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STATUTORY INTERPRETATION IN THE ADMINISTRATIVE STATE

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[S]ince the only or principal dispute relates to the meaning of [a] statutory term, the controversy must ultimately be resolved, not on the basis of matters within the special competence of the [agency], but by judicial application of canons of statutory construction.

—Justice William O. Douglas, in *Barlow v. Collins*¹

When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.

—Chief Justice Earl Warren, in *Udall v. Tallman*²

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¹ 397 U.S. 159, 166 (1970).

² 380 U.S. 1, 16 (1965).

After a long period of relative neglect,³ the subject of statutory interpretation once again enjoys favor in the courts of academic discourse. Indeed, for the first time since the famous Radin-Landis debate of 1930,⁴ the subject provokes sharp—even heated—exchanges among contributors to learned journals.⁵ The contemporary debate operates on two levels, one epistemological, the other institutional. The epistemological controversy centers around the possibility of achieving “objectivity” in interpretation. Participants in this discussion are interested in statutes merely as one among several forms of written text whose meaning must be explicated by an “interpreter.” In this sense, the revived interest in statutory interpretation is a by-product of the emergent interest in critical literary⁶ and philosophical⁷ theory among legal scholars.

It is at the institutional level of contemporary debate, however, that the peculiar social function of statutes assumes primary importance. Here, renewed attention to statutory interpretation has rekindled debate over the proper allocation of lawmaking prerogatives between legislatures and courts. Some commentators, most notably Guido Calabresi in his recent book *A Common Law for the Age of Statutes*,⁸ have urged courts to take greater liberties with the handiwork of legislatures. Other scholars, including Calabresi's many critics,⁹ advocate a more reserved judicial posture. While unquestionably stimulating, this debate has largely sidestepped what I view as the central question of statutory

³ See Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 215 (1983).

⁴ Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930); Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930).

⁵ See, e.g., Dworkin, *My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk About Objectivity Anymore*, in THE POLITICS OF INTERPRETATION 287 (W.J.T. Mitchell ed. 1983); Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982); Fish, *Wrong Again*, 62 TEX. L. REV. 299 (1983); Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551 (1982); see also Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982); Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

⁶ See, e.g., Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair*, 32 RUTGERS L. REV. 676 (1979); *Law and Literature*, 60 TEX. L. REV. 373 (1982) (symposium).

⁷ See, e.g., Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983). For general accounts of the critical legal studies movement, see THE POLITICS OF LAW (D. Kairys ed. 1982); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983); *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984).

⁸ G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

⁹ See, e.g. Cox, Book Review, 70 CALIF. L. REV. 1463 (1982); see also Estreicher, *Judicial Nullification: Guido Calabresi's Uncommon Common Law for a Statutory Age* (Book Review), 57 N.Y.U. L. REV. 1126 (1982); Mikva, Book Review, 96 HARV. L. REV. 534 (1982); Weisberg, *supra* note 3.

interpretation in the "modern administrative state"¹⁰—whether administrative agencies or courts should exercise greater authority over statutory interpretation. For it is a defining characteristic of the administrative state that most statutes are not direct commands to the public enforced exclusively by courts, but are delegations to administrative agencies to issue and enforce such commands.¹¹

Two competing traditions in American jurisprudence address the issue of the appropriate allocation of interpretive authority between agencies and courts. One, exemplified by the opening quotation from *Barlow v. Collins*,¹² views matters of statutory interpretation as questions of "law" reserved for independent determination by the judiciary.¹³ This view stems from a "private law" conception of the judicial function in reviewing administrative action.¹⁴ Under this conception, a court must independently examine an administrative agency's claimed authority to inflict harm upon a plaintiff, just as it would assess the legal authority of a private entity to do so.

The alternative view of the judicial function, illustrated by Chief Justice Warren's familiar dictum in *Udall v. Tallman*,¹⁵ can be traced back at least to the 1930's.¹⁶ This tradition views agencies as delegates, empowered by the legislature to exercise legislative power to articulate and implement public goals. Legislation, so conceived, is as much a mandate as a constraint. Under this conception, courts involved in statutory interpretation must provide enough leeway for agencies to give shape to that legislative mandate.¹⁷

These two traditions have coexisted uneasily throughout the modern era of administrative law. The prolonged congressional debate over the so-called Bumpers Amendment to the Administrative Procedure Act is merely the latest chapter in the history of this ongoing tension. As

¹⁰ *Immigration & Naturalization Serv. v. Chadha*, 103 S. Ct. 2764, 2801 (1983) (White, J., dissenting). The term "administrative state" dates back at least to 1948. See D. WALDO, *THE ADMINISTRATIVE STATE* (1948).

¹¹ See, e.g., J. FREEDMAN, *CRISIS AND LEGITIMACY* 3 (1978); T. LOWI, *THE END OF LIBERALISM* 92-126 (1979).

¹² 397 U.S. 159 (1970).

¹³ See, e.g., *Hardin v. Kentucky Utils. Co.*, 390 U.S. 1, 14 (1968) (Harlan, J., dissenting); *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322, 325-26 (1951); *NLRB v. Marcus Trucking Co.*, 286 F.2d 583, 590-91 (2d Cir. 1961). For a recent defense of independent review, see Bye, *Scope of Judicial Review in Informal Rulemaking*, 33 AD. L. REV. 183, 190-93 (1981).

¹⁴ See Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1202-03 (1982); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1671-76 (1975).

¹⁵ 380 U.S. 1 (1965).

¹⁶ See *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933).

¹⁷ For a review of the early cases applying the doctrine, see Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 VAND. L. REV. 470 (1950).

originally introduced in 1975, Senator Bumpers's bill would have commanded reviewing courts to decide *de novo* all questions of statutory interpretation and would have removed the presumption of validity customarily extended to administrative rules.¹⁸ The amendment quickly became a rallying point for both critics and defenders of the modern regulatory state.¹⁹ While the bill's language was eventually diluted sufficiently to secure its passage by the Senate,²⁰ the controversy it touched off continues to simmer.

This Article addresses the issue of interpretive responsibility left unresolved by that congressional debate and largely skirted by the recent literature on the theory of legal interpretation. While the Article attempts to draw upon that literature as a basis for determining whether agencies or courts exercise superior interpretive competence, it does not side with any single faction in the contemporary academic debate. Rather, it articulates a composite view of statutory interpretation, as an exercise in both "finding" and "making" law, that corresponds roughly with the prevailing judicial view. This model serves as the template against which to assess the comparative institutional competencies of courts and agencies as statutory interpreters.

The first two parts of the Article describe the modes of statutory interpretation—"independent" and "deferential"—associated with the two traditions described above. Part III then examines how courts might go about deciding how to choose between the two modes of interpretation and recommends the use of a utilitarian mode of analysis. Parts IV and V use that approach to determine the relative competencies of courts and agencies to perform the "lawfinding" and "lawmaking" components of statutory interpretation. Based on that assessment, I conclude that courts should presumptively defer to agency interpretations of statutes in situations where Congress has endowed the agency with significant policymaking responsibility. Part VI of the Article sketches the contours of this presumption.

I. STATUTORY INTERPRETATION IN THE INDEPENDENT MODE

Each generation has its theory of statutory interpretation.²¹ Just as

¹⁸ See S. 2408, 94th Cong., 1st Sess., 121 CONG. REC. 29,956 (1975).

¹⁹ For discussions of the bill's history, see O'Reilly, *Deference Makes a Difference: A Study of Impacts of the Bumpers Judicial Review Amendment*, 49 U. CIN. L. REV. 739 (1980); Woodward & Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 AD. L. REV. 329 (1979); Wright, *Musings on Administrative Law*, 33 AD. L. REV. 177, 177-80 (1981).

²⁰ See 125 CONG. REC. 23,504-05 (1979). The most recent version is contained in S. 1766 & H.R. 1776, 98th Cong., 1st Sess. (1983).

²¹ For a historical survey of changing fashions in the theory of statutory interpre-

Pound²² and Holmes²³ had attacked the textual formalism of their forebears, thirty years later Realists like Max Radin would characterize their search for "legislative intent" as "a transparent and absurd fiction."²⁴ The discredited notion of legislative intent was, in turn, resurrected as "statutory purpose" by the "legal process" movement of the 1950's.²⁵ After two decades of assimilation, a new generation of textual skeptics dismisses the feasibility of interpretive objectivity.²⁶

Throughout these trends in intellectual fashion, the underlying dilemmas of statutory interpretation persist. Does statutory text have any intrinsic meaning apart from context? Is there an ascertainable "legislative intent" or "statutory purpose"? Ought it to be controlling? What evidence counts toward a determination of legislative intent or purpose? Yet as these controversies persist, courts continue to go about the daily business of adjudicating disputes involving conflicting claims about statutory meaning. While it may be too generous to say that courts have a unified theory of interpretation, their behavior seems, for the most part, to fall into a discernible pattern. A description of that pattern—which I call the "independent mode"—serves as the baseline for my inquiry.

A. A Prototype

The Supreme Court's decision in *American Tobacco Co. v. Patterson*²⁷ exemplifies the independent mode of statutory interpretation. A group of American Tobacco's black employees had attacked the company's promotional ladder as an "unlawful employment practice" having a racially discriminatory impact under Title VII of the 1964 Civil Rights Act.²⁸ The employer had sought protection behind section 703(h) of the Act, which immunizes the application of "a bona fide

tation in Anglo-American law, see Corry, *Administrative Law and the Interpretation of Statutes*, 1 U. TORONTO L.J. 286 (1936).

²² See Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908).

²³ See Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899).

²⁴ Radin, *supra* note 4, at 870. See also Corry, *supra* note 21, at 290 ("The intention of the legislature is a myth . . .").

²⁵ See H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1150-57 (tentative ed. 1958). For an earlier expression, see Cox, *Judge Learned Hand and The Interpretation of Statutes*, 60 HARV. L. REV. 370 (1947).

²⁶ See, e.g., S. FISH, *IS THERE A TEXT IN THIS CLASS?* (1980); Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982).

²⁷ 456 U.S. 63 (1982). Although the case involves an administrative agency (the Equal Employment Opportunity Commission), the agency plays only a minor supporting role. None of the Justices' opinions accords the EEOC's interpretation of Title VII any greater deference than they do the interpretation of the agency's copetitioner.

²⁸ 42 U.S.C. §§ 2000e-2000h-6 (1982).

seniority . . . system"²⁹ from attack under the Act. The United States Court of Appeals for the Fourth Circuit upheld a judgment against the company,³⁰ finding the section 703(h) shield inapplicable to seniority systems, like American Tobacco's, adopted after the Act's effective date. The Supreme Court reversed, five to four.

Justice White's opinion for the majority is a textbook illustration of statutory interpretation in the independent mode. He began his search for legislative guidance with the statutory text. Absent a contrary indication from Congress, he observed, the statutory language, as understood in its "ordinary" sense, "must . . . be regarded as conclusive."³¹ Especially is this so when there is evidence—found here in remarks by one of the bill's sponsors—that the language of the bill received "meticulous attention" in Congress.³² Noting the absence of any explicit distinction between pre-Act and post-Act systems, the presence elsewhere in the Act of explicit grandfather clauses, and the assertedly "unreasonable results"³³ produced by the petitioners' interpretation, Justice White found the "plain meaning" of the statutory language to favor the employer's interpretation.

He then turned to the legislative history, but only with some trepidation: "Going behind the plain language of a statute in search of a possibly contrary congressional intent is 'a step to be taken cautiously' even under the best of circumstances."³⁴ Since section 703(h) first appeared in a substitute bill introduced on the Senate floor, the bill's legislative history was more meager than is usually the case. After rummaging through available "fragments"³⁵ of legislative history—references to seniority in a House minority report, floor remarks of various supporters, a Justice Department memorandum, and interpretive memoranda written by the bill's supporters—Justice White

²⁹ 42 U.S.C. § 2000e-2(h) (1982). The section declares that

it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences [sic] are not the result of an intention to discriminate because of race

³⁰ *Patterson v. American Tobacco Co.*, 634 F.2d 744, 749 (4th Cir. 1980), *vacated*, 456 U.S. 63, *on remand*, 691 F.2d 496 (4th Cir. 1982).

³¹ 456 U.S. at 68 (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962), and *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

³² *Id.* at 68-69 (quoting 110 CONG. REC. 11,935 (1964) (remarks of Sen. Dirksen)).

³³ *Id.* at 71.

³⁴ *Id.* at 75 (quoting *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 26 (1977)).

³⁵ *Id.*

found the history to be "inconclusive."³⁶

The final support for White's construction was an asserted congressional "policy favoring minimal supervision by courts and other governmental agencies over the substantive terms of collective-bargaining agreements."³⁷ Conceding that the "overall purpose" of Title VII is "to eliminate discrimination in employment," Justice White read section 703(h) to "balance" those two policies, and concluded that extending 703(h) immunity to post-Act seniority systems would better promote this balance of policies than would the opposite interpretation.³⁸

In a dissenting opinion, Justice Brennan disputed each of these three subsidiary conclusions. In his view, the statutory text "plainly" protected only pre-Act seniority systems since it permitted employers only to "apply" bona fide seniority systems, not to "adopt" them. The message that he received from the legislative history, moreover, was not "inconclusive," but emphatic in its concern to protect only accrued seniority rights against "retrospective" abrogation.³⁹ And the "narrow" purpose of section 703(h) was "to protect the *expectations* that employees acquire through the continued operation of a seniority system."⁴⁰ To accomplish this purpose, Justice Brennan concluded, one should interpret the Act to immunize only pre-Act systems.

B. *Underlying Assumptions*

At least in their *Patterson* opinions, Justices White and Brennan appear to disagree not about the theory of statutory interpretation, but rather about its application to the facts of the case. That apparently shared theory of statutory interpretation has, as its central normative principle, a notion of legislative supremacy.⁴¹ In a representative democracy, the views of the popularly elected legislature must prevail over those of the appointed judiciary, except in areas specifically reserved to the latter by the Constitution. Whatever its own policy view may be, the Court's job is to discover and effectuate the legislative will as expressed in the text of the enacted statute. Only through the formalities of statutory enactment can a legislature express its will, and only through the formality of statutory amendment can that will, once

³⁶ *Id.* at 71.

³⁷ *Id.* at 76-77.

³⁸ *Id.*

³⁹ *Id.* at 83-84 (quoting 110 CONG. REC. 7,213 (1964) (remarks of Sen. Clark)).

⁴⁰ *Id.* at 81.

