The opinion more closely tracks the standard of arbitrary and capricious review that § 706 of the APA specifies, and it reflects a more realistic understanding of the core function of the administrative agency. As such, the opinion's methodology resembles methods of review in the early cases of *State Farm*, *Sierra Club* and others of that era, when the courts tended not to frame all actions on judicial review as questions of law or questions of "statutory interpretation." Rather, those earlier cases preserved a full bodied administrative domain in which agencies could carry out and implement statutes through specific, iterative, bureaucratic action, using administrative expertise and process, as long as the bureaucratic actions were reasonable.[188] In other words, Justice Breyer avoided making a fixed judicial interpretation of the statute as a baseline using only orthodox judicial tools of the sort we have come to expect under *Chevron.*

Thus Justice Scalia's hearty criticism of the majority in *Zuni*'s dissent is off the mark. The dissent accuses the majority of making *judicial* policy through statutory construction akin to what the Supreme Court did many years earlier in *Church of the Holy Trinity v. United States*,[189] a workhorse for the contested proposition that judges may ignore plain meaning to avoid absurd results. But Justice Scalia's argument reveals an area of persistent doctrinal confusion ever since the *Chevron* doctrines began treating mainstream public administration as if it were the same as statutory construction by a court in a case or controversy. *Holy Trinity* was not a case of judicial review of administrative action. There was not an administrative implementing function under review, and the Court there was free to determine its own methods of statutory interpretation, as misguided as Justice Scalia may think them now. By contrast, *Zuni* was a case of judicial review of an implementing action taken by an institution of public administration that was charged with "carrying out" a statutory program so long as it did so in a manner "not inconsistent" with its enabling act. Statutory provisions governing the standard of review for that

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187. *See id*. at 1546, 1550; Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

188. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 56 (1983) (stating that an agency may change its view on a matter as long as it is not arbitrary and capricious).

189. *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 472 (1891) (stating that regardless of how broadly a statute reaches, if an act appears to violate that statute textually, but Congress did not intend to prohibit such an act, courts have an obligation to interpret the law to permit the act pursuant to legislative intent).

bureaucratic act counsel restraint in finding and deciding so-called questions of law and provide that the default standard of review of that implementing function is review for arbitrariness. Justice Breyer's opinion accords with this framework and with the practice of the courts in reviewing mainstream administrative functions in many cases of the pre-*Chevron* era.

A recent, thoughtful piece by Osamudia James criticizes the *Zuni* decision for its failure to probe more deeply into the reasonableness of the agency's rule.[190] She suggests that a more fully developed administrative record and greater attention to the consequences of the agency's rule would have revealed that the agency's rule in fact was unreasonable because of its impact on Native American school children.[191] This type of defect in the administrative process likely stems from overuse of the *Chevron* doctrine itself and not from the majority's improved methodology in *Zuni*, as discussed earlier.[192] *Chevron* discourages the development of full and reasoned administrative records on technical and expert issues, as they are largely irrelevant to a style of judicial review that is framed as review of statutory construction. Moreover, while the Supreme Court should be applauded for nudging the standard of review back toward a comparative institutional approach in *Zuni*, no doubt Zuni's counsel developed and argued the case in anticipation of a typical *Chevron* treatment by the Court.

Underscoring *Zuni*'s break from *Chevron* orthodoxy, Justice Breyer repeats *Zuni's* atypical methodology in his second majority opinion of the pair of administrative cases announced the same day last Term, *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications Inc*.[193] In that case, the majority upheld a regulation of the FCC that implemented §§ 201(b) and 207 of the Communications Act by allowing payphone operators to sue long-distance carriers for their failure to pay compensation, as an "unreasonable practice."[194] Despite the grumblings from other Justices in *Zuni* about his methodology, Justice Breyer doggedly proceeded in the same fashion in *Global Crossing*. Once again, the majority opinion refused to march down *Chevron*'s two steps. Justice Breyer avoided framing the case simply as one of statutory construction; he frequently called the agency action an "application" or "implementation" of

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190. *See* James, *supra* note 150 (asserting a failure to comprehend the rule's effect on policy at the public school level).

