ARTICLE

The Deference Dilemma: Judicial Responses to the Great Legislative Power Giveaway

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Introduction

The delegation of legislative power to federal government agencies has spawned a vigorous debate over judicial review of the agencies' exercise of that delegated power. When Congress delegates power to agencies in nonspecific, ambiguously worded delegating statutes it ultimately leaves unelected judges with the task of allocating the power between the executive and judicial branches. Judicial deference is the courts' legitimization of an agency's exercise of its delegated authority.[1]

When a court speaks of judicial deference to an agency decision, it is describing either a process or a conclusion. As a process, deference limits the scope of judicial review over an agency's decision.[2] As a conclusion, deference accepts a delegate agency's interpretation of its enabling statute.[3] In either case a reviewing court does not independently search for the "correct" decision dictated by the delegating statute but, instead,

1. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 6 (1983): "A statement that judicial deference is mandated to an administrative 'interpretation' of a statute is more appropriately understood as a judicial conclusion that some substantive lawmaking authority has been conferred upon the agency."

2. *See infra* text accompanying notes 168-191.

3. *See, e.g.*, Batterton v. Francis, 432 U.S. 416 (1977) (the Court implies that deference compels the acceptance of an agency statutory interpretation at odds with the statutory language); *see also infra* text accompanying notes 193-208.

accepts the delegate's conclusion, so long as that conclusion accords with whatever standards short of certainty the court articulates.

In some cases, judicial deference has permitted an agency to exercise virtually unconstrained discretionary legislative power. This occurs when an agency is authorized to determine the nature and extent of its power and to act accordingly.[4] In other cases, however, the courts have refused to defer to the agency's interpretation by maintaining the right to determine independently the meaning of the delegating statutes.[5] When courts refuse to defer, the courts can be viewed as exercising a form of unconstrained legislative power.

This Article examines the judicial responses to the issue of whether a court should defer to the statutory interpretation of an agency exercising delegated legislative authority. In particular, the Article identifies two models of deferential judicial review: traditional deference[6] and discretionary deference.[7] These models serve as organizational frameworks for categorizing the variety of Supreme Court decisions that have addressed the deference issue. The models are drawn largely from the historical development of the concept of judicial deference in United States Supreme Court case law. The features of each model are the product of judicial responses to the growth in administrative lawmaking.

In traditional deference, the Court's decision to defer in review of administrative adjudications depended initially upon the distinction between agency findings of fact and conclusions of law.[8] Like appellate review of trial court proceedings,[9] the Court deferred to the adjudicator's factual conclusions. This "traditional model" became problematic as the legislative-administrative lawmaking process increasingly blurred the

4. The idea that an agency could define through interpretation of vague statutory language the scope of its delegated authority, and thus could provide the basis for a judicial determination of whether the agency had acted ultra vires, was first sanctioned by the Supreme Court in Yakus v. United States, 321 U.S. 414 (1944). *See infra* text accompanying notes 365-368; *see also* Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971) (three judge court) (court accepts the history of administrative experience with wage and price controls as the source of boundaries of agency power delegated by a broad and vague statute).

5. *See, e.g.,* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); NLRB v. Highland Park Mfg. Co., 341 U.S. 322 (1951) (the Court supplied the statutory meaning, ignoring the agency interpretation); *see also infra* notes 86-91 and accompanying text (discussing *Citizens to Preserve Overton Park*).

6. *See infra* Part I.

7. *See infra* Part II.

8. *See infra* text accompanying notes 22-30. Questions of law encompassed issues concerning the meaning of statutes, common law, and the Constitution, the extent of administrative jurisdiction, and protection against an agency's capricious decision or abuse of discretion. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.01 (1958 & Supp. 1982).

9. *See infra* text accompanying notes 31-35.

distinction between law and fact and shifted from adjudication to rulemaking. The Court was challenged to extend its deference to agency decisions that were not purely factual. The result was the creation of a new category of "law-fact" to which, the Court reasoned, deference was owed.[10]

The modern "discretionary deference model"[11] is grounded in the Court's choice to limit its review of an agency's interpretations of the agency's own statutory directives or authority. As conclusions of law such agency interpretations of statutes were not traditionally entitled to deference. In this model the court has two choices: to deny deference and adjudicate the matter independently, or to defer, using one of two standards. Since deference is discretionary, a court may deny it altogether. In such a situation, the court could adjudicate the issue and arrive at its own decision. However, if the court elects to defer, it may choose between two types of discretionary deference: "weighted deference" and "presumptive deference."[12]

Under weighted deference, the court accords varying levels of significance to an agency's conclusions. The court first inquires into the decisionmaker's qualifications and the nature of the decision to determine whether to defer. Then, based upon these criteria, the court determines what weight to accord the agency's conclusion. This weight is roughly analogous to the level of judicial scrutiny afforded to a challenged decision. Under weighted deference the court theoretically may defer, yet still conclude after limited scrutiny that it cannot uphold an agency's decision.

By contrast, presumptive deference is result-oriented. When the court chooses to accord an agency presumptive deference, it appears that the decision to defer compels it to uphold the agency's conclusion. Presumptive deference, however, may exist in part to allow a court to accept an agency decision that is not justifiable on the merits.

Identification of the two deference models and application of them to the body of case law serves to explain and to organize the judicial responses to the issue of deference to agency decisions involving the interpretation of statutes.[13] The models, however, offer little help in predicting the outcome of individual cases, nor are they designed to suggest

10. *See infra* text accompanying notes 52-71.

11. *See infra* Part II.

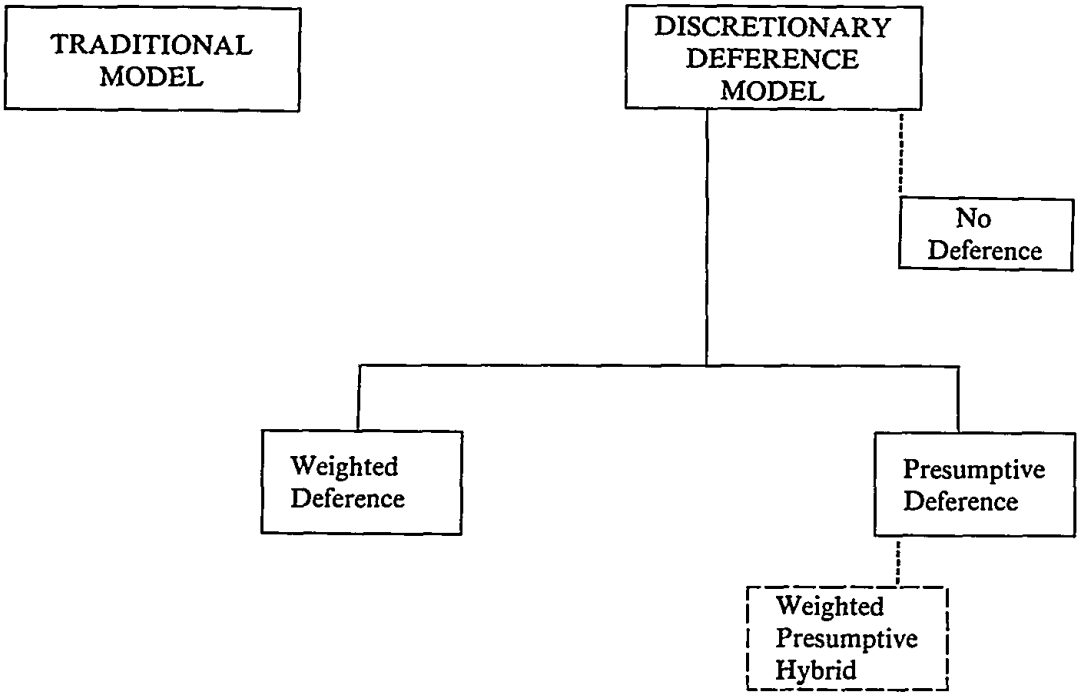
12. *See infra* notes 168-218 and accompanying text.

13. The taxonomy described in this Article is illustrated as follows:

what the court should do.[14] The fault lies not with the judicial deference models but with the Supreme Court's failure to provide its own analytical framework for understanding the nature and meaning of the decision whether to defer.[15] Present judicial responses to congressional delegation of its legislative power have resulted in deferential judicial review in theoretical disarray. Pinpointing the problems contributes to the search for solutions.

The purposes of this Article are threefold. First, objectively applicable criteria need to be developed to govern both the decision to defer and the nature of deferential review. Models aid in identifying areas of inconsistency, ambiguity, and unpredictability in the case law.

Second, the framework of judicial review of administrative lawmaking needs to be examined, particularly the outmoded review structure of the Administrative Procedure Act (APA).[16] The issues involving defer-



14. The author subscribes to the same limitations expressed by Professor Frug in his analysis of administrative and corporate law doctrines by means of models that serve to examine the justifications offered for the bureaucratic form. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1281-82 (1984).

15. Professor Colin Diver has observed that courts' decisions to defer are based upon "too many factors of indeterminate relative weight to allow for a simple resolution of the deference dilemma." Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 593 (1985). See *id.* at 562 n.95 for a partial list of these factors.

16. 5 U.S.C. §§ 701-706 (1982 & Supp. III 1985). In a recent thoughtful article, Professor Ronald Levin highlights many of the APA's weaknesses as he proposes a more coherent framework for distinguishing between questions of law and fact for determining the propriety

ence transcend the distinction between adjudication and rulemaking found in the judicial review provisions of the APA. Thus, review under the traditional deference model is distorted by the need to categorize the nature of the proceedings and the emergent decision.[17] Moreover, since deference under the APA turns on the distinction between law and fact, discretionary deference escapes statutory direction.[18]

Third, in addition to the twofold choice between court and agency for assignment of statutory meaning, the Article seeks to illuminate a third alternative: returning the disputed matter to Congress for reconsideration.[19]

This Article is divided into three parts. Part One presents and analyzes the development of the deference concept and the traditional model of deferential judicial review. Part Two lays out the discretionary deference model. It explores the modern practices and consequences associated with deferential review, concluding with an examination of three Supreme Court cases that highlight the judicial choices in this model.[20] Part Three addresses the problems raised by the Supreme Court's present reviewing practices, and outlines a proposed deference-delegation model

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of deference by a reviewing court. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1 (1985) [hereinafter Levin, *Questions of Law*]. His introduction also collects statements by many leading administrative law commentators which illustrate that "[s]cope of review doctrine has always been one of the whipping boys of administrative law." *Id.* at 1-2. Professor Levin has also led the efforts of the American Bar Association to revise the APA's scope of review provisions in accordance with modern developments. *See* Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239 (1986) [hereinafter Levin, *Scope-of-Review Doctrine*]. In general, Professor Levin's proposed amendments would preserve the traditional framework more than the proposals advanced in this Article. *See infra* Part III.

17. Consequently, the models presented do not rely upon this distinction. In the traditional model, regardless of whether the proceedings involve rulemaking or adjudication, judicial deference is grounded in the separation of law and fact. However, under the APA, the scope of the deferential review accorded to factual decisions depends also upon whether the agency proceedings fall within the formal adjudicatory requirements of the APA, which apply as well to formal rulemaking.

18. Modern discretionary deference is primarily concerned with conclusions of law, which are not traditionally accorded deference. Consequently, most cases of discretionary deference involve agency statutory interpretations profferred as part of a rulemaking proceeding. In the context of informal rulemaking, therefore, the propriety of judicial deference does not require the court to characterize the application of a statute to the facts as a factual decision. On the other hand, few discernible criteria appear to govern the court's decision to defer to the agency's statutory interpretation.

19. By focusing on the consequences of the judicial decision to defer, this study identifies cases in which deference excuses the constitutionally assigned legislative responsibility of Congress. The judicial refusal to defer or to supply meaning for meaningless statutory language would halt agency action until Congress provided more specific, less ambiguous statutory directives of authorization.

20. *See infra* notes 230-333 and accompanying text.

of judicial review. In this model courts would follow a rule of deference under which most, if not all, statutory interpretations would be made by the agency charged with administration of the statute. Under such a rule, a court unable to accept an agency interpretation would remand the matter to the agency for further consideration.

The model also identifies circumstances under which courts should both refuse deference and independent interpretaion of a disputed statute. In such cases, the court would effectively return the matter to Congress for clarification before the delegate would be permitted to act.[21] The deference-delegation model legitimizes the practices of judicial deference by limiting the congressional delegation of broad legislative power. It also offers a consistent framework for judicial responses to challenged agency lawmaking decisions. As this Article illustrates, the establishment and efficient operation of the "administrative state" require judicial definition and enforcement of the constitutionally ordained legislative responsibilities of all three branches. The proposal suggested in this Article would help achieve this goal.

I. Traditional Deference

The model of traditional deference to agency decisions is premised upon the notion that an adjudicator is in a better position than a reviewer to determine the facts of a controversy. Because a trial judge as an adjudicator hears witness testimony and examines all the materials submitted, she is in a better position than appellate judges to evaluate the evidence and make findings of fact warranted by that evidence.[22] On the other hand, appellate judges are deemed better suited to review the trial record dispassionately for errors concerning interpretation of law or application of law to the facts.[23] Thus, traditional deference was based upon a fundamental division between questions of law and findings of fact. Review of factual findings was limited,[24] while matters of law were

21. Unlike the historical nondelegation doctrine, which implied a judicial hostility to the concept of administrative agencies exercising legislative power, *see, e.g.*, Field v. Clark, 143 U.S. 649 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."), the deference-delegation model envisions a reconstructed delegation doctrine under which delegation of legislative authority by Congress to administrative agencies is both constitutionally permissible and desirable. *See infra* notes 362-417 and accompanying text.

22. B. SCHWARTZ, ADMINISTRATIVE LAW 592-94 (2d ed. 1984).

23. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70 (1944).

24. "If the action rests upon administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because

"independently" determined by the court.[25]

The law-fact dichotomy of the traditional model produced two primary misconceptions. First, it advanced the notion that a sharp line of distinction exists between what is fact and what is law.[26] In truth, the separation of the factual and legal components of a challenged agency decision is often impossible.[27] Second, it maintained the idea that a reviewing court is generally more competent to interpret the statutes that authorized the agency action under review.[28] However, frequently a

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the reviewing court might have made a different determination were it empowered to do so." SEC v. Chenery Corp., 318 U.S. 80, 94 (1943). *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 546 (1965) ("The administrative [agency] is the sole fact finder. The judiciary may set aside a finding of fact not adequately supported by the record, but, with certain exceptions, its function is at that point exhausted. It has, as it were, a veto but no positive power of determination.").

25. The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied . . . . But supremacy of law does not demand that the correctness of every finding of fact to which the rule of law is to be applied shall be subject to review by a court.

St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring). *See* NLRB v. Highland Park Co., 341 U.S. 322 (1951); Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947); L. JAFFE, *supra* note 24, at 547; J. LANDIS, THE ADMINISTRATIVE PROCESS 152 (1938). In practice, however, courts did not always use their own judgment to determine statutory meaning independently of the agency's construction. Gray v. Powell, 314 U.S. 402, 411-12 (1941) (the Court refused to alter an administrative decision where Congress specifically delegated the determination of statutory exemptions to the administrative agency). *See* K. DAVIS, *supra* note 8, at §§ 3.06-3.07; *see also infra* notes 52-61 and accompanying text.

26. Historically the law-fact determination was viewed as "the keystone upon which the system of appellate review in the courts has been built." *See* B. SCHWARTZ, *supra* note 22, at 592; *see also* L. JAFFE, *supra* note 24, at 546; Nathanson, *Reviews*, 70 YALE L.J. 1210, 1211 (1961).

> In truth, the distinction between questions of law and questions of fact really gives little help in determining how far the courts will review . . . . When courts are unwilling to review, they are tempted to explain by the easy device of calling the question one of fact; and when otherwise disposed, they say that it is a question of law.

J. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 55 (1927). *See also* Schotland, *Scope of Review of Administrative Action—Remarks Before the District of Columbia Circuit Judicial Conference*, 34 FED. B.J. 54 (1975).

27. The definition and identification of what is "fact" and what is "law" for purposes of judicial review has long been a matter of controversy. *See* L. JAFFE, *supra* note 24, at 546-55; B. SCHWARTZ, *supra* note 22, at 647-68. *See also* Levin, *Questions of Law*, *supra* note 16, at 9-11. "In a sense, this absence of a shared vocabulary [for defining 'questions of law'] leaves one with the Humpty Dumpty-like privilege of making the phrase whatever one chooses it to mean." *Id.* at 9. Similarly, judicial decisions have recognized that fact finding involves both different decisional components as well as different kinds of fact. *See* NLRB v. Marcus Trucking Co., 286 F.2d 583, 590-92 (2d Cir. 1961); Saginaw Broadcasting Co. v. FCC, 96 F.2d 554, 559-60 (D.C. Cir. 1938).

28. *See* J. LANDIS, *supra* note 25, at 152. *But see* B. SCHWARTZ, *supra* note 22, at 593 (courts were thought to possess greater competence and expertise to determine the applicable law). *See also* NLRB v. Hearst Publications, Inc., 322 U.S. 111, 136 (1944) (Roberts, J., dissenting) ("The question who is an employee . . . is a question of the meaning of the Act and,

court is in no better position than the agency to determine the meaning of a broad and general statutory delegation of decisionmaking authority.

Preservation of the distinction between fact and law is attractive nonetheless because it permits the court to retain control over the outcome of challenges to individual agency decisions. A reviewing court can assert its control in two ways. By labelling a decision "fact," a court can limit its review and accept an agency decision even if there is insufficient evidence to support the result.[29] Also, by expanding or contracting the scope of its limited review, the court itself can control whether it will find sufficient evidence to reverse an agency decision.[30]

To understand the limitations of traditional deference principles as a coherent and consistent model for predicting the propriety and scope of judicial deference in particular cases, it is appropriate to examine the origins and modern context of the traditional deference model.

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therefore, is a judicial and not an administrative question.") (discussed *infra* notes 54-61 and accompanying text).

29. "It is sometimes said that a question is fact or law depending on whether the court chooses to treat it as one or the other." L. JAFFE, *supra* note 24, at 547. Similarly, a "reviewing court may substitute its judgement if it chooses to turn the question of inference into a question of law." K. DAVIS, *supra* note 8, at § 29.05. *See* REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 90 (1941) ("What one judge regards as a question of fact another thinks is a question of law.") [hereinafter ADMINISTRATIVE PROCEDURE REPORT]. Despite the report's admission of judicial confusion and inconsistency, the distinction was preserved in the Administrative Procedure Act, the drafting of which was heavily influenced by the Committee's report. The distinction between fact and law for purposes of deference is found by implication in the "Scope of Review" provisions of the APA. 5 U.S.C. §§ 701-706 (1982 & Supp. III 1985). There are separate directives to a court to set aside an agency decision that is "unsupported by substantial evidence" (*id.* at § 706(2)(E)), or is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (*id.* at § 706(2)(A)), and a decision that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" (*id.* at § 706(2)(C)). *See infra* note 65.

30. ADMINISTRATIVE PROCEDURE REPORT, *supra* note 29, at 90. Courts have readily admitted or agreed with commentators that the scope of review defies definition of general applicability in all cases of judicial review. *See* Schotland, *supra* note 26, at 54, 59 (describing the scope of review as a "spectrum" with "mood-points" of degrees of judicial aggressiveness or restraint). This analysis was cited with approval by the D.C. Circuit in Industrial Union Dept., AFL-CIO v. Hodgson, 499 F.2d 467, 473-74 n.16 (D.C. Cir. 1974) ("Professor Schotland's useful perceptions are many, but none more so than his reminder that the concept of scope of review defies generalized application, and demands, instead, close attention to the nature of the particular problem faced by the agency.").

Even under limited review the court may scrutinize the record and determine that the agency finding is not supported by substantial evidence, or is arbitrary or unreasonable. The sufficiency of the evidence to support a factual finding is theoretically considered a question of law. L. JAFFE, *supra* note 24, at 595. Consequently, the court may exercise its own judgment as to whether there is adequate support for the agency's conclusion. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29 (1983) (discussed *infra* Part II).

A. Origins: From Fact and Law to "Law-Fact"

1. Early Judicial Efforts to Restrain Agency Power

In the early days of administrative law, courts were called upon to review agency decisions reached after formal administrative adjudicatory hearings.[31] These hearings were similar to a trial court proceeding before a judge sitting without a jury.[32] The early cases of judicial review evinced a judicial dilemma. On the one hand, analogy of the administrative adjudication to the trial court favored a limited review by the appellate court of the adjudicator's factual conclusions.[33] On the other hand, judicial suspicion of administrative governance and encroachment on judicial prerogatives motivated arguments against any limitation of review.[34] A special scrutiny developed which, if not as extensive as independent determination of all contested issues, was more than a determination of the competency of the administrative decisionmaker. This extensive judicial review or reconsideration made the administrative mechanism less efficient and hence less attractive as an alternative forum for dispute resolution.[35]

Judges, suspicious of politicians' expanded use of administrative agencies following the Supreme Court's removal of restraints on both government intervention and the delegation of legislative power,[36] could only restrain agency power by controlling the outcomes of individual agency decisions.

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31. W. GELLHORN, C. BYSE & P. STRAUSS, ADMINISTRATIVE LAW CASES AND COMMENTS 298 (7th ed. 1979) [hereinafter GELLHORN].

32. ADMINISTRATIVE PROCEDURE REPORT, *supra* note 29, at 68-73.

33. Jaffe, *Judicial Review: Questions of Fact*, 69 HARV. L. REV. 1020, 1031 (1956).

34. Initially, judicial hostility to government intervention and administrative regulation was manifest by striking down regulatory legislation using doctrines such as substantive due process and nondelegation. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 434-46 (1978). As the Court retreated from attacking the regulatory statutes, it turned its attention to the content of the adminstrative agency decisions. *See infra* text accompanying notes 37-41.

35. *See infra* note 40 and accompanying text.

36. The leading decisions heralding the demise of substantive constitutional review of legislative decisions to regulate socio-economic matters included: Olsen v. Nebraska, 313 U.S. 236 (1941); United States v. Carolene Products Co., 304 U.S. 144 (1938); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); and Nebbia v. New York, 291 U.S. 502 (1934). In the 1940's, the Supreme Court upheld delegations of legislative power in five principal cases challenging the constitutionality of statutes. *See* Lichter v. United States, 334 U.S. 742 (1948) (recovery of excess profits on war goods); Bowles v. Willingham, 321 U.S. 503 (1944) (rent control); Yakus v. United States, 321 U.S. 414 (1944) (wartime price controls); FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944) (natural gas rates); Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126 (1941) (wages and hours in textile industry). In addition, in Fahey v. Mallonee, 332 U.S. 245 (1947), the Court dismissed a challenge to a depression statute authorizing the appointment of conservators to run banks in danger of failing.

A majority of the Supreme Court flirted briefly with the idea of reserving certain factual findings for independent judicial determination. The constitutional and jurisdictional fact doctrines authorized a trial de novo on challenged facts involving either constitutional rights of affected interests or agency jurisdiction to regulate a particular matter.[37] However, the initial narrowness of these doctrines has never been expanded, largely due to both procedural and philosophical reasons: judicial control over the administrative fact finding process proved unworkable almost immediately,[38] and judicial attitudes changed with the appointment of Justices more familiar with and favorably disposed towards administrative governance.[39] Nevertheless, the Court, wary of increasing government regulation, had established, however briefly, a mechanism for controlling the substance of an agency decision.[40] Although the doctrines are no longer effective, they have never been expressly overruled.[41]

2. *New Deferential Review*

Judicial acceptance of the concept of limited review of agency fact finding did not produce a consistent body of case law regarding the extent and scope of judicial review. The analogy of judicial review of agency decisions to appellate review of trial court decisions proved in-

37. St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936); Crowell v. Benson, 285 U.S. 22 (1932); Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920).

38. The Supreme Court has not followed the constitutional fact doctrine of *Ben Avon* since 1936. *See* Baltimore & O.R. Co. v. United States, 298 U.S. 349 (1936). As Justice Harlan observed, "it is almost impossible to conceive how this Court might continue to function effectively were we to resolve afresh all the underlying factual disputes in all cases containing constitutional issues." Time, Inc. v. Pape, 401 U.S. 279, 294 (1971) (Harlan, J., dissenting).