⁴¹ See, e.g., *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194-95 (1978); R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 7 (1975).

expressed, be modified or overridden.⁴²

Yet the modern Court has not adopted a narrowly "textualist"⁴³ approach to statutory interpretation. Despite repeated invocation of the "plain meaning" rule, the Supreme Court does not take statutory words wholly out of context.⁴⁴ At least implicitly, it assumes a particular speaker (Congress) and audience (usually "ordinary" people,⁴⁵ but sometimes a more specialized group⁴⁶). The Court, moreover, rarely concludes its analysis at the textual level without at least pursuing into the documentary underbrush of the statute's legislative history plausible leads suggested by litigants.⁴⁷

During this interpretive search the Court clearly stamps upon the historical materials its own idealized conception of the legislative process.⁴⁸ In the first place, the Court customarily treats the multimember Congress as a "rational actor" capable of formulating a corporate intent or purpose.⁴⁹ It views statutes as means consciously adopted for the attainment of some antecedent goal that can be inferred from the enacted text.⁵⁰ And to the extent that the text is ambiguous, the Court assumes that the statute's underlying purpose can be determined from the published proceedings of committee hearings and floor debates without inquiry into the private conversations, markup sessions, and conference committee meetings that many view as the "real" legislative

⁴² See Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515, 517, 523 (1982).

⁴³ The term is Paul Brest's. See Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 205 (1980).

⁴⁴ See Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 196-99 (1983). But cf. Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 894 (1982) (arguing that the Court "now invokes a literalist reading of statutory terms as a surrogate for actual legislative intent") (footnote omitted).

⁴⁵ See, e.g., *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 618, *reh'g denied*, 323 U.S. 809 (1944) (characterizing the statute in question as "addressed to the common run of men and . . . therefore to be understood according to the sense of the thing").

⁴⁶ See, e.g., *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322, 326-27 (1951) (Frankfurter, J., dissenting).

⁴⁷ See Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975). For a statistical survey of the Supreme Court's invocation of legislative history, see Carro & Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294 (1982).

⁴⁸ See Tushnet, *supra* note 7, at 793-96.

⁴⁹ See Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1, 26-29 (1980).

⁵⁰ See G. ALLISON, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* 32-38 (1971).

process.⁵¹

Implicitly, the Court has rejected possible alternative models of the legislative process that view legislation as the product of preprogrammed organizational routines or the result of a stylized bargaining game.⁵² An "organizational process" explanation for a particular piece of legislation, for example, suggests that the ultimate output is shaped by such standard operating procedures as the formal rules for enacting bills, customary rules of privilege and courtesy, deadlines, and procedures for hiring and training technical staff.⁵³ A "bureaucratic politics" account of legislation, by contrast, focuses on the processes of bargaining, threat, and bluff by which interpersonal conflicts are resolved.⁵⁴ This model views legislation as a loosely structured game in which self-interested players—both within and outside the legislature—compete for the prize of desired statutory language.

The Court is not entirely insensitive to evidence relevant to such explanations. The majority opinion in *Patterson*, for instance, notes that section 703(h) was first introduced as a floor amendment,⁵⁵ a fact that might imply an awareness of organizational process explanations for legislation. Yet the Court's only apparent reason for reciting this fact was to explain the absence of commentary from committee reports.⁵⁶ Similarly, the Court's practice of identifying particular members of Congress by their role in a bill's passage (for example, sponsor or conferee⁵⁷) might suggest recognition of a governmental-politics explanation of the legislative process. But the Court rarely looks behind formal designations for the de facto bargaining power on which the micropolitical model depends. Furthermore, the Court's preoccupation with authorship and public rationalizations bears only an attenuated connection to the forces of leadership, discipline, log-rolling, and personal instinct thought by most social scientists to influence legislators' votes.⁵⁸

⁵¹ See Mangum, *Legislative History in the Interpretation of Law: An Illustrative Case Study*, 1983 B.Y.U. L. REV. 281, 298-301; Wald, *supra* note 44, at 200-03.

⁵² See G. ALLISON, *supra* note 50, at 78-96, 162-81.

⁵³ See E. REDMAN, *THE DANCE OF LEGISLATION* (1973).

⁵⁴ See A. WILDAVSKY, *THE POLITICS OF THE BUDGETARY PROCESS* (1976). This view is also reflected in interest group theories of legislation. See, e.g., A. BENTLEY, *THE PROCESS OF GOVERNMENT* (1967); E. LATHAM, *THE GROUP BASIS OF POLITICS* 35 (1965).

⁵⁵ 456 U.S. at 72.

⁵⁶ See *id.* at 75.

⁵⁷ See, e.g., *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982) (sponsor); *Schweiker v. Gray Panthers*, 453 U.S. 34, 45 (1981) (head of Senate's conference delegation); *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 514-16 (1981) (sponsors of amendments).

⁵⁸ See, e.g., J. KINGDON, *CONGRESSMEN'S VOTING DECISIONS* (1973).

Occasionally, courts are confronted with explicit nonrational explanations for the outcome of legislative deliberations. In *North Haven Board of Education v. Bell*⁵⁹ the Supreme Court had to determine whether Title IX's prohibition against sex-based discrimination in most federally aided programs⁶⁰ extended to employees of such programs or only to service recipients. The answer to that question depended in part on the significance to be attached to the conference committee's deletion of a section appearing in the original bill that explicitly excluded employment discrimination from the coverage of the Act. Arguing that this action should be accorded little or no significance, the Board of Education offered a quote from Representative O'Hara that the section had originally "got in through a drafting error."⁶¹ The majority implicitly rejected this organizational process explanation with the rational actor assumption that if Congress had intended the courts to adopt the interpretation offered by the Board, it would have said so explicitly.⁶²

Not only does the Court resist nonrational explanations of legislative outcomes, it also adopts a restrictive conception of the "purposes" that animate Congress. The Court assumes that in enacting a particular statute, Congress seeks to effect some beneficial change in the general social or economic order, not, as some have argued, to generate "casework" opportunities for its members,⁶³ to give symbolic reassurance to the restless masses,⁶⁴ or to auction its member's votes to the highest bidder.⁶⁵ Thus, for example, members of the *Patterson* Court might disagree about whether the purpose of section 703(h) was to protect "the collective bargaining process"⁶⁶ or employees' "expectations."⁶⁷ But both of these interests, while by no means shared by the entire "public," reflect accepted and honorable values such as self-determination and promise keeping. No member of the Court would have based an opinion on an ascribed legislative interest in saving the best jobs for whites or assuring a continued flow of union campaign contri-

⁵⁹ 456 U.S. 512 (1982).

⁶⁰ 20 U.S.C. § 1681 (1982).

⁶¹ 456 U.S. at 528 (quoting *Sex Discrimination Regulations: Hearings before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 409 (1975)).

⁶² See *id.* at 530.

⁶³ See M. FIORINA, CONGRESS, KEYSTONE OF THE WASHINGTON ESTABLISHMENT 42-49 (1977); Fiorina & Noll, *Voters, Legislators, and Bureaucracy: Institutional Design in the Public Sector*, 68 AM. ECON. REV., May 1978, at 256, 256-57.

⁶⁴ See, e.g., M. EDELMAN, THE SYMBOLIC USES OF POLITICS (1964).

⁶⁵ See, e.g., Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 214 (1976); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 10-13 (1971).

⁶⁶ 456 U.S. at 76-77.

⁶⁷ *Id.* at 81 (Brennan, J., dissenting).

butions to Democratic members of Congress. Yet, in the hard-headed world of the public choice and interest group theorists, such are precisely the types of explanations suggested for legislative behavior.

The technique of statutory interpretation exemplified by *Patterson*, then, combines what others have called "lawfinding" and "law-making" activities.⁶⁸ Courts attempt to find the meaning of the statutory text as intended by the enacting legislature. Yet, by adopting conventions to guide and constrain the search for that meaning, courts necessarily create meaning as well. In so doing, courts have achieved what Robert Weisberg calls the "conventional modern accommodation"⁶⁹ between the "indestructible tradition of formalism in our jurisprudence"⁷⁰ and the "demand for intellectual coherence in our comprehensive view of legal rules and principles."⁷¹

II. STATUTORY INTERPRETATION IN THE DEFERENTIAL MODE

*American Tobacco Co. v. Patterson*⁷² illustrates statutory interpretation in the "independent mode" in the sense that the Court specifies what the statute at issue means without regard for the way in which any other nonlegislative entity would interpret the statute. To be sure, the Court does entertain arguments by those who favor one interpretation or another. But those suggested interpretations compete on an equal a priori footing with each other. One party's position may, of course, be intrinsically more plausible or convincing than the other's. But the *pedigree* of an interpretation—that is, the identity of its sponsor or author—itself has no impact either on the method of analysis used by the Court or on the outcome of the case.

When one of the contested statutory interpretations has been adopted or endorsed by an administrative agency with at least *prima facie* responsibility for the statute's enforcement, however, courts often claim to accord a distinctive status to that interpretation. This status is customarily referred to as "deference." I use the term "deferential mode" to describe the method of statutory interpretation in such cases. The question explored in this section is how the deferential mode differs from the independent mode.

⁶⁸ See Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1127-28 (1983). The distinction has been drawn by numerous other commentators. See, e.g., Cohen, *Judicial "Legisputation" and the Dimensions of Legislative Meaning*, 36 IND. L.J. 414, 418 (1961); Witherspoon, *The Essential Focus of Statutory Interpretation*, 36 IND. L.J. 423, 441 (1961).

⁶⁹ Weisberg, *supra* note 3, at 234.

⁷⁰ *Id.* at 217.

⁷¹ *Id.* at 234.

⁷² 456 U.S. 63 (1982).

A. Theme

Justice White's majority opinion in *Federal Election Commission v. Democratic Senatorial Campaign Committee*⁷³ contains a particularly self-conscious methodological statement about deferential analysis. That case raised the issue whether the national senatorial campaign committee of a political party, otherwise forbidden by the Federal Election Campaign Act of 1971⁷⁴ from making expenditures on behalf of senatorial candidates, may do so as the agent of a state campaign committee allowed to make such expenditures.⁷⁵ Certain state Republican committees had designated the National Republican Senatorial Committee (NRSC) as their agent to expend their funds on behalf of Republican senatorial candidates in their states.⁷⁶ The Federal Election Commission (FEC), which has authority to enforce the statute,⁷⁷ dismissed a complaint lodged by the Democratic Senatorial Campaign Committee (DSCC). The DSCC then challenged the FEC's action in court on the ground that the statute forbade state political parties from delegating to any other partisan committee their express statutory authority to make expenditures on behalf of candidates.⁷⁸ The United States Court of Appeals for the District of Columbia Circuit, after deciding that the FEC's interpretation merited no deference,⁷⁹ concluded that the statute's "plain language" forbade such delegations.⁸⁰

The Supreme Court rejected both the methodology and the analysis of the court of appeals. According to Justice White's opinion, the proper sequence of judicial review of administrative decisions involves analysis of text and legislative history first and deference to administrative interpretation second, not vice versa. "[T]he courts are the final authorities on issues of statutory construction. They must reject administrative constructions . . . that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement."⁸¹

⁷³ 454 U.S. 27 (1981).

⁷⁴ Pub. L. No. 92-225, 86 Stat. 3 (codified as amended in scattered sections of titles 2, 5, 18, 26 & 47 of the United States Code).

⁷⁵ *Democratic Senatorial Campaign Comm.*, 454 U.S. at 28, 29.

⁷⁶ See *id.* at 30.

⁷⁷ The case involved interpretation of two sections of the Federal Election Campaign Act of 1971: 2 U.S.C. § 441a(h) (1982) (authorizing national party senatorial committees to *contribute funds* (up to a ceiling) to a senatorial candidate), and 2 U.S.C. § 441a(d)(3) (1982) (authorizing national and state party committees to *make expenditures* (up to a ceiling) on behalf of a senatorial candidate).

⁷⁸ *Democratic Senatorial Campaign Comm. v. Federal Election Comm'n*, 660 F.2d 773, 776 (D.C. Cir. 1980), *rev'd*, 454 U.S. 27 (1981).

⁷⁹ *Id.* at 776-77.

⁸⁰ *Id.* at 778-82.

⁸¹ *Democratic Senatorial Campaign Comm.*, 454 U.S. at 32 (citation omitted).

If the administrative action under review conflicts with the "plain language of the Act as well as the statutory purposes revealed by the legislative history,"⁸² the issue of deference is irrelevant: the court must invalidate the action. By the same token, if the statute expressly commands or sanctions the administrative action, inquiry into deference is unnecessary.⁸³

The Court found neither situation to be the case. While section 441a(d)(3) of the Act authorized only "[t]he national committee of a political party, or a State committee of a political party" to make expenditures on a candidate's behalf,⁸⁴ the statute did not expressly forbid these committees from designating campaign committees such as NRSC as their agents.⁸⁵ Nor did section 441a(h), by expressly authorizing committees such as NRSC to make *contributions* to candidates, evince an intention to preclude them from making campaign *expenditures* on their behalf as an agent of a state committee.⁸⁶ Some desultory foraging in off-the-cuff policy arguments, analogies, and legislative history furnished Justice White with no "plainer" indication of statutory meaning.⁸⁷

The Supreme Court also disagreed with the court of appeals in ruling that deference be accorded the FEC's interpretation of the statute.⁸⁸ Not only did the FEC's broad policymaking and enforcement powers make it "precisely the type of agency to which deference should presumptively be afforded,"⁸⁹ but its position on the issue of agency agreements had been clear, consistent, and well considered.⁹⁰ As such, the FEC's position needed only be "'sufficiently reasonable' to be accepted by a reviewing court,"⁹¹ and not "the only reasonable [reading] or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."⁹² The FEC's position cleared this relaxed hurdle with ease, as the Court once again trotted out the assertedly ambiguous statutory language along with some new arguments from analogy, policy, and purpose.⁹³

⁸² *Id.* at 31.

⁸³ *Id.* at 32-33.

⁸⁴ 2 U.S.C. § 441a(d)(3) (1982).

⁸⁵ *Democratic Senatorial Campaign Comm.*, 454 U.S. at 33.

⁸⁶ *Id.* at 35.

⁸⁷ *Id.* at 32-36.

⁸⁸ *Id.* at 37.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 39 (quoting *Train v. Natural Resources Defense Council*, 421 U.S. 60, 75 (1975)).

⁹² *Id.* at 39.

⁹³ *Id.* at 39-42.