191. *See id.* (stating that funding cuts disproportionately affect school districts near tribal lands, forcing districts to choose between funding additional academic programs and critically necessary facility improvements).

192. *See supra* Part II.B.2.

193. *See* Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc., 127 S. Ct. 1513, 1521 (2007).

194. *See id.* at 1520.

the statute, which are more realistic descriptors of the administrative function.[195] Once again in *Global Crossing*, the majority reviewed the agency's action under a standard of reasonableness akin to the APA framework that was typical before *Chevron.* In short, the majority found the agency action reasonable, not prohibited by Congress, and thus lawful.[196]

In neither *Zuni* nor *Global Crossing* did Justice Breyer dwell on step one of *Chevron*, which would have required a judicial holding about the precise meaning of a statute or its gaps and ambiguities, using orthodox judicial methodology. Instead, in *Global Crossing*, the majority reformulates the "gap" search of *Chevron* in a way that completely changes its meaning. Rather than asking whether a specific statutory word or phrase (such as "source" or "bound" or "offer" or "drug") is legally ambiguous using traditional tools of statutory construction, Justice Breyer wrote that the question of a "gap" is a more basic inquiry into whether Congress delegated authority to an agency "to apply [the statute] through regulations and orders with the force of law."[197] He transformed the "gap" inquiry into a more basic question of whether an agency has authority to carry out a statutory program. This formulation avoids the problems of undermining the administrative function and of excessive judicial ossification that are generated by *Chevron*'s approach.

In his third majority opinion on methods of judicial review last Term, *Long Island Care at Home, Ltd. v. Coke*, Justice Breyer yet again opted for a comparative institutional approach in lieu of *Chevron*'s two steps. The Court upheld a regulation of the Department of Labor that extends an exemption for companionship workers under the Fair Labor Standards Act to include services rendered by employees of certain third parties. In a short, unanimous opinion, the Court reasoned that the statutory gap was for the agency to fill because it concerned a topic within the agency's expertise, it was interstitial, and it would benefit from resolution by the administrative process of consulation with affected interests.[198] Having found the matter suited for the administrative domain, the Court then asked whether there was "anything about the regulation that might make it unreasonable or otherwise unlawful."[199] Like both *Zuni* and *Global Crossing, Long Island Care at Home* is highly reminiscent of the approach that was taken by the Court in pre-*Chevron* cases during the formative years of the APA.

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195. *See id.* at 1516.
196. *Id.* at 1521-22.
197. *Id.* at 1522.
198. *See* Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339, 2346-47 (2007).
199. *Id.* at 2346.

Finally, one other decision of the Supreme Court last Term, *Massachusetts v. EPA*,[200] is consistent with the revival of APA standards latent in *Zuni, Global Crossing,* and *Long Island Care at Home*. In a majority opinion written by Justice Stevens, who authored the *Chevron* decision in 1984, the Supreme Court used the arbitrary and capricious test of the Clean Air Act to frame review of the EPA's decision not to regulate greenhouse gases, one of the few Supreme Court cases in the *Chevron*-laden decades to resurrect that statutory relic as the standard of review. While the nature of the EPA's action on review in that case was somewhat atypical—a denial of a petition for rulemaking—its use may presage the return of that statutory as the standard for affirmative administrative implementations as well. Decisions to regulate or to refrain from regulating are similar aspects of an administrative function in carrying out a statute.[201] Last Term's administrative law cases may well be the beginning of the end of an era.

CONCLUSION

Some twenty years on, *Chevron*'s effect on administrative process is more complicated than the story that is often told about *Chevron*—that it is a doctrine of judicial restraint. Whatever the impact on the rate of agency wins and losses, under *Chevron*'s doctrines, the Court, not Congress, is making the rules. In a little more than two decades, the Supreme Court managed to make large portions of the APA virtually obsolete.