In 1944, Justice Frankfurter noted that the opinion in *Crowell v. Benson* "and the casuistries to which they have given rise bear unedifying testimony of the morass into which one is led in working out problems of judicial review over administrative decisions by loose talk about jurisdiction." City of Yonkers v. United States, 320 U.S. 685, 695 (1944) (Frankfurter, J., dissenting).

39. See, e.g., National Broadcasting Co. v. United States, 319 U.S. 190 (1943), in which Justice Frankfurter extolled the promise and potential of administrative governance. Justice Frankfurter had taught Administrative Law at Harvard Law School prior to his appointment to the Supreme Court. Justice Douglas, also a Roosevelt appointee, had been Chairman of the Securities and Exchange Commission.

40. Crowell v. Benson, 285 U.S. at 94 (Brandeis, J., dissenting). To do so they had ignored the warning that "to permit a contest de novo in the district court of an issue tried, or triable, before the deputy commissioner will . . . gravely hamper the effective administration of the Act." *Id.*

41. *See* B. SCHWARTZ, *supra* note 22, at 627, 639-47; *see also* Schwartz, *Does the Ghost of* Crowell v. Benson *Still Walk?*, 98 U. PA. L. REV. 163 (1949).

complete[42] for two reasons. First, unlike a trial judge or jury, the agency decisionmaker was supposedly an expert on the subject matter of the decision. Presumably the knowledge and judgment of agency personnel prompted the congressional delegation of decisionmaking authority. Such delegations generally led to agency decisions that are qualitatively and quantitatively different from those made by judges.[43] Thus, in the event of a conflict between the expert's judgment and a court's judgment concerning a particular conclusion drawn from the evidence, courts conceded that Congress expected that the agency's conclusion should prevail.[44]

Second, the detailed instructions to the jury or a body of judicial precedent generally dictated the nature and content of the required trial court findings.[45] A reviewing court could then evaluate the explicit or implicit factual findings in the decision of a judge or the verdict of a jury according to the legal rules articulated.[46] By contrast, agency factfinders

42. *See* L. JAFFE, *supra* note 24, at 615-18; H. HART & A. SACHS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1345 (tent. ed. 1958). It is noteworthy that an agency's decision is likely to have more extensive application and, hence, greater long-term impact, than that of a jury.

43. *See* GELLHORN, *supra* note 31, at 675-80.

44. *See, e.g.*, Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). Justice Frankfurter asserts that the substantial evidence test of judicial review was not "intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." *Id.* at 488. *See also* Board of Governors v. Agnew, 329 U.S. 441, 449 (1947) (Rutledge, J., concurring). Justice Rutledge, joined by Justice Frankfurter, objected to the Court's evaluation of the merits of the Board's position and to the opposing position of the court of appeals. He argued that:

> [The] judgment [of the Board] should be conclusive upon any matter . . . open to [a] reasonable difference of opinion. Their specialized experience gives them an advantage judges cannot possibly have, not only in dealing with the problems raised for their discretion by the system's working, but also in ascertaining the meaning Congress had in mind in prescribing the standards by which they should administer it.

Id. But see L. JAFFE, *supra* note 24, at 613 ("But expertness is not a magic wand which can be indiscriminately waved over the corpus of an agency's findings to preserve them from review. The so-called areas of expertness are not marked off by bright lines; they are inextricably woven into the whole fabric of judgment.").

45. *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE § 7.14 (3d ed. 1985). The judge's charge to the jury should tell the jury which questions they ought to decide, what the issues are, and what rules of substantive law they should apply to the findings of fact they make. The judge may indicate what inferences may be drawn from the facts, and which inferences are stronger than others. The judge may also comment on the weight of the evidence and express her own opinion, further influencing the fact finders.

46. In light of the facts as they appear in the record and the instructions to the jury on the issues and substantive law, a reviewing court can determine whether the jury "might reasonably" have found as they did. *See id.* at § 12.8.

supplied the rules governing their decisions.[47] The agency's selection or interpretation of law could only be evaluated according to the incomplete directives of the delegating statute.[48] The statute rarely provided the same basis for review of agency application of law to fact as did a court's instructions to the jury.

Consequently, expertise justified and necessity dictated a limited judicial review distinct from the historical analogue of judicial review of a trial court proceeding. Moreover, expertise and necessity also influenced the judicial determination of which agency decisions were entitled to what scope of limited review.[49]

a. Expanding Judicial Deference

There were two problems in identifying the agency decisions entitled to deference. First, decisions of fact[50] entitled to deference were often inseparable from decisions of law for purposes of review.[51] Secondly, when they could be separated from the pure factual findings, there was

47. *See* Yakus v. United States, 321 U.S. 414 (1944). *See infra* text accompanying notes 367-368.

48. *See, e.g.*, FCC v. National Broadcasting Co., 319 U.S. 239, 244-45 (1943) (criterion of "public convenience, interest or necessity" is not an indefinite standard but one to be interpreted by its context); FPC v. Hope Natural Gas Co., 320 U.S. 591, 600-01 (1944) (applying statutory standard of "just and reasonable rates").

49. On the role of expertise in determining the scope of judicial review, compare Republic Aviation Corp. v. NLRB, 324 U.S. 793, 800 (1945) ("One of the purposes which led to the creation of [administrative] boards is to have particular decisions under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration.") and NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 349 (1953) ("[I]n devising a remedy the [Labor] Board is not confined to the record of a particular proceeding. 'Cumulative experience' begets understanding and insight by which judgments not objectively demonstrable are validated or qualified or invalidated."), with NLRB v. Highland Park Mfg. Co., 341 U.S. 322, 325 (1951) ("it would be strange indeed if the courts were compelled to enforce without inquiry an order which could only result from proceedings that . . . the [Labor] Board was forbidden to conduct") and Dobson v. Commissioner, 320 U.S. 489, 502 (1943) ("where no statute or regulation controls, the Tax Court's selection of the course to follow is no more reviewable than any other question of fact"). *But see* Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility,* 67 HARV. L. REV. 436, 473 (1954) ("Administrative expertise is a slogan which served well in a period of struggle to establish some degree of authority for the emerging new tribunals. Perhaps the time has come for reexamination of the content of this slogan."). *See also infra* Part II.

50. Professor Jaffe defines the pure question of fact as "the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect." L. JAFFE, *supra* note 24, at 548.

51. This law-making aspect of the fact-finding process is particularly pronounced in administrative factfinding; for we have a fact finder who combines expertness and a responsibility for policy making. His experience tends to beget rules for drawing inferences, his devotion to the purposes of the statute tends to beget presumptions for resolving doubtful questions in favor of his theory of statutory purpose.

concern about the court's competence to review the agency's implicit legal conclusions. The absence of congressional clarity did not make the court more capable than the agency of finding statutory meaning. If Congress had neither addressed the subject matter nor considered whether to delegate discretion over the matter, there was no "law" for a court to interpret.

Courts responded to this problem by expanding the situations in which they deferred to agency decisions. As the Supreme Court accepted and embraced administrative governance and delegation of legislative power, it also extended deference to agency decisions that were not purely factual. In *Gray v. Powell*,[52] the Supreme Court articulated the principle of expanded deference: "In a matter left specifically by Congress to the determination of an administrative body, . . . the function of review placed upon the courts . . . is fully performed when they determine that there has been . . . an application of the statute in a just and reasoned manner."[53]

Soon after, in *NLRB v. Hearst Publications, Inc.*,[54] the Court reaffirmed the principle of expanded deference and defined the new category of "law-fact."[55] The Court announced its willingness to limit its review of agency decisions involving the "specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially."[56] The Court maintained, however, that "specific application" was not the same as "statutory interpretation."[57] Whereas statutory interpretation remained the exclusive responsibility of the reviewing court, review of law-fact conclusions would be accepted if they had "warrant in the record"[58] and a "reasonable basis in law."[59]

Id. at 552. Questions such as whether newsboys were statutory "employees," NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944), or whether railroads were exempt from regulation as "producers" of coal, Gray v. Powell, 314 U.S. 402 (1941), inseparably intertwined issues of fact and law. If the court limited its review of the agency's finding that newsboys were employees, it must defer as well to the agency's implicit conclusion regarding the legal meaning of employee. L. JAFFE, *supra* note 24, at 552.

52. 314 U.S. 402 (1941).

53. *Id.* at 411.

54. 322 U.S. 111 (1944).

55. *Id.* at 120-25.

56. *Id.* at 131.

57. *Id.* at 130-31.

58. "[T]he Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *Id.* at 131. An early test required only that a reviewing court search for any evidence supporting the agency's findings regardless of the quantity and quality of evidence to the contrary. NLRB v. Nevada Consol. Copper Corp., 316 U.S. 105 (1942); Interstate Commerce Comm'n v. Union Pacific Ry. Co., 222 U.S. 541, 547-548 (1912).

However, the task of defining the scope of this new limited review proved more difficult than identifying administrative decisions entitled to such review. The Court continuously modified the content of its review standard,[60] struggling to find a middle ground between the abdication of its reviewing responsibility and usurpation of the administrative function.[61]

Major modification followed the passage of the Administrative Procedure Act in 1946.[62] Whereas reviewing courts previously had searched only for any evidence supporting an agency's findings, the Supreme Court now directed that courts must take account of whatever in the record fairly detracts from the weight of the supporting evidence.[63] The

59. Interestingly, in several cases arising after the *Gray v. Powell* and *Hearst* decisions, the Court neither limited nor explained its refusal to limit its review of law-fact decisions. *See, e.g.,* NLRB v. Highland Park Mfg. Co., 341 U.S. 322 (1951); Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947); NLRB v. Guy F. Atkinson Co., 195 F.2d 141, 150 (9th Cir. 1952) (the cases following and refusing to follow *Gray v. Powell* are not easily distinguishable). While some commentators have tried to reconcile these cases, the opinions created divergent deference principles. *See* L. JAFFE, *supra* note 24, at 560-64 (offering explanation for different judicial approaches in *Hearst* and *Packard Motor Car*); B. SCHWARTZ, *supra* note 22, at 660-66; *see also* Nathanson, *Administrative Discretion in the Interpretation of Statutes,* 3 VAND. L. REV. 470 (1950); Levin, *Questions of Law, supra* note 16, at 24-25. One consequence of the new form of limited review that may have disturbed some members of the judiciary was that judicial deference in cases such as *Gray v. Powell* and *Hearst* effectively institutionalized administrative lawmaking. *See, e.g.,* NLRB v. Hearst Publications, Inc., 322 U.S. 111, 135-37 (1944) (Roberts, J., dissenting) (noting the majority's apparent acceptance to the contrary, the dissent argues that the question of who is an employee within the terms of the National Labor Relations Act is a judicial, and not an administrative question).

60. The Court later replaced the "warrant in the record" standard with the "substantial evidence" test. The struggle to determine the meaning of the limited review standard continued regardless of the descriptive phrase used. The history of the review under the substantial evidence test prior to the adoption of the APA is detailed in Universal Camera Corp. v. NLRB, 340 U.S. 474, 477-91 (1951). Congress itself had rejected the "clearly erroneous" language used to describe the review of evidence in nonjury trials in favor of "substantial evidence." *Id.* at 492-93. *See* L. JAFFE, *supra* note 24, at 615. The Court, however, did not desist from efforts to provide a conventionally understood meaning when it stated that "substantial evidence . . . must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." NLRB v. Columbian Enameling Stamping Co., 306 U.S. 292, 300 (1939) (cited with approval in Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620 (1966)). This description, however, was inapplicable as a guide for limited review of agency law-fact decisions.

61. Compare the Court's justification for a more rigouous review in American Ship Building Co. v. NLRB, 380 U.S. 300, 318 (1965) (the "deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia") with its justification for limiting review in Industrial Union Dept., AFL-CIO v. Hodgson, 499 F.2d 467, 475 (D.C. Cir. 1974) ("A due respect for the boundaries between the legislative and the judicial function dictates that we approach our reviewing task with a flexibility informed and shaped by sensitivity to the diverse origins of the determinations that enter into a legislative judgment.").

62. 5 U.S.C. §§ 701-706 (1946).

63. The APA directed that an agency's factual finding had to be supported by substantial evidence "on the record considered as a whole." *Id.* at § 706(2)(E). The Court interpreted this language as a directive to change its one-sided review. Universal Camera Corp. v. NLRB,

Act also distinguished between findings made after a formal adjudicatory hearing on the record and conclusions reached in most other types of informal agency decisionmaking,[64] a new consideration that in time provided additional confusion regarding the meaning of limited review. Initially, cases of review had involved primarily formal adjudications in which the court was presented with a record of the proceedings, which it reviewed for substantial evidence supporting the agency's decision.

On the other hand, decisions made in informal proceedings were to be set aside if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[65] However, the Act did not require an agency to maintain a record in support of its informally made decisions. As the bulk of agency decisionmaking shifted from formal adjudication to informal rulemaking, reviewing courts faced a new standard of review without any record to which it could apply the "arbitrary and capricious" standard.[66]

Review under the arbitrary and capricious standard had no corol-

340 U.S. 494, 487-88 (1951). This new standard was imprecise, however, allowing a court to manipulate review of supporting and opposing evidence to reach the judicially desired result:

> It is fair to say that in [legislative change] Congress expressed a mood.... As legislation that mood must be respected, even though it can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of application. Enforcement of such broad standards implies subtlety of mind and solidity of judgment.

Id. at 487.

64. *See* 5 U.S.C. §§ 553, 556-557 (1982). The APA review provision directs that an agency decision should be set aside if "unsupported by substantial evidence in a case subject to [the formal hearing provisions] of this title or otherwise reviewed on the record of an agency hearing provided by statute." *Id. at* § 706(2)(E). *See also infra* note 65 and accompanying text.

65. 5 U.S.C. § 706(2)(A) (1946). Neither the limited review under the arbitrary and capricious standard nor the substantial evidence standard, however, arguably applied to questions of statutory interpretation. A separate provision of the APA directed that courts invalidate agency action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id.* at § 706(2)(C).

66. Agencies both received and assumed more authority to make law by means other than formal adjudicatory proceedings. The expanded use of informal proceedings, particularly rulemaking, was encouraged and sanctioned by the courts. *See, e.g.,* NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974); SEC v. Chenery Corp., 332 U.S. 194 (1947); National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). Moreover, the Court contributed to the simplification of the administrative decisionmaking process by ruling that a statutory directive for a public hearing preceding issuance of a final decision did not require a formal on-the-record adjudication. United States v. Florida East Coast Ry. Co., 410 U.S. 224 (1973). *See also* Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973) (administrative summary judgment permitted to avoid unnecessary formal adjudications). By allowing preenforcement review of agencies' legislative decisions, the Court assured federal courts of a continuous supply of cases for review unaccompanied by a formal record. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967); Gardner v. Toilet Goods Ass'n, 387 U.S. 167 (1967).

lary in judicial decisionmaking.[67] Moreover, it was considered to be a less stringent standard of review than substantial evidence.[68] Thus, the APA distinction between review of formal and informal proceedings ironically resulted in informal rulemaking, in which the agency decisions fall more on the law side of the law-fact equation,[69] while receiving less rigorous judicial supervision than formal adjudication with its emphasis on the facts. Similarly, agency decisions made with fewer procedural formalities received less scrutiny[70] than the quasi-judicial adjudication that yielded a record and an opinion detailing findings of fact and conclusions of law.[71]

b. *Citizens to Preserve Overton Park v. Volpe*

Efforts by the Supreme Court to identify the agency decisions entitled to traditional deference and to define the scope of deferential review in light of the newer informal agency decisionmaking culminated with its

67. As noted earlier, the Court had maintained a supervisory presence in formal adjudication by defining the substantial evidence standard as requiring a judicial evaluation of the entire record, including both supporting as well as opposing evidence. *See supra* note 63 and accompanying text. The test for upholding the agency's evidentiary conclusions, while imprecise, had at least a partial historical corollary in judicial decisionmaking. The Court was thus able to draw upon conventional terminology to describe the nature of its review of findings of fact in a formal adjudication.

68. *See* Industrial Union Dept., AFL-CIO v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974). The D.C. Circuit conceded that the statutory directive to review the agency's decision made in informal proceedings under the substantial evidence test is meant to require a more stringent review than arbitrary and capricious review. The court, however, has a difficult time articulating the difference.

69. A rule is concerned with generalities and is based upon an agency's judgment about future results. It is generally applicable to a group or class only prospectively and involves general rather than particular facts. *See* Schwartz, *Administrative Terminology and the Administrative Procedure Act,* 48 MICH. L. REV. 57, 67 (1949). Consequently, an agency's decision that the rule is within its statutory authority and warranted under the situation is usually a law-fact decision, if not purely a question of statutory interpretation.

70. In the absence of formalities, the agency decisionmaker could exercise wide discretion that would be difficult for a court to review. Traditional deference to an informally made rule meant that the Court presumed that the agency's choice of substantive content was reasonable. Pacific State Boxes & Basket Co. v. White, 296 U.S. 176, 186 (1935) ("[W]here the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes . . . and to orders of administrative bodies."). Where the statute and its history were vague or ambiguous, a court could be even less certain of the correctness of the agency's statutory interpretation than it could be in a formal, on-the-record hearing that reveals both a factual basis and an explanation for the agency's decision.

71. Of course, in the absence of a formal record there is less material to review. Moreover, due process arguably requires standard procedures of the formal adjudication to protect the individual interests that are usually directly at issue in such adjudication. However, the effect of rules is generally more widespread and their impact is potentially greater since they provide guidance to a group or class involved in a future activity.

decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*.[72] In *Overton Park*, the Court was faced with defining the standard of review in an informal adjudication. At issue in *Overton Park* was the Secretary of Transportation's approval of the use of federal funds to build a highway that would destroy twenty-six acres of public park land.[73] In accordance with the requirements of the authorizing statutes, the Secretary approved the destruction of the publicly owned park land after finding that there was "no feasible or prudent alternative."[74]

While the decision to allow the expenditure of federal funds for a highway through a public park was not a rule,[75] neither was the decision-making process a formal adjudication.[76] In essence, the proceeding was an informal adjudication. This raised a question as to the proper scope of judicial review, because the APA only distinguished between formal adjudication and formal and informal rulemaking,[77] and thus recognized no such category.

The petitioners argued for either a standard of review based on the test of substantial evidence or an independent de novo determination of whether the Secretary's action was "unwarranted by the facts."[78] The Court rejected this argument in favor of a more limited judicial review. The Court ruled that since the agency was not required to hold formal adjudicatory hearings, the agency's findings were subject to the less stringent arbitrary and capricious standard rather than the substantial evidence test.[79] This expanded deference, however, applied only to review of the agency findings of fact.[80] Although the Court accorded greater deference to an adjudicatory decision than it had in the past, it did not defer to the Secretary's statutory interpretation that governed the outcome of the case. Thus, the Court continued to hold against deference to an agency's statutory interpretations as long as they could be separated from findings of fact and decisions of law-fact.[81]

72. 401 U.S. 402 (1971). *Overton Park* has been called the "leading federal case on scope of review." Levin, *Scope-of-Review Doctrine*, *supra* note 16, at 243-44.

73. 401 U.S. at 406.

74. *Id.* at 405, 407-08.

75. *Id.* at 414.

76. *Id.* at 415.

77. *See* 5 U.S.C. §§ 553, 556-557 (1982).

78. 401 U.S. at 414. The petitioner's argument for independent review was based upon section 10(e)(2)(F) of the Adminstrative Procedure Act, 5 U.S.C. § 706(2)(F) (1946), which requires the reviewing court to hold unlawful and set aside agency actions, findings, and conclusions that are unwarranted by the facts, to the extent such facts are subject to de novo review.

79. 401 U.S. at 415-17.

80. *See id.* at 416.

81. *See infra* text accompanying notes 86-91.

The *Overton Park* decision is important to an understanding of the nature of traditional deference in the context of modern administrative decisionmaking for three reasons. First, the Court confirmed its role in the legislative process by limiting the category of cases in which it will find that Congress foreclosed judicial review. The Court found that Congress had not committed the matter in question *solely* to the discretion of the Department of Transportation.[82] Although the Secretary's decision was discretionary, the Court concluded that it would find judicial review barred only if there was "no law to apply."[83]

Second, the Court reaffirmed the distinction between agency determinations of law and fact for purposes of deferential judicial review. Although the Court admitted that the legislative history of the statutory provision in question was ambiguous,[84] the Court contradicted the agency interpretation without any discussion of either the agency's entitlement to deference or the Court's refusal to defer. The Court simply substituted its own interpretation, reserving deference for scrutiny of the facts.[85]

Although the Court asserted that "[c]ertainly, the Secretary's decision is entitled to a presumption of regularity,"[86] it nevertheless inserted its own meaning of the ambiguous statutory language.[87] Thus, the presumption, and hence, limited judicial review, was applicable only to the issue of the reasonableness of the Secretary's belief that he was acting within the scope of authority as determined by the Court. Judicial deference did not extend to the Secretary's explanation of what Congress meant when it chose its language. This line of inquiry is not necessarily inconsistent with either the principles of traditional deference or review

82. 401 U.S. at 410.

83. *Id.* The Court's insistence that an agency's exercise of discretion is generally reviewable assured the continuing availability of judicial review. Even if Congress increasingly delegated wide discretion in broad and ambiguous language, the Court announced that it would rarely find review foreclosed because there was no " 'law to apply.' " *Id.* Significantly, the Court demonstrated the existence of "law to apply" by disagreeing with the Secretary's interpretation of the statutory requirements. *Id.* at 411-13. *See infra* text accompanying notes 84-85. *But see* Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 518-20 (challenging the *Overton Park* reasoning and arguing that the Court should find a matter committed to agency discretion, and thus unreviewable, where a statute contains meaningless substantive standards to enable review).

84. 401 U.S. at 412 n.29.

85. In *Overton Park*, the Secretary of Transportation maintained that the determination of whether there was "no 'feasible' alternative" required him to weigh the environmental detriment against the costs of alternatives. The Court summarily rejected the view that "such wide-ranging endeavor was intended." *Id.* at 411.

86. *Id.* at 415.

87. *See supra* note 85.

provisions of the APA. On the other hand, the Court could have characterized the decision as law-fact and accorded it deference. In choosing to preserve the classical distinction, however, the Court cited no reference or authority that would place this inquiry in a precedential context.[88] Interestingly, the preservation of nondeferential review of the Secretary's statutory interpretation in *Overton Park* has largely been overlooked. Lower courts continually cite the case to support the principle of deference to an agency decision concerning statutory meaning.[89]

The third important feature of *Overton Park* is the Court's functional definition of limited review of informal agency decisions. The Court sought to define the "arbitrary and capricious" standard.[90] Review, it stated, should be "searching and careful."[91] This directive, though frequently cited,[92] falls short of a definitive explanation of the APA standard for review of informal decisionmaking. In fact, the Court's use of contradictory language subsequently opened a new line of inquiry regarding the meaning of the *Overton Park* standard.[93]

Overton Park is generally perceived as an expansion of judicial deference to agency decisions. Actually, the expansion, if any, was limited to review of factual findings in informal adjudicatory decisions. Nevertheless, the misperception of the expanded deference framework triggered significant consequences. Led primarily by the United States Court of Appeals for the District of Columbia Circuit, some judges sought to regain control over agency decisions and decisionmaking processes which, in their view, had been lost as a result of the Court's broad defini-

88. The Court cited to Professor Jaffe's treatise on judicial review. 401 U.S. at 416 (citing L. JAFFE, *supra* note 24, at 359). The cited passage, however, refers to a discussion of the availability of judicial review for an agency's exercise of discretion, rather than to the scope of such review.

89. *See, e.g.,* Michigan Dep't of Social Serv. v. Schweiker, 563 F. Supp. 797 (W.D. Mich. 1983); United Neighbors Civic Ass'n of Jamaica v. Pierce, 563 F. Supp. 200 (E.D.N.Y. 1983); City of Loveland v. Pierce, 564 F. Supp. 76 (S.D. Ohio 1983); Warren County v. North Carolina, 528 F. Supp. 276 (E.D.N.C. 1981).

90. *See supra* text accompanying note 79.

91. 401 U.S. at 416.