B. Variations

As a methodological treatise on the role of deference in judicial review of administrative action, *Democratic Senatorial Campaign Committee* illustrates the prevailing judicial orthodoxy. That orthodoxy consists of three tenets:

(1) Only if the statute's "plain" meaning (as illuminated by judicial examination of its text and history) fails to solve the riddle is an inquiry into deference appropriate.⁹⁴

(2) The decision whether to grant deference depends on various attributes of the agency's legal authority and functions and of the administrative interpretation at issue.⁹⁵

(3) The consequence of granting deference is to convert the court's task from determining whether the contested interpretation is correct to determining whether it is "reasonable."⁹⁶

There are, however, divergent strains in the Court's administrative review jurisprudence. One is the notion that deference has a dimension of "weight." In *Griggs v. Duke Power Co.*,⁹⁷ for example, the Court accorded "great" deference to guidelines issued by the Equal Employ-

⁹⁴ See, e.g., *Democratic Senatorial Campaign Comm.*, 454 U.S. at 32.

⁹⁵ A partial list of the factors cited by the Court would include: (1) whether the agency construction was rendered contemporaneously with the statute's passage, see, e.g., *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933); (2) whether the agency's construction is of longstanding application, see, e.g., *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); (3) whether the agency has maintained its position consistently (even if infrequently), see, e.g., *Haig v. Agee*, 453 U.S. 280, 293 (1981); (4) whether the public has relied on the agency's interpretation, see, e.g., *Udall v. Tallman*, 380 U.S. 1, 18 (1965); (5) whether the interpretation involves a matter of "public controversy," see, e.g., *United States v. Rutherford*, 442 U.S. 544, 545 (1979); (6) whether the interpretation is based on "expertise" or involves a "technical and complex" subject, see, e.g., *Aluminum Co. of Am. v. Central Lincoln People's Util. Dist.*, 52 U.S.L.W. 4716, 4719 (U.S. June 5, 1984) (No. 82-1071); (7) whether the agency has rulemaking authority, see, e.g., *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 793 (1978); (8) whether agency action is necessary to set the statute in motion, see, e.g., *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565-66 (1980); (9) whether Congress was aware of the agency interpretation and failed to repudiate it, see, e.g., *Zemel v. Rusk*, 381 U.S. 1, 11 (1965); and (10) whether the agency has expressly addressed the application of the statute to its proposed action, see, e.g., *Investment Co. Inst. v. Camp*, 401 U.S. 617, 627-28 (1971).

⁹⁶ The Court has used various expressions for this idea. See, e.g., *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979) ("reasonably defensible"); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944) ("reasonable basis in law"); *Dobson v. Commissioner*, 320 U.S. 489, 501 (1943) ("rational basis" in the law); *Gray v. Powell*, 314 U.S. 402, 411, 413 (1941) ("just and reasoned" and "sensible exercise of judgment").

⁹⁷ 401 U.S. 424 (1971).

ment Opportunity Commission (EEOC), as "the administrative interpretation of the [Civil Rights] Act by the enforcing agency."⁹⁸ In *General Electric Co. v. Gilbert*,⁹⁹ by contrast, a divided Court refused to give "great" deference to an EEOC guideline, noting an inconsistency in the agency's position over time.¹⁰⁰ Similarly, in *United States v. Vogel Fertilizer Co.*,¹⁰¹ the Court gave "less" deference to a Treasury regulation issued under a "general," rather than "specific," grant of rulemaking authority.¹⁰²

Another apparent variation from the approach in *Democratic Senatorial Campaign Committee* is the Court's willingness in some cases to *begin* its inquiry with an examination of deference. In upholding the Federal Communication Commission's "entertainment formats" policy in *FCC v. WNCN Listeners Guild*,¹⁰³ the majority opinion launched quickly into an examination of the scope of the FCC's policymaking discretion, and concluded that its judgment is "entitled to substantial judicial deference."¹⁰⁴ Only then did the Court look to the legislative history for the insights it might yield.¹⁰⁵ Perhaps *WNCN* can be harmonized with *Democratic Senatorial Campaign Committee* by an argument that hopelessly vague statutory delegations, such as the FCC's "public interest" standard, permit a court to bypass the "plain meaning" step.¹⁰⁶ But it is not only in the context of obviously vague statutes that the Court reverses the sequence prescribed in *Democratic Senatorial Campaign Committee*. In *Batterton v. Francis*,¹⁰⁷ for example, the Court engaged in an extended discussion of deference before analyzing a statutory provision authorizing extension of welfare benefits to children deprived of support by their father's "unemployment."¹⁰⁸

Finally, the Court occasionally resolves challenges to administrative action without any discussion of deference whatsoever.¹⁰⁹ To be

⁹⁸ *Id.* at 433-34.

⁹⁹ 429 U.S. 125 (1976).

¹⁰⁰ *Id.* at 142.

¹⁰¹ 455 U.S. 16 (1982).

¹⁰² *Id.* at 24. See also *Rowan v. United States*, 452 U.S. 247, 253 (1981).

¹⁰³ 450 U.S. 582 (1981).

¹⁰⁴ *Id.* at 596.

¹⁰⁵ See *id.* at 597.

¹⁰⁶ See *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 476 (1979) (where statutory term has "no well-defined meaning or common usage," a court "customarily defers to the [agency's] regulation").

¹⁰⁷ 432 U.S. 416, 426 (1977).

¹⁰⁸ *Id.* at 426-27. See also *Herweg v. Ray*, 455 U.S. 265, 266 (1982); *Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981). For an example from a different context, see *Fulman v. United States*, 434 U.S. 528 (1977) (tax code).

¹⁰⁹ See, e.g., *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981) (where Congress uses terms with settled meanings, the Court must infer that Congress intended those meanings); *Aaron v. SEC*, 446 U.S. 680, 699-700 (1980) (in absence of conflict be-

sure, the orthodox rule requires this result if the statute's "plain meaning" disposes of the controversy. But the relevant statutory meaning in such cases is often—to judge by the intensity of the dissents or one's own intuition—anything but "plain." In *FCC v. Midwest Video Corp.*,¹¹⁰ for instance, the Court overturned a rule requiring certain cable television systems to provide access channels, without so much as a mention of the deference with which the Court was so lavish in *WNCN*. In so doing the Court relied on what the dissent correctly identified as incompletely quoted language from a circular definition in the nonoperational introduction to the Communications Act.¹¹¹

C. Puzzles

There is, of course, no reason to expect greater consistency in the Court's treatment of administrative interpretations than in its other actions.¹¹² Indeed, a legal realist might dismiss all this judicial talk of deference as so much justificatory rhetoric. According to this account, courts always independently decide how they think a statute should be read. If that interpretation coincides with the position of the administering agency, the court may base the outcome on deference in order to shift responsibility for the policy judgment onto someone else who can bear the blame for its unfavorable consequences or political rejection.¹¹³

Undoubtedly, deference sometimes serves this function. But I cannot accept a view of deference as nothing other than justificatory ritual. Indeed, if deference serves no purpose other than to obscure the Court's implementation of its own values, debate over whether and when deference is appropriate becomes pointless. I accept the Court's characterizations of deference as both a factor in the decisionmaking process and an explanation for its outcome. This acceptance invites the question of exactly how deference affects the Court's interpretive process. What do courts do when they "defer" to an agency's construction? How, if at

tween plain meanings and legislative history, words of the statute prevail); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978) (ordinary meaning of statute's plain language governs).

¹¹⁰ 440 U.S. 689 (1979).

¹¹¹ See *id.* at 710.

¹¹² See Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 811-31 (1982).

¹¹³ See Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 15 (1984) ("Judicial rhetoric about deference to the 'political branches' and to administrative expertise, of course, is commonplace. Such talk is a venerable aspect of the courts' protective coloration, and should not be taken too seriously."); see also Gellhorn & Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 780 (1975); Rabin, *Administrative Law in Transition: A Discipline in Search of an Organizing Principle*, 72 NW. U.L. REV. 120, 130 (1977).

all, does deference alter the manner in which courts conduct their inquiry or reach their decision?

Courts and commentators who speak the language of deference tend not to confront these questions squarely. They use the term "deference" and others like it¹¹⁴ as though such terms were self-defining. But the idea has several plausible meanings. At one extreme, deference might mean nothing more than "respectful or courteous regard."¹¹⁵ Perhaps this is what Justice Jackson meant in his famous passage on judicial review in *Skidmore v. Swift & Co.*¹¹⁶ Answering his own question of "what, if any, deference courts should pay"¹¹⁷ to interpretive bulletins of the Federal Wage and Hour Administrator, Jackson observed, "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."¹¹⁸ Of course, the "weight" assigned to *any* advocate's position is presumably dependent upon the "thoroughness evident in its consideration" and the "validity of its reasoning." Deference in this sense is no more than "courteous regard." The argument's *pedigree* adds nothing to the persuasive force inherent in its reasoning.¹¹⁹

At the other extreme, "deference" might mean that an administrative interpretation is decisive as to the statute's meaning. An alternative dictionary definition of "submission or yielding to the judgment . . . of another"¹²⁰ has this connotation. Perhaps this is what Justice Jackson meant by "power to control."¹²¹ An administrative interpretation "controls" a court when the court "submits" to it. Submission implies that no countervailing consideration can ever overturn the administrative position.

Courts generally use "deference" in an intermediate sense, be-

¹¹⁴ Such terms include "weight," *see, e.g.*, *Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981), and "respect," *see, e.g.*, *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

¹¹⁵ *See* AMERICAN COLLEGE DICTIONARY 317 (1952).

¹¹⁶ 323 U.S. 134 (1944).

¹¹⁷ *Id.* at 139.

¹¹⁸ *Id.* at 140.

¹¹⁹ A second weak sense of "deference" that need not delay us relates solely to the sequence of decision: a court defers to an agency by permitting it to "go first." Deference in this sense is addressed under the rubrics of primary jurisdiction and exhaustion of remedies. For present purposes, I assume that the agency has in fact already taken a position on the interpretive question before the court. *See* sources cited *infra* notes 134-35.

¹²⁰ *See* AMERICAN COLLEGE DICTIONARY 317 (1952).

¹²¹ *Skidmore*, 323 U.S. at 140. Elsewhere, Jackson described the Administrator's interpretation as "not controlling upon the courts by reason of their authority," *id.*, and as not "conclusive" or "bind[ing]," *id.* at 139.

tween "courteous regard" and "submission." The fact that a particular interpretation bears the administering agency's imprimatur counts in its favor, but not decisively. Courts exercise independent judgment on the meaning of a statute, but in so doing, they give a special recognition to the agency's views. Thus, courts will accept any "reasonable" or "permissible" administrative construction, rather than search for the (only) "correct" interpretation.¹²² Judicial proclivity to recognize relative weights or degrees of deference indicates this intermediate view, since "submission" (in the sense of substituting the agency's view for the court's judgment) is a one-dimensional concept.

But how does the fact of administrative sponsorship operate upon the Court's decisionmaking process? A court might simply treat it as an additional datum to be tossed into the balance along with other scraps of evidence for and against the competing arguments. Judicial opinions invoking deference seemingly as an afterthought suggest this treatment.¹²³ But courts do not explicitly balance agency sponsorship against competing arguments as they so often balance interests in other contexts.¹²⁴ Nor is it evident how such an additive approach would co-exist with the essentially sequential method of analysis characteristic of the independent mode.

Deference might alternatively be understood as a kind of "evidentiary" rule—a filter through which a court views conventional evidence or arguments about statutory meaning. A deferential filter might, for instance, systematically screen out evidence of a certain type, such as postenactment legislative statements or analogies drawn from other statutes. But there is no a priori reason to believe that any particular category of evidence or argument will support or undercut an administrator's position. Nor is there any direct evidence that deferential courts fail to examine precisely the same sorts of material that courts examine in the independent mode.¹²⁵

Perhaps it is more plausible to think of deference as a lens. Deferential courts, while examining the same evidence as independent courts, might see it in a new light. Judges might be inclined to trust adminis-

¹²² See, e.g., *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 484 (1979) (upholding agency's reading of statute, though "not the only possible one"); *Fulman v. United States*, 434 U.S. 528, 534, 536 (1978) (accepting "reasonable" agency position, despite fact that competing interpretation had "logical force").

¹²³ See, e.g., *American Paper Inst. v. American Elec. Power Serv. Corp.*, 461 U.S. 402, 422-23 (1983); *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 83 (1980).

¹²⁴ See, e.g., *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (determining requirements of procedural due process).

¹²⁵ An example is *Democratic Senatorial Campaign Comm.*, where the Court examined—not once, but twice—the text, legislative history, and statutory purpose. *Democratic Senatorial Campaign Comm.*, 454 U.S. at 32-36, 39-42.

trative interpretations of statutes more than other interpretations. Perhaps this is what courts mean when they defer to administrative "expertise"¹²⁶—that agencies are more expert than laypeople at extracting meaning from ambiguous statutory words or equivocal statements by legislators. Similarly, "contemporaneous constructions"¹²⁷ may impress judges for the same reason that many people find eyewitness accounts more reliable than subsequent reconstructions.

Aside from such ambiguous and occasional hints, however, judicial opinions offer little direct support for the "lens" analogy. The manner in which deferential courts approach legislative materials is not obviously different from that characteristic of independent analysis. The lens model suggests, for instance, that courts would invoke "deference" to resolve ambiguities about particular inputs into the interpretive process—whether Congress intended to use words in an "ordinary" or technical sense, or what significance to attach to the deletion of a bill's provision. But courts ordinarily do not. Nominally, at least, they "defer" to the agency's overall interpretation, not the component judgments upon which the ultimate choice rests. Courts respond to an agency's suggested interpretation with greater confidence than they do to another party's proposal. Deference, in effect, reduces the level of confidence necessary for a court to uphold an interpretation.

As the Supreme Court explained in according deference to a Treasury regulation in *Fulman v. United States*,¹²⁸ the agency's position "must be sustained unless unreasonable and plainly inconsistent with the revenue statutes."¹²⁹ Conceding that the taxpayer's position had "logical force"¹³⁰ and "might well prevail"¹³¹ in the absence of a Treasury regulation, the majority found the administrative interpretation sufficiently "reasonable" to be sustained.¹³² In other words, the Court's duty is no longer to impose upon the intractable material of statutory language and legislative history a uniquely correct interpretation, but merely to determine whether the agency's proffered construction meets some threshold level of acceptability.