Why did the *Chevron* paradigm—that agency work is statutory construction—come to dominate judicial review? At the time, *Chevron* was not teed up to make new law on the standards of judicial review. And its verbiage on scope of review easily could have fallen into judicial oblivion like so many other quirky formulations over the years. That *Chevron* took hold when its doctrines were less institutionally savvy than the ones they displaced seems counterintuitive. Perhaps the *Chevron* era

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200. 127 S. Ct. 1438, 1463 (2007) (holding that the EPA was arbitrary and capricious in refusing to examine whether greenhouse gases contribute to climate change).

201. As noted above, that standard has been used somewhat more often in recent years in the lower federal courts, albeit frequently in conjunction with step two of the *Chevron* canon. *See* Murphy et al., *supra* note 8, at 94, 101 (noting efforts of lower federal courts to appraise whether agency engaged in reasoned decision-making); *see also* Lisa Schultz Bressman, *Judicial Review of Agency Discretion*, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 177, 184-191 (John F. Duffy & Michael Herz eds., 2005) (describing circumstances under which a court will set aside an agency action). Professor M. Elizabeth Magill recently urged the courts to shift their reasonableness inquiry at step two into an arbitrary and capricious test. *See* Magill, *supra* note 8, at 93-97 (noting confusion in the lower courts regarding the relationship between step two and the arbitrary and capricious assessment); *see also* Goldstein v. SEC, 451 F.3d 873, 884 (D.C. Cir. 2006) (finding arbitrary a rule that exempted hedge funds with one hundred or fewer investors from registering under one act, but that required funds with fifteen or more investors to register under another act).

reflects institutional bias or mirroring, as the courts came to view agencies more in the courts' own image. Perhaps *Chevron*'s framework gained ground because it coincided with the emergence of a new field in academic writings and law schools: statutory interpretation. Administrative work, tied as it is to statutes, made its way into that pigeonhole, instead of into its own domain of public administration. Fatigue and conflict from the old standards may also share responsibility. Review of an agency's record for rationality as public administration could be dull and taxing for chambers, and it fell afield from what judges, law clerks, and counsel are centrally trained to do.[202] How appealing it must have been when the *Chevron* Court extracted from that messy, bureaucratic, deeply political, highly technical, special interest free-for-all a quality that was more reassuringly familiar to courts and counsel, more manageably narrow, and something that sounded more like the legal process that courts and counsel are trained to manage—"statutory construction." And *Chevron* seemed to answer the call for judicial restraint in setting aside agency actions, a promise that was not in fact realized.

Chevron's formulation also fed an impulse of the Justices to advance their own views about the allocation of government power through judicial canons about standards of review, even in the context of statutes such as the APA that should be authoritative. Certainly a disinterested Congress has also played its part in these twenty-some years of judicial improvisation in administrative law. Congress revisits the APA only rarely,[203] and it eschews oversight of the judicial review provisions of the APA or those of specific enabling acts.[204]

Administrative agencies and courts are complex institutions, and if history is a guide, any legal doctrine about the interaction of the two through judicial review will be somewhat taxing and chaotic to implement. But the APA's section on standards of review and parallel provisions in many enabling acts do well to simplify the framework of judicial review in ways that respect the actual institutional strengths of agencies and courts. Recent decisions of the Supreme Court may portend a revival of that more institutionally savvy framework. This is heartening. Fundamentally, the

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202. *See, e.g.*, Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981) (extending over 130 pages in the Federal Reporter, plus technical appendices).

203. *E.g.*, Negotiated Rulemaking Act, 5 U.S.C. §§ 561-70a (2000) (establishing a structure to execute negotiated rulemaking to improve the informal rulemaking system); Congressional Review Act, 5 U.S.C. §§ 801-08 (2000) (providing for congressional review of agency rulemaking in Chapter 8 of the Administrative Procedure Act).

204. Unfortunately, one of Congress's recent significant actions on administrative process was its de-funding of the Administrative Conference of the United States (ACUS), in 1995. *See* Jeffrey S. Lubbers, *Consensus-Building in Administrative Law: The Revival of the Administrative Conference of the U.S.*, 30 ADMIN. & REG. L. NEWS, Winter 2005, at 3 (describing congressional efforts to revive the ACUS).

APA is a better scheme and, after all, it is the one that Congress enacted into law. Judicial review of agency action can be rescued from its current muddle. Statutes are the way out.