92. *See, e.g.,* Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980); FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978); Getty v. Federal Sav. and Loan Ins. Corp., 805 F.2d 1050 (D.C. Cir. 1986); Friends of the Earth v. Hintz, 800 F.2d 822 (9th Cir. 1986); Texarkana Livestock Comm'n v. United States Dep't of Agric., 613 F. Supp. 271 (E.D. Tex. 1935); Coalition of Concerned Citizens Against I-670 v. Damian, 608 F. Supp. 110 (S.D. Ohio 1984).

93. *See infra* notes 95-112 and accompanying text. Significantly, the Court did not apply the newly defined standard to the facts of the case. Instead, it remanded the case to the district court. 401 U.S. at 420. The refusal to remand to the agency—as suggested by the dissent, *id.* at 421 (Black, J., dissenting)—for reconsideration in light of the Court's statutory interpretation, deprived the agency of the opportunity to apply the law to its findings of fact.

tion of deference.[94]

B. The Retreat: From Deference to "Hard Look"

The debate over interpretation of the review standard announced in *Overton Park* ensued openly among the judges of the District of Columbia Circuit.[95] Their disagreement illustrates the ambiguity that remained unresolved despite the Supreme Court's attempt in *Overton Park* to explain the nature of limited review. Significantly, however, none of the judges retained the *Overton Park* distinction between law and fact. Instead of independently determining statutory meaning, the judges treated such questions as law-fact included within the deference accorded the agency decision. The efforts of the District of Columbia Circuit judges most likely provided the basis for subsequent Supreme Court deference decisions.[96]

Shortly after *Overton Park,* Judge McKinnon termed limited review "formalistic muttering."[97] Though he echoed the Supreme Court's language that judicial review should be "searching and careful,"[98] he maintained that the court's review should not be limited to a finding that an executive judgment was reasonable or not clearly erroneous.[99]

A second interpretation of the review standard is illustrated by his colleague, Judge Bazelon, who emerged as the leading spokesman for defining the court's task as ensuring that the administrator provide "a

94. This was particularly true after the arbitrary and capricious standard of *Overton Park* was subsequently extended to the review of informal rules. *See* discussion *infra* Part II.

95. There are six law review articles by judges of the D.C. Circuit alone, explaining their responses to judicial review of administrative decisions. *See* Bazelon, *The Impact of the Courts on Public Administration,* 52 IND. L.J. 101 (1976) [hereinafter Bazelon, *Public Administration*]; Bazelon, *Coping with Technology Through the Legal Process,* 62 CORNELL L. REV. 817 (1977); Leventhal, *Appellate Procedures: Design, Patchwork, and Managed Flexibility,* 23 UCLA L. REV. 432 (1976); Leventhal, *Environmental Decisionmaking and the Role of the Courts,* 122 U. PA. L. REV. 509 (1974) [hereinafter Leventhal, *Environmental Decisionmaking*]; Wright, *Court of Appeals Review of Federal Regulatory Agency Rulemaking,* 26 ADMIN. L. REV. 199 (1974); Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review,* 59 CORNELL L. REV. 375 (1974).

96. *See, e.g.,* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Counsel, Inc., 435 U.S. 519 (1978) (rejecting the D.C. Circuit's order to the agency to provide additional hearing procedures and directing the agency to respond in greater detail to all of the challenger's objections); Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29 (1983) (the Supreme Court accepts "hard look" review of agency rules); Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837 (1984) (discussed *infra* notes 239-287 and accompanying text).

97. City of Chicago v. FPC, 458 F.2d 731, 742 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 1074 (1972).

98. *Id.* at 744.

99. *Id.* at 744-45.

framework for principled decision-making."[100] He complained that reasonableness, defined in terms of the rational basis test of *Gray v. Powell*,[101] was too strict.[102] Judge Bazelon took issue with both the propriety and the competency of courts to engage in in-depth evaluation of the substantive conclusions underlying an agency's legislative decisions.[103] He maintained that if courts ensured the integrity of the administrative process, the importance of judicial review would diminish.[104]

A third interpretation of judicial review of an agency decision was the "hard look" doctrine,[105] propounded by Judge Leventhal. Under this approach a court, if necessary, would "penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent."[106] If the required judicial study of the agency's record took a court into complex technical and specialized matters,[107] Judge Leventhal suggested that judges might employ technical specialists—such as economists or engineers—as nonlegal clerks to help decipher the complex or technical issues that must be considered in the course of a review under the hard look standard.[108]

The hard look doctrine ignored the distinctions between review of formal and informal agency decisions and the respective substantial evidence and arbitrary and capricious standards.[109] The doctrine thus

100. Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971). This meant that "[c]ourts should require administrators to articulate the standards and principles that govern their discretionary decisions in as much detail as possible." *Id.* at 598 (footnote omitted). The courts could then ascertain whether the administrator had based his or her decision on the proper criteria.

101. 314 U.S. 402, 411 (1941) (the review function of the courts has been performed when, inter alia, it has been determined that a statute has been applied in a just and reasoned manner).

102. Bazelon, *Public Administration, supra* note 95, at 106.

103. *See* International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 650-51 (D.C. Cir. 1973) (Bazelon, C.J., concurring). This approach was curtailed by the Supreme Court's decision in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Counsel, Inc., 435 U.S. 519 (1978).

104. Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d at 98.

105. The doctrine was first articulated in Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

106. *Id.* at 850 (footnote omitted).

107. *Id.*

108. Leventhal, *Environmental Decisionmaking, supra* note 95, at 550-54.

109. The D.C. Circuit first mandated this standard of stricter scrutiny in a case involving formal adjudication. Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). It subsequently applied the doctrine to informal rulemaking as well. *See* Ethyl Corp. v. EPA, 541 F.2d 1, 37 n.79 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976).

emerged as a "judicial gloss" on the APA,[110] identifying the manner and nature of judicial review regardless of the descriptive label attached to the scope of review.[111] Under the hard look doctrine the court specified what reviewing courts should look for when called upon to review an agency decision.[112] Compared with the standard articulated in *Overton Park*, the hard look doctrine is not a complete narrowing of deferential review. The application of law to fact as a category of administrative decisionmaking is still entitled to deference.[113] The court dictated that law-fact decisions should be included in the heightened, yet deferential, review it was describing.[114]

The relationship between the reviewing court and the deciding agency was fundamental to the court's opinion regarding the nature of review. The court expressed this relationship in summing up the function of the reviewing court:

> The process thus combines judicial supervision with a salutary principle of judicial restraint, an awareness that agencies and courts together constitute a "partnership" in furtherance of the public interest, and are "collaborative instrumentalities of justice." The court is in a real sense part of the total administrative process, and not a hostile stranger to the office of first instance.[115]

By its use of the "partnership" metaphor, the court appeared to change the emphasis of judicial review[116] from concentrating on whether the

110. Sunstein, *Deregulation and the Hard-Look Doctrine,* 1983 SUP. CT. REV. 177, 183 ("The procedural and substantive elements of the hard-look doctrine are a controversial gloss on judicial review for arbitrariness, which is authorized by the APA.").

111. The hard look doctrine is applicable to review of an adjudicatory decision for substantial evidence as well as of informal decisions for arbitrariness. *See supra* notes 109-110; see also *infra* Part II, for a discussion of the hard look doctrine in review of informal rules.

112. Greater Boston Television Corp. v. FCC, 444 F.2d at 850-51. Judge Leventhal explained the "salient aspects" of hard look review as follows:

> It begins at the threshold, with enforcement of the requirement of reasonable procedure, with fair notice and opportunity to the parties to present their case. It continues into examination of the evidence and agency's findings of facts, for the court must be satisfied that the agency's evidentiary fact findings are supported by substantial evidence, and provide rational support for the agency's inferences of ultimate fact. . . .
>
> The function of the court is to assure that the agency . . . articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts, a course that tends to assure that the agency's policies effectuate general standards, applied without unreasonable discrimination.

Id. (footnotes omitted).

113. *Id.*

114. *Id.* at 851.

115. *Id.* at 851-52.

116. See Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 597 (D.C. Cir. 1971), in which Judge Bazelon wrote: "We stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts." He went on to criticize the courts' practice of "regularly [upholding] agency action, with a nod in

agency decision was entitled to deference, to ensuring that the reviewing court take an active role in the administrative decisional process.[117]

With this emphasis on active review rather than deference, the Court of Appeals for the District of Columbia Circuit did little to clear up the confusion as to the meaning of deference. The heightened review under the banner of hard look clearly served the ends of those judges who sought a legitimate basis for disagreement with an agency decision.[118] The hard look doctrine signalled a retreat from the judicial expansion of the deference concept that occurred particularly during the twenty-five years following the end of World War II.[119]

In sum, the hard look doctrine as applied in the context of traditional deference was a reaffirmation of the judicial prerogative to review, in its entirety, the basis of an administrative decision, including those findings previously entitled to deference. The doctrine represented a significant assertion of judicial authority because it was articulated by the court that received the largest number of appeals from administrative decisions. By emphasizing the responsibility of the judiciary to examine the basis of an agency's decision rather than the limitations upon the power of judicial review, the court effectively arrested further expansion of traditional deference.

C. The Present Status of Traditional Deference

After *Overton Park* and the hard look doctrine, traditional deference permitted judges to retreat from the type of judicial deference that they believed allocated too much power to the administrative decisionmaker. Following this retreat, several observations assist in understanding the traditional deference model and its position in administrative law.

First, arbitrary and capricious emerged as the standard of review of most agency decisions. This standard applied to fact findings and law-

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the direction of the 'substantial evidence' test, and a bow to the mysteries of administrative expertise." *Id.* He concluded: "To protect [fundamental personal interests affected by the expanding character of administrative litigation], it is necessary, but not sufficient, to insist on strict judicial scrutiny of administrative action." *Id.* at 598.

117. The fear to which hard look responded was expressed in the court opinion announcing the doctrine. The court stated: "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia." *Greater Boston Television Corp.*, 444 F.2d at 850 (quoting Volkswagenwerk Aktiengesell-Schaft v. FMC, 390 U.S. 261, 272 (1968)). *See also* Leventhal, *Environmental Decisionmaking, supra* note 95, at 511-12.

118. By claiming that an administrative decisionmaker had failed to take "a 'hard look' at the salient problems, and [had] not genuinely engaged in reasoned decisionmaking," a judge could declare that the agency conclusion was either arbitrary and capricious or not supported by substantial evidence. *Greater Boston Television Corp.*, 444 F.2d at 851.

119. *See supra* note 109.

fact decisions in all types of administrative proceedings except the relatively few formal adjudications. The arbitrary and capricious standard allowed a degree of assimilation between all forms of informal administrative decisionmaking, since it applied to review of both legislative rules and adjudicatory orders.[120]

Secondly, although once considered less stringent than substantial evidence review, the arbitrary and capricious standard, as modified by hard look, is potentially *less* deferential than the original substantial evidence standard. This is because the hard look doctrine offers a court the opportunity to take an active role in evaluating, and hence, controlling the outcome of an agency decision.[121] Only the likelihood of an appeal and the prospect of reversal inhibit the opportunity for unrestrained judicial activism.

Third, the traditional deference model still depends upon the distinction between fact and law. The labeling approach has permitted expansion of agency decisions entitled to deference by the creation of the law-fact category as a gloss on decisions additionally considered as fact.[122] On the other hand, a court's treatment of an agency's decision as primarily involving law permits the court to change the outcome of a case by substituting its own judgment for that of the agency's.[123]

Maintaining distinctions that are no longer significant, such as those between questions of fact and matters of law, as well as between formal and informal administrative proceedings, distracts attention from the need to examine the consequences of a legislative process characterized by a wholesale delegation of legislative power to the executive branch. Both the development and the continuation of the traditional deference model reveal judicial attempts to respond to the congressional delegation of broad legislative power. Unfortunately, the response lacks sufficient coherence and consistency either to allocate clearly the delegated legisla-

120. Although courts appear willing to limit review of both rules and orders, the courts maintain a distinction between deference in the traditional model and the modern discretionary deference model. *See* discussion *infra* Part II.

121. A judicial disagreement with an agency decision could easily be masked beneath a probing review. An extensive decisionmaking record is likely to yield evidence upon which a court could conclude that the agency decisionmaker failed to take a hard look at the issue that is the subject of the agency-court disagreement. *See, e.g.,* Kaufman, *Judicial Review of Agency Action: Judge's Unburdening,* 45 N.Y.U. L. REV. 201, 209 (1970): "With the voluminous records which burden the arms of the law clerks and the minds of the judges in agency cases, three enterprising lawyers (for once their minds are made up, judges become advocates and write their decisions accordingly) can usually find error upon which to base a reversal."

122. *See supra* text accompanying notes 54-61.

123. Traditional deference requires neither a description by a court of what constitutes law as opposed to law-fact, nor an explanation of its refusal to defer to an agency's legal conclusion.

tive power between the executive and judiciary or to require Congress to reassume some of the responsibility for clarifying statutory content.

II. Discretionary Deference

When a court is not compelled to defer by any principle of history, legal doctrine, or explicit legislative direction, its decision to defer is descretionary. A court that chooses to limit its review rather than conduct a full independent evaluation of the challenged agency decision is exercising discretionary deference.

Discretionary deference developed out of the distinction in the traditional model between review of law and fact.[124] Where the administrative elaboration of the statutory or common-law norm was a matter of law, independent of any factual findings,[125] a challenge to the agency conclusion was to be resolved by a court exercising independent judgment.[126]

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124. *See supra* notes 24-28 and accompanying text; see also Levin, *Questions of Law*, *supra* note 16, at 10-13, for a discussion of the "venerate pedigree" of the distinction between law and fact and efforts to define "law."

125. Deference to an agency statutory interpretation and other legal rulings was distinct from the law-fact decision in which law was applied to the agency's findings of fact. Law-fact decisions were categorized as facts for purposes of limiting review in accordance with the traditional model. *See supra* text accompanying notes 54-59.

126. *See supra* note 25; *see also* Deputy v. DuPont, 308 U.S. 488, 499 (1940) (Frankfurter, J., concurring) (maintaining that the issue of what the statute means by "trade or business" is separable from the factual issues and thus open to full review by the Court). Recent decisions in which the Court indicated it had special responsibility for reviewing questions of statutory meaning include: IEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981); SEC v. Sloan, 436 U.S. 103, 118 (1978); and Volkswagenwerk Aktiengesell-Schaft v. FMC, 390 U.S. 261, 272 (1968).

The refusal to defer to an agency decision meant, at a minimum, that if a court disagreed with an agency interpretation it could substitute its own conclusions for that of the agency decisionmaker. In FTC v. Gratz, 253 U.S. 421 (1920), the Court faced the first challenge to the Federal Trade Commission's power to restrain "unfair methods of competition." Noting that these words were not defined in the statute and that their exact meaning was in dispute, the Court maintained that "[i]t is for the courts, not the commission, ultimately to determine as a matter of law what statutory words they include." *Id.* at 427. This position has essentially been repudiated. *See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972); Atlantic Ref. Co. v. FTC, 381 U.S. 357, 367 (1965).

In its broadest sense, independent review meant that a court was required to ensure that the administrative interpretation was correct rather than merely reasonable, rational, fair, or not incorrect. See Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 87 (1975), in which the Court concluded that the agency interpretation was "correct." Elsewhere in the opinion, however, the Court found "at the very least [the agency interpretation] was sufficiently reasonable that it should have been accepted by the reviewing courts." *Id.* at 75. *See also* American Paper Inst. v. American Elec. Power Serv. Corp., 461 U.S. 402, 423 (1983) ("We need only conclude that [the agency interpretation] is a reasonable interpretation of the relevant provisions."); Gray v. Powell, 314 U.S. 402 (1941).

Discretionary deference originated as a separate line of inquiry from the issue of deference defined in the traditional review model. In traditional deference, an agency decision labelled "fact" received limited judicial scrutiny,[127] while discretionary deference required a court to justify its decision to limit its review. In the traditional deference model, the scope of limited review was defined by either the substantial evidence or arbitrary and capricious standard.[128] By contrast, in discretionary deferential review, the variety of considerations invoked to justify deference in turn fostered a variety of descriptions of the scope of that deferential review.[129]

The concept of discretionary deference gradually emerged as the dominant form of modern deferential review for all agency decisions. The court was still expected to justify its decision to defer, but the justification was generally associated with the court's explanation for the scope of its remaining inquiry. The elevation of deference to normative status made the justification of a judicial decision *not* to defer more significant than a court's reasons for deferring.

Three choices formed the basis of the discretionary deference model: (1) independent determination; (2) weighted deference; and (3) presumptive deference. In the first of these choices the court retains the prerogative to determine for itself the matter at issue but should justify its decision not to defer.[130] If the court chooses independent determination, it may adopt the agency decision as its own or use its own methods of interpretation to reach either the same or a different conclusion. The court thus remains free to substitute its own judgment for that of the agency.

The weighted deference and presumptive deference choices form a bipartite paradigm of modern deferential review. Each refers to a cate-

127. *See supra* text accompanying notes 22-25.

128. Although the content of each formula evolved through application over time in a series of cases, there remained essentially two descriptive standards. Each standard was applicable to an objectively determinable set of circumstances. Scalia & Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 UCLA L. REV. 899, 934-35 (1973).

129. Although the term "arbitrary and capricious" is frequently used to refer to the scope of deferential discretionary review, this rhetorical formula is described and applied in different ways. *See* Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1050 (D.C. Cir. 1979) ("[T]he concept of 'arbitrary and capricious' review defies generalized applications and demands, instead, close attention to the nature of the particular problem faced by the agency."); *see also* Note, *Judicial Review of Informal Administrative Rulemaking*, 1984 DUKE L.J. 347, 350.

130. If the court engages in review under the traditional model it may not separately address its decision not to defer. Under the traditional model, history or tradition implicitly rationalizes independent judicial resolution of a disputed statutory interpretation. *See supra* notes 82-85 and accompanying text (discussing *Overton Park*).

gory of judicial choice involving both a court's decision to defer and the scope of the inquiry once the decision is made. Each of these choices will be examined in detail below.[131]

The remainder of this Article examines this discretionary deference model.[132] The discussion is presented in three sections. The first briefly traces the evolution of the concept of discretionary deference.[133] This discussion reveals the rationales used to justify a court's decision to allocate unchecked lawmaking power to the agency and illustrates how the concept of discretionary deference serves as a rationalization for a court's failure to require Congress to provide more specific statutory directives.

The second section examines the choices of presumptive deference and weighted deference which form the bipartite paradigm of modern deferential review.[134] The analysis of these choices essentially provides a retrospective understanding of a court's choice for the form of deference accorded to a particular agency decision. Admittedly, the paradigm identifies the types of deferential review but does little to assist prediction of when a court will choose a particular type of deference.[135]

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131. *See infra* notes 168-227 and accompanying text.

132. The model presented here offers an organizing framework for the body of case law in which courts face the questions of whether to defer to an agency decision, and if so, what that deference means. The categories of choices that comprise the model are drawn essentially from examination of Supreme Court decisions. It is not suggested that the Court has consciously defined these categories. Rather, the model is imposed upon the body of case law as a device for understanding the nature of judicial deference to agency decisions not traditionally entitled to deference. The model is also constructed to provide a basis for discussing the Court's motivation for developing and maintaining judicial discretion to defer. The cases cited are for purposes of illustration. The objective is not to categorize or collect all applicable cases.

It should be recalled that the discretionary deference model is part of a larger reviewing context in which the court effectively allocates ultimate lawmaking power between the three branches of government. The choice between deference to an agency's statutory interpretation, independent determination, and the refusal either to defer or to interpret the statute so as to prohibit agency action, is a decision to hold the agency, the court, or the Legislature, respectively, responsible for statutory content and meaning. Within this framework, the model of discretionary deference presented here provides a context for analysis of the allocation of lawmaking power between the judicial and executive branches. Examination of this distribution of power reveals as well judicial conceptions regarding the legislative responsibility of Congress. See *infra* notes 348-349 and accompanying text for a discussion of judicial enforcement of congressional legislative responsibility.

133. *See infra* notes 137-167 and accompanying text.

134. *See infra* notes 168-218 and accompanying text.

135. This weakness is a fault of the model only to the extent that courts have fostered this unpredictability. The analysis of the deferential paradigm reinforces the suspicion that modern deferential review provides a principled basis for justifying the choice, once made, of whether to defer. The making of that choice, however, has been deliberately left unpredictable. Professor K.C. Davis recently observed:

> Clearly the scope of review of questions of law defies encapsulation in a formula. Courts may substitute judgment, but the patterns of refraining from full exercise of that power varies with the inclination of courts about the substantive questions. Sub-

The consequences of the absence of a coherent and predictable framework for prospective analysis of individual cases is illustrated in the third section's examination of three recent Supreme Court cases.[136] Each opinion represents one of the three choices that form the model of modern discretionary deference.

A. Development of the Discretionary Deference Concept

Two themes characterize the judicial justification of discretionary deference: expertise and necessity.

1. Expertise

In the early cases that form the foundation of modern discretionary deference, the Supreme Court decided to defer to the agency's conclusions that were not purely factual. The 1944 case of *Skidmore v. Swift & Co.*[137] reviewed an agency decision that was not reached pursuant to a formal adjudicatory hearing.[138] Consequently, to defer to the agency's

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stitution of judgment is common, but varying degrees of deference are accorded administrative determinations. And many opinions refuse to clarify the choice between substitution of judgment and the use of the reasonableness test.

K. DAVIS, *supra* note 8, at §§ 29.00-.06 (Supp. 1982).

136. *See infra* notes 230-333 and accompanying text. The cases are: Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984); Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys. I, 467 U.S. 137 (1984); and Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys. II, 467 U.S. 207 (1984).

137. 323 U.S. 134 (1944).

138. The administrative position in *Skidmore v. Swift & Co.* was expressed in an interpretive bulletin and informal ruling. At issue was the application of these views by a trial judge. *Cf.* NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944). The distinction between an agency interpretation as an interpretive rule and as an element of fact finding lies in the nature of the proceeding in which the interpretation is announced. The different procedures do not satisfactorily explain, however, why the Court presumes that limited review is appropriate where the interpretation is announced as part of an adjudication, but may choose not to defer where the interpretation is offered in another context.

In *Skidmore*, the Court suggests that the difference in judicial review is affected by congressional intent. The Court notes, for example, that "Congress did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act. Instead, it put this responsibility on the courts." 323 U.S. at 137. The explanation, however, is not applicable in cases where the administrative interpretation is not embodied in an adjudicatory order or legislative rule due solely to the circumstances in which the matter was presented to the agency and subsequently to the court. *See, e.g.*, National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982). Moreover, basing the decision to defer upon congressional intent, particularly in the broad statutes of the post-New Deal era, often resembles an exercise in metaphysics. *See* Nathanson, *supra* note 59, at 491.

The APA recognizes interpretive rules as a distinct subspecies of rules. Although the Act does not define the term, interpretive rules are exempt from the notice and comment requirement of legislative rules. 5 U.S.C. § 553(b)(3)(A) (1982). The exemption is due to the fact that an interpretive regulation is only an agency opinion of what the law means, and thus, does not have the binding force of law. *See* Continental Oil Co. v. Burns, 317 F. Supp. 194, 197 (D.

statutory interpretation the Court could not rely upon the reasoning that Congress had assigned the agency the authority to apply the statute in the course of an adjudicatory proceeding. Nevertheless, the Supreme Court invoked a variant of the traditional model of deference, premised upon the agency's expertise. The Court articulated the criteria that would guide its determination to defer to various types of agency decisions to which it had historically not deferred:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[139]

The explicit judicial recognition of the propriety of deference to agency decisions not purely factual included implicit judicial acceptance of agency lawmaking through statutory interpretation.[140] This willingness to defer marked a significant development in administrative law. However, the open-ended nature of the deference formula by inclusion of the phrase "all those factors which give it power to persuade,"[141] compli-

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Del. 1970) ("An . . . interpretative rule is a clarification or explanation of existing laws or regulations rather than a substantive modification in or adoption of new regulations. Substantive legislative rules and regulations 'create law . . . whereas interpretative rules are statements as to what the administrative officer thinks the statute or regulation means.' ").