¹²⁶ See, e.g., *Charles D. Bonanno Linen Serv. v. NLRB*, 454 U.S. 404, 413 (1982); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980).

¹²⁷ See, e.g., *American Paper Inst. v. American Elec. Power Serv. Corp.*, 461 U.S. 402, 422 (1983); *Watt v. Alaska*, 451 U.S. 259, 272-73 (1981); *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

¹²⁸ 434 U.S. 528 (1978).

¹²⁹ *Id.* at 533 (quoting *Commissioner v. South Tex. Lumber Co.*, 333 U.S. 496, 501 (1948)).

¹³⁰ *Id.* at 534.

¹³¹ *Id.* at 536.

¹³² *Id.*

III. STRUCTURING THE INQUIRY INTO INTERPRETIVE RESPONSIBILITY

The choice between deferential and independent review is really about the allocation of interpretive responsibility between administrative agencies and courts.¹³³ Those two allocational alternatives lie in the midsection of a spectrum of possible assignments, ranging from exclusive agency interpretation to exclusive judicial interpretation. This Article does not attempt to explore the two poles of this spectrum. The question when a court should interpret a statute without first giving an administrative agency an opportunity to express its opinion is addressed by the doctrines of "exhaustion of remedies"¹³⁴ and "primary jurisdiction,"¹³⁵ whose intricacies I do not attempt to disentangle here. Nor do I dwell on the opposite extreme. While courts can theoretically confer exclusive interpretive power on agencies by declining jurisdiction, they rarely do so in practice. To overcome the well-established presumption in favor of judicial review¹³⁶ would require either a clear legislative statement or else other exceptional circumstances.¹³⁷

Rather than address these extremes, I assume a situation in which an agency's opinion about the meaning of a statute, formulated in the course of carrying out its duties as it defines them, has been challenged in a petition for judicial review seeking to overturn the agency's action. As a practical matter, then, a reviewing court must choose between independent interpretation and deferential interpretation. In making that choice, courts might resort either to the command of some authoritarian

¹³³ See McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1166 (1977).

¹³⁴ See generally Berger, *Exhaustion of Administrative Remedies*, 48 YALE L.J. 981 (1939); Fuchs, *Prerequisites to Judicial Review of Administrative Agency Action*, 51 IND. L.J. 817, 859-911 (1976).

¹³⁵ See generally Botein, *Primary Jurisdiction: The Need for Better Court/Agency Interaction*, 29 RUTGERS L. REV. 867 (1976); Convisser, *Primary Jurisdiction: The Rule and Its Rationalizations*, 65 YALE L.J. 315 (1956).

¹³⁶ See, e.g., *Barlow v. Collins*, 397 U.S. 159, 166-67 (1970); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99, 105 (1977).

¹³⁷ See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967); *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962). Each of these cases was overruled on other grounds by *Califano v. Sanders*, 430 U.S. 99, 105 (1977); see also Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 STAN. L. REV. 905, 905-07 (1975) (discussing rare instance of an explicit congressional barrier to judicial review of administrative action); Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion"*, 82 HARV. L. REV. 367, 370 (1968) ("committed to agency discretion" doctrine, codified in Administrative Procedure Act, expresses a general presumption against review "contrary to the general presumption for review").

principle derived from the positive law or to the results of an instrumental calculus.

A. *Positive Law*

The United States Constitution might once have been understood to settle the question in favor of independent review. After all, the Constitution clearly vests the "judicial power" in courts, not administrative agencies.¹³⁸ If it is, as Chief Justice Marshall declared, "emphatically the province and duty of the judicial department to say what the law is,"¹³⁹ article III would seem to dictate independent judicial review of all statutes. Deferential review would effectively delegate to a nonjudicial agency a power vested in the courts by the founders, thus violating the maxim *delegata potestas non potest delegari*.¹⁴⁰

Modern administrative law has not, of course, worked out that way. Nor is there any necessity that it should. As Henry Monaghan has convincingly shown, courts do not necessarily abdicate a Marshallian duty to "say what the law is" by deferring to agencies.¹⁴¹ Courts retain the authority to control administrative abuses of power; deferential review simply recasts the question of "law" as whether the agency's interpretation is "reasonable."

In an earlier era we might have resisted granting deference to an agency's statutory interpretations for a different reason. The power to choose freely among "reasonable" interpretations is, in essence, the power to make law. And since article I vests the "legislative power" exclusively in Congress,¹⁴² one might argue that any bestowal of that power upon agencies would be improper. But, again, history has overwhelmed logic. In an age that freely accepts explicit delegations of broad rulemaking authority,¹⁴³ the degree of lawmaking discretion implicit in a deferential standard of review will scarcely raise an eyebrow. So long as that delegation, like more explicit ones, is circumscribed by substantive standards and procedural regularities, no constitutional barrier will arise.¹⁴⁴

¹³⁸ U.S. CONST. art. III, § 1.

¹³⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

¹⁴⁰ A delegated power cannot be delegated.

¹⁴¹ Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 27-28 (1983).

¹⁴² U.S. CONST. art. I, § 1.

¹⁴³ See, e.g., Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L.J. 1, 7-17 (1982); Schwartz, *Of Administrators and Philosopher-Kings: The Republic, the Laws, and Delegations of Power*, 72 NW. U.L. REV. 443 (1977).

¹⁴⁴ A growing number of commentators have called for revival of the delegation

Statutory law itself is a source of positive law that may offer courts guidance in determining the correct mode of statutory interpretation. Indeed, as the Court of Appeals for the District of Columbia Circuit recently stated, "The extent to which courts should defer to agency interpretations of law is ultimately 'a function of Congress' intent on the subject as revealed in the particular statutory scheme at issue.'" ¹⁴⁵ The courts must, in other words, follow the legislature's "interpretative intent" ¹⁴⁶ as much as its substantive intent. In some instances courts may find explicit evidence of a legislative intention concerning the choice of interpretive method. In *Ford Motor Credit Co. v. Milhollin*, ¹⁴⁷ for instance, the Supreme Court granted "a high degree of deference" ¹⁴⁸ to the Federal Reserve Board's interpretation of a provision in the Truth in Lending Act. Among other things, the Court relied on

language in the legislative history [that] evinces a decided preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation. Courts should honor that congressional choice. Thus, while not abdicating their ultimate judicial responsibility to determine the law, judges ought to refrain from substituting their own interstitial lawmaking for that of the [agency], so long as the latter's lawmaking is not irrational. ¹⁴⁹

But clear evidence of interpretive intent such as the Court claimed to have found in *Milhollin* is a rarity. Congress seldom provides explicit guidance, even in legislative history, on how it wishes courts to interpret statutory language. Statutes that speak at all to the issue generally incorporate one or more of the elastic formulations enshrined in section 706 of the Administrative Procedure Act, directing reviewing courts to "decide all relevant questions of law, interpret . . . statutory provisions, . . . [and] hold unlawful . . . agency actions . . . found to be . . . arbitrary and capricious, an abuse of discretion, or otherwise

doctrine. See, e.g., J. ELY, *DEMOCRACY AND DISTRUST* 131-34 (1981); McGowan, *supra* note 133, at 1127-30; Wright, *Beyond Discretionary Justice* (Book Review), 81 *YALE L.J.* 575, 582-87 (1972). But even their proposals would probably leave untouched the range of administrative lawmaking power implicit in deferential review.

¹⁴⁵ *Process Gas Consumers Group v. United States Dep't of Agriculture*, 694 F.2d 778, 791 (D.C. Cir. 1982) (en banc) (quoting *Constance v. Secretary of Health & Human Servs.*, 672 F.2d 990, 995 (1st Cir. 1982)), *cert. denied*, 461 U.S. 905 (1983). See also Monaghan, *supra* note 141, at 31 n.184.

¹⁴⁶ Brest, *supra* note 43, at 215-16. Although Brest is interested in constitutional interpretation, he speaks generically of an "adopter's" interpretive intent.

¹⁴⁷ 444 U.S. 555 (1980).

¹⁴⁸ *Id.* at 557.

¹⁴⁹ *Id.* at 568 (citations omitted).

not in accordance with law . . . in excess of statutory jurisdiction, authority or limitations, or short of statutory right.”¹⁵⁰ The phrases “decide all relevant questions of law” and “interpret statutory provisions” suggest an independent mode of review for all questions of statutory interpretation. But that conclusion is not absolutely compelled. One can “decide” a question of law while extending deference in most or all of the senses discussed in the previous section. The “question of law” then becomes whether the agency’s interpretation is reasonable.¹⁵¹ And the simultaneous availability of a concededly deferential standard like “arbitrary and capricious” leaves courts with an essentially unguided choice.

B. *A Utilitarian Approach*

Absent dispositive guidance from the positive law, courts must resort to jurisprudential principles for choosing between independent and deferential review. One could refer the question to what Ronald Dworkin has called an “ideal” jurisprudential argument derived from a system of absolute rights or fundamental values.¹⁵² An example of such an argument is Jerry Mashaw’s effort to identify the “dignitary values” embodied in our liberal-democratic traditions.¹⁵³ But Mashaw’s own analysis suggests the futility of invoking fundamental values or absolute rights to settle the allocation of interpretive authority between courts and agencies. The few process values that Mashaw finds worthy of recognition as absolute rights—equality, comprehensibility, and privacy¹⁵⁴—are too crude to support a choice between independent and deferential review. Equality requires only that the mode of review selected be applied without regard to the litigants’ identity. Comprehensibility demands only that the interpreter—whomever it may be—articulate reasons for its decision. And neither deferential nor independent interpretation seem to pose a threat to individual privacy.

Mashaw identifies other values plausibly implicated by the choice of decisionmaking structures, such as participation, revelation, and fraternity.¹⁵⁵ But he finds them to be too ambiguous, derivative, or internally contradictory to qualify for treatment as absolute rights. At most, these values deserve recognition in some sort of “prudential” balancing

¹⁵⁰ 5 U.S.C. § 706 (1982).

¹⁵¹ See Monaghan, *supra* note 141, at 26-27.

¹⁵² R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 232 (1978).

¹⁵³ Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U.L. REV. 885 (1981).

¹⁵⁴ *Id.* at 924-25.

¹⁵⁵ *Id.* at 902-06.

of interests.¹⁵⁶

An explicitly utilitarian analysis seems far better suited to the task of engineering our social apparatus for interpreting statutes. That activity requires more finely calibrated tools than "fundamental values" or "absolute rights." A utilitarian calculus, by aggregating and comparing the costs and benefits of alternative modes, can better perform that function. Viewing interpretation as a process with the potential to enhance or diminish social welfare, courts should ask which allocation will produce the highest quality outputs for the lowest cost.

1. Cost

Statutory interpretation is a costly process involving research, analysis, deliberation, and explanation. Other things being equal, we should prefer a method of interpretation that minimizes these costs. There are two reasons why deferential review might consume fewer social resources than independent review. First, a deferential posture may simplify the reviewing court's task. Instead of determining which of two or more competing interpretations is the correct one, it asks only whether the agency's interpretation is "reasonable." Thus, a deferential court may examine fewer options than an independent court. Furthermore, the court's inquiry into those options may be less probing since it will not be fully responsible for the ultimate interpretation.¹⁵⁷ There is, however, little direct support for this hypothesis in reported opinions since, as indicated earlier, courts do not explicitly utilize deference as an "evidentiary" rule.¹⁵⁸ Most deferential courts seem to examine the same range of extrinsic sources as do independent courts. The cost saving attributable to this effect, then, is probably quite modest.

Deferential review may have a more substantial effect on interpretation costs by discouraging petitions for judicial review in the first place. By raising the probability that an agency position will be sustained on appeal, a rule of deference will reduce the value of a judicial appeal to persons adversely affected by an agency's interpretation. Assuming that the rule of deference is clear enough to be correctly understood by potential litigants, it should marginally reduce the volume of petitions filed and therefore the number of review petitions heard. The precise magnitude of such an effect is impossible to gauge, however,

¹⁵⁶ *Id.* at 921-22.

¹⁵⁷ *Cf. Cox, supra* note 9, at 1472-73 (expressing concern that if a court is not bound by legislative intent, it will "break off the search for legislative intent earlier and more often").

¹⁵⁸ *See supra* text accompanying notes 125-27.

since the total cost of interpretive activities depends on other variables. A reduction in cases filed might simply decrease the number of cases settled without affecting the number litigated.¹⁵⁹ Also, anticipating a more hostile reception at the judicial stage, private parties might invest more heavily at the administrative stage. As a general matter, however, it seems a safe assumption that a presumption of deferential review will have a favorable impact on interpretation costs.

2. Quality

To make qualitative comparisons among the products of different interpreters is much more difficult. One must first specify the "output" of the interpretive process. The proximate output is an "interpretation"—that is, a statement made by a particular speaker, having a particular content and form. Like other writings,¹⁶⁰ a statutory interpretation is a form of communication. Consequently, an intermediate output is the understanding that it produces in the minds of its audience. Since statutory interpretation is a form of *legal* communication, moreover, its ultimate output is the change of behavior induced by that understanding.¹⁶¹

Second, one must specify standards for the evaluation of those outputs. The choice of evaluative criteria depends on one's underlying theory of statutory interpretation. One who views interpretation as lawfinding will judge an interpretation by its fidelity to the existing "law," as somehow discoverable by examining such extrinsic sources as the textual meaning "intended" by the enactor or "understood" by the audience. One who views interpretation as lawmaking, by contrast, will judge an interpretation by its fidelity to the interpreter's values, or perhaps the evaluator's values.

As *American Tobacco Co. v. Patterson*¹⁶² illustrates, courts have not cast their lot exclusively with either conception, but rather have adopted a composite approach that incorporates both. Consequently, our quality measure must incorporate both conceptions of interpretation. In order to allocate interpretive responsibility between agencies and courts, one must assess their relative abilities to perform both functions.

¹⁵⁹ See generally Priest & Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

¹⁶⁰ See Abraham, *supra* note 6.

¹⁶¹ See Fiss, *supra* note 5, at 750 (law-interpreters seek to be "efficacious").

¹⁶² 456 U.S. 63 (1982); see *supra* text accompanying notes 68 & 69.

IV. INTERPRETIVE COMPETENCE: INTERPRETATION AS LAWFINDING

Conventional wisdom views courts as superior to agencies at lawfinding. James Landis argued, for example, that courts are "expert" at the business of interpreting statutes.¹⁶³ Here, as elsewhere, however,¹⁶⁴ claims of expertise tend to obscure more than illuminate. A claim of interpretive expertise might be based on any one of three possible grounds: (1) access to greater knowledge or evidence of statutory meaning; (2) an interpretive process better suited to yielding correct solutions; or (3) motivation by a set of preferences more conducive to accurate identification of statutory meaning. This section examines these three claims in order.

A. *Knowledge*

1. The Enactor's Intent

Since agencies and courts have equal access to statutory text, claims of superior knowledge must rest upon those secondary sources of meaning to which lawfinders look in their search for the authoritative meaning of the text. The most important of these secondary sources is the enactor's "intention." Since the enactor of a statute is a corporate body, its intent is presumably a composite of the intentions of some or all of its constituent members.¹⁶⁵ A search for legislative intent, then, would require two kinds of knowledge: knowledge about the intentions of individual legislators, and knowledge about the conventions for aggregating those individual intentions into a corporate intent.

As discussed earlier,¹⁶⁶ judicial methods of unearthing legislative intent are primitive and naive given contemporary standards of social science. Courts rely almost exclusively on the recorded public statements of immediate participants in the legislative process, and almost never probe into legislators' unspoken motives.¹⁶⁷ When called upon to

¹⁶³ J. LANDIS, *THE ADMINISTRATIVE PROCESS* 154-55 (1938); see also *Hardin v. Kentucky Utils. Co.*, 390 U.S. 1, 14 (1968) (Harlan, J., dissenting) (stating that the meaning of a statutory term "presents issues on which courts, and not [agencies] are relatively more expert").

¹⁶⁴ See, e.g., Freedman, *Expertise and the Administrative Process*, 28 AD. L. REV. 363 (1976). For a ringing indictment of one agency's supposed expertise, see Getman & Goldberg, *The Myth of Labor Board Expertise*, 39 U. CHI. L. REV. 681 (1972).

¹⁶⁵ See Mac Callum, *Legislative Intent*, 75 YALE L.J. 754, 767-68 (1966).

¹⁶⁶ See *supra* text accompanying notes 52-62.

¹⁶⁷ See Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 542-44 (1947); Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151,

aggregate individual statements into a composite corporate intent, moreover, courts rely on an "agency" model¹⁶⁸ that assumes that formal rules of legislative organization accurately represent the true process.

Assuming that judges, as worldly citizens, understand legislative politics as well as social scientists do,¹⁶⁹ how can we account for their idealized model of legislation? One common explanation is limited judicial capacity. As Richard Posner argues, "Courts do not have the research tools that they would need to discover the motives behind legislation."¹⁷⁰ By this account, agencies would seem to have a distinct advantage over courts. In addition to equal access to the published sources consulted by courts, agencies also possess many of the "tools" that Posner claims courts lack—including permanent investigative staffs, specific analytical skills, and political sophistication.

Agency decisionmakers often have direct knowledge of the circumstances surrounding enactment of the statutes that they administer. Such knowledge may be derived from personal participation in that process¹⁷¹ or from close and frequent contact with other participants. To the extent that lawfinding entails an accurate reconstruction of the enactors' actual intentions, then, we should conclude that administrative agencies will interpret statutes more accurately than courts.

2. Audience Understanding

The goal of honoring the enactor's intention must be balanced, however, with the goal of avoiding unfair surprise to those whose interests are directly affected by the legislation.¹⁷² As Lon Fuller has argued, the "inner morality" of law requires that it be comprehensible to those whose conduct it regulates.¹⁷³ A statute whose meaning can be ascertained only by reference to unpublished, unreported, or unstated

251 (1981). On the confusion of courts over whether to examine legislative "motive" in the constitutional context, see Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

¹⁶⁸ For a discussion of the advantages and limitations of the "agency" model, see Mac Callum, *supra* note 165, at 782-84.

¹⁶⁹ There is ample evidence to support this assumption. See, e.g., Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CALIF. L. REV. 200, 209-10 (1984).

¹⁷⁰ Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 272 (1982); see also Mac Callum, *supra* note 165, at 762-63 (it is too "tedious" for courts to look behind legislators' spoken words for their true meaning).

¹⁷¹ See, e.g., *Howe v. Smith*, 452 U.S. 473, 485-87 (1981).

¹⁷² See R. DICKERSON, *supra* note 41, at 134-35.

¹⁷³ L. FULLER, *THE MORALITY OF LAW* 63-65 (1969).

legislative preferences cannot be fully comprehensible to its audience.

Nor would such a statute serve the related goal of encouraging legislative candor. As Posner argues, limiting the judicial search for legislative intent "to public materials offsets to some extent the distortions that voter ignorance introduces into the operation of a democratic political system."¹⁷⁴ By refusing to credit the unspoken motives of legislators, courts encourage lawmakers to spread their genuine views on the public record, where constituents and opponents can see them.

As between agency and court, it is likely that the agency is again in a better position to elucidate the understanding of a statute's audience. First, the administering agency is itself a member of the legislative audience and, indeed, is usually its most important member. The statutes whose interpretation is the subject of this Article are essentially instructions from legislatures to agencies.¹⁷⁵ Because such statutes confer powers and impose duties and constraints on an agency, that agency's interpretations are entitled to special respect.

The trouble with this line of argument is that few statutes are addressed *exclusively* to an agency. Unless Congress intended to exclude judicial review,¹⁷⁶ one must presume that the courts are also among its intended audience. Why, then, should a court's genuinely held belief about a statute's meaning merit less respect? One response is that no matter how vigorously courts may assert "partnership" status,¹⁷⁷ agencies empowered by statute to promulgate rules, adjudicate disputes, issue licenses, distribute benefits, or render authoritative advisory opinions may fairly claim to be the senior partners.

Another objection to the agency-as-audience argument is that most regulatory statutes' audiences also include private parties whose conduct or status is subject to regulation by the administering agency.¹⁷⁸

¹⁷⁴ Posner, *supra* note 170, at 273.

¹⁷⁵ See Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 167 ("Most significant legislation passed by Congress today is not addressed to the citizenry, but to supposedly expert administrative decisionmakers . . .").

¹⁷⁶ See *Southern Ry. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 454 (1978); *Morris v. Gressette*, 432 U.S. 491, 501 (1977); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99, 105 (1977).

¹⁷⁷ See, e.g., *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851-52 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); *ABA National Institute Proceedings—Panel IV: Judicial Review of Agency Action*, 26 AD. L. REV. 545, 576 (1974) (statement of Judge James L. Oakes).

¹⁷⁸ In Professor Dan-Cohen's terms, the "acoustic separation" between "decision rules" (addressed to officials) and "conduct rules" (addressed to the regulated public) is necessarily imperfect. Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 627, 635 n.21 (1984).

The logic of Fuller's argument that law must be comprehensible to those subject to it applies with greatest force to these private parties. Since they have no authoritative interpretive power, their legitimate expectations must be protected from the agencies and courts possessing such power.

Still, it is uncertain that courts are better equipped than agencies to know what those expectations are. Courts have contact with those affected by a particular statute sporadically and selectively. Administering agencies customarily deal with them repeatedly. Organized or powerful interest groups lobby agency officials, make frequent appearances in official proceedings, and even supply agencies with members and staff. Even unorganized constituents affect the agency, either directly through myriad informal contacts or indirectly through their elected or self-appointed representatives. Whether the legislature intended to speak in "ordinary" or in technical language, one would generally expect the administering agency to have better insight than the courts into the understanding of those affected by the statute.

3. Behavioral Consequences

Even under the lawfinding model, a correct identification of the enactor's intention (as may reasonably be perceived by the statute's audience) does not usually complete the interpretive process. Rarely will the enactor have had in mind the specific situation confronted by the interpreter. More likely, the enactor envisioned some general condition or idea, or perhaps some specific ideals of a more general condition.¹⁷⁹ The lawfinder must then take a final and more avowedly creative step of determining which "interpretation" of the statute will produce that general condition. To do this, the interpreter needs knowledge about the behavioral consequences of adopting particular interpretations.

Adopting one possible interpretation of a statute over another may have profound implications for the behavior of persons subject to the statute. In *Schweiker v. Gray Panthers*,¹⁸⁰ for example, the Secretary of Health and Human Services had interpreted the Medicaid statute to permit states to include a portion of a spouse's income in determining certain applicants' eligibility for benefits. Presumably the Secretary had to weigh carefully the consequences of making that decision. Allowing inclusion of spousal income might reasonably have been expected to reduce federal and state Medicaid payments by limiting the number of

¹⁷⁹ See, e.g., Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 627 (1958); Landis, *supra* note 4, at 889.

¹⁸⁰ 453 U.S. 34 (1981).

persons qualifying for benefits. But it might also have discouraged spouses from working or encouraged couples to separate or to conceal income. Not only would these side effects be unfortunate in their own right, but they might impose greater burdens on the Treasury by increasing enforcement costs or expanding eligibility for Medicaid and other welfare programs.

The Secretary of Health and Human Services should be better equipped than a court to predict the nature, magnitude, and incidence of these consequences. She heads a staff of skilled investigators and expert analysts, has the resources to hire outside experts, and has close and regular contacts with representatives of persons and groups likely to be affected by the decision—such as the state Medicaid agencies, the various social service agencies, and health care providers.¹⁸¹ Her department may, in addition, have direct experience with analogous situations from which it can infer the consequences of a decision. Compared to agencies, courts possess only limited investigative resources and analytical faculties. They must rely, therefore, on less accurate estimates of consequential impacts.¹⁸² Thus, agencies seem to have greater access to the knowledge necessary to understand what is intended by statutory enactors.

B. *Interpretive Process*

Even though courts may be less knowledgeable than agencies about the factors behind statutory enactment and interpretation, they may still generate better interpretive decisions by virtue of a superior "technology" of production. Defenders of independent review might argue that the adversarial process of appellate argument is the best means of ascertaining the intention of an enacting legislature or the understanding of the statute's audience. Each advocate, after all, has an incentive to search for evidence supporting her preferred interpretation and discrediting alternative interpretations. This contest is more likely to result in "the truth" than is a nonadversarial investigation by a bureaucratic entity, or so the argument goes.

Of course, agencies also often rely on an adversarial process to generate the foundation for making interpretive judgments. There

¹⁸¹ See generally H. KAUFMAN, ³ADMINISTRATIVE FEEDBACK (1973) (a study of nine federal agencies demonstrates an informational flow adequate to determine subordinate noncompliance).

¹⁸² For extended attempts to demonstrate judicial incapacity to predict policy consequences in particular contexts, see D. HORWITZ, *THE COURTS AND SOCIAL POLICY* (1977); R.S. MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT* (1983).

seems little basis to assume, on process grounds at least, that the Labor Act is more likely to be misinterpreted by the NLRB in an unfair labor practice case than by a court of appeals in an enforcement action.¹⁸³ At most, this line of argument suggests that courts should give less deference to administrative interpretations rendered in an informal proceeding such as rulemaking than to interpretations rendered in a formal adjudication.

But even this limitation is unwarranted. Statutory interpretation is not a strictly adversarial process even in the courts. In searching for legislative meaning, judges and their clerks are not restricted to materials presented by the parties. Nor should they be, since statutory interpretation has precedential effects extending far beyond the immediate litigants. Indeed, legislatures often create administrative agencies to champion interests that would not find adequate expression in a traditional adversarial process.¹⁸⁴ When such an agency proceeds to make policy in a more encompassing gesture, through a device like rulemaking, the breadth of its inquiry may compensate for any deficiencies in its depth.¹⁸⁵ In addition, the hierarchical process of internal review within a bureaucratic decisionmaking process can provide much of the discipline afforded by adversarial review. Consequently, courts do not generally accord greater weight to an agency's interpretation, simply because the interpretation resulted from a more formal interpretive process.

C. *Motive*

The strongest argument for those who assert the superiority of courts as lawfinders is that judges are less likely than agencies to allow personal bias or self-interest to distort their reading of the enactor's intent.¹⁸⁶ Landes and Posner argue, for example, that courts (the "independent judiciary") have a stronger incentive than agencies (the "dependent judiciary") to honor the enacting legislature's intent.¹⁸⁷ Headed by political appointees with short tenure in office and staffed

¹⁸³ See Krent, *Avoidance and Its Costs: Application of the Clear Statement Rule to Supreme Court Review of NLRB Cases*, 15 CONN. L. REV. 209, 223 (1983).

¹⁸⁴ See, e.g., W. GELLHORN, *FEDERAL ADMINISTRATIVE AGENCIES* 5-14 (1941).

¹⁸⁵ Courts often claim to accord especially great deference to agency rulemaking authority. See, e.g., *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 793 (1978); *Batterton v. Francis*, 432 U.S. 416, 425-26 (1977).

¹⁸⁶ See, e.g., G. CALABRESI, *supra* note 8, at 110-11; Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486, 493 (1982).

¹⁸⁷ Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 879, 887-88 (1975).

by bureaucrats interested in budgetary expansion,¹⁸⁸ agencies are likely to be much more responsive to the will of the current legislature than to the will of some previous enacting legislature. Only the current legislature, after all, can punish or reward them.¹⁸⁹

Although this last point can be made about courts as well,¹⁹⁰ Landes and Posner have argued that legislatures punish and reward courts and agencies differently because they expect the two to serve distinct functions. While they expect agencies to respond to current policy preferences, legislators want courts to follow the intent of the enacting legislature. By faithfully enforcing legislative "deals" according to the intention of the contracting "parties," courts enhance the durability of those deals and hence the value of all legislators' votes.¹⁹¹ For this reason, it is important for legislators to preserve the integrity of the independent judiciary. If current legislators disagree with a position taken by their predecessors in enacting a particular statute, therefore, they would prefer to see that condition corrected by statutory amendment rather than by an unfaithful judicial reading of the statute, because such judicial lawmaking impairs the value of the courts as enforcers of future legislative enactments. When a legislature entrusts implementation of a statute to an agency, by contrast, it insures that the "deal" will remain flexible and adaptive to changing political fashions.

Thus, according to this theory, courts and agencies will interpret old statutes differently. If we value faithfulness to the enactor's intention, we should prefer interpretation by courts rather than agencies. Even if one accepts the premise of this argument, however, it does not clearly resolve our paradigm case where a legislature entrusted the administration of a statute to an agency, subject to judicial review. Will a reviewing court best effectuate legislative intent by enforcing its own view of the enacting legislature's substantive intent, or by leaving undisturbed an agency interpretation, presumably responsive to the current majority?