In reality, however, a regulated interest that fails to conform its behavior to the statute as interpreted by the agency faces the possibility of sanction in an adjudicative proceeding in which the agency applies the interpretation. Thus, the so-called clarification or modification embodied in an interpretive rule may operate as a legislative or substantive rule. Presumably, an agency cannot escape the procedural requirements of rulemaking by designating a rule as interpretive. National Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688 (2d Cir. 1975).

Modern deference distinguishes between legislative and interpretive rules in terms of both the decision to defer and the weight accorded to each type of rule. Deference to interpretive rules is always discretionary while certain legislative rules are presumed to be entitled to deference. Historically, however, since both types of rules involved statutory interpretation, which was a question of law, the court was theoretically charged with the responsibility for determining independently the meaning of a disputed statutory provision.

139. *Skidmore,* 323 U.S. at 140. *Accord* General Electric Co. v. Gilbert, 429 U.S. 125, 141-42 (1976).

140. The Court was willing to allow the agency to assign meaning to vague, ambiguous, or broad statutory language and thus, to sanction agency lawmaking through administrative rules or orders based upon the agency's application of its interpretation to the facts of the matter under consideration.

141. 323 U.S. at 140. For a collection of cases identifying various criteria for deference, see Annotation, *Supreme Court's View as to Weight and Effect to be Given, on Subsequent Judicial*

cated efforts to understand or predict the extent of the Court's willingness to defer on such matters in future cases.

The perception of the administrative decisionmaker as an expert became the principal justification for discretionary deference. This rationale was used by the Court both to excuse Congress from legislative specificity and to justify the Court's decision to limit its review of the agency's conclusion. The rationale was as follows: Congress was entitled to seek the assistance of an expert administrative body that could effectively fashion solutions to the problem identified in the delegating statute.[142] The delegate should be permitted to use its expertise free of judicial interference because Congress so intended.[143] This legislative intent was implied from the fact that the delegate's action was predicated upon an administratively assigned statutory meaning.[144] Admittedly, judges were no more competent than agency decisionmakers to determine statutory meaning or to resolve congressional ambiguity with any greater degree of certainty. Moreover, courts have noted that judges lacked the delegate's resources and experience needed to investigate and evaluate the wisdom or consequences of a particular interpretation.[145]

In this argument, expertise provided several justifications for deference: (1) by deferring, a court was complying with the congressional intent to seek the assistance of an expert; (2) a court was no more competent than the delegate to decide questions involving statutory meaning; and (3) a court was incompetent to review agency decisions that appeared to involve some expert judgment. Of course, since the decision to defer was discretionary, a court could still assert its competency to decide legal matters.

The frequent failure of courts to defer frustrated efforts to discern a consistent pattern among the deference decisions. One could identify the reasons and principles that influenced the decision to defer, but could

Construction, to Prior Administrative Construction of Statute, 39 L.Ed.2d 942 (1975); *see also supra* note 15.

142. *See, e.g.*, National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

143. "[T]he legislature presumably intended the statute to achieve its apparent objectives to the fullest extent practicable within the limits clearly defined, and that the best judges of practicability are those to whom is entrusted the primary responsibility for administration." Nathanson, *supra* note 59, at 491. *See also* Monaghan, *supra* note 1; Levin, *Questions of Law*, *supra* note 16.

144. *See, e.g.*, Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984); Collins v. SEC, 432 U.S. 46 (1977).

145. Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 103 (1983) ("A reviewing court must remember that the Commission is making predictions within its area of special expertise . . . .").

predict neither their application nor the outcome in a particular case.[146]

2. Expertise-Policy

To supplement the expertise justification, the Court borrowed the labeling approach used to limit review under the traditional deference model,[147] and invoked a new label: "policy." Where the agency decision in question was based upon a variety of considerations and conclusions not strictly verifiable as findings of fact or indisputable issues of law, the Court found such "policy" decisions were entitled to deference.[148]

The reasoning underlying the policy labeling approach paralleled the expertise argument with an added twist. By labeling an agency decision "policy," the Court created a code word to justify both deferring to the recipient agency's exercise of delegated authority,[149] and inferring that the delegating statute is constitutionally legitimate.[150] As with the expertise justification, one argument supporting deference to policy decisions centered on congressional intent. Where Congress delegated con-

146. In his treatise, Professor Jaffe described the differing practices associated with review of an agency's choice of legal rules to support a decision:

> A court might hold that it has the obligation to determine the correctness of every such rule and independently adopt or reject the rule as its own decision. However, the practice of the Supreme Court, for example, shows the Court sometimes asserting the correctness of the agency rule, at other times, going no further than to hold that the administrator can but is not required to adopt such a rule. It is this latter practice which has given rise to profound difficulties of description and analysis, and to intense controversy. It has seemed to some that a court which thus leaves to an administrator the power to bind and to loose is abandoning the prime function of a court of law.

L. JAFFE, *supra* note 24, at 557-58 (citations omitted).

147. See, e.g., NLRB v. Hearst Publications, Inc., 332 U.S. 111 (1944), in which the Court maintained that the application of law to facts was not statutory interpretation—that is, a matter of law—and thus, the Court was not constrained from deferring to the agency's decision. *See supra* text accompanying notes 54-56; *see also supra* note 17.

148. An early articulation of the expertise-policy rationale for deference is found in NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 349 (1953) (" 'Cumulative experience' begets understanding and insight by which judgments not objectively demonstrable are validated or qualified or invalidated."). The need to defer to an agency "policy" decision most likely also evolved from increasingly broad delegations that made impossible independent judicial review of all administrative decisions not purely factual. Such review had been advocated in earlier times. Dickinson, *The Judicial Review Provisions of the Federal Administrative Procedure Act (Section 10): Background and Effect,* in THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES 584-85 & nn. 54, 55 (G. Warren ed. 1947) (cited in Levin, *Questions of Law*, *supra* note 16, at 12 n.70.

149. In FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981), the Supreme Court rejected the D.C. Circuit's insistence that the FCC's decision was law and not policy. The D.C. Circuit had used the distinction to reject the Commission's refusal to consider the diversity in program format in making radio station licensing decisions. The Supreme Court instead insisted that the Commission's policy statement was "entitled to substantial judicial deference." *Id.* at 596.

150. *See, e.g.,* Yakus v. United States, 321 U.S. 414, 424-25 (1944); Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126, 144 (1941).

tinuing regulatory power in nonspecific statutory language, the legislators included a delegation of policymaking authority.[151] In addition, the delegate's exercise of discretion in formulating the substance of the congressionally ordained program was deemed to involve policy decisions, and thus, entitled to judicial deference.[152] This reasoning implicitly included the perception that the policymaker was an expert on the matter in question.

The twist was that in order for the nonspecific delegating statute to be constitutional, the Court needed to find that Congress had articulated a "policy" to guide the agency's exercise of discretion.[153] The fact that the delegate acted often implied that Congress had met this responsibility.[154] This inference had a circular quality to it: the fact that the agency had interpreted the statute was used as evidence that Congress intended to delegate the interpretory power. However, since the Court was hard-pressed to determine the delegate's conformance with the statute, it simplified the task of judicial review by deferring to the agency's policy decision.

Despite the frequent invocation of the policy rationale, the Court never really defined the term "policy" in either the statutory or agency context. Moreover, since the early days of the New Deal, the Supreme Court failed to find a congressional enactment unconstitutional on the basis of an insufficiently defined policy. This was so even in cases where the legislative history indicated an absence of agreement among legislators over fundamental aspects of the delegated authority.[155] The failure of Congress to assign priorities to the factors and values intended to guide the decisionmakers' judgment often left the delegate with virtually

151. *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837, 864-66 (1984) (an administrative decision is entitled to deference since the statutory ambiguity left the policy decision to the agency).

152. *See* Levin, *Questions of Law*, *supra* note 16, at 11 & n.61: "[T]he Court frankly acknowledges that some, but not all, *normative* decisions that agencies make as they implement their mandates are matters of agency discretion and may not freely be set aside on judicial review." (citing INS v. Jong Ha Wang, 450 U.S. 139, 144-45 (1981); E.I. du Pont de Nemours & Co. v. Collins, 432 U.S. 46, 57 (1977)) (emphasis in original).

153. *See supra* note 150 and accompanying text.

154. Before acting, the delegate had to interpret the statute and then act in accordance with the proferred interpretation. Consequently, the delegate's decision implied that the statute was capable of interpretation. A classic example of delegate action implicitly confirming statutory adequacy is a delegation to administrators to set "just and reasonable" rates. *See, e.g.*, Permian Basin Area Rate Cases, 390 U.S. 747 (1968); American Public Gas Ass'n v. FPC, 567 F.2d 1016 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978); *see also* Pierce, *supra* note 83, at 474 n.18 (illustrating why "just and reasonable" is an empty policy standard).

155. *See, e.g.*, Industrial Union Dept., AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980) (discussed *infra* notes 400-414 and accompanying text).

unfettered discretion. Thus, where discretionary deference was granted, an administrative policy could dictate both the fact and law decisions of an agency.

3. Necessity

While expertise as a basis for deference was premised upon the purpose of administrative governance, necessity was occasioned by the increase in the power of federal regulatory agencies. Congressional use of delegation to order agencies to fashion legislative remedies to pressing problems brought significant changes in the nature and extent of agency decisions. These procedural and substantive changes affected courts' abilities to review agency decisions.

Most importantly, rulemaking, and in particular informal rulemaking rather than formal adjudication, became the preferred form of decisionmaking.[156] This increase in rulemaking marked the emergence of a discretionary deference model independent of the traditional deference model. In the early days of informal rulemaking the administrative procedures commanded little attention. Since the agency was not required to compile a factual record, the court presumed that facts existed to support the rule. Consequently, deference was almost complete with respect to agency fact findings and application of law to fact. Under such circumstances, deference to agency conclusions of law was also required. Where the court lacked the factual raw materials, it was unable to build a persuasive case that the agency had misinterpreted the statute.

As the use of informal rulemaking increased, however, the Court faced the prospect of having to abandon judicial scrutiny.[157] To avoid this, the Court required that the agency provide a record for review.[158] Judicial review could now include examination of both the agency's sub-

156. Both the majority of administrative agencies and courts preferred rulemaking to adjudication for announcement of decisions of general applicability. *See, e.g.*, National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974); SEC v. Chenery Corp., 318 U.S. 80 (1943).

157. Where the Court had no record it could not review whether the evidence supported the agency's factual findings. Moreover, without a discussion of the agency's interpretation of the pertinent law and the application of that law to the facts of the matter, the Court would be unable to evaluate the rationality or correctness of the agency's decision. At most, the Court could review the procedural steps taken by the agency to reach its final decision.

158. The record "requirement" in informal rulemaking has been assumed by the courts rather than formally required. *See, e.g.*, Camp v. Pitts, 411 U.S. 138, 142 (1973) (rejecting the lower court's call for a trial de novo and calling for review on "the administrative record already in existence"); *Overton Park*, 401 U.S. 402, 420 (1971) (noting that the full administrative record was before the Court). Initially, reviewing courts built upon the Administrative Procedure Act (APA) provision calling for agency rules to be accompanied by a statement of the rule's basis and purpose. 5 U.S.C. § 553(c) (1982). The D.C. Circuit in particular used

stantive and procedural decisions. Nevertheless, by the time the record keeping requirement was established, necessity had already fostered deference as the norm for review of all aspects of the agency's decisions, including the so-called legal issues not traditionally entitled to deference. The Court eventually narrowed the scope of review,[159] and occasionally disagreed with an agency conclusion,[160] but it proceeded from a posture of deference. Consequently, as a rule, courts neither conducted an unlimited search of the agency record nor sought the "correct" statutory meaning or application.

Thus, in cases involving review of informal agency rulemaking, the emergent modern deferential review model was built upon different considerations than those of the traditional model. The distinction between fact, law-fact, and law was relatively insignificant as a basis for deciding whether to limit review. Instead, the qualifications of the decisionmaker and the circumstances surrounding both the congressional delegation and the administrative decision became the primary focus.[161] Under the new model, moreover, the nature of the deference was considerably less defined than its traditional counterpart. The expertise and policy labeling rationales that served to justify discretionary deference also influenced the scope of the remaining review.

Other explicit and implicit factors appeared to influence the meaning of discretionary deference review in particular cases. Reviewing courts originated a variety of phrases to describe the purpose of the limited review. Whether there are any practical differences among the descriptive terms is debatable. Nevertheless, by using different language to

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this provision to require that the agency demonstrate the substantive basis of its rule. *Cf.* International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973).

The Supreme Court eventually chastised the D.C. Circuit for imposing procedural requirements upon agency rulemaking beyond those mandated by the APA, it nevertheless assumed the existence of a record requirement. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 524-25 (1978). In *Vermont Yankee*, the Supreme Court overturned the D.C. Circuit's order that the agency permit cross-examination of witnesses in an informal rulemaking proceeding. However, the Supreme Court remanded the case to the district court to determine whether the record adequately supported the administrative decision.

Although the Supreme Court has never defined the nature of an informal rulemaking record, it has rejected lower court efforts to seek information beyond the record presented by the agency. FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326 (1976). *See generally,* Pederson, *Formal Records and Informal Rulemaking,* 85 YALE L.J. 38 (1975).

159. *See supra* notes 116-121 and accompanying text.

160. *See, e.g.,* NLRB v. Yeshiva University, 444 U.S. 672 (1980) (the Court insists that university faculty are managers barred by the statute from organizing a union, contrary to the Board's application of its statutory interpretation to its findings of fact).

161. *See supra* text accompanying notes 138-139; *see also infra* notes 182-184 and accompanying text.

describe the scope of review in individual decisions, the Court implied that differences existed. To the extent that a difference was more than semantic, the choices associated with the various descriptions of deferential review did not emerge as distinct concepts.[162]

In effect the choices represent points on a continuum: at one end is the choice to ignore the agency's interpretation entirely without addressing the question of deference;[163] at the other is the explicit decision to decline review by finding the matter solely committed to agency discretion[164] or implicitly by treating the decision to defer as determinative of an outcome upholding the agency decision.[165] Other descriptions convey the impression that there are varying degrees of judicial deference—ranging from strict to cursory review—which fall along the continuum.[166]

Discretionary deference at its inception was essentially a patchwork of ideas about how to allocate the ultimate decisionmaking power between the judicial and executive branches when Congress failed to perform that function.[167] Where Congress used vague or ambiguous

162. *See* Coffman, *Judicial Review of Administrative Interpretations of Statutes,* 6 W. NEW ENG. L. REV. 1, 1-2 (1983) (citing cases using various descriptions of weight accorded to agency statutory interpretations, Professor Coffman maintains that "[w]hatever the expression used, the essential meaning is that the administrator's interpretation will be upheld if it is 'reasonable' "); *see also* Note, *A Framework for Judicial Review of an Agency's Statutory Interpretation:* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 1985 DUKE L.J. 469, 471 n.18 (citing cases other than those of Professor Coffman, the author comments that "[t]he 'reasonableness' standard has assumed many different forms") [hereinafter Note, *A Framework for Judicial Review*].

Given the variety of descriptions and expressions, the term "reasonableness" in its present usage as a concept of deferential review has no meaning and little practical significance. It exists as a conclusion attached to a court's decision to uphold an agency's interpretation without deciding that the interpretation is the only acceptable meaning of the statutory language. The descriptive terminology that comprises the reasonableness conclusion, however, appears to indicate different levels of judicial scrutiny involved in a determination of reasonableness. *See infra* notes 172-173 and accompanying text.

163. *See, e.g.,* Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 713 (1980) (Marshall, J., dissenting); *cf. Overton Park,* 401 U.S. 402 (1971) (discussed *supra* notes 72-94 and accompanying text); *see also* Diver, *supra* note 15, at 563-64.

164. Technically, determination of statutory meaning is not a matter committed to agency discretion. *Cf. Overton Park,* 401 U.S. at 410. On the other hand, where the challenge is to an agency decision that embodies a statutory interpretation, the potential for judicial declination of review exists if the court deems the agency action "discretionary."

165. *See infra* notes 193-218 and accompanying text (discussing presumptive deference).

166. *See, e.g.,* Stever, *Deference to Administrative Agencies in Federal Environmental, Health and Safety Litigation—Thoughts on Varying Judicial Application of the Rule,* 6 W. NEW ENG. L. REV. 35 (1983); Coffman, *supra* note 162; R. PIERCE, S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS §§ 7.4.3, 7.7.1 (1985); *see also infra* notes 169-170 and accompanying text & note 172.

167. "The Court's choice between substituting its judgment for that of the agencies or using a reasonableness test is not guided by explicit theory but depends upon judicial discretion." K. DAVIS, *supra* note 8, at § 30.58. Presently, the justification of deference usually follows a

statutory language, a reviewing court had to decide whether to determine statutory meaning itself, or to give the agency's interpretation some role in resolving the conflict between interpretations advanced by the agency and the challenger. Eventually, the patchwork narrowed into three choices, including the refusal to defer. The two other choices, weighted deference and presumptive deference, form the paradigm of discretionary judicial deference. Each is examined in the next section.

B. The Discretionary Deference Model

1. Weighted Deference

Weighted deference refers to a court's choice to limit its review by assigning a "weight" to the challenged agency decision. This weight represents the level of scrutiny involved in the court's review.[168] The weighted deference category encompasses most of the cases in which a court defers to an agency's statutory interpretation.

The possible levels of limited judicial scrutiny under weighted deference range from cursory to searching review. At one end, the review is sufficiently extensive to permit the court to disagree with an agency decision despite the court's claim that it is deferring.[169] At the other end, the review is so limited as to approach an irrebuttable presumption that the agency's decision is acceptable.[170] Theoretically, the greater the weight commanded by an agency decision, the less searching is a court's evaluation of the decisionmaker's explanation for its conclusion.[171]

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court's determination that the statutory language in question is without an obvious or explicit meaning. *See* Diver, *supra* note 15, at 560-63.

168. The origins of judicial identification of factors that determine the weight accorded an administrative interpretation can be traced to Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (discussed *supra* notes 138-141 and accompanying text). *See also* Batterton v. Francis, 432 U.S. 416, 426 (1977) ("The regulation at issue in this case is therefore entitled to more than mere deference or weight."); General Elec. Co. v. Gilbert, 429 U.S. 125, 141-45 (1976); Morton v. Ruiz, 415 U.S. 199, 231-37 (1974) (varying degrees of deference based upon factors concerning agency qualifications).

169. *See, e.g.*, E.I. DuPont de Nemours v. Collins, 432 U.S. 46 (1977) (the Court reversed the lower court's substitution of judgment, but closely scrutinized the agency's interpretation of the statute in question).

170. *See, e.g.*, Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980) ("Unless demonstrably irrational, Federal Reserve Board staff opinions . . . should be dispositive . . . ."); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 121 (1973) ("we are guided by the 'venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . .' "); *see also infra* notes 193-218 and accompanying text.

171. *But see* Diver, *supra* note 15, at 566 (claiming that there is no direct evidence that deferential courts fail to examine precisely the same sorts of material that courts examine when engaging in independent review).

The case law is not particularly enlightening in understanding the weighted deference concept because of the inconsistent terminology courts have used to define the scope of review, based upon varying degrees of deference.[172] In addition to this rhetorical confusion, the

172. Professor Davis maintains that one cannot "get at the realities of the scope of [judicial] review [by] taking apart" the many confused verbalisms. K. DAVIS, *supra* note 8, at § 29.2. He notes that such descriptions at their best are broad and general, and at their worst subtract from understanding more than they add. *Id.* at § 29.00-.02. The Court has also been inconsistent with respect to the context in which it applies its descriptive phrases. The Court's descriptions of weighted deferential review appear to apply in four non-mutually exclusive contexts. These are functional, quasi-qualitative, doctrinal, and procedural.

Functional formulae describe review that ranges from careful scrutiny to cursory glance.

Quasi-qualitative review refers to descriptions of judicial evaluation standards. Among the most frequently cited descriptions is the familiar "arbitrary and capricious" standard, an extension of the traditional deference standard for reviewing decisions of fact and law-fact. *See supra* notes 22-35 and accompanying text. Under weighted deference, "arbitrary and capricious" describes the standard for judicial evaluation of an agency's asserted legal basis for its decision. The quasi-qualitative category also includes evaluative descriptions such as "reasonable" and "rational."

The doctrinal classifications are the courts' recent efforts to narrow the extent of their deference. *See supra* notes 95-119 and accompanying text. In particular, the "hard look" review, first fashioned in the traditional deference model to limit deference to the law-fact decisions in formal adjudication, has been extended to agency rulemaking decisions. In Ethyl Corp. v. EPA, 541 F.2d 1, 37 n.79 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976), the D.C. Circuit held that hard look modified the arbitrary and capricious standard of review of informal rulemaking in a manner similar to the modification of the substantial evidence review standard of adjudication and formal rulemaking. *See supra* notes 120-121 and accompanying text; *see also* Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 520 (D.C. Cir. 1983). The Supreme Court recently endorsed the use of hard look as a reviewing standard of informal rulemaking. In Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29 (1983), the Court overturned the Department of Transportation's decision to rescind its rule requiring the installation of air bags or passive restraints. The National Highway Traffic Safety Administration (NHTSA), to which the Secretary of Transportation delegated his authority concerning the promulgation of safety standards, claimed that the rule, which had been promulgated during the previous Administration, would not produce significant safety benefits. *Id.* at 38. The Court was unwilling to accord the degree of deference that the agency claimed it was owed according to earlier Court decisions. In particular, the Court refused to hold that deference to an administrative decision was equivalent to the presumption of constitutionality due a congressionally enacted statute. *Id.* at 43 n.9. Although the Court used the rhetorical label "arbitrary and capricious," the Court's decision indicated that this review standard was being modified to require a more extensive judicial evaluation of the agency's decision.

The procedural approach to limiting review is perhaps the most subtle variant of weighted deference. The level of scrutiny can be substantially affected by judicial assignment of the burden of persuasion between challenger and agency. For example, descriptions of review standards requiring that an agency's decision be rationally based or reasonable imply that a court must find sufficient support for an agency's conclusions in the agency's decisionmaking record. This means that at least part of the burden rests with the agency. The agency must make an affirmative showing that the basis of its decision meets the requisite review standard. See, e.g., Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 653-54 (1980), in which the Court found that the agency "did not even attempt to carry its burden of proof." The Court rejected the agency position that the burden was on the regulated inter-

Supreme Court's failure to provide an analytical framework for predicting the scope of deferential review leaves one to speculate as to an individual court's motivation for invoking and applying discretionary weighted deference in a particular set of circumstances. Moreover, while the case law identifies the factors favoring deference, the significance of a decision to accord greater or lesser weight is not always evident.[173]

The Court's decision to accord an agency decision weighted deference is also plagued by analytical uncertainty. The leading Supreme Court case in the development of modern weighted deference is *Udall v. Tallman.*[174] This case is frequently cited for the broad proposition that a court should defer to a statutory interpretation by agency officials whom Congress entrusted with the administration of the statutory scheme.[175] However, the decision in *Udall* was considerably narrower than this principle and the flexible application of *Udall* illustrates the unpredictability of the weighted deference choice.

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ests to disprove the agency's conclusion. *Id.* at 653. On the other hand, the burden rests with the challenger when a court asserts that it will not overturn an agency decision unless the challenger has demonstrated to the court's satisfaction that there is an unreasonable or plainly erroneous agency interpretation. *See* Compton v. Tennessee Dep't of Pub. Welfare, 32 F.2d 561, 565 (6th Cir. 1976) ("including rent supplement payments in the definition of income for food stamps is [not] plainly erroneous or inconsistent with the vendor payment regulation"); Burglin v. Morton, 527 F.2d 486, 490 (9th Cir. 1976) ("The plaintiffs have not made a tender of evidence sufficient to overcome the presumption of validity of administrative action."); *see also* Bingler v. Johnson, 394 U.S. 741, 750 (1969) ("unless unreasonable and plainly inconsistent with the . . . statutes"); NLRB v. Coca-Cola Bottling Co., 350 U.S. 264, 269 (1956) ("if that definition does not appear too farfetched"); *cf.* Stever, *supra* note 166, at 45.

Conceding that the variations of deferential review "are almost infinite," Professor Stever divides the judicial approaches into three broad categories: "hard look," "quick look," and "no look" cases.

The four contextual categories are not mutually exclusive, but represent different approaches used by the Court. They may, for instance, occupy equivalent spots along the spectrum of narrow to extensive review. For example, hard look, which this Article classifies as a doctrinal description, may be equated with the functional description of careful scrutiny. The observation of the descriptive groups is not intended to be a comprehensive survey of all cases involving discretionary weighted deference. Rather, the classification offers a perspective on the present review practices of courts in order to determine whether there is some basis for achieving a coherent understanding of these practices in a larger analytic framework.

173. The line of cases that identifies criteria for justifying judicial deference is generally not helpful in assigning priorities among the various factors that favor deference. Consequently, predicting the nature of the deferential review in particular circumstances is even more difficult than speculating on whether a court will defer (*see* discussion of *Udall v. Tallman*, *infra* notes 174-181 and accompanying text).

174. 380 U.S. 1 (1965).

175. *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984); United States v. Rutherford, 442 U.S. 544, 544 (1979); NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974). The principle in *Udall* was articulated in dictum. 380 U.S. at 16.

Udall involved a decision by an administrative official charged with responsibility under a presidential executive order, not an administrative legislative rule.[176] The interpretation of that order, which was embodied in the decision, was entitled to deference for two reasons: it was consistent with past agency practices,[177] and it induced reliance that would be detrimental if the Court substituted its own interpretation.[178]

As noted earlier, subsequent decisions relying upon *Udall* have not been so limited. Since all statutes require some interpretation, and all delegations of legislative power identify the officials charged with administering the statutory scheme, *Udall*'s broad proposition can justify deference in almost every instance of administrative statutory interpretation. The widespread applicability of this proposition, however, clashes with the reluctance of at least some courts to curtail its review so severely.[179]

Hence, *Udall* has spawned two lines of cases. One line establishes deference as the decisional norm by expanding the factors that justify a court's decision to accept an agency interpretation.[180] The other line distinguishes application of this norm by identifying the circumstances that disqualify the administrator from entitlement to deference.[181] While the two lines of cases are not antithetical, if read together they do not form a coherent model either for determining when an agency's decision qualifies for deference or for predicting the level of scrutiny accompanying a court's decision to defer.

For example, a court's decision to defer may be considered indepen-

176. 380 U.S. at 5.

177. *Id.* at 17.

178. *Id.* at 18.

179. *Compare* United States v. Clark, 454 U.S. 555 (1982) (agency construction of a statute given great deference when followed consistently over a long period), *with* Morrison-Knudsen Constr. Co. v. Office of Workers' Compensation Programs, 461 U.S. 624, 644 (1983) (Marshall, J., dissenting) (deference given to a relatively recent and inconsistent agency interpretation).

180. *See supra* note 175.

181. This second line of cases spawned by *Udall* is not synonymous with the line of cases in which the Court independently determines statutory meaning on the grounds that the interpretive function is solely a judicial responsibility. *See* Barlow v. Collins, 397 U.S. 159, 166 (1970); Hardin v. Kentucky Utils. Co., 390 U.S. 1, 14 (1968) (Harlan, J., dissenting); *see also supra* note 25 & text accompanying notes 54-59. Commentators and judges often speak of two lines of decisions involving judicial review of administrative statutory interpretation. In essence they refer to those in which a court defers and those in which a court exercises independent judgment. *See* Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2d Cir. 1976); Diver, *supra* note 15, at 551. The line of decision discussed here acknowledges deference as a general proposition but concludes that in the particular case under review, the agency's decision is not entitled to deference. The court may then provide its own interpretation.

dently of another court's reasons for not deferring.[182] This means that the criteria supporting deference in one case do not necessarily exclude deference in a seemingly opposite situation.[183] Where the traditional factors favoring deference in a particular case are absent, a court may create new reasons for deferring.[184] Similarly, even where the traditional factors warranting deference are present, a court may still decide not to defer.[185]

Equally problematical is the fact that the criteria identified in the case law calls for highly subjective judgments by reviewing judges.[186] A consequence of the dichotomous application of *Udall* is that by manipu-

182. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

183. For example, the Court has asserted that an administrative interpretation that was contemporaneous with the passage of the enabling statute, and that has been consistently adhered to since that time, is entitled to deference. *See, e.g.,* United States v. Clark, 454 U.S. 555 (1982). On the other hand, the Court has also deferred to an administrative change in a statutory interpretation despite the fact that the change represents a new policy without an accompanying congressional amendment. United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

184. For example, deference has been justified on the grounds that an agency was engaged in an experimental attempt to implement a new regulatory concept even though the concept could not be traced to a specific congressional policy. Permian Basin Area Rate Cases, 390 U.S. 747 (1968). See also United States v. Rutherford, 442 U.S. 44 (1979), in which the Supreme Court found that deference was particularly appropriate when the issue involved a matter of public controversy.

185. In Association of American R.Rs. v. Costle, 562 F.2d 1310, 1318-19 (D.C. Cir. 1977), the court ruled that deference was not applicable where the agency "misinterpreted its statute." This reasoning may be the equivalent of saying that a court need not defer when it wants to reach a different conclusion. See also Moon v. United States Dep't of Labor, 727 F.2d 1315 (D.C. Cir. 1984), and Trailways, Inc. v. ICC, 727 F.2d 1284 (D.C. Cir. 1984), in which different panels of the same court evaded *Udall* with little difficulty.

186. In National Wildlife Fed'n v. Gorsuch, 530 F. Supp. 1291 (D.D.C.), *rev'd*, 693 F.2d 156 (D.C. Cir. 1982), the district court refused to defer to the EPA, based upon its findings that the Agency's statutory interpretation did not require scientific expertise, was not based upon policy reasons, was contrary to congressional intent expressed in both the broad and interim goals, and was inconsistent with the EPA's implementation of the Act in other contexts. *Id.* at 1311. By contrast, on appeal, the D.C. Circuit concluded that "great deference" was owed to the EPA because of, among other reasons, the Agency's scientific and technical expertise and its contemporaneous and consistent construction of the Act. 693 F.2d at 166-70. While the district court emphasized congressional purpose in enacting the regulatory scheme, 530 F. Supp. at 1304, the D.C. Circuit emphasized the consequences of the EPA's choice, 693 F.2d at 181-82. The D.C. Circuit characterized the considerations underlying the EPA decision as based upon "expertise," but the concerns listed appeared to be more political than scientific. *Id.* at 182-83.

The district court's decision would have forced the EPA to become an unwilling regulator in order to further the congressional purpose. The D.C. Circuit avoided this result by construing congressional intent to give the agency both "substantial discretion in administering the Act" and "at least some power to define the specific terms" at issue. *Id.* at 167. The D.C. Circuit explained that by accepting the Agency's interpretation, priority was accorded to the spirit of the statute. Moreover, the D.C. Circuit found "special reason to defer" based upon the fact that Congress did not contemplate the issues associated with regulating this particular matter. *Id.* at 182.

lating the criteria for deferring or refusing to defer, judges may base their agreement or disagreement with an agency's interpretation upon their personal evaluation of the wisdom of the underlying agency policies.

Judges can also use deference criteria to mask their displeasure with congressional legislative programs.[187] A court's refusal to defer by assigning its own statutory meaning can severely restrict the effective scope of a legislative program.[188] On the other hand, a court in general agreement with a program's goals can excuse the absence of statutory specificity by finding sufficient factors to warrant deferring to the delegate's decision.[189] Even where the court agrees with an agency interpretation, the difference between deferring to the agency's decision—rather than affirming by adopting the agency interpretation as its own—is significant because deference theoretically permits the agency to reinterpret the statute to reach an opposite result in another case.[190]

The use of deference as a justification for upholding agency action for which there is no evidence of congressional contemplation significantly alters the interpretive process in which statutory meaning is deduced from the statutory language or legislative history, or both. Consequently, judicial deference permits, if not encourages, the agency "to draw upon its practical experience to develop new meanings of [statutory] phrases as time passes."[191] The legislative amendment process can thus continue indefinitely without formal congressional action. Since the bases for judicial deference elude generalization with any degree of certainty, one is left to guess whether a court will accept or reject the agency's efforts.

187. *See* Bureau of Alcohol, Tobacco, & Firearms v. Federal Labor Relations Auth., 464 U.S. 89 (1983) (deference not given when the interpretation involved a policy decision more properly made by Congress); Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 713 (1980) (Marshall, J., dissenting) (Justice Marshall objected to the plurality's refusal to defer to the agency's determination of safe exposure level by reinterpreting the statute in an unorthodox manner: "The plurality is obviously more interested in the consequences of its decision than in discerning the intention of Congress.").

188. *See, e.g.,* Grove City College v. Bell, 465 U.S. 555 (1984).

189. *See* Arizona Power Auth. v. Morton, 549 F.2d 1231 (9th Cir. 1977) (the court offered circular reasoning to justify deference to an administrative interpretation: after concluding that the interpretation was entitled to deference, the court used that conclusion as support for a finding of reasonableness).

190. For example, in United States v. Rutherford, 442 U.S. 544 (1979), the Supreme Court deferred to the FDA's interpretation of the Food, Drug and Cosmetic Act that new drugs for the treatment of terminally ill persons were not exempt from the requirement of pre-market testing. Since the Court found that the FDA was delegated discretion on the matter of testing new drugs, the FDA theoretically retains the authority to find that the Act permits an exemption for some other drug. *See infra* note 194.

191. Woodward & Levin, *In Defense of Deference: Judicial Review of Agency Action,* 31 ADMIN. L. REV. 329, 339 (1979).

2. Presumptive Deference

Presumptive deference refers to the category of cases in which the court's choice to defer compels it to accept the agency's decision. This category is distinct from weighted deference because here the deference decision is outcome determinative: presumptive deference permits a court to uphold a questionable agency interpretation by placing upon a challenger the virtually impossible burden of proving the agency incorrect.

The theoretical availability of a challenger's opportunity to rebut distinguishes presumptive deference from those cases held to be unreviewable because the matter was committed to the discretion of the agency.[192] Nevertheless, the reasoning of presumptive deference and unreviewable cases is similar. Both depend on a court's determination that Congress intended to delegate broad discretionary authority that included the power to determine the meaning of the delegated statute. Unlike cases deemed unreviewable, however, the court need not find an explicit congressional directive foreclosing judicial review. Instead, the court maintains that it will intervene if a challenger can show clear evidence that the agency interpretation is contradicted by a specific statutory directive. Such a showing is impossible where the statute contains only general language and vague or ambiguous directives.

Review under presumptive deference in effect is little more than a review of the form rather than the substance of an agency's decision. So long as the agency provides the required explanation of its interpretation, the court is unlikely to evaluate the reasoning underlying the agency's conclusion. Consequently, a challenger's only hope of convincing a court to evaluate the substance of an agency decision is to rebut the presumed adequacy of the agency's explanation.[193]

The availability of the presumptive deference choice serves two purposes. First, it allows a court to uphold a questionable agency interpretation by effectively refusing to review the substantive basis of the agency's

192. 5 U.S.C. § 701(a)(2) (1982). *See also supra* note 83.

193. Presumptive deference is not synonymous with the presumption of regularity or validity to which the courts sometimes refer in the course of reviewing challenged agency action. While there is some dispute over the meaning, and even the existence of the latter presumption, to the extent that it exists the presumption of regularity would appear to be a broader concept. It encompasses more than the issue of the delegate's statutory interpretation by presuming that both the procedural and substantive considerations underlying the agency decision are reasonable in the absence of evidence to the contrary. While this presumption implicitly includes the delegate's interpretation of the statute, the issue of statutory meaning may be isolated from a presumption accorded to the procedures and factual support for the challenged decision. *See* Levin, *Scope-of-Review Doctrine*, *supra* note 16, at 282-84; Monaghan, *supra* note 1.

decision. Second, it permits a court to legitimize a broad statutory delegation by "bootstrapping" the administrative interpretation onto the meaningless statutory language. Since the constitutionality of such delegations is rarely challenged, the court need not address the issue of whether a court could, if asked, determine if an agency action exceeded the scope of its delegated authority.[194]

Admittedly, the judicial choice to accord an agency decision presumptive deference is questionable. In particular, it raises the issue of whether the choice exists in order to allow a court to justify upholding an agency decision that could not be sustained upon a closer judicial examination. An affirmative answer to this query is supported by the fact that the judicial decision to accord presumptive deference is generally recognized only retrospectively. The cases do not reveal any judicial acknowledgment that there are objectively determinable circumstances under which a court is likely to uphold an agency decision by using presumptive as opposed to weighted deference. Nevertheless, the case law reveals instances in which courts are either unwilling or unable to sustain an agency decision by meaningfully evaluating the substantive basis for the challenged agency decision.[195]

The Supreme Court's decision in *Batterton v. Francis*[196] illustrates the presumptive deference paradigm. The case concerned the meaning of the term "unemployment" as used in the Social Security Act.[197] The challenged agency regulations permitted states to exclude from receipt of special welfare benefits those classes of persons ineligible for unemployment compensation under state programs.[198]

194. It might be argued that the agency's initial interpretation serves to clarify the boundaries of its delegated power. Although this approach permits the delegate to define its own jurisdiction, it also arguably provides the specificity required by regulated interests to predict the consequences of planned action. The weakness in this argument is revealed by cases sanctioning a delegate's change in its interpretation of the statute without any intervening congressional action. *Cf.* Bob Jones Univ. v. United States, 461 U.S. 574 (1983); Permian Basin Area Rate Cases, 390 U.S. 747 (1968). The Court implicitly legitimizes a delegation as well by according an agency interpretation weighted deference. Unlike presumptive deference, however, weighted deference preserves some limited review. Thus, the Court at least implicitly acknowledges that it is capable of determining whether the agency acted ultra vires.

195. In some cases of result-oriented review, the court may appear to review the basis of the agency's decision. Such review is largely a sham. *See infra* notes 219-227 and accompanying text (discussing weighted-presumptive hybrid deference).

196. 432 U.S. 416 (1977). For a different interpretation of *Batterton*, see Levin, *Questions of Law*, *supra* note 16. Professor Levin argues that the Court was mistaken in according deference to a pure question of law interpretation, which did not involve law application.

197. 432 U.S. at 424.

198. *Id.* at 420-21. Some states excluded certain classes of "unemployed" persons from receiving benefits—such as those who voluntarily left their job or who were out of work as a result of a labor dispute.

The lower court held that the agency interpretation was incorrect in part because Congress had intended to establish a national standard that did not permit variation by individual states.[199] The Supreme Court reversed, claiming that it was compelled to defer to the agency's interpretation.[200] Even though the agency's interpretation was "at some variance" with the legislative history,[201] the Court upheld the regulations. In effect, presumptive deference permitted the five member majority to uphold the agency's decision despite extensive evidence cited by the dissent that Congress did not intend to permit the states to define the statutory term in question.[202]

The Supreme Court's analysis was supported by two considerations representative of presumptive deference reasoning. First, the Justices characterized the statutory language as ambiguous.[203] Second, they determined that Congress delegated legislative authority for the purpose of authorizing the agency to clarify any statutory ambiguity.[204] Thus, the Court concluded: "The regulation at issue in this case is therefore entitled to *more than mere deference or weight*. It can be set aside only if the Secretary exceeded his statutory authority or if the regulation is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' "[205]

The Court's explanation for this nearly blind deference is problematic. The Court invokes the rhetorical formula of the conventional arbitrary and capricious review standard, yet it is not necessarily implying that all review under that standard compels "more than mere deference." Both before and after its decision in *Batterton*, the Court continued to evaluate many, if not most, of the challenged agency decisions presented. Consequently, the *Batterton* opinion represented a distinct type of judicial review: where Congress delegates explicit lawmaking power and deliberately uses ambiguous statutory language, the Court may severely restrict its review of agency decisions that supply statutory meanings.

199. *Id.* at 428-29.

200. *Id.* at 425-26.

201. *Id.* at 430. The Court explained: "Certainly, the congressional purpose was to promote greater uniformity in the applicability of the AFDC-UF program. But the goal of greater uniformity can be met without imposing identical standards on each State." *Id.* at 431. The Court essentially reasoned that uniformity need not be uniform.

202. *Id.* at 432-37 (White, J., dissenting).

203. 432 U.S. at 427-28.

204. "Congress itself must have appreciated that the meaning of the statutory term was not self-evident, or it would not have given the Secretary the power to prescribe standards." *Id.* at 428. See also Trailways, Inc. v. ICC, 727 F.2d 1284, 1287-88 (D.C. Cir. 1984), where Judge Wright poses the question as "whether Congress delegated the norm-elaboration function to the agency."

205. 432 U.S. at 426 (emphasis added).

Similarly, the *Batterton* Court's emphasis of the distinction between legislative and interpretive rules for purposes of deference fails to provide a satisfactory explanation. The Court maintained that legislative rules promulgated pursuant to an explicit grant of lawmaking power differed from the deference owed to interpretive rules.[206] However, since the Court has frequently evaluated agency statutory interpretations pursuant to delegations of legislative power while claiming it is deferring,[207] the Court's distinction between legislative and interpretive rules cannot mean that all legislative rules are entitled to deference.

The effect of the *Batterton* analysis is to allow a court to ignore a specific congressional directive if three conditions are met: (1) Congress intended to delegate broad legislative rulemaking authority; (2) the challenged agency decision is an exercise of that delegated authority; and (3) at least a portion of the statutory language is capable of more than one meaning. As *Batterton* demonstrates, even where Congress is unusually instructive, the statutory ambiguity condition can be satisfied by judicial creativity. Thus, despite the congressional directive to establish a uniform and national standard of eligibility,[208] the Court refused to imply that the directive prohibited an agency decision to make the standard dependent on varying local policies.

Another example of the use of presumptive deference is the case of *Ford Motor Credit Co. v. Milhollin*.[209] The respondents in *Milhollin* challenged the validity of a consumer credit transaction because the creditor failed to disclose the existence of an acceleration clause on the face of the credit agreement. The Federal Reserve Board ruled that neither the statute nor the regulations containing the Board's statutory interpretation and enforcement provisions required such disclosure.[210]

The Ninth Circuit Court of Appeals disagreed with the Board,[211] and offered its own interpretation of the statute. It reasoned that in the absence of clear statutory language, a court should try to achieve the

206. "By way of contrast, a court is not required to give effect to an interpretive regulation. Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise." *Id.* at 425 n.9 (citing General Elec. Co. v. Gilbert, 429 U.S. 125, 141-45 (1976); Morton v. Ruiz, 415 U.S. 199, 231-37 (1974); and Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

207. *See supra* notes 169-171 and accompanying text. The Court has also refused to defer to agency interpretations embodied in legislative rules. *See, e.g.*, Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys. I, 468 U.S. 137 (1984).

208. 432 U.S. at 430-31.

209. 444 U.S. 555 (1980).

210. *Id.* at 559. This ruling was not contained in a regulation issued according to the rulemaking procedures of the APA. *See infra* note 214.

211. Milhollin v. Ford Motor Credit Co., 588 F.2d 753 (9th Cir. 1978).

congressional purpose by choosing the most logical direction. The Supreme Court agreed with the Ninth Circuit that the matter in question was not governed by clear statutory or regulatory language, but nevertheless reversed the Ninth Circuit's decision. The Court reasoned that in light of the "lacuna in the express prescriptions," the lower court "had no ground for displacing the [Board's] expert judgment."[212]

Although the agency's interpretation in *Milhollin* was not explicitly contrary to the congressional statutory language or purpose as in *Batterton*, the Court invoked presumptive deference. It maintained that the Board's statutory construction was "dispositive"—meaning that it should be sustained unless it was "demonstrably irrational."[213] Since the Court noted that Congress had not specifically addressed the matter, irrationality was virtually impossible to demonstrate on the facts.

The Court's justification for its choice of presumptive deference was based upon a finding that Congress intended the recipient of its delegated power to exercise discretion free of judicial intervention.[214] Thus, the Court did not engage in an evaluation of the conformance of the challenged agency interpretation to the delegating statute.[215]

As in *Batterton*, which it did not cite, the Court found the same three conditions for presumptive deference. The Court maintained that Congress intended the broad delegation of authority, noting that the Board's decision was an exercise of that authority. Further, the Court admitted that the statutory language was capable of several acceptable interpretations.[216] However, the Court in *Milhollin* added an additional

212. 444 U.S. at 570.

213. *Id.* at 565.

214. The Court found that the statute signalled "an unmistakable congressional decision to treat administrative rulemaking and interpretation under [the Truth in Lending Act] as authoritative." *Id.* at 567-68. It also noted that the legislative history indicated a congressional "preference for resolving interpretive issues by uniform administrative decision, rather than through piecemeal litigation." *Id.* The interpretation in question, however, was offered by the staff of the Federal Reserve Board without review by the Board. The staff was authorized to issue unreviewed "Information Letters" in response to inquiries. In *Milhollin*, the administrative interpretation was, therefore, not issued as a regulation subject to a hearing process or mandated by a statutory directive.

215. Professor Davis notes that the *Milhollin* case "establishes a new high water mark of judicial tolerance for delegation and subdelegation of unreviewable power to make law." K. DAVIS, *supra* note 8, at 386. Noting the extent of the judicial deference accorded to an administrative interpretation that was not the product of an agency rulemaking proceeding, Professor Davis adds: "In a very broad perspective, the *Milhollin* case may be regarded as one of the most extreme decisions the Supreme Court has ever made." *Id.* at 388-89.

216. The various interpretations of the Act are evinced by the split in the Circuits over interpretation of the statute. *See* 444 U.S. at 559 n.6. The Court may have chosen to invoke presumptive deference in order to avoid choosing among varying interpretations that support the same outcome.

consideration: it claimed that deference was compelled by necessity. According to the reasoning underlying this claim, the decision in question involved judgment in balancing competing considerations. Consequently, the Court asserted that the Board was better suited than the Court to perform the necessary evaluation.[217]

Because a court need not find affirmative evidence of reasonableness, presumptive deference decisions may be shorter than those based upon weighted deference.[218] Moreover, because a court need only examine the statute to determine first, that Congress intended to delegate discretion, and second, that the statute is either silent or ambiguous regarding the matter in question, the court can sustain an agency decision that it might reverse upon closer scrutiny.

A court's choice of presumptive deference over weighted deference is significant in two respects. First, the choice of presumptive deference inhibits the ability of future courts to refuse to sustain agency decisions regarding the same statute. If a court has presumptively deferred to an agency, a later court must accept all subsequent agency interpretations unless the court reinterprets the delegating statute. The court is not free to disagree with the agency decision based upon a judicial evaluation of the agency's substantive basis for its decision. Moreover, in conformance with the principles of stare decisis, any subsequent judicial statutory reinterpretation would have to be based upon a finding either that the earlier court was incorrect in according presumptive deference, or that Congress did not intend for the delegate to exercise discretion regarding the particular matter under review. Even if the agency has radically altered the policy upon which it based the earlier action, the court would be expected to continue to accord agency decisions presumptive deference.

The second respect in which a choice of presumptive or weighted deference is significant concerns the relative freedom of a court using weighted deference. Where the decision to defer does not compel the court to accept the agency decision, it remains free to defer yet to disagree with the agency. Moreover, in subsequent challenges to a decision of an agency previously deferred to, the court may conclude that new considerations require the court to accord "less weight" to the new

217. *Id.* at 568. The Court maintained that "a court that tries to chart a true course to the Act's purpose embarks upon a voyage without a compass when it disregards the agency's views." *Id.*

218. Once the Court justified its decision to defer, the remainder of the discussion in *Milhollin* was perfunctory. In a passing reference, the Court simply stated that the Board's conclusion was "reasonable." *Id.* at 569.

agency decision. Consequently, despite an earlier decision to defer, the court continues at liberty to disagree with an agency decision.

The consequences of the choice between presumptive and weighted deference are explored further in the next section. It examines recent Supreme Court decisions that illustrate each of the choices available to a reviewing court. First, however, to understand fully the discretionary deference model, a brief digression about the "weighted presumptive" hybrid is necessary. The purpose and extent of a court's use of presumptive deference is illustrated by the judicial creation of the hybrid approach.

3. *The Weighted-Presumptive Hybrid*

The weighted-presumptive hybrid is an approach to judicial review that uses the form of weighted deference and the language of presumptive deference. A court might invoke the hybrid approach to sustain an agency decision that does not meet the conditions for presumptive deference because it is not embodied in a legislative rule. In such a situation, the court uses deference to justify its acceptance of an agency decision that, but for the presumption of acceptability, could be successfully challenged.