The motive argument in favor of judicial interpretation is further

¹⁸⁸ See, e.g., R. ARNOLD, CONGRESS AND THE BUREAUCRACY: A THEORY OF INFLUENCE 21 (1979). But see Lindsay, *A Theory of Government Enterprise*, 84 J. POL. ECON. 1061, 1063 (1976) (claiming that the notion that government managers are simply out to expand their budgets is "implausible").

¹⁸⁹ See, e.g., Weingast & Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983); Weingast & Moran, *The Myth of Runaway Bureaucracy: The Case of the FTC*, 6 REGULATION, May-June 1982, at 33.

¹⁹⁰ Indeed, Richard Posner has done so. R. POSNER, *THE ECONOMIC ANALYSIS OF LAW* 416 (1977). See also Michelman, *Constitutions, Statutes, and the Theory of Efficient Adjudication*, 9 J. LEGAL STUD. 431, 441-42 (1980).

¹⁹¹ Landes & Posner, *supra* note 187, at 877-79.

weakened because observers disagree over the extent to which agencies dance to the current legislature's tune. The "monopoly bureau" theory¹⁹² views administrators as relatively autonomous from their legislative sponsors and free to pursue self-serving objectives such as personal prestige, future income, or promotion of an idiosyncratic view of the public interest.¹⁹³ Some of these objectives surely counsel allegiance to the will of the enacting legislature. For example, interest groups that have invested heavily to secure the original legislative deal may offer administrators substantial inducements to honor that deal.¹⁹⁴

Moreover, as Landes and Posner concede, courts are unlikely to be especially responsive to the wishes of current legislatures.¹⁹⁵ Most appellate judges are at the apex of their careers and probably derive little incremental satisfaction from expanded staffs or budgets. Since federal judges in particular have life tenure and constitutional protection against salary reduction, Congress can do little to harm them directly.

What, then, motivates judges? Some theorists suggest that judges forego the larger financial rewards of private practice for the opportunity to exercise power, achieve prestige, promote a personal conception of the public good, or merely to enjoy greater leisure time.¹⁹⁶ The extent to which any of these objectives propel judges toward faithful adherence to the will of some distant enacting legislature is difficult to determine. A judge who derives great satisfaction from the opportunity to be creative or to assert personal values would presumably prefer to be freed from the bonds of the enactor's intent. Yet others will respond more strongly to a personal ethic or perceived social ethic that condemns judicial creativity.

Even if we do not understand very well the motivations of agencies and courts, our choice of interpretive method may respond to percep-

¹⁹² The leading example is W. NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971).

¹⁹³ See, e.g., Hilton, *Regulatory Reform in Transportation: The Basic Behavior of Regulatory Commissions*, 62 AM. ECON. REV. 47, 47-49 (1972).

¹⁹⁴ This is essentially the prediction of the "capture" theory, which asserts in general terms that economic regulation is a process by which interest groups seek to promote their private interests. See Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. 335, 341 (1974); see also M. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 86-91 (1955). The capture hypothesis has been justifiably debunked as neither universally true nor rigorously specified. See Posner, *supra*, at 341-43. But it retains utility as an accurate characterization of the relationships between many agencies and the industries they regulate. See B. OWEN & R. BRAEUTIGAM, *THE REGULATION GAME* 2-9 (1978).

¹⁹⁵ Landes & Posner, *supra* note 187, at 885.

¹⁹⁶ See R. POSNER, *supra* note 190, at 415-17; see also Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107, 131 (1983) (suggesting that while private judges are likely to make decisions that will maximize income, public judges are likely to seek prestige among litigants, although out of weaker motivation).

tions about the magnitude of their respective stakes in individual cases. An agency clearly has a direct and substantial stake in the way in which its charter is interpreted.¹⁹⁷ Of course, this fact alone does not tell us *which* interpretation serves that interest in any particular case. A decision in favor of administrative authority might confer desired power and prestige or it might result in unwanted headaches.¹⁹⁸ Whether the agency is a power-seeker or risk-avoider, however, the danger that self-interest will infect the agency's reading of its statute is pronounced. By contrast, courts of general jurisdiction have no comparable stake in the interpretation of any particular statute. Whatever personal preferences the judges might have, the outcome of any single case will rarely have much impact upon them.

This difference can be overstated. For every decision significantly affecting their jurisdiction, agencies probably make dozens or hundreds of interpretive decisions of little moment. Likewise, judges are probably aware when a particular case will have a greater impact on society or their public image. As a general matter, however, it seems safe to conclude that a reviewing court will have less to gain or lose from the outcome of an individual case than an administering agency. To the extent that self-interest is likely to distort a lawfinder's search for objective meaning, this conclusion supports a preference for independent review.

It is difficult to tease a general presumption in favor of either mode of review from this analysis of courts and agencies as lawfinders. If courts enjoy an edge on motivational grounds, arguments from knowledge and process seem to favor agencies. None of these subsidiary conclusions, moreover, rests on especially firm soil. To find a surer basis for choosing between independent and deferential review, then, we must turn our attention to the lawmaking component of statutory interpretation.

V. INTERPRETIVE COMPETENCE: INTERPRETATION AS LAWMAKING

Statutory interpretation, like any form of literary interpretation, is unavoidably an act of creating meaning. The very choice of principles by which the search for meaning is to be guided stamps the inter-

¹⁹⁷ Cf. Wellington, *supra* note 186, at 489 (noting that entrenched bureaucracies have both personal and political stakes in maintaining control over policy).

¹⁹⁸ Compare, e.g., *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) (upholding FCC's expansionary reading of its charter) with, e.g., *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981) (upholding FCC's restrictive reading of its charter).

preter's personality indelibly on the outcome of the inquiry.¹⁹⁹ Furthermore, under almost any conceivable set of hermeneutic principles, external sources will not yield determinate answers to most questions. However faithfully an interpreter may seek to reconstruct an enacting legislature's "will" or ascertain an audience's "understanding," historical materials inevitably reach a point at which their capacity to provide guidance is exhausted.²⁰⁰ At that point, the interpreter must necessarily draw inspiration from her own personal values to complete the elaboration of meaning.

To the extent that interpretation entails the making of such value choices, the choice between independent and deferential review requires a comparative assessment of courts' and agencies' lawmaking capacity. The conventional wisdom, if there is one, favors agencies on this score.²⁰¹ If agencies possess such an advantage, it must be based on a belief either in the relative soundness of their policy decisions taken in isolation, or in the internal coherence of their policy decisions taken in the aggregate. In this section I evaluate these two claims in order.

A. *Intrinsic Soundness*

Other things being equal, we should assign primary interpretive responsibility to that social institution which customarily incorporates into its interpretive judgments the most sound conception of social policy. One cannot make that determination, however, without first solving two preliminary riddles, one empirical and the other normative. First, what, if any, are the differences in the types of justifications given by courts and agencies for their decisions? Second, by what criteria ought we to evaluate their comparative merits?

The answer to the former question may lie in a consideration of the distinction between "policies" and "principles."²⁰² The structural differences between courts and agencies discussed in the previous section lead agencies to invoke "policies" to justify their interpretive choices, while courts prefer to invoke "principles." For example, be-

¹⁹⁹ See, e.g., Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 471-76 (1981); Hermann, *Phenomenology, Structuralism, Hermeneutics, and Legal Study: Applications of Contemporary Continental Thought to Legal Phenomena*, 36 U. MIAMI L. REV. 379, 400-04 (1982).

²⁰⁰ See, e.g., R. DICKERSON, *supra* note 41, at 22-28; Hart, *supra* note 179, at 607.

²⁰¹ See, e.g., G. CALABRESI, *supra* note 8, at 110-11; Winter, *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53, 67-74.

²⁰² See, e.g., R. DWORKIN, *supra* note 152, at 22-28; Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 262-64 (1973).

cause administrators are more immediately beholden to an elected legislature and executive, administrative policymaking is likely to be somewhat more responsive than judicial policymaking to the preferences of the prevailing political power structure. Since they are more bureaucratic and impersonal, moreover, agencies will tend to couch their value choices in technocratic arguments rather than in expressions of either individual conviction or enduring principle. Moreover, because of their superior investigative, analytical, and monitoring capacity, agencies will be encouraged to rely more heavily on utilitarian-instrumentalist justifications for these decisions. By contrast, relatively isolated judges must rely more on deontological reasoning.

These differences can be overstated, of course. The use of multi-member appellate panels, for example, holds in check the likelihood that courts will promote widely unpopular or unconventional views in the name of principle.²⁰³ Similarly, the "zone of indifference"²⁰⁴ surrounding all administrators leaves at least some room for the advancement of personal conviction. As a gross generalization, however, the "principle-policy" dichotomy captures an important kernel of truth about judicial and administrative interpretation-as-lawmaking.

The question which type of justification we ought to prefer is unlikely to yield a universal answer no matter what theory of social value we choose to adopt. Some issues of statutory interpretation seem to cry out for the invocation of durable, broadly applicable principles of the sort elucidated by courts over a long period of time and in many diverse contexts. Interpretation of statutory provisions that closely track constitutional boundaries have this quality.²⁰⁵ So, too, do some questions involving the meaning of basic "constitutional" statutes like the Sherman Act²⁰⁶ or the Administrative Procedure Act.²⁰⁷

Some commentators, notably Guido Calabresi, would have courts adopt a universal "common law" approach to statutory interpretation—one that seeks to assimilate all statutes into a more encompassing and stable conception of the legal "landscape".²⁰⁸ But most have re-

²⁰³ See L. Kornhauser & L. Sager, *Unpacking the Court* (Dec. 1984) [unpublished manuscript on file with the *University of Pennsylvania Law Review*].

²⁰⁴ The term is Chester Barnard's. See C. BARNARD, *THE FUNCTIONS OF THE EXECUTIVE* 168-69 (1968).

²⁰⁵ See, e.g., *Kent v. Dulles*, 357 U.S. 116 (1958) (narrowly construing the Secretary of State's authority to withhold passports, to avoid infringing upon constitutional right to travel).

²⁰⁶ 15 U.S.C. §§ 1-7 (1982).

²⁰⁷ 5 U.S.C. §§ 551-570 (1982).

²⁰⁸ G. CALABRESI, *supra* note 8; see also Note, *supra* note 44, at 913 ("Rather than always being bound by the positive commands of a statute's words or professing adherence to undefinable concepts of legislative intent or purpose, courts would explic-

jected that view—correctly, I think—as fundamentally incompatible with our constitutional and political traditions.²⁰⁹ Those traditions counsel courts to view most statutes as discrete, self-contained expressions of social policy.²¹⁰ The elucidation of such pronouncements seems to require not the invocation of broad regenerative principles but rather the identification of the contours and implications of some particular policy choice. Whether one takes a democratic or technocratic view of social policymaking, administrative agencies, with their greater political accountability and research tools, seem to be more appropriate vehicles for making those choices.

B. *Internal Coherence*

On one level, an analysis of statutory interpretation involves an abstract evaluation of the particular rules generated from specific fact situations against some appropriate normative standards. On perhaps a more useful level, the analysis focuses on statutory interpretation as a component in the larger process by which social policy, as embodied in the statute as a whole, is implemented. This perspective draws our attention to the relationship of the parts to each other and to the whole. As between courts and agencies we must determine which justification will implement more coherently the underlying public policy of statutes. In this section I distinguish five different aspects of “policy coherence”—geographical uniformity, continuity over time, harmony with related policies, integration of policy and enforcement, and expedition of implementation—and examine the implications of deferential and independent review for each.

1. Geographical Uniformity

In the realm of statutory interpretation, policy coherence at its most basic level seeks to assure that the same rules apply everywhere within the political jurisdiction in which the statute applies. In a hierarchical system of review in which a reviewing court oversees one or more lower courts, the goal of uniformity argues in favor of independent review. Thus, appellate courts apply an independent standard

itly reason from and develop statutory principles in the tentative, incremental fashion of common law.”) (footnotes omitted).

²⁰⁹ See sources cited *supra* note 9.

²¹⁰ See Weisberg, *supra* note 3, at 230 (noting that “[w]ithin their realm, statutes were all-powerful, but that realm was narrowly defined, and statutes had no legal significance beyond it” in nineteenth century jurisprudence).

when reviewing a trial court's conclusions of law.²¹¹ Were they to apply a deferential standard to each trial court's conclusions, inconsistent rules of law within a single jurisdiction might develop. For the same reason, we expect heads of administrative agencies to apply independent judgment when reviewing the legal or policy decisions of their subordinates.²¹²

Judicial review of administrative actions at the federal level, however, turns the pyramid on its head. Any single agency is subject to review by many different federal courts.²¹³ In such a system, independent review will almost certainly produce less uniformity than deferential review.²¹⁴ Since deferential review is more likely to result in acceptance of the agency's choice, differences of opinion among multiple reviewers is less likely than under an independent standard. Disagreement between courts and agencies will occur most frequently within the "lawmaking" domain of statutory interpretation. Judges and agencies making interpretive judgments are likely to rely on different values and to foresee different consequences in any given situation. These differences will be more pronounced than those relating to standard meanings of statutory terms or special connotations indicated in legislative commentary. Since deference will result in the displacement of judicial judgment primarily in the former realm, it should further reduce disagreement among reviewing courts. Of course, higher level appellate review can resolve those disagreements that do occur. But, because of the nature of the Supreme Court's certiorari jurisdiction, that solution is time-consuming, expensive, and, largely for those reasons, unreliable.

²¹¹ See Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 755-56 (1982) ("[T]he trial judge's decision is accorded no deference beyond its persuasive power, as in the case of determinations of the proper rule of law . . ."); Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 113 (1944) ("[N]o reason of policy and no rule or statute require that the trial court's judgment as to the application of a rule of law to the facts found be binding to any extent on the appellate court.").

²¹² See Cass, *Allocation of Authority Within Bureaucracies: Agency Review in Adjudication* [unpublished manuscript on file with the *University of Pennsylvania Law Review*].

²¹³ See Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 5 (1975) ("Congress has frequently . . . provide[d] for review by three-judge trial courts, by the courts of appeals generally, by a single court of appeals, or by a more or less specialized tribunal."); McGarity, *Multi-Party Forum Shopping for Appellate Review of Administrative Action*, 129 U. PA. L. REV. 302, 304 (1980) ("[T]he venue provisions of individual agency statutes commonly allow for review in several possible circuits.").

²¹⁴ See, e.g., *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 & n.12 (1980) ("[A] court that tries to chart a true course to the [Truth in Lending] Act's purpose embarks upon a voyage without a compass when it disregards the [Federal Reserve Board's] views.").