The use of weighted deference to create a presumption of acceptability of a challenged agency decision merits separate discussion because it represents a distinct approach to judicial review. It does not, however, represent a choice separate from presumptive deference.[219] The hybrid approach employs deference to determine the outcome of judicial review, however, it requires a slight detour in judicial reasoning for the court to reach its conclusion. Although the court claims to be examining the evidence supporting the agency's decision, the discussion is unnecessary. The judicial evaluation of the reasonableness of the agency decision is largely superfluous. The court need only conclude that the statutory language is broad or ambiguous, and a successful challenge becomes virtually impossible.

The hybrid approach is illustrated in *National Wildlife Federation v. Gorsuch*.[220] The form of the court's opinion was dictated by the agency action under review. The case arose as a challenge to an agency's refusal to act. The refusal amounted to an interpretive ruling, a type of agency decision specifically distinguished from the legislative rules to which the

219. The hybrid approach is distinguished from presumptive deference in form rather than substance.

220. 693 F.2d 156 (D.C. Cir. 1982).

court in *Batterton* had accorded presumptive deference.[221]

Gorsuch involved the refusal by the Environmental Protection Agency (EPA) to regulate changes in water quality caused by hydroelectrical dams. Nothing in the applicable statute, the Clean Water Act,[222] or its legislative history suggested that Congress had ever considered the problem. The Act required the EPA to regulate "pollutants added" to the water from "point sources."[223] The EPA's interpretation that dams were not "point sources" resulted in a refusal to regulate.

Interestingly, if the EPA had chosen to regulate dams by issuing emission standards, the Court could have accepted the decision on the basis that the Agency's decision was a legislative rule entitled to presumptive deference. In that case, the Court could reason that the Act delegated broad discretionary power in ambiguous language; therefore, the EPA's interpretation embodied in its legislative rule compelled judicial approval. One consequence of the *Gorsuch* Court's use of the hybrid approach to sustain the opposite EPA decision is to allow the Agency unrestricted power of statutory interpretation.[224]

The District of Columbia Circuit's approach in *Gorsuch* transformed a congressional mandate to regulate pollution sources into a choice left to the Agency's discretion.[225] Instead of reading the mandate in conjunction with the long-term and interim goals expressed in the stat-

221. The Agency's decision was based upon its interpretation of the statute. The interpretation was not embodied in a rule subject to notice and comment proceedings. The court also rejected using the presumptive deference standard of *Ford Motor Credit Co. v. Milhollin. See supra* notes 209-217 and accompanying text.

222. Clean Water Act, § 402, 33 U.S.C. § 1342 (1982).

223. 693 F.2d at 165. "Point source" is defined in the statute as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel [or] conduit . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362 (14) (1982).

224. Since the D.C. Circuit's opinion followed the form of a weighted deference decision, it was obliged to discuss its conclusion that the Agency's interpretation was "reasonable." 693 F.2d at 177. Despite the additional discussion, however, the opinion appeared outcome determinative based upon the court's decision to defer. The D.C. Circuit in *Gorsuch* cited *Ford Motor Credit Co. v. Milhollin* and its narrower standard of review, but rejected it stating, "we believe that this standard was meant to apply only to the Truth in Lending Act . . . ." *Id.* at 171 n.46. It is this rejection of the presumptive deference of *Milhollin* that places *Gorsuch* in a seemingly separate category. Nevertheless, the court limited its inquiry into the conformance of the Agency's interpretation with the delegating statute by according the Agency's decision "great deference." *Id.* at 166-67 (citing Udall v. Tallman, 380 U.S. 1 (1965)).

225. The D.C. Circuit's approach stands in sharp contrast to that of the district court. *See* National Wildlife Fed'n v. Gorsuch, 530 F. Supp. 1291 (D.D.C. 1982). The lower court refused to accept the Agency's interpretation because it found that interpretation "more tortured" and "overly literal and technical" than if the Act were read to include water pollution caused by dams. *Id.* at 1307. The D.C. Circuit's reversal does not contradict the district court's characterization. Instead, the appellate court's finding of reasonableness is supported by a strained judicial explanation of both the congressional intent and the statutory language.

ute, the court framed the issue as whether the Agency's construction "plainly frustrate[s] the general congressional purposes underlying the Act."[226] By making the standard for reversal so difficult to meet, the court was able to uphold an interpretation that failed to further the statutory goal and most likely diminished efforts to accomplish the congressional purpose. Although the court examined the basis of the Agency's decision, judicial deference in this case caused the court to go to great lengths to sustain that decision.

The effect of the District of Columbia Circuit's decision in *Gorsuch* on legislative responsibility is much the same as if it had presumptively deferred. The decision both condoned congressional inaction and excused the Legislature's failure to consider the political and economic consequences of its regulatory scheme. Unlike the legislative rule involved in the *Batterton* case, however, the *Gorsuch* court accorded the equivalent of presumptive deference to a statutory interpretation not subject to a rulemaking proceeding. Thus, the public was not given an opportunity to scrutinize and comment on the agency decision.

Admittedly, if the court had independently reached the conclusion that Congress did not delegate the power to regulate pollution caused by dams, the immediate result of the case would have been the same. Nevertheless, responsibility for the omission in the regulatory scheme would rest with Congress. If Congress then decided to regulate dam pollution, elected officials would have to consider the political and economic consequences associated with that decision. If, on the other hand, the court took the statute at its word and read the Act as intending to regulate sources of pollution, it could not uphold the Agency's interpretation.

See 693 F.2d at 170-83. The D.C. Circuit's "limited inquiry" regarding the reasonableness of the EPA's decision included the following findings:

—Dam induced water conditions are not substances "added" to water, and thus, although pollution, they are not "pollutants;"

—Congress could have chosen language to make the definition of "pollutant" broader if such was its intent. The use of both "pollutant" and "pollution" implies that they are different. Moreover, congressional drafters' use of the word "means" as opposed to "included within the meaning of 'pollutant' " excludes any meaning not stated. Thus, it may not be expanded to incorporate water conditions rather than added substances.

Admittedly, this literal reading augurs against the hypothesis that the court would have upheld the opposite EPA decision. As *Batterton* illustrates, however, where the court determines that presumptive deference compels acceptance of an agency interpretation, it matters not that the court would reach a different interpretation. If the court chose to evaluate the substance of the EPA decision to regulate, it could emphasize the legislative history and purpose rather than the plain language of the statute. Moreover, in *Gorsuch* the court's concentration on the words of the statute follows only after it has established that Congress intended the Agency to have substantial discretion in interpreting the Act. The court's focus on statutory language is for the purpose of upholding the Agency's decision.

226. 693 F.2d at 177.

Without the presumption of reasonableness, there is little in the statute or its history to support the Agency's decision to exclude dam pollution from regulation. Only with the presumption could the court argue that since Congress failed to consider the matter, there is no evidence expressly contradicting the Agency's interpretation.[227] Like presumptive deference, the hybrid approach effectively excuses both Congress and the courts from responsibility for limiting agency lawmaking power.

4. Afterword

"Real life" cases of judicial review do not always fit neatly within the categories defined in the model of discretionary deference outlined in the preceding discussion. As noted in the Introduction to this Article,[228] the Supreme Court's failure to define an analytical framework for deciding the issue of deference inhibits efforts to understand some actual court decisions within the context of the model.

One area of difficult analysis is the distinction between independent determination and weighted deference. This distinction is lost when a court upholds a challenged agency interpretation without discussion of the scope of judicial review. Whether the court independently determined that the agency conclusion was correct or whether its affirmation was based upon deference can only be hypothesized. Moreover, this distinction may be equally unclear in cases where a court disagrees with an agency decision by providing what it asserts to be the correct interpretation of the delegating statute. Where the court does not remand the decision to the agency, the reason for the court's refusal to accord weighted deference to the agency's interpretation cannot be determined.[229]

It may also be difficult to discern whether a court has chosen presumptive deference or weighted deference in a particular case. This is especially true in cases where the court's decision might be classified at the end of the weighted deference spectrum where judicial scrutiny is most circumspect. The subtle distinction between the absence of evidence sufficient to prove error in the agency's interpretation and the failure to demonstrate that an agency decision is unreasonable is not often

227. The D.C. Circuit distinguished the "grand goal" of Congress from a mandate of full compliance. It found that the substantive provisions in the Act appeared to fall short of completely achieving the statute's announced goal. Thus, the court concluded that it could not find that the Agency's interpretation "plainly frustrates" the congressional purpose. *Id.* at 178-79. This "plainly frustrates" standard places a higher burden on the challenger of an agency decision than one that requires a showing that the interpretation is contrary to statutory purpose.

228. *See supra* notes 7-15 and accompanying text.

229. *See supra* notes 135 & 181.

discussed in judicial reasoning. Moreover, the distinction is less certain due to the presence of the hybrid approach. Despite the ambiguity, presumptive deference, with its higher burden of proof on the challenger, is distinctly reserved for those instances in which the agency's decision is acceptable to a court that requires a challenger to provide evidence of explicit prohibition in an inexplicit statute.

Even if some cases may elude categorization, the model focuses attention on the nature of considerations inherent in modern cases involving the issue of judicial deference. At a minimum, the model permits examination and understanding of the immediate and long-term consequences of the present judicial approach. In addition, the model enables identification of the areas that must be addressed in order to achieve consistency and predictability in judicial review of agency lawmaking.

The model also illustrates the consequences of the modern congressional practice of broadly delegating legislative power. The judicial response of deference has permitted elected officials to retreat from both responsibility and accountability for statutory content. The relationship between delegation and deference and the areas of reform suggested by the model discussed in this section will be examined further in Part Three. Before doing so, it is instructive to examine concrete examples of the analytical confusion wrought by the Supreme Court in confronting the deference issue in an isolated and ad hoc fashion.

C. Application: Supreme Court Cases

1. The Choice of Paradigmatic Cases

Three cases decided by the Supreme Court in the final days of the 1983 Term illustrate the three choices that comprise the model of discretionary deference discussed in the preceding sections.[230] In each case the Court responds differently to the issue of whether it will defer to the agency's interpretation of the statutory delegation.

The Court, however, fails to reconcile its choice of approach in one case with its choice of a different approach in the others. Consequently, the individual opinions explain the basis for the Court's response under the circumstances of the case presented, but offer few clues towards predicting the application of that explanation to other cases. Read together, the decisions reinforce the elusive nature of an analytical framework for

230. The cases are: Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984); Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys. I, 468 U.S. 137 (1984); and Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys. II, 468 U.S. 207 (1984).

predicting when a reviewing court will accept, reject, or modify an agency's interpretation of its enabling statute.

In the first of these cases, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[231] the Court upheld EPA regulations that allowed states to use a "bubble concept"[232] in controlling sources of pollution emission under the Clean Air Act.[233] Presumptive deference was accorded to the EPA's interpretation of the statute. Consequently, the Court focused its review primarily on justifying its decision to defer, from which judicial approval of the EPA's decision followed. This result-oriented deference permitted the Court to reject the interpretive analysis developed by the District of Columbia Circuit in several earlier cases.[234] It also disapproved the lower court's heightened scope of review. The Court did not simply find the statute silent or ambiguous on the matter, but conceded that Congress might have been unwilling to be more specific in framing the EPA's mandate under the Act.

The other two cases discussed in this section were handed down on the same day, review decisions of the same agency, concern the same statute, and are captioned by the same name, but reach opposite conclusions with respect to judicial deference. In the first of the two *Securities Industry*[235] cases, the Supreme Court refused to defer to the Board's determination that commercial paper was not a "security" within the meaning of the Glass-Steagall Act.[236] The Court thus reversed the Board's determination that the Act does not prohibit commercial banks from marketing such financial instruments, and instead, the Court supplied its own meaning for the disputed statutory term. As an acknowledgement of the modern approach in which deference is the decisional norm, the Court sought both to discredit the Board's entitlement to deference as well as to demonstrate that the Board's interpretation was incorrect.[237]

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231. 467 U.S. 837 (1984).

232. *See infra* note 242.

233. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 172(b)(6), 91 Stat. 685, 747 (codified at 42 U.S.C. § 7502(b)(6) (1982)).

234. *See infra* note 247.

235. 468 U.S. 137 (1984).

236. *Id.* at 142-44. *See infra* note 292.

237. The Court characterized the Board's defense of its interpretation as a change in its original argument. Because of this change, the Court reasoned that the Board was not entitled to deference. 468 U.S. at 143-44. The Court next took issue with the Board's conclusions and consequently supplied its own interpretation. *Id.* at 144-60. As will be explained *infra*, the Court's characterization of the Board's position was disingenuous and its techniques of interpretation were questionable. *See infra* notes 297-318 and accompanying text.

In the second *Securities Industry*[238] case, the Court deferred to the Board's decision that a bank holding company could acquire a retail securities brokerage because the latter business was "closely related" to banking. By according weighted deference to the Board's interpretation, the Court found that it was reasonable to conclude that the Glass-Steagall Act did not prohibit the challenged acquisition.

Taken together, the three cases perpetuate, rather than resolve, the dilemma created by the failure of Congress to guide the exercise of discretion delegated to an administrative decisionmaker. Although each decision reinforces the concept of deference as the threshold concern of judicial review of administrative decisionmaking, the opinions reveal as well the emptiness of the criteria invoked to justify a court's decision regarding whether or not to defer. Consequently, in the absence of a requirement for greater statutory specificity provided by Congress, allocation of the ultimate legislative responsibility between the executive and judicial branches remains largely a guessing game.

2. *Presumptive Deference: The "Bubble Case"*

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.[239] serves as an exemplary case of judicial review of an agency legislative decision for two reasons. First, the opinion contains a "restatement" of judicial deference that attempts to impose a categorical framework on the body of case law.[240] Unlike the analysis presented in this Article, however, the Court's restatement tries to synthesize traditional independent judicial determination and modern discretionary deference to the administrative interpretation rather than recognizing the two approaches as separate choices. Second, the Court's decision to uphold the challenged agency regulations is based upon presumptive deference.[241] The Court's use of presumptive deference allows it to excuse Congress from making the fundamental choices essential to achieving the congressional legislative objectives. Moreover, such deference leaves the agency with broad discretionary lawmaking power subject to few, if any, constraints.

Both aspects of the Court's opinion are important illustrations of judicial deference analysis presented in this Article. Each will be separately examined following a brief outline of the material facts in the case.

The challenge in *Chevron* was to the EPA's regulations permitting states to use the "bubble concept" in controlling pollution emitting de-

238. 468 U.S. 207 (1984).
239. 467 U.S. 837 (1984).
240. *Id.* at 842.
241. *Id.* at 844-45. *See supra* notes 193-218 and accompanying text.

vices.[242] The Clean Air Act Amendments of 1977[243] established a regulatory structure requiring certain states to develop a permit program for "construction and operation of new or modified major stationary sources" of air pollution.[244] The EPA regulations promulgated to implement this program allowed a state to use a plantwide definition of "stationary source."[245] The Court acknowledged that this "bubble concept" meant that some new or modified sources of pollution in states that had not attained national air quality standards would not be required to meet the "lowest achievable emission rate" under the current state of the art for that facility.[246]

Subjecting all new or modified polluting sources to a permit requirement would not have been inconsistent with either the statute or its legislative history.[247] Nevertheless, the Court upheld the EPA's reading of

242. Under this concept, the states were permitted to treat all pollution emitting devices within the same industrial grouping, even if from separate sources, as though they were encased within a single "bubble." Opponents of this EPA interpretation argued that each new or modified stationary source of pollution was subject to a separate control standard. 467 U.S. at 843. The statutory scheme required the states to submit State Implementation Plans (SIP) outlining their plans to attain the National Ambient Air Quality Standards set by the EPA. As part of the SIP, states were to require permits for the construction and operation of new or modified stationary sources. The statute, however, did not define the term "stationary source" for purposes of the permit program. The bubble concept evaded the permit requirement for new or modified pollution emitting devices where the device is added to a bubble considered an existing stationary source. *See infra* text accompanying note 246.

243. Pub. L. No. 95-95, § 129, 91 Stat. 685, 747 (codified at 42 U.S.C. § 7502 (1982)).

244. *Chevron,* 467 U.S. at 849. As noted earlier, the Act did not define "stationary source."

245. *Id.* at 840 n.2.

246. The court of appeals, as well as the challengers to the EPA interpretation, believed that the paramount intent of Congress was to seek to improve air quality. Hence, the statute imposed certain technological requirements on new or modified stationary sources of emission. The requirement that such sources comply with the "lowest achievable emission rate" (LAER) could not be waived by the states.

The Court rejected the notion that the bubble concept—which measures only sources of emissions on a plantwide basis—amounts to a waiver of the LAER requirement. Although a new source may emit more pollution than the lowest achievable rate for that source, the Court reasoned that the source would not be a stationary source within the meaning of the Act where the states defined such sources as an entire facility. The respondents argued that allowing a new pollution source to be offset by a reduction of pollution from an existing source effectively waived the LAER requirement. The Court dismissed their argument as "a classic example of circular reasoning." *Id.* at 861 n.34. On the other hand, the Supreme Court's explanation that the statute "merely deals with the consequences of the definition of the term 'source' and does not define the term" was a less than satisfactory rebuttal to the respondent's accusation. *Id.* At least the Supreme Court cannot be accused of "employing traditional tools of statutory construction" to discredit others' attempts to do so. *Id.* at 843 n.9.

247. The D.C. Circuit held this position with respect to such sources in areas that had yet to attain the National Ambient Air Quality Standards. *See* Natural Resources Defense Council, Inc. v. Gorsuch, 685 F.2d 718, 726 (D.C. Cir. 1982). The decision in that case was based upon two earlier D.C. Circuit Court precedents. *See* Alabama Power Co. v. Costle, 636 F.2d

the statute that permitted balancing the environmental interest in upgrading air quality with the economic interest in not discouraging continuation of capital improvements. Since Congress did not define what was a stationary source for purposes of the permit program, the Supreme Court reasoned that this responsibility belonged to the EPA. Significantly, both the Supreme Court and the District of Columbia Circuit Court, in two different cases, lamented Congress' failure to provide this definition. The two courts disagreed, however, on the reviewing court's role in light of congressional silence.[248]

The District of Columbia Circuit Court supplied its own definition of stationary source.[249] In so doing, it rejected the EPA interpretation as incorrect, making only a passing reference to the fact that the court was not deferring to the Agency's explanation.[250] The Supreme Court's reversal was based primarily on its conclusion that the EPA interpretation was entitled to presumptive deference.

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323 (D.C. Cir. 1979); ASARCO, Inc. v. EPA, 578 F.2d 319 (D.C. Cir. 1978); *see also Chevron*, 467 U.S. at 840 & n.6.

248. The Supreme Court specifically noted its displeasure with the Legislature's omission: "We regret, of course, that Congress did not advert specifically to the bubble concept's application to various Clean Air Act programs, and note that a further clarifying statutory directive would facilitate the work of the agency and of the court in their endeavors to serve the legislators' will." 467 U.S. at 840 n.5 (citing Natural Resources Defense Council, Inc. v. Gorsuch, 685 F.2d at 726 n.39).

249. 685 F.2d at 725.

250. Although the D.C. Circuit did not explicitly discuss its refusal to defer or limit the scope of its review, it mentioned in a footnote that the agency had not engaged in reasoned decisionmaking since it provided no support for its change or abandonment of its earlier position. *Id.* at 727 n.41. The D.C. Circuit held that the propriety of the bubble concept was to be determined by "a bright line" between areas in which the air quality was to be maintained and those in which it was to be improved. In maintenance areas, it ruled that the bubble concept was mandatory. *Id.* at 726 (relying on Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979)). In improvement areas, the court rejected the bubble concept in total. *Id.* (relying on ASARCO, Inc. v. EPA, 578 F.2d 319 (D.C. Cir. 1978)).

The bubble regulations challenged in *Chevron* were, in effect, the second attempt by the EPA to implement such a concept. In the *ASARCO* case, the D.C. Circuit had refused to defer to the EPA regulations that did not distinguish between new sources of pollution and emissions from an entire facility. In that case, the court acknowledged that "considerable deference" was owed to the Agency interpretation, but devoted its opinion to demonstrating that the EPA's decision was wrong. The EPA initially adopted regulations incorporating the reasoning of the D.C. Circuit. However, the agency later amended these regulations as part of a reexamination of the burdens imposed by existing regulatory schemes. *See* 467 U.S. at 857. When the D.C. Circuit invalidated the regulations based upon its earlier precedent, the Reagan Administration appealed to the Supreme Court.

Interestingly, as the case was presented to the Supreme Court, the interpretation supplied by the D.C. Circuit had no defender. Neither the EPA nor its challengers accepted the court's distinction between maintenance and improvement of air quality for purposes of employing the bubble concept. Instead, they disagreed on whether the Act authorized use of the bubble concept in both cases or not at all. *Id.* at 842 n.7.

a. The "Restatement" of Judicial Deference

The Court's restatement of the principles of judicial deference distinguishes among three types of cases.[251] In the first category are those cases in which Congress has directly spoken "to the precise question at issue."[252] According to the Court, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[253] This category can be partially analogized to the category defined in this analysis in which a court chooses not to defer.[254] The Court then exercises independent judgment to determine statutory meaning. The Court, however, defines this category so narrowly that it appears to exclude the majority of cases seeking judicial review.[255] Indeed, if the congressional intent is "unambiguous," a challenge is unlikely to arise.[256]

251. *See* 467 U.S. at 842-45. The Supreme Court's restatement is hardly a presentation of a definitive analytical framework for determining the scope of review. For another analysis of both the substance and applicability of the *Chevron* model, see Note, *A Framework for Judicial Review*, *supra* note 162.

252. 467 U.S. at 842, 843 n.9.

253. *Id.* at 842.

254. *See supra* text accompanying notes 85-87.

255. The Court cited this category in support of a decision to overrule a Federal Reserve Board interpretation of the Bank Holding Company Act under which the Board sought to regulate so-called "nonbank banks." Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 106 S. Ct. 681 (1986). The Court implied that its narrow judicial interpretation based upon the statutory language should prevail over the agency interpretation based upon statutory purpose because the language "reflect[ed] hard fought compromises" that the Court should respect. *Id.* at 689. The Court's refusal to defer to an agency interpretation consistent with the broad purpose of the legislation was not really based upon an "unambiguously expressed" congressional intent. In light of the disagreement between agency and court and the fact that Congress, when it passed the statute, did not contemplate the problem of "nonbank banks" addressed by the Board, it would be difficult to characterize the congressional intent as unambiguous. Although the Court cites *Chevron*, its decision in *Dimension* sounds more like an application of the so-called "plain meaning" rule. *See id.* The Court's invocation of this rule of construction has hardly been predictable or consistent. *See* Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195 (1983). *But cf.* Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982). *See also supra* notes 196-208 and accompanying text (discussing *Batterton v. Francis*).

256. An example of what the Court may have had in mind when it identified the category of "clear" congressional intent may be found in Regan v. Wald, 468 U.S. 222 (1984), in which the President's decision to restrict travel to Cuba was challenged as a violation of the Trading with the Enemy Act (40 Stat. 411, as amended 50 U.S.C. App. §§ 1-44 (1983)). This Act had been amended to restrict the presidential exercise of emergency economic powers in peacetime. Moreover, the Act required the President to comply with new conditions and procedures as a prerequisite for the exercise of such powers. The President conceded that he did not comply with these provisions, but maintained that his action was exempt under the "grandfather clause." The grandfather clause exempted from compliance with the Act "authorities . . . being exercised with respect to a country on July 1, 1977." 468 U.S. at 228-29 (citing 50

In the second and third categories the Court places those cases in which the statutes are either silent or ambiguous.[257] These categories are distinguished on the basis of whether Congress explicitly left a gap in the statute for the agency to fill, or whether the delegation of legislative power was implicit in the ambiguous statutory language. According to the restatement, a court should defer to the administrative interpretation in both types of cases, but the extent of scrutiny will vary.[258]

According to the Court's analysis, when the delegation of the interpretive task is express, the court should give agency legislative regulations "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[259] Such scrutiny coincides with the approach of a court that accords presumptive deference to an agency decision.[260] Indeed, among the authorities cited by the Court is *Bat-*

U.S.C. § 5). According to the President's argument, the "authority" that allowed him to restrict travel to Cuba was being exercised before that date in the form of a general license that permitted travel and payment of expenses to Cuba. The restriction, therefore, was nothing more than an amendment of the license.