In assessing the uniformity argument, one must gauge the consequences as well as the frequency of variance.²¹⁵ Maintaining incompatible rules of law within a common territory is obviously intolerable, but stare decisis can hold this problem in check. The more common problem is the existence of different interpretations in different federal circuits. Consideration of a common issue by multiple circuits may improve the quality of the ultimate resolution of the issue,²¹⁶ but parallel review imposes potentially severe costs on anyone doing business in more than one circuit. At a minimum, this includes the administrative agency itself, which must then tailor its enforcement procedures to the interpretation prevailing in each circuit. Similarly, national companies or organizations subject to statutory regulations may be unable to economize by standardizing operations.

2. Continuity

A second level of policy coherence is concerned with assuring the continuity of policy over time. Although deferential review seems to encourage uniformity, independent review appears to be better suited to promoting continuity. Judicial interpretation of the "correct" statutory meaning permits no subsequent modification by the agency. Judicial approval of a contested interpretation as merely "reasonable," on the other hand, implies that alternative meanings could also lie within the bounds of reason. Presumably the agency would remain free to adopt one of those interpretations at a later time. Thus, for example, the Secretary of Health, Education, and Welfare could perhaps have decided at some time subsequent to the decision in *Batterton v. Francis*²¹⁷ to require states to include strikers within the ranks of the "unemployed." By implicitly sanctioning multiple readings of a statutory provision, deferential review encourages greater variation in administrative policy over time.

Such fluctuations in policy may disrupt settled patterns of behavior or destroy the value of investments made in reliance on an earlier inter-

²¹⁵ See, e.g., Schaeter, *Reducing Circuit Conflicts*, 69 A.B.A.J. 452 (1983); Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CALIF. L. REV. 913 (1983) (reviewing the costs of various proposals to increase uniformity).

²¹⁶ See *United States v. Mendoza*, 104 S. Ct. 568, 572 (1984) ("Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari."); Commission on Revision of the Fed. Court Appellate Sys., *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 219 (1975) (noting that some issues benefit from "successive considerations by several courts").

²¹⁷ 432 U.S. 416 (1977).

pretation. Following *Federal Election Commission v. Democratic Senatorial Campaign Committee*,²¹⁸ for example, national political parties might invest heavily in strengthening their national senatorial campaign committees. Reversal by the FEC would force them to rebuild atrophied state committees. Changing the rules might, on balance, be worse than consistent adherence to either of the two policies.

But consistency over time is not always a virtue. Maintaining a uniform interpretation in the face of changing circumstances or enhanced knowledge can be pernicious. If at some subsequent time a party's state committees became so weak or subservient to the national organization as to make the "agency" relationship utterly superficial, the FEC ought to have discretion to reverse its policy. A deferential judicial endorsement of the original ruling allows for this result without requiring the agency to convince either the Court to overrule its decision or Congress to amend the law.

Deferential review would be unwise if agencies could not be trusted to distinguish between justified and foolish consistencies. But that view is unwarranted. Those whose interests will be adversely affected by a change in policy can usually be counted upon to bring that fact forcefully to the agency's attention. And even though these interests are not always fully represented,²¹⁹ the incremental benefits to be gained are not worth the cost of eliminating any avenue of administrative adjustment. Courts have adequate means short of an *ex ante* prohibition of subsequent modification for policing those occasional errors. One device is to accord no deference to an agency whose interpretation has been "inconsistent" over time.²²⁰ A less restrictive judicial constraint imposes on agencies an extra burden of explanation when they change any settled policy.²²¹ By restricting the agency's subsequent interpretive freedom, these doctrines make it more difficult for agencies to change their policies. In such a regime, agencies will presumably at-

²¹⁸ 454 U.S. 27 (1981).

²¹⁹ See Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 98-101 (1983) (communication of social costs and benefits of regulations).

²²⁰ See, e.g., *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 522-23 n.12 (1982) (reviewing Department of Education regulations of sex discrimination); *Rowan Cos. v. United States*, 452 U.S. 247, 253, 258-62 (1981) (noting inconsistency of Treasury Regulations defining wages); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976) (discussing EEOC guideline for employee disability plans).

²²¹ See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 103 S. Ct. 2856, 2866 (1983) ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."); *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1425-26 (D.C. Cir. 1983) ("[A]brupt shifts in policy do constitute 'danger signals' that the Commission may be acting inconsistently with its statutory mandate.") (footnote omitted).

tempt to alter settled statutory interpretations only for very good reason.

The choice between these two devices depends on one's diagnosis of administrative behavior. Which is the greater problem: bureaucratic inertia or capriciousness? If the latter, a stronger counterweight against improvident policy change is warranted. My reading of the literature on administrative behavior, however, suggests that inertia blocks desirable change at least as often as capriciousness precipitates harmful change.²²² If this diagnosis is correct, the burden of explanation approach is the preferable corrective.

3. Harmony

Invariably the policy choice reflected in any question of statutory interpretation is embedded in a larger mosaic of policy judgments.²²³ Whether the Secretary of HHS should permit states to exclude strikers from the "unemployed fathers" program,²²⁴ for example, may affect the size of benefit payments, the level of federal financial participation, the income and asset test for eligibility, or the durational test for determining "unemployed" status. Successful implementation requires that individual policy choices harmonize with the position taken on related issues.²²⁵

Deferential review gives agencies greater freedom to select a statutory reading that reinforces policies that they have already adopted or intend to adopt.²²⁶ This is not to say that courts, operating in an independent mode, need be insensitive to these concerns. But because agencies are more familiar with the range of policy choices likely to be affected by the interpretation at hand, there is little reason to expect courts to do a better job of reconciling these competing policies. More-

²²² There is an extensive literature on the tendency of bureaucracies to become rigidified. *See, e.g.*, M. CROZIER, *THE BUREAUCRATIC PHENOMENON* 175-208 (1964); A. DOWNS, *INSIDE BUREAUCRACY* 158-66 (1967); G. TULLOCK, *THE POLITICS OF BUREAUCRACY* 221-24 (1965).

²²³ *See, e.g.*, H. HART & A. SACKS, *supra* note 25, at 1320-23 (discussing distinctions among legislative and interpretive regulations and enforcement rulings).

²²⁴ *See* *Batterton v. Francis*, 432 U.S. 416 (1977) (upholding authority of Secretary of HEW to promulgate a regulation allowing participating states to exclude strikers from their definition of unemployed for the purpose of measuring AFDC-UF aid because the statute expressly delegates to the Secretary the power to determine the standards for unemployment).

²²⁵ On policy implementation, see generally E. BARDACH, *THE IMPLEMENTATION GAME: WHAT HAPPENS AFTER A BILL BECOMES A LAW* (1977); J. PRESSMAN & A. WILDAVSKY, *IMPLEMENTATION* (1984).

²²⁶ *See, e.g.*, *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933) (noting the agency's "responsibility . . . of making the [statute's] parts work efficiently and smoothly while they are yet untried and new").

over, because the agency will typically experience a significant portion of the disruption caused by adopting an ill-fitting policy, it has ample incentive to select a harmonious interpretation.

This logic applies, of course, only within the agency's policy domain. To the extent that an interpretation presents problems of conformity to policies maintained or enforced by other entities, precisely the reverse conclusion is in order. The agency will very likely have less knowledge than a reviewing court about the adverse external consequences of its policies and will, in any event, have little incentive to minimize those consequences. For this reason, courts correctly refuse to defer to an agency's interpretation of statutes of general applicability.²²⁷ For the same reason, courts are less likely to defer to an agency whose policymaking powers are severely truncated.²²⁸ As a general matter, however, so long as an agency has apparent authority to issue binding interpretations through rulemaking or adjudication,²²⁹ the goal of harmonious policy development favors deferential review of statutes to which those powers pertain.

4. Integration

Successful policy implementation requires a synergy between the making and enforcement of policy. In theory, the design of an enforcement apparatus follows the articulation of policy goals. But in reality, organizational rigidities and resource constraints often severely limit the effective range of enforcement tactics.²³⁰ Abstract policy decisions adopted without careful attention to those constraints may be distorted beyond recognition in the process of their application by inspectors, prosecutors, and arbiters. The notorious preference among regulators for specification standards rather than performance standards, for example, reflects the importance of administrability in the design of legal rules.²³¹

²²⁷ See, e.g., *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980) (holding that section 6(b)(1) of the Consumer Product Safety Act governs disclosures made by the CPSC as a result of a request under the Freedom of Information Act).

²²⁸ See, e.g., *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (judicial review of administrative decisions under the Fair Labor Standards Act).

²²⁹ See *infra* text accompanying notes 239-47.

²³⁰ See generally Diver, *A Theory of Regulatory Enforcement*, 28 PUB. POL'Y 257 (1980) (discussing the value of combining the use of top-down and bottom-up perspectives by policymakers in order to enhance enforcement effectiveness through the "more discriminating use of structural, procedural, and behavioral strategies").

²³¹ See generally E. BARDACH & R. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* (1982) (discussing the manifestations of regulatory "unreasonableness," the possibility of a more flexible style of enforcement,

The greater freedom of interpretation afforded to agencies by deferential review expands their capacity to integrate enforcement with interpretive policy. Once again, the likelihood that agencies will in fact use that freedom to enhance policy coherence depends on the scope of their responsibilities. An agency possessing exclusive responsibility for the enforcement of a statutory provision is most likely to achieve integration of policy and enforcement. Direct experience will provide it with superior knowledge about the constraints on and costs of enforcement. It has an incentive to minimize the costs of inefficient enforcement, moreover, since it bears those costs directly. When the agency shares enforcement responsibility with private citizens, an independent enforcement agency like the Justice Department,²³² or others, however, the case for deference becomes weaker.

5. Expedition

A final measure for evaluating policy implementation is the rate at which official acts are translated into primary behavior. One factor plausibly affecting that rate is the standard of review applied by courts to actions of agencies charged with administering a statute. Deferential review might be thought to accelerate the rate of policy implementation by making agency decisions appear more final. As discussed earlier, deferential review ought to reduce the number of judicial challenges to an agency's interpretive judgments.²³³ To that extent, one might expect policy decisions grounded on those interpretations to take effect sooner and more decisively than if subjected to protracted judicial review.

Merely reducing the volume of judicial challenges, however, need not increase the rate of compliance. Indeed, the failure of one affected party to challenge a controversial agency interpretation may simply prolong the uncertainty faced by others affected by the ruling. If the regulated population is more inclined to defy than comply with a ruling pending judicial resolution, early judicial review better serves the goal of expedition. But judicial adoption of a deferential posture will presumably affect the compliance calculation. Knowing in advance that an agency's interpretation will be treated with deference, the regulated population is more likely to comply with the agency's ruling. Consequently, even if deferential review were to delay definitive judicial resolution, it could accelerate the rate of overall compliance.

and considering the alternatives of "indirect regulation").

²³² See Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 407-08 (1981).

²³³ See *supra* text accompanying note 159.

The social value of expeditious policy implementation is not everywhere the same, of course. On occasion courts have singled out this feature as providing an especially strong justification for judicial deference. In *Haig v. Agee*,²³⁴ for example, the Supreme Court based its decision upholding a State Department rule partly on the ground that the Secretary of State required broad flexibility to respond quickly to rapidly changing international events. Similarly, in *Democratic Senatorial Campaign Committee* the Court noted that the Federal Election Commission "must decide issues charged with the dynamics of party politics, often under the pressure of an impending election."²³⁵ In such situations, the Court has apparently valued the importance of acting quickly and decisively more than the importance of acting deliberately. While this emphasis may not be called for in other regulatory contexts, expedition is a virtue that ought generally to be cultivated. To the extent that deferential review accelerates compliance by raising the estimated cost of defiance, it should be favored over independent review.

VI. A PRESUMPTIVE RULE OF DEFERENCE

Not surprisingly, abstract comparisons of the relative competencies of courts and agencies engaging in statutory interpretation yield no resounding victories for advocates of either independent or deferential review. Courts and administrative agencies are too complex, diverse, and adaptive to permit decisive comparison of their abilities as lawfinders. Agencies, in particular, come in such a wide variety of shapes, sizes, and functions that one hesitates to venture even modest generalizations about their ability to discern congressional intent and audience understanding. And even to the extent that differences in lawfinding capacity appear, they rarely push uniformly in one direction.

Although a comparison of courts and agencies as lawmakers points to a general conclusion that agencies are more appropriate interpreters than courts, the preceding discussion should demonstrate the folly—if not the futility—of attempting to frame any simple, universal rule for assigning interpretive responsibility. The original Bumpers Amendment calling for de novo judicial review of all agency rulings²³⁶ was as extravagant as the caricature of judicial abdication to which its supporters claimed it was an antidote. The erratic behavior exhibited by many courts confronting this issue seems to suggest that there is no coherent middle ground between these two unacceptable extremes. In justifying

²³⁴ 453 U.S. 280 (1981).

²³⁵ *Democratic Senatorial Campaign Comm.*, 454 U.S. at 37.

²³⁶ See *supra* text accompanying note 18.

their choice of interpretive mode, these courts seem to invoke too many factors of indeterminate relative weight to allow for a simple resolution of the deference dilemma.²³⁷

My resolution of the issue, however, is more optimistic. Since interpretation is inherently a form of policymaking, courts should presumptively defer to an agency's interpretation of a statute under which the agency exercises significant policymaking responsibility. Because the argument that agencies make more coherent policy choices rests on democratic and technocratic notions, however, it is appropriate to limit this presumption to the area of an agency's delegated decisionmaking responsibility and accumulated expertise. The statute that creates an agency and defines the scope of its powers can be consulted to determine the margins of its policymaking responsibilities.²³⁸ Within that realm, deference by courts to an agency's views on the meaning of a statute is appropriate. Outside that domain, courts should independently decide questions of interpretation, giving the opinions of agencies no greater weight than those of other litigants. The question explored in this section, then, is how to locate the boundary line between those two domains.

A. Significant Policymaking Responsibility

The indicia of policymaking responsibility are usually not hard to identify. This responsibility is most evident where an agency is explicitly delegated the power to issue substantive rules. Courts frequently refer to agency rulemaking authority as a justification for according deference to an agency's interpretation.²³⁹ One question that arises, however, is whether the degree of deference should vary with the specificity of the delegated power. Courts often claim that it should. Thus, in *Batterton v. Francis*,²⁴⁰ the Supreme Court accorded "more than mere deference" to the Health, Education and Welfare Secretary's interpretation of a statutory provision specifically empowering the Secretary to define "unemployment."²⁴¹ In *United States v. Vogel Fertilizer Co.*,²⁴² by contrast, the Court accorded "less deference" to a Treasury interpretation of the tax code embodied in a rule issued under a "gen-

²³⁷ See *supra* note 95.

²³⁸ For a similar argument, see Wright, *Judicial Review and the Equal Protection Clause*, 15 HARV. C.R.-C.L. L. REV. 1, 6-7 (1980).

²³⁹ See, e.g., *Haig v. Agee*, 453 U.S. 280, 291 (1981); *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 476-77 (1979); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 793 (1978).

²⁴⁰ 432 U.S. 416 (1977).

²⁴¹ *Id.* at 426.

²⁴² 455 U.S. 16 (1982).

eral authority" to "prescribe all needful rules and regulations" for the Code's enforcement.²⁴³

The specificity of a rulemaking power may be useful in making a *prima facie* determination of its applicability to the case at hand, as will be discussed below.²⁴⁴ But, aside from this use, I see no value in drawing fine distinctions of the sort suggested in *Batterton* and *Vogel Fertilizer*. A broad rulemaking power is no less an indication of policymaking responsibility than is a narrow one. Indeed, the difficulty of maintaining policy coherence increases as the scope of rulemaking power enlarges.

Even absent any rulemaking authority whatsoever, agencies may still be involved in significant policymaking through adjudication.²⁴⁵ Adjudicative power implies a responsibility to establish policy by the gradual accretion of precedent. Exclusive power to enforce a statute reinforces this impression, since the selection of cases for investigation and prosecution requires some evaluative criteria. But even without exclusive power to initiate enforcement actions, an agency empowered to adjudicate disputes over a statute's application should be accorded policymaking status for this purpose.²⁴⁶

²⁴³ *Id.* at 24.

²⁴⁴ See *infra* text accompanying notes 248-53.

²⁴⁵ See generally Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 536-37 (1970) (suggesting a need to eliminate rulemaking/adjudicatory distinctions and urging a move away from the "prescription of uniform procedures" toward specific procedures "tailored to the distinctive functions of each individual agency" with any uniformity arising out of "basic similarities in agency functions"); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965) (discussing possible benefits from an increased use of rulemaking procedures that could result from a "reexamination of certain conceptual distinctions" supporting some court decisions and an increased delegation of rulemaking authority to agencies).

²⁴⁶ Cf. Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 VAND. L. REV. 470, 489-90 (1950) (whether an agency chooses to regulate generally or by a "particular order approach, . . . the same fundamental elements of administrative discretion are present, and the same fundamental standards of judicial review must be applied . . ."). In fact, however, courts often accord no overt deference to interpretations by agencies with purely adjudicative authority. See, e.g., *Director, Office of Workers' Compensation Programs, United States Dep't of Labor v. Perini N. River Assocs.*, 459 U.S. 297 (1983) (interpretation of Longshoremen's and Harbor Workers' Compensation Act by Labor Department's Benefits Review Board accorded no deference); *Landon v. Plasencia*, 459 U.S. 21 (1982) (agreeing with interpretation of Justice Department's Bureau of Immigration Appeals, but with no discussion of deference).

Occasionally, two different administrative agencies have responsibility for issuing rules and adjudicating disputes under the same statutes. In such cases, courts ought to defer to the rulemaking agency. See, e.g., *National Indus. Sand Ass'n v. Marshall*, 601 F.2d 689, 698 (3d Cir. 1979) (finding Secretary of Labor's interpretation of a regulation he promulgated worthy of "great deference"); *Clarkson Constr. Co. v. Occupational Safety and Health Review Comm'n*, 531 F.2d 451, 457 (10th Cir. 1976) (accord-

An agency possessing only the power to issue advisory rulings presents a much weaker claim for deferential review. Early cases involving judicial review of Equal Employment Opportunity Commission guidelines illustrate the problem.²⁴⁷ On the one hand, the fact that Title VII of the Civil Rights Act may be enforced by private action in federal courts implies that courts have substantial policymaking responsibility. On the other hand, the EEOC clearly possesses greater consequential knowledge about practices subject to the Act than do the courts. Moreover, EEOC guidelines avoid the problems of delay and intercourt variation endemic to judicial enforcement. Under the circumstances, EEOC guidelines play an important role in the implementation of the Act, and courts should thus defer to the Commission's interpretations of the statute.

B. *Jurisdiction*

That an agency possesses policymaking tools is not, by itself, sufficient to render its statutory interpretations eligible for deferential review. The interpretation at issue must fall within the domain of that policymaking activity. The problem of circularity is obvious: whether an agency's rulemaking or adjudicative responsibilities encompass a particular subject is often precisely the issue of statutory interpretation confronting the reviewing court. The issue in *Batterton*, for example, was whether the Secretary's conceded authority to define "unemployment" by rule included the authority to permit states to exclude strikers from welfare eligibility.²⁴⁸ One cannot determine the appropriate standard of review by assuming the very power being contested.

Although this circle is logically seamless, it may be broken by invoking a notion akin to subject-matter jurisdiction. So long as an agency otherwise equipped with policymaking tools has *prima facie* jurisdiction over the subject of the interpretation in question, the presumption of deference should apply. This test is met when the statutory provision whose interpretation is at issue is expressly covered by a delegation of rulemaking or adjudicative power. *Batterton* represents the clearest case: the very statutory term whose meaning was contested—"unemployment"—was contained in a sentence that delegated to the Secretary of HEW power to "prescribe" "standards" for its de-

ing deference to interpretation urged by Secretary of Labor, who had promulgated the regulation in question).

²⁴⁷ Compare *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) ("great deference" accorded to EEOC interpretation) with *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (little or no deference accorded).

²⁴⁸ *Batterton*, 432 U.S. at 417-18.

termination. But most delegations of rulemaking or adjudicative power identify clearly the substantive provisions that lie within their field of application. For example, even though the Treasury's rulemaking power under the Internal Revenue Code is expansively defined, there was no question that it applied to the specific statutory provision at issue in *Vogel Fertilizer*.²⁴⁹ For purposes of justifying a presumption of deferential review, such clear applicability should have been sufficient evidence of the Treasury's policymaking responsibility.

Admittedly, ambiguities sometimes exist concerning the jurisdictional scope of delegated powers.²⁵⁰ But a review of the cases suggests that ambiguities are rare and, when they do arise, can be adequately handled by resolving doubts in favor of the agency. The one exception to this presumption should be for statutory provisions arguably applicable to two or more agencies. *Consumer Product Safety Commission v. GTE Sylvania Corp.*²⁵¹ is illustrative. Section 6(b)(1) of the Consumer Product Safety Act²⁵² restricted the right of the Consumer Product Safety Commission (CPSC) to disclose product information to the public. The CPSC interpreted section 6(b)(1) to apply only to voluntary disclosures by the CPSC, not to disclosures mandated by the Freedom of Information Act.²⁵³ On review, the Supreme Court correctly accorded no deference to the agency's interpretation. Although section 6(b)(1) is part of the statute exclusively enforced by the CPSC, the Freedom of Information Act applies to all federal agencies. The interaction of the two statutes thus raises issues of general application that a court ought not to entrust to any single agency. In such contexts, the interests of uniformity, continuity, harmony, and integration can be served far more effectively by a hierarchical court system than by an atomistic collection of agencies. For similar reasons, courts must independently resolve jurisdictional disputes between agencies.²⁵⁴

²⁴⁹ The provision of the Internal Revenue Code at issue was 26 U.S.C. § 1561(a) (1982). The Treasury's rulemaking power extends to "all needful rules and regulations for the enforcement of . . . title [26]." 26 U.S.C. § 7805(a) (1982).

²⁵⁰ See, e.g., *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778, 2782 (1984) ("Sometimes the legislative delegation to any agency on a particular question is implicit rather than explicit.").

²⁵¹ 447 U.S. 102 (1980).

²⁵² 15 U.S.C. § 2055(b)(1) (1982).

²⁵³ 5 U.S.C. § 552 (1982).

²⁵⁴ Conflicts of this sort sometimes arise when the Justice Department attempts to enforce the antitrust laws against an industry regulated by another agency. The resolutions have varied. See, e.g., *United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694 (1975) (narrowly construing the Investment Company Act of 1940 to avoid displacing the antitrust laws); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963) (the Bank Merger Act of 1960 cannot immunize mergers from challenge under other federal antitrust laws); *United States v. Radio Corp. of Am.* 358 U.S. 334 (1959)

C. The "Reasonableness" Constraint

Even with the foregoing caveat, the presumptive rule I have suggested may be attacked as too broad. Not every interpretation rendered by agencies acting within the outer limits of their policymaking jurisdiction necessarily deserves judicial deference. The question is whether the effort to refine the rule further is worth the resulting increase in its complexity. Courts act as though it were. Judicial decisions bristle with additional factors that allegedly strengthen or weaken the case for deferential review of an agency's interpretation—the interpretation's age and consistency, the need for prompt agency action, or the formality of the procedure for its adoption.²⁵⁵ These considerations plausibly relate to the underlying justifications for deference recited earlier in this Article. But my own view is that their incorporation into an explicit rule of deference causes more mischief than it cures. By increasing legal uncertainty, a complex rule of deference increases the likelihood of litigation. This, in turn, diminishes the value of deference as a means to enhance the uniformity, expedition, harmony, and integration of public policy.

The cost of an overbroad rule of deference, moreover, is held in check by the "reasonableness" safeguard.²⁵⁶ Deferential courts can and should still reject interpretations that strike them as incompatible with the legislative mandate, as viewed through the lawfinder's lens. The efficacy of this safety valve depends, of course, on its specifications and operation. A "reasonableness" test can become so elastic as to allow courts effectively to nullify any formulation of a deference rule. Unhappily, no amount of academic pontification can make "reasonableness" dramatically less elastic. Indeed, I have often wondered whether anyone will improve on Louis Jaffe's celebrated formulation, written twenty years ago: "[W]here the *judges* are themselves *convinced* that [a] certain reading, or application, of the statute is the *correct*—or the only *faithful*—reading or application, they should intervene and so declare."²⁵⁷

The suggestion is that courts should reject an administrative interpretation that will unfairly surprise the statute's nonofficial audience.²⁵⁸ Such an interpretation is one that cannot be supported by the words of the statute, as the court believes them to be understood among

(FCC approval of a transaction does not protect it from subsequent challenge as a violation of the antitrust laws).

²⁵⁵ See *supra* note 95 and accompanying text.

²⁵⁶ See *supra* text accompanying notes 81-83.

²⁵⁷ L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 572 (1965).

²⁵⁸ See *supra* text accompanying notes 172-73.

the relevant "community of interpreters."²⁵⁹ Such an interpretation is presumably also one that, while compatible with the text, was apparently considered and rejected, or is quite similar to one considered and rejected, by the enacting legislature, as reliably revealed in the publicly accessible legislative history. Finally, the courts should find unreasonable an interpretation that runs counter to a well-focused purpose made manifest in the statutory text or public legislative history. Admittedly, such a reformulation of the "reasonableness" constraint runs the risk of being "either a crashing platitude or a resounding rationalization."²⁶⁰ But it should at least caution courts to adopt a modest view of their role in reviewing the interpretive judgments of agencies operating within their policymaking spheres. In essence, I am proposing that courts consciously restrict their independent judgments to the "cognitive" core of interpretation²⁶¹ where constitutional notions of legislative supremacy and conventional notions of institutional competence conspire most strongly against administrative hegemony.

CONCLUSION

In one sense, I have labored mightily in this Article to defend the status quo, for judicial deference to an agency's interpretation of "its" statute is surely the norm in contemporary administrative law. But, as we know from casual observation,²⁶² specific case studies,²⁶³ and admittedly crude efforts at empirical estimation,²⁶⁴ it is a norm with many exceptions. Those exceptions attest to the persistence of the older competing tradition of independent judicial construction of regulatory statutes.

The persistence of that tradition forever reminds administrators how fragile is their hold on interpretive prerogatives. Deference, however frequently conferred, seems always to be an act of judicial grace, to be withheld whenever some reviewing court's overdeveloped olfactory sense detects the odor of administrative waywardness.²⁶⁵ To those who

²⁵⁹ See Abraham, *supra* note 6, at 685-86.

²⁶⁰ L. JAFFE, *supra* note 257, at 572.

²⁶¹ See R. DICKERSON, *supra* note 41, at 21-22.

²⁶² See, e.g., McGowan, *supra* note 133, at 1166-67 (courts less deferential in the 1970's than in earlier decades).

²⁶³ See, e.g., R.S. MELNICK, *supra* note 182, at 343-45.

²⁶⁴ See, e.g., L. WENNER, *THE ENVIRONMENTAL DECADE IN COURT* 120-44 (1982); Gardner, *Federal Courts and Agencies: An Audit of the Partnership Books*, 75 COLUM. L. REV. 800 (1975); O'Reilly, *supra* note 19, at 780.

²⁶⁵ Judges sometimes attempt to describe the factors that cause them to "cock a skeptical eye" at agencies. See, e.g., Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 523-24 (1974).

view scope of review unidimensionally, as a means of controlling a runaway bureaucracy,²⁶⁶ this is as it should be. Deference should be regarded as a privilege, to be earned in each case by responsible behavior, and not simply as an entitlement conferred by status alone. Adherents of this view will resist my call for a strong and simplified presumption of deference. They will argue that in the short run such a presumption may not change outcomes in many individual cases, but that in the long run it will weaken the disciplining force of judicial oversight and thereby heighten the risk of administrative excess.

The answer presented and defended in this Article stems from a conviction that standard of review cannot sensibly be perceived unidimensionally. The choice of interpretive mode is a decision not simply about "controlling the bureaucracy," but about allocating interpretive authority between the bureaucracies of court and agency.²⁶⁷ That judgment can rest only on a comparative assessment of the capacities and limitations of each. Viewing interpretation as an exercise simultaneously in finding and creating norms, I conclude that a strong presumption of deference to interpretations lying within an agency's *prima facie* policymaking domain best accommodates the competing demands for responsibility and initiative in the administrative state.

²⁶⁶ See Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1334-38 (1984).

²⁶⁷ See Witherspoon, *Administrative Discretion to Determine Statutory Meaning: "The High Road,"* 35 TEX. L. REV. 63, 64 (1956) (viewing courts as merely higher-level "agencies" involved in the administration of statutes, which review "but a small proportion of the determinations made below").