In a five-to-four decision the Supreme Court upheld this broad interpretation of the grandfather clause. Despite the fact that the new regulation prohibited an activity previously permitted, the Court found the statutory term at issue was "clear." *Id.* at 234-35 n.18. In so finding, the majority reasoned that there was no need to examine the congressional intent, even though the legislators' intent may be at odds with the "clear" language. *Id.* at 236-37.

The majority opinion is a model of form over substance. The clarity that serves as the foundation of the Court's conclusion is little more than an excuse to approve an interpretation consistent with the Justices' political philosophy. The legislation was not so clear as to prevent a contrary interpretation by a unanimous court of appeals and four Justices of the Supreme Court. The dissenting opinion summarizes the majority approach:

> The Court rejects this narrow interpretation in favor of one that loses all sight of the general legislative purpose of the [new legislation] and the clear legislative intent behind the grandfather clause. To achieve its labored result, the Court invokes a series of platitudes on statutory interpretation, but ignores their application to this case. Ironically, the very pieces of legislative history that the Court cites to justify its result clearly support the contrary view.

Id. at 255 (Blackmun, J., dissenting).

Significantly, the majority's argument that deference is owed to the Executive's judgment in matters of foreign policy is added almost as an afterthought at the end of the opinion. 468 U.S. at 242-43. The dissent does not address the issue. Therefore, both opinions cite the same legislative history, but use it to support opposite conclusions. *See id.* at 236-40; *id.* at 256 (Blackmun, J., dissenting). Moreover, both opinions agree on the general interpretive propositions, but disagree on the relevance of these propositions to the issue in the case. *Cf.* FEA v. Algonquin SNG, Inc., 426 U.S. 548 (1976) (the Supreme Court and the lower court used the same legislative history to reach opposite conclusions). Consequently, the case undermines any confidence in the usefulness of the canons of construction or other interpretive devices as a predictor of when a court might find statutory language sufficiently clear as to assume responsibility for supplying or independently confirming the correct interpretation.

257. 467 U.S. at 843-44 nn.12 & 13.

258. *Id.* at 843-44.

259. *Id.* at 844.

260. *See supra* notes 193-218 and accompanying text.

terton v. Francis.[261] Based upon the *Chevron* Court's brief description, however, the meaning of "controlling weight" is not entirely clear.[262] Although the "arbitrary and capricious" language also appears in *Batterton*,[263] it is evident from its application in *Batterton* that the standard of review was limited to reading the statute to make certain that there was no explicit prohibition of the Secretary's interpretation.[264] Since the deliberate absence of statutory guidance would trigger the judicial decision to accord the agency interpretation controlling weight, the statute could not contain an explicit prohibition.

The Supreme Court's restatement implies that cases fall into the third category—those involving ambiguous statutory language—when the statute fails to delegate to the agency the specific responsibility for administrative legislation that would clarify the meaning of the statutory provision in dispute.[265] With respect to review in such cases, the Court states that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[266]

According to the Court, deference in this category extends to all cases in which implementation of a statutory scheme is entrusted to an agency so long as the statutory language neither explicitly delegates interpretive authority nor provides a clear and obvious meaning. Unlike cases involving weighted deference,[267] the Court does not envision any threshold determination of whether or not the agency decision qualifies for deference. The Court's description ignores the case law in which courts considered the qualifications of the decisionmaker and the nature of the agency's decision as the basis of its decision to defer.[268] According to this case law, such considerations also influenced the degree of defer-

261. 467 U.S. at 844 n.12 (citing *Batterton*, 432 U.S. 416 (1977), which applies a presumptive deference standard).

262. *Id.* at 844.

263. 432 U.S. at 426.

264. *Id.* Presumptive deference in *Chevron* was occasioned by the finding of an implicit delegation of power in Congress' expressed intent that the Act be flexibly administered. Only in passing did the Court conclude that the Agency's decision was reasonable. This conclusion, however, was not supported by independent analysis of a legislative or administrative record. In the context of the opinion, the conclusion emerges after the Court found nothing contradictory in either the statute or its history. *See* 467 U.S. at 844.

265. 467 U.S. at 844.

266. *Id.*

267. *See supra* notes 168-191 and accompanying text.

268. See *supra* notes 180-185 and accompanying text for a discussion of the criteria influencing weighted deferential review; see also Diver, *supra* note 15, at 562 n.95, for a partial listing of factors cited by the Supreme Court as a basis for determining whether an agency's decision qualifies for judicial review.

ence, expressed in the form of the extent of judicial scrutiny, accorded to the bases for the agency's conclusion.

Thus, the Court's restatement retains no option for a court to refuse deference in any case in which the statutory language is genuinely in dispute. Moreover, there is no room in the Court's model for a paradigmatic case in which neither a court nor an agency is competent to provide the meaning of a statute that is silent or ambiguous. The Court's restatement fails to recognize a judicial choice that would require Congress to address the matter before the Court will sanction the delegate's action.

The Court's restatement also fails to clarify whether a unitary standard governs the expanded deferential review that comprises the third category.[269] The Court speaks of a reasonableness determination,[270] and also defines the question as whether "the agency's answer is based on a permissible construction of the statute."[271] Elsewhere the Court asserts that "considerable weight" should be accorded to an agency's interpretation of a statute it is assigned to administer.[272] The Court further explains that the "conflicting policies . . . committed to the agency's care by the statute" should not be disturbed "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."[273] In the end, the Court's standard for review in this category amounts to little more than a collection of descriptive phrases drawn from the body of case law. The restatement fails to explain how review in this category accommodates and clarifies the variety of extant review standards.

Unfortunately, the utility of the Court's restatement of judicial deference is undermined by its failure to integrate its review of the challenged agency decision in *Chevron* with the principles advanced in the restatement. The Court's consideration of the disputed issues in the case is independent of the restatement's analytical framework in both ap-

269. The spectrum of review standards in the weighted deference category defined above is related to the bases upon which a court determines that the agency is entitled to deference. Since the category identified by the *Chevron* Court does not include an initial inquiry of whether the agency qualifies for deference, it is likely that the Court envisions a single standard of review, although it is presently described in a variety of ways.

270. 467 U.S. at 845.

271. *Id.* at 843. The Court cited Udall v. Tallman, 380 U.S. 1 (1965), and other cases to support the proposition that "[t]he Court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." 467 U.S. at 843 n.11 (citations omitted).

272. 467 U.S. at 844.

273. *Id.* at 845 (citing United States v. Shimer, 367 U.S. 374, 382- 83 (1961)).

proach and language. Even where the Court uses the words of the restatement in its reasoning, they are often applied in a different context.

For example, the Court notes that Congress was silent regarding the applicability of the bubble concept to the permit program.[274] Thus, the Court claims, the District of Columbia Circuit Court was wrong in deciding whether the concept was "inappropriate" in the general context of the statutory program.[275] Instead, the Court asserts that the question is whether the EPA's view of the bubble concept as appropriate was a "reasonable one."[276] This language indicates that the review is for reasonableness, which is the standard applicable to the third category comprised of ambiguous statutes. The body of its opinion, however, is devoted to justifying the Court's decision to defer rather than determining the reasonableness of the Agency's decision.

Ultimately, the Court's approach reflects the second category. The Court concedes that the Agency's choice filled "a gap left open by Congress."[277] Moreover, the Court's review emphasizes the absence of any statutory language, congressional intent, or legislative history that contradicts the Agency's interpretation,[278] rather than whether there is evidence that the Agency's interpretation is reasonable. The Court also implies that its review standard is less stringent than a reasonableness determination, by drawing upon a rationale not explicitly part of its restatement. By characterizing the Agency's decision as a policy choice,[279]

274. *Id.* The absence of a plain meaning or an unambiguously expressed congressional intent is a prerequisite judicial finding for deferential review. See Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27 (1981), in which the Court first examines the statute and its history to conclude that the agency interpretation is neither prohibited nor authorized. The Court then reviews whether the interpretation is "sufficiently reasonable." *Id.* at 39 (citation omitted). The case is cited in *Chevron* to support both its second and third categories. 467 U.S. at 843 nn.9 & 11.

275. 467 U.S. at 845.

276. *Id.*

277. *Id.* at 866.

278. The Court's examination of the statute served only to provide the background of the challenge or to show that Congress left open the question of the acceptability of the bubble concept in the permit program. *Id.* at 845-51, 859-66. Similarly, the Court reviewed the legislative history to conclude that it is "unilluminating." *Id.* at 851-53, 859-66. *See supra* note 258. Thus, the Court did not evaluate whether the Agency's decision conformed to the statutory text or legislative history.

The Court's discussion of the EPA regulations was primarily descriptive. The fact that the EPA interpretation at issue was different from earlier Agency interpretations is minimized in the opinion. The Court used the shift in position as evidence of the EPA's flexibility in interpreting the statute, which accords with the intent of Congress in making the delegation. At the same time, the Court asserted that the earlier interpretation was based upon an incorrect interpretation mandated by the D.C. Circuit rather than by EPA judgment. 467 U.S. at 862-64.

279. 467 U.S. at 864-65.

the Court redirects the issue from formal review of statutory meaning to respect for an agency's substantive policy decision.

b. The Court's Presumptive Deference

Rather than fitting consistently within one of the categories in the restatement, the Court's reasoning in *Chevron* reflects the presumptive deference approach described above. The Court justified its approach by finding an implicit delegation of power in Congress' expressed intent that the Act be flexibly administered. Moreover, as viewed by the Court, the challenge to the EPA's decision was not directed to its interpretation of the statute, but to the method used by the Agency to pursue the statutory goals. By characterizing the question as involving agency judgment as well as interpretation, the Court refused to address the wisdom of the policy choice.[280] Consequently, the Court declined to evaluate both the merits of the challenger's argument and the substantive basis for the Agency's decision. Noting the absence of congressional directives regarding the matter in question, the Court further argued that it was required to respect the Agency's broad discretion in "effectuat[ing] the policies of the Act."[281]

The opinion in *Chevron* illustrates how presumptive deference disguises the distortion in the legislative process wrought by broad congressional delegations of its power to the executive branch. By focusing only on justification of its decision to defer rather than on the conformance of the Agency's interpretation with the statute, the Court essentially ignores Congress' failure to provide the kind of guidance that would obviate the dispute. If Congress had identified the fundamental policy directives or assigned priorities to the competing legislative objectives, the Court would not have had to allocate that power either to the Agency by deferring, or to itself by assigning its own meaning to the statute.

Significantly, the Court concedes that the failure of Congress to be more specific may be due to irreconcilable political differences among

280. *Id.* at 865-66.

281. *Id.* at 862. This conclusion emerged from the Court's examination of the statutory language, congressional intent, legislative history, and the failure of Congress "to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality." *Id.* at 851. On the subject of statutory language, the Court stated: "To the extent any congressional 'intent' can be discerned from this language, it would appear that the listing of overlapping, illustrative terms was intended to enlarge, rather than to confine, the scope of the agency's power to regulate particular sources in order to effectuate the policies of the Act." *Id.* at 862. Similarly, after reviewing the legislative history the Court concluded: "We find that the legislative history as a whole is silent on the precise issue before us. It is, however, consistent with the view that the EPA should have broad discretion in implementing the policies of the 1977 Amendments." *Id.*

legislators rather than lack of competence and the need for expert assistance.[282] This admission represents a constitutionally questionable dimension of the current congressional delegation practices. Elected officials wanting to avoid responsibility for controversial decisions can pass them on to appointed officials with the blessing of the Supreme Court. Instead of questioning the legitimacy of the delegation, the Court uses the congressional desire to escape responsibility for legislative content as a justification for refusing to evaluate the merits of the decision.[283] Thus, the Court dismisses the challenger's argument regarding the inappropriateness of the bubble concept by noting that such arguments should be addressed to the Legislature or the Administration rather than to the judiciary.[284]

It is probably also significant that Justice Rehnquist did not participate in either the consideration or the decision of the case.[285] He is the Court's leading advocate for revitalizing a nondelegation doctrine that would require Congress to make "fundamental policy decisions."[286] Particularly in light of the *Chevron* Court's closing statement, one might have expected Justice Rehnquist to argue that the challenged regulations should be invalidated. He would probably have concluded that the statute was an unconstitutional delegation of legislative authority to the extent that it failed to instruct the EPA on how to accommodate the conflicting goals of economic growth and environmental protection. Particularly since the potential consequences of choosing one goal over the

282. *Id.* at 847.

283. *Id.* at 865-66. *See infra* Part III.

284. 467 U.S. at 865-66.

285. Only six Justices decided the *Chevron* case. Justice Marshall, like Justice Rehnquist, did not participate in either the consideration or the decision. Justice O'Connor did not participate in the decision.

Ironically, the Court's decision was authored by Justice Stevens, who had had some significant disagreements with Justice Rehnquist over the issue of deference to administrative interpretations. Justice Stevens had sought to narrow the apparent discretion resulting from a vague delegating statute in Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978) (Stevens, J., dissenting) and Hampton v. Mow Sun Wong, 426 U.S. 88 (1976). In Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980), Justice Stevens authored a plurality opinion rejecting the agency interpretation in favor of a judicial interpretation designed to narrow the instances in which the agency could exercise its delegated regulatory power. Justice Rehnquist concurred in the result. *See infra* note 286 & text accompanying notes 400-414.

286. *See, e.g.*, Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring). Justice Rehnquist argued that the provision allowing the Occupational Safety and Health Administration to set safety standards was an invalid delegation to the extent it gave the agency authority to determine what level of risk was acceptable. Such a decision, he maintained, required Congressional guidance that was absent in the statute. *See infra* notes 405-407 and accompanying text.

other may be irreversible, according to this argument the choice should rest with the elected legislators.

Without a challenge to the delegation, however, the Court's conclusion serves as an apology for congressional indecision and an endowment of unrestrained legislative power to the executive branch. The conclusion of the opinion reads like a vindication of the Court's hesitancy to become mired in the problem.[287]

If followed, the *Chevron* analysis would preclude courts from reviewing agency interpretations drawn from silent or ambiguous statutory provisions, undermine judicial responsibility for allocating the lawmaking responsibility between itself and the Executive, and ignore any notion of congressional legislative responsibility beyond the identification of a recipient of delegated authority and the drafting of a vague statute. Even if deference to the bubble idea is appropriate, the Court failed to explain adequately why deference was appropriate in this case.

3. *Traditional Review: Independently Defining "Commercial Paper"*

In light of both the inherent and potential problems of the *Chevron* decision, it is not surprising that the Supreme Court did not cite the case when it handed down two decisions involving questions of judicial deference a week later.[288] Both opinions were captioned *Securities Industry*

287. The Court concludes:

> In these cases, the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies. Congress intended to accommodate both interests but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and *perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency.* For judicial purposes, it matters not which of these things occurred.
>
> Judges are not experts in the field, and are not part of either political branch of Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judge's personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation properly rely upon the incumbent administration's view of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, *or intentionally left to be resolved by the agency charged with the administration of the statute* in light of everyday realities.

467 U.S. at 865-66 (emphasis added).

288. For an alternative analysis of the impact of the *Chevron* decision, see Note, *A Framework for Judicial Review*, *supra* note 162, at 481-95.

Association v. Board of Governors of the Federal Reserve System.[289] In the first, the "commercial paper" case, the Court refused to defer and reversed the decision of the Agency.[290] In the second, the "securities brokerage" case, the Court applied a weighted deference standard, deferring to the administrative interpretation and upholding the Board's conclusion.[291] The Court itself offered no principled explanation for its distinction. Instead, the two cases illustrate the manipulability of the criteria for weighted deference and further highlight the consequences of congressional nonspecificity.

In the commercial paper case, the Supreme Court by a divided vote reversed a ruling by the Board of Governors of the Federal Reserve System that commercial paper was not a "security" or "note" within the meaning of investment transactions prohibited under the Glass-Steagall Act.[292] The Board had used a "functional analysis" to conclude that the sales of such paper by commercial banks more closely resembled traditional banking operations than the type of risk transactions addressed by the Act.[293] The Board thus narrowly read the statutory language prohibiting banks from underwriting "securities and stock" or from marketing "stocks . . . notes, or other securities."[294]

For its part, Congress had neither defined these statutory terms nor specifically considered the status of commercial paper under the Act. To resolve the issue, the Board had to assign meaning to the undefined statutory terms that enumerated the prohibited activities. In support of its

289. Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys. I, 468 U.S. 137 (1984) [hereinafter commercial paper case]; Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys. II, 468 U.S. 207 (1984) [hereinafter securities brokerage case].

290. Commercial paper case, 468 U.S. at 142-44.

291. Securities brokerage case, 468 U.S. at 217.

292. The Glass-Steagall Act comprises sections 16, 20, 21, and 32 of the Banking Act of 1933 (codified at 12 U.S.C. §§ 24, 377, 378 (1982)). This case involved sections 16 and 21 of the Act (codified at 12 U.S.C. §§ 24 & 378, respectively).

293. The D.C. Circuit agreed with the Board that the marketing of commercial paper would not "cause the hazards the Act was designed to prevent." A.G. Becker, Inc. v. Board of Governors of the Fed. Reserve Sys., 693 F.2d 136, 148 (D.C. Cir. 1982).

294. *See* Glass-Steagall Act, §§ 16, 21, 12 U.S.C. §§ 24, 378 (1982). The Board offered several reasons for its decision. First, it noted that since the grouped words all share the characteristic of an investment, the Act is meant to prohibit the underwriting of those notes that share the investment characteristic. 468 U.S. at 152. Commercial paper, according to the Board, was more in the nature of a commercial loan than a security investment within the meaning of the Act. *Id.* at 150. Second, the Board maintained that a broad interpretation of the term "security" would bring within the ambit of the statutory prohibition banking activities in which commercial banks would have traditionally engaged. *Id.* at 158 n.11. Third, the Board reasoned that its interpretation was consistent with the congressional intent to encourage investment in short term obligations. For a discussion of the Board's argument addressing the safety of commercial paper sales, see *id.* at 160, 169 (O'Connor, J., dissenting).

conclusion that sales of commercial paper were not prohibited, the Board reasoned that its interpretation was consistent with the congressional intent to encourage investment in short term obligations.[295] Consequently, the Board allowed the sales of commercial paper to continue.[296]

The Supreme Court acknowledged that the Legislature failed to define "securities" or to evince whether the category of prohibited transactions included or excluded commercial paper.[297] The Court, however, did not treat the Board's effort to remedy the omission as involving simply a question of statutory interpretation. Instead, the Court characterized the Board's interpretation as defining a statutory exemption through regulation.[298] Thus, the Court related the issue as one of agency authority rather than as a statutory interpretation inextricably part of a required agency decision. This judicial characterization provided one of the pretexts for the Court's refusal to defer.[299]

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295. 468 U.S. at 141.

296. Since the Court's decision in this case only determined whether commercial paper was a "security" within the meaning of the Glass-Steagall Act, the Court remanded the case to the district court for a determination of whether the commercial paper placement activities in question constituted "underwriting, selling or distributing." *Id.* at 150. The district court subsequently remanded the case to the Board to determine whether the activities were "underwriting." The Board's determination was once again challenged, and the United States District Court for the District of Columbia, refusing to defer, reversed the Federal Reserve Board's determination that these activities were not "underwriting, selling, or distributing." Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys., 627 F. Supp. 695 (D.D.C. 1986).

297. 468 U.S. at 149.

298. *Id.* at 149-50. The majority argued that the effect of the Board's decision would be to convert the statutory prohibition into a regulatory scheme. The implication that the Board's interpretation would amount to an unauthorized extension of its jurisdiction, however, was disingenuous. The Court's characterization would only be true if commercial paper was considered a security. The Board already had some jurisdiction over the subject matter and was required to make the ruling in question. To permit commercial banks to engage in the sale and acquisition of commercial paper does not alter the Board's regulatory powers.

The dissent made a similar argument. It asserted that the Board's functional analysis would not vest the Board with substantial regulatory discretion since the Board's conclusion was simply a construction of the statute. It added that the Board's issuance of guidelines regarding sales of commercial paper was pursuant to "distinct statutory authority to restrain unsafe or unsound banking practices." *Id.* at 180 (O'Connor, J., dissenting).

299. The Court's perspective that the Board lacked authority was not the most natural one. Since the issue of whether banks could sell commercial paper had been properly presented to the Board, the Court could not conclude that the Board lacked the jurisdiction or authority to render an answer, when that authority had been explicitly delegated by Congress under the Federal Reserve Act, Ch. 6, 38 Stat. 259, 261 (1931) (codified as amended at 12 U.S.C. §§ 248, 321 (1982)). Statutory interpretation by the Board was essential to resolving whether a bank's sale of commercial paper violated the Act. Although the decision is legislative, it is within the regulatory responsibility delegated by Congress to the Board. The interpretation, however, need not be characterized as amounting to an exemption from a statutory prohibition. To the extent that the Board's decision amounted to an exemption, it was because the Board, in an

As the case was presented, the Supreme Court had essentially three choices. First, it could defer to the agency interpretation by treating the decision as an application of law to a particular set of facts or by recognizing the Board's expertise and experience. Although the Board's decision was not made in a formal adjudication, the Court could nonetheless characterize the decision as one traditionally entitled to limited review.[300] This choice would allow the Court to limit its review of the Board's law-fact decision.

The Court could also choose to defer by finding that the decision was entitled to weighted deference because of the Board's competence.[301] This was a classic case for applying weighted deference analysis. Indeed, as the dissent noted, the Board possessed expertise and experience in the complexities and technicalities of the law and the financial world it governed, as well as "extensive responsibility"[302] for administering federal banking law.[303] Taken together with the lack of clarity in the statute, it was reasonable to expect the Board's decision to be accorded deference at the heavily weighted end of the spectrum.[304]

The second choice available to the Court was to remand the issue to the agency for reconsideration. The Court could have relied on the fact that the Board's argument before the Supreme Court had not been explored in its initial decisionmaking process.[305]

The third choice was for the Court to engage in traditional independent review, which would involve reviewing the agency decision to determine if the Board's interpretation was correct and substituting a judicial interpretation if the Court disagreed with the agency conclusion.[306]

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exercise of its regulatory responsibility, had decided that Congress had exempted the challenged banking activity. 468 U.S. at 173-74 (O'Connor, J., dissenting).

300. Although the decision clearly involves statutory interpretation, the Court could nevertheless label the question as one of "fact," which is traditionally entitled to limited judicial review. In that case, review would be under the arbitrary and capricious standard for informal agency decisions which were not based upon a formal record. *See supra* notes 31-94 and accompanying text.

301. *See supra* notes 168-191 and accompanying text.

302. 468 U.S. at 161 (O'Connor, J., dissenting).

303. *Id.* at 161-62.

304. In fact, the majority opinion acknowledged as much. It conceded that "[t]he Board is the agency responsible for federal regulation of the national banking system, and its interpretation of a federal banking statute is entitled to substantial deference." 468 U.S. at 142. Ironically, the Court cited *Securities Industry II*, the securities brokerage case, for the proposition that deference is generally the norm in judicial review of this type. The Court does not cite Udall v. Tallman, 380 U.S. 1 (1965), or any other case of broad principle.

305. *See supra* note 294.

306. *See supra* Part I. The traditional approach also permits the Court to ignore the agency interpretation and provide its own meaning of the disputed language. Since the meaning of the statutory prohibition was the only issue, however, the case technically would not be

The District of Columbia Circuit Court chose the first route.[307] It reviewed the administrative decision within the particular context in which it arose.[308] Although it raised certain concerns about the effect of the Board's decision, the court deferred and upheld the agency's conclusion in the case at issue.[309]

The Supreme Court, however, used an unusual approach to justify its refusal to defer, although it conceded that deference was the norm. The Court disqualified the Board from entitlement to deference in this case because the Board had responded in argument before the Supreme Court to some of the concerns expressed in the dicta of the court of appeal's opinion. The Court claimed that the Board's response represented a change in "the nature" of the Board's argument,[310] and thus, amounted to a "post hoc rationalization" that was entitled to "less weight" and "little deference."[311]

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a "review." If the Court's initial approach disregards the agency decision, there would be nothing for it to review.

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

308. The Board's interpretation was a response to a securities industry petition for a ruling that required the Board to apply law to fact. Concerned about potential competition from commercial banks, securities industry representatives petitioned for a ruling that the placing of commercial paper in the commercial paper market was prohibited under the Act. The Board rejected this assertion, based upon a narrow reading of the statutory prohibition. *See supra* text accompanying notes 295-296.

In the context of the petition, the Board was not required to explore all aspects of the scope and future applications of its ruling to other commercial transactions. Even if the ruling is considered a general interpretive rule regarding all commercial paper, in the context of this challenge deference would not be inappropriate under Skidmore v. Swift & Co., 323 U.S. 134 (1944). The Board possesses the skill and informed judgment that qualify its decisions for judicial deference. *See supra* text accompanying notes 137-142.

309. The Board initially maintained that it need not consider the kinds of concerns raised by the D.C. Circuit. The court expressed concern that certain kinds of commercial paper not at issue in the present case may fall within the prohibition of the Act. A.G. Becker, Inc. v. Board of Governors of the Fed. Reserve Sys., 693 F.2d 136, 151 (D.C. Cir. 1982).

310. 468 U.S. at 143-44.

311. *Id.* Implicitly, the Court translated this review standard into no weight and no deference beyond using the Board's decision as the starting point of its analysis. Moreover, to achieve its objective, the Court distorted the Board's argument. As mentioned earlier, the Board maintained that the D.C. Circuit's concerns were not material in light of the Board's interpretation. In the court of appeals, the Board maintained that since commercial paper was not a "security" within the meaning of the Act, the Board need not examine the dangers that the Act was intended to eliminate. The Board did not change its position, and before the Supreme Court the Board supplemented its original argument in an effort to resolve any doubts about the conformance of its decision with statutory intent. The Supreme Court, however, seized upon this additional, and probably unnecessary argument by the Board as a pretext for discrediting the Board's position. According to the Supreme Court, the Board changed its argument by insisting that the activities approved in the actual case involved none of the hazards that the Court identified as concerns at which the Act is aimed. *Id.* at 143.

At most, the Court's reasoning would have supported a remand to the administrative agency for additional consideration of the agency's new position.[312] The Court, however, did not remand. It chose instead to substitute its own contrary interpretation. This approach was the least defensible in the context of modern deferential review.[313]

According to the Court's earlier restatement in *Chevron*,[314] judicial substitution of its own statutory interpretation for that of the agency assigned to administer the statute should occur only where the statutory meaning is so unambiguously expressed as to present a clear meaning.[315] Barring statutory precision, the Court could have refused to defer based on either a conclusion that Congress did not intend to delegate discretion, or a finding that the agency failed to qualify for weighted deference under the criteria identified in *Skidmore v. Swift & Co.*[316] and *Udall v. Tallman*.[317] However, the Court's justification is not grounded on either

Consequently, the Supreme Court determined that this additional elaboration "counsels against full deference." *Id.*

312. *See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972); SEC v. Chenery Corp., 318 U.S. 80 (1943). In addition to invoking the pretext that the Board had changed its position, the Court raised concerns not addressed by the Board. As mentioned earlier, the Board considered the case in a narrow context by applying its interpretation of the statute to the particular facts of the case presented. 468 U.S. at 141. The Court, however, spoke of hypothetical situations in which application of the Board's conclusion might be contrary to the statutory intent. *Id.* at 156-57. Such hypotheticals were only marginally relevant, if at all, since the Board was only applyng its statutory interpretation to the facts of a particular case that the Board was requested to decide. The Board was not bound by its decision in future cases presenting different circumstances. If the Court's concerns were genuine, principles of administrative law would have dictated remand to the agency for further consideration of its decision in light of these concerns.

313. 468 U.S. at 143-44. The problem with the majority's position lies not so much with the outcome as with the reasoning. The mischaracterization of the issue as agency lack of authority, *see supra* text accompanying notes 298-299, and the unconventional disqualification of the agency from entitlement to deference, *see supra* notes 310-311 and accompanying text, are unconvincing rationalizations to support the desired outcome.

314. 467 U.S. at 842-45.

315. *Id. See supra* notes 252-256 and accompanying text. The disagreement between the majority and dissent in the commercial paper case illustrates that the statutory language "cannot bear the only construction . . . adopted by the [majority of the] Court." 468 U.S. at 181 (O'Connor, J., dissenting). In fact, the agency charged with administration of the Act, the court of appeals, and three Supreme Court Justices disagreed with the Court's ultimate interpretation.

316. 323 U.S. 134 (1944). The criteria of *Skidmore*, being rather general and imprecise, allow the Court to argue that the Board lacks the expertise and experience to decide this issue, particularly since it is a new statutory interpretation applied to recent developments in the practices of the regulated interest. *See supra* notes 137-141 and accompanying text.

317. 380 U.S. 1 (1965). Although *Udall* is generally cited for the broad proposition that a court should defer to a statutory interpretation by agency officials entrusted with the administration of the statutory scheme, *see supra* note 175 and accompanying text, its applicability can be narrowed or distinguished. *See supra* notes 176-188 and accompanying text; *see also supra*

of these recognized reasons.

Once the Court mischaracterized the Board's authority as legislating a statutory exemption, and invoked the pretext that the Board had changed its position, the Court challenged the substance of the Board's interpretation, claiming the interpretation had no affirmative support in the statute.[318] In contrast to modern deferential review, the Court implicitly established congressional specificity as a prerequisite for sustaining an agency interpretation. The Court could have found that the agency decision was reasonable in light of the statutory silence. Similarly, it could have determined that nothing in the statutory language or history contradicted the agency decision. Given the absence of definition or discussion in the statute, the Justices knew they would not find any support for the Board's conclusion. However, the Court's reasoning turned modern deference upside down; the absence of legislative precision rather than its existence served as an excuse for independent judicial interpretation.

The dissent in the commercial paper case presented the classic arguments for weighted deference, implying that a delegate's misinterpretation was for Congress to correct. The contrast between the majority and dissenting opinions strikingly illustrates the weaknesses in the accepted legislative process of vague statutory delegations that leave the fashioning of legislative content to the agencies and courts under the guise of interpretation.[319] Despite the apparent thoroughness of the analysis in

note 304. While the merits of judicial reasoning distinguishing the applicability of *Skidmore* or *Udall* might be questionable, particularly in a case such as this, the judicial approach is at least conventional.

318. 468 U.S. at 149-54.

319. The Court's statutory interpretation is also flawed. The Court invokes as rules the canons of construction, *id.* at 144-49, and manipulates the application of these canons to support its conclusions. The disagreement between the majority and dissent illustrates the weakness of reasoning based upon these canons. By selective choice and application of various canons, the two opinions show how the same basic canon can be read in different ways to support opposite positions (*compare id.* at 150-51 (use of the term "security" in other statutes is used to define the meaning of the same term in the statute at issue), *with id.* at 174-75 (O'Connor, J., dissenting) (the meaning of the term "security" in other statutes is only one factor to be considered, because the meaning may vary according to the content in which it is used)), how the use of different canons in similar contexts can lead to inconsistent conclusions (*compare* 468 U.S. at 158-59 n.11 (the "Board's [statutory] argument [is] unpersuasive because it rests on [a] faulty premise"), *with id.* at 176 (O'Connor, J., dissenting) (statutory reading "only reinforces the Board's conclusion")), and how the canons can be manipulated to oppose or support the Board's interpretation (*see* 468 U.S. at 149-54; *id.* at 179 (O'Connor, J., dissenting)). Moreover, the majority and the dissenting opinions present striking examples of judicial manipulation of both the history and the potential associated with the regulatory approach inherent in the Board's interpretation of its enabling statute. The view of the past and future of the Board's interpretation in the two opinions provided the justification for their arguments against and for deference, respectively (*compare* 468 U.S. at 159-60 (history of the act,

both the majority and dissenting opinions, or perhaps because of it, one is left with the impression that the principal deciding factor was the individual Justice's preference regarding the substantive law of commercial banking and the propriety of deference in general.

The marked difference of opinion between the majority and dissent in the commercial paper case stands in sharp contrast to the unanimous decision in the securities brokerage case.[320] The Justices' decision to defer to the Federal Reserve Board in a second challenge by the securities industry reinforces the suspicion that judicial personal preference often motivates the outcome of judicial review of agency decisionmaking.

4. *Weighted Deference: When Sales of Securities Need Not Be Investment Transactions*

At issue in the securities brokerage case was the Board's decision that the acquisition by a bank holding company of a retail securities brokerage did not violate either the Bank Holding Company Act[321] or the Glass-Steagall Act.[322] In the present case, a bank holding company had applied for approval to acquire the voting shares of a retail discount securities brokerage. The statutory procedures under which the Board rendered its decision clearly recognized the administrative determination as lawmaking. The Board was specifically authorized to approve exceptions to the statutory prohibition against acquisitions by bank holding companies of voting shares of nonbanking entities.[323] The Board was directed

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although "far from conclusive . . . does support" the majority's view), *with id.* at 177 (O'Connor, J., dissenting) (history of the act "of course does not undermine—it does not even address" the relevant arguments)).

Ultimately, the difference between the majority and dissent reduces itself to a choice of priorities. Whereas the majority focuses on the policy implications of the agency's substantive decision, the dissent emphasizes the intergovernmental relationship of the legislative agency and the reviewing court. The majority thus provides its own interpretation of the general policy concerns underlying congressional passage of the enabling legislation. To this end, it invokes the spectre of possible abuses that could result from extension of the Board's statutory interpretation. *See* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 521 app. C (1960):

> When it comes to presenting a proposed statutory construction in court, there is an accepted conventional vocabulary. As in argument over points of case-law, the accepted convention still, unhappily, requires discussion as if only one single correct meaning could exist. Hence there are two opposing canons on almost every point.

320. 468 U.S. 207 (1984).

321. Under section 4 of the Bank Holding Company Act of 1956, 12 U.S.C. § 1843 (1982), banks are prohibited from acquiring the voting shares of a nonbanking company unless exempted under section 4(c)(8). *See* 468 U.S. at 210.

322. Section 20 of the Glass-Steagall Act, 12 U.S.C. § 377 (1982), prohibits a bank holding company from owning any company that is principally engaged in retail securities brokerage. *See* 468 U.S. at 213.

323. 468 U.S. at 210.

to determine if the nonbanking activities were "closely related" to banking.[324] If it so found, the Board could amend its regulations to include the activity as a permissible nonbanking activity.[325] The process was thus akin to legislative rulemaking in that it simplified the approval process for similar applications in the future.[326]

In the securities brokerage case the Board's decision was rendered after several days of hearing and a recommendation by an administrative law judge to approve the exception. Representatives of the securities industry participated in those hearings and subsequently petitioned the court of appeals and later the Supreme Court for review.[327]

The petitioners challenged the Board's conclusion that a retail securities brokerage business, which did not facilitate other banking operations, was "closely related" to banking, and argued that the acquisition violated the Glass-Steagall Act's prohibition against bank holding companies owning an entity engaged in retail securities brokerage. The petitioners asked the Court to review two different statutory interpretations of the Board. The Court responded by according one of the interpretations presumptive deference and the other weighted deference.[328] Signifi-

324. For the Board's guidelines in determining whether an activity is "closely related," see *id.* at 210-11 n.5.

325. 12 C.F.R. § 225 (1986) ("Regulation Y").

326. *See* 468 U.S. at 211 n.7 (for an explanation of the application procedure); *see also* 12 U.S.C. § 1843(c)(8) (1982).

327. 468 U.S. at 209.

328. *See supra* text accompanying notes 292-298. The Court upheld the Board's interpretation of the Bank Holding Company Act by according it presumptive deference. The Court relied upon model reasoning to justify its choice: Congress committed to the Board the power to determine which activities may be exempted from the Act's prohibitions through the administrative rulemaking process defined in the statute. 12 U.S.C. § 1843(c)(8) (1982) (cited at 468 U.S. at 210 n.4). The Board's interpretation was rendered in the course of exercising its power and the statutory language was imprecise. The Court thus concluded that the general nature of the statutory language vests the Board with "considerable discretion to consider and weigh a variety of factors in determining whether an activity is 'closely related' to banking." 468 U.S. at 214. The Court rejected the interpretation suggested by the petitioners on the basis that there was nothing in the statutory language to support a requirement that "closely related" means activity that facilitates other banking operations. Unlike the commercial paper case, here the Court placed the requirement of producing affirmative support for a proffered statutory interpretation on the challenger rather than the agency.

Were this the only issue raised for review, the Court's decision to accord the "greatest deference" to the Board and to reject the narrow interpretation advanced by the petitioner would not be easily reconcilable with the commercial paper case. *See id.* at 215-16. Unlike in the latter case, the Court's approach to review of the Board's interpretation of the provisions of the Bank Holding Company Act (BHC) was cursory, and based upon simple reasoning:

> Congress has committed to the Board the primary responsibility for administering the BHC Act. Accordingly, the Board's determination of what activities are "closely related" to banking within the meaning of [the Act] "is entitled to the greatest deference." . . . The Court of Appeals, therefore, properly deferred to the Board's determination in this case.

cantly, the Court accorded weighted deference to the Board's interpretation of the same statute that the Court had independently interpreted in the commercial paper case.

In the commercial paper case, the Court majority implied that the Board's interpretation of the statutory prohibition in the Glass-Steagall Act was entitled neither to presumptive nor weighted deference. However, without even citing the commercial paper case, the Court in the securities brokerage case began its review of whether the challenged transaction was prohibited by that same statute from a deferential perspective:

> The Board has broad power to regulate and supervise bank holding companies and banks that are members of the Federal Reserve System. In this respect, the Board has primary responsibility for implementing the Glass-Steagall Act, and we accord substantial deference to the Board's interpretation of that Act whenever its interpretation provides a reasonable construction of the statutory language and is consistent with legislative intent.[329]

The question posed in the securities brokerage case was whether or not the entity being acquired engaged in the "public sale" of securities as prohibited in the Act.[330] While there was no escaping the fact that a retail securities broker sells securities, the Board, the court of appeals, and the Supreme Court all agreed that the prohibition referred to in the Act had a narrower definition.[331]

Id. (quoting Board of Governors of the Fed. Reserve Sys. v. Investment Co. Inst., 450 U.S. 46 (1981)).

Interestingly, the Court upheld the D.C. Circuit's decision to defer rather than articulate the decision as its own determination. In the commercial paper case, the Supreme Court did not specifically address the issue of why the court of appeals decision to defer was incorrect. Instead, it proceeded to discredit the correctness of the Board's interpretation.

However, in order to approve the acquisition at issue in the securities brokerage case, the Board also had to find no prohibition in the Glass-Steagall Act. The Court's review, based upon weighted deference, makes the two decisions nearly impossible to reconcile in light of the reasons offered by the Court.

Some may argue that the distinction between the two cases lies in the fact that the weighted deference in the securities brokerage case was accorded to an administrative decision reached after public hearings, whereas in the commercial paper case, the court refused to defer to an administrative decision reached without general public comment. The Court, however, did not base its decision in either case upon the Board's decisionmaking process. While this distinction may have some initial appeal, it does not withstand scrutiny. The commercial paper case was decided in a narrow context that need not have had broad public application. If the issue in the commercial paper case really concerned the adequacy of the decisionmaking procedures, the Court need not have resorted to its elaborate mischaracterizations and pretext. *See supra* notes 289-321 and accompanying text.

329. 468 U.S. at 217 (citations omitted).

330. *Id.*

331. *Id.* at 219-21.

The Supreme Court did not attempt to distinguish this decision in favor of weighted deference from its opposite conclusion in the commercial paper case. Nevertheless, deference to the Board's decision in the securities brokerage case meant that the Court must have accepted two propositions fundamental to deferential review, which it had rejected in the commercial paper case: first, the Court limited its review to the narrow context in which the Board decided the issue; and second, the Court determined only that the Board's interpretation was reasonable.[332] While the securities brokerage case appears to fit within the model of weighted deferential review which encompasses most cases of modern judicial review, closer examination of the Court's opinion raises some unresolved questions.

Would the Court have upheld the Board's conclusion if the Board had reached the opposite decision regarding statutory meaning? Could the Court have accorded weighted deference and still found unreasonable the agency's interpretation that the Act prohibited the type of proposed sales of securities by banks at issue in this case? If so, would the Court have remanded to the Board or would the Court have substituted its own interpretation deciding that the acquisition was permissible? Acceptance of deference as the reviewing norm should encourage a court to remand the case to the agency. Yet the Court's retention of its prerogative to

332. Consistent with its choice to accord weighted deference to the Board's interpretation of the Glass-Steagall Act, the Court did not refrain from evaluating the substance of the Board's decision. Its examination of the merits, however, was limited. Ironically, the Court's conclusion that the agency was reasonable in determining that a statutory term could be confined by the context of related terms, was based upon the statutory interpretive technique rejected by the majority in the commercial paper case. *Compare* 468 U.S. at 218 (relying upon " 'the familiar principle of statutory construction that words grouped in a list should be given related meaning' ") (quoting Third Nat'l Bank v. Impac, Ltd., 432 U.S. 312, 322 (1977)), *with* 468 U.S. at 149-52 (rejecting the same principle in the commercial paper case) *and id.* at 166-67 (O'Connor, J., dissenting) (the dissent used the same principle to support the argument that the Board's interpretation was correct). Although the Court asserts in the securities brokerage case that the Board's interpretation of the disputed term was "supported by the plain language of the statute . . . [and] entirely consistent with legislative intent," 468 U.S. at 219, this assertion is little more than conclusory. The Court did not require nor did it provide any evidence that the statutory prohibition specifically excluded commercial bank affiliations with entities engaged in the public sale of securities. Instead, the Court noted that the narrow interpretation was consistent with the long standing interpretation of identical language in *another* section of the same act. *Id.* at 218-19. Although such interpretive support was unavailable in the commercial paper case, the Court did not distinguish its deference in the securities brokerage case on this basis. In addition, unlike in the commercial paper case, the Court did not require affirmative evidence that Congress intended to exclude trading of securities in its prohibition of "public sale" of such securities. Instead, the Court was satisfied that Congress had not prohibited the action that the Board had approved. *Id.* at 219-21 (noting that the legislative history indicated that Congress was primarily concerned with activities not at issue in this case).

supply its own statutory meaning, such as in the commercial paper case, renders the outcome of a weighted deference decision largely unpredictable.

A second type of question arising from the Court's decision concerns the absence of a discernible basis for the Court's choice of weighted deference over presumptive deference. Why did the Court not choose to uphold the Board's decision on the basis that its deference to the agency compelled acceptance of its decision? In the end, although the result in the securities brokerage case appears consistent with the body of case law, closer analysis reveals that it is no more principled than the unconvincing reasoning in cases with unconventional outcomes.

5. Summary

The three cases just discussed illustrate the content of a model of judicial deference that presents the appearance of reasoned decisionmaking in resolving challenges to administrative legislative actions. The model admittedly provides little more than a facade. Behind the judicial language cast in terms of general principles, the Court remains free to fashion its approach to review so as to achieve desired substantive results.

Examined together, the decisions highlight the absence of determinancy and coherence in allocating the responsibility for assigning content to broad statutory provisions. The cases also show the failure of the Court to develop a consistent set of standards for determining the actual substantive content of broad statutory schemes. Moreover, the *Chevron* case in particular reveals Congress' absence from that part of the legislative process in which a statute is given its concrete meaning. While the conduct of elected legislators is perhaps understandable in terms of human behavior, the tolerance of such conduct by judges sworn to uphold the Constitution is less acceptable.

It is no doubt true that the cases also reveal the variations and the complexities associated with applying general statutory language to concrete situations. Different kinds of situations require different legislative and administrative approaches, and thus, must provoke different responses from the court charged with review. Reconciliation of the reasoning and outcomes in the cases such as those discussed in this section does not require an inflexible rule of deference or a bright line dividing cases of deference from those of independent review. At a minimum, however, Supreme Court decisions should educate and provide an understanding of the constitutional responsibilities of government officials. This should be done not only to aid such officials in the conduct of their

duties, but to help the public understand what can be expected from its representatives in the lawmaking process.

The model presented in this section is flawed but not useless. It serves two instrumental purposes. First, it focuses attention on the role of the court in the lawmaking process and the value, as well as the danger, inherent in its position as legislator of incremental law. The judiciary's strength rests in the ability to reinforce the separation between the three branches of the federal government and to recalibrate the system of checks and balances in a flexible and responsible manner. The judiciary's weakness results from the almost invisible manner in which the Court's incremental lawmaking may permit the accretion of power that upsets the delicate constitutional balance.[333]

Second, it directs attention to those aspects of judicial behavior which are potentially destructive of democratic values. In a democracy the principal goals of the legislative process are not efficiency or uniformity but rather rationality, accountability, and fairness. The model assists identification of what and how the courts can contribute practically to the preservation and restoration of these values. In understanding the present judicial practices, the process of examining desirable modifications can begin.

III. A Deference-Delegation Model of Judicial Review

The deference dilemma has captured wider attention recently because the so-called "modern administrative state" is changing the legislative process.[334] Congressional use of broad delegations combined with the reviewing practices of the Supreme Court have occasioned a shift in the locus of lawmaking power from the Legislature to the other two

333. There are those who argue that courts should take an even more active role in fashioning legislative content. *See* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982). Although Professor Calabresi speaks of judicial involvement in the legislative process in a different context than that discussed in this Article, he rejects the use of the nondelegation doctrine as a means of forcing Congress to assume greater responsiblity for statutory content and meaning. *Id.* at 163-71. The Calabresi argument favoring judicial activism has many critics. *See, e.g.*, Cox, Book Review, 70 CALIF. L. REV. 1463 (1982); Mikva, Book Review, 96 HARV. L. REV. 534 (1982); Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213 (1983). While the reviewers criticize the context of Calabresi's discussion, they advocate a greater congressional role in fashioning legislative content. Significantly, both Professor Cox and Judge Mikva have served in government positions that enabled them to experience first hand the realities of the political process.

334. INS v. Chadha, 462 U.S. 919, 984 (1983) (White, J., dissenting). For a consummate study of the development of the present permanent and pervasive federal administrative system with regulatory powers and policymaking discretion, see Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986).

branches of government.[335] Consequently, the debate over the propriety and extent of judicial deference cannot be isolated from issues associated with the transfer of legislative power from Congress to the agencies of the executive branch.

To recognize that the deference dilemma is a species of the larger question of how much discretionary lawmaking power the legislative and judicial branches should permit the executive branch to exercise is not to suggest that delegation is either unconstitutional or undesirable. It is generally recognized, however, that the present allocation of lawmaking power and the restraints, or absence thereof, upon the exercise of such power are in need of clarification.[336] The examination of judicial reviewing practices detailed in this Article suggests a few starting points for restoring the checks and balances to the legislative process. There are two categories of suggested reforms. One category seeks a coherent model for assigning the interpretive function between agencies and courts. The second attempts to define and preserve congressional responsibility in the lawmaking process.

335. The majority of legislative commands are no longer made by elected officials. Agency regulations published in the Federal Register exceed congressional legislation in both volume and detail. *See* J. O'REILLY, ADMINISTRATIVE RULEMAKING 1-2 (1983); *Chadha*, 462 U.S. at 985-86 (White, J., dissenting). The Federal Register numbered under 3,000 pages in 1936. In 1977, it surpassed 65,000 pages. S. BREYER, REGULATION AND ITS REFORM 1 (1982). *See also* J. ELY, DEMOCRACY AND DISTRUST 131-34 (1980). Dean Ely describes the actual lawmaking process as being "nearly upside down" from the theory: "Much of the law is . . . effectively left to be made by the legions of unelected administrators whose duty it becomes to give operative meaning to the broad delegations the statutes contain." *Id.* at 131.

336. The criticisms come from many quarters and the proposed remedies take many forms. Judges, legal scholars, legislators, and law organizations have offered remedies including legislation, improved administrative procedures, reshaping administrative law concepts, and defining or redefining the judicial role in reviewing administrative legislation. The literature is too extensive to be categorized here, but a representative sampling includes: Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); S. BREYER, *supra* note 335; Diver, *supra* note 15; McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1128-29 (1977); Mikva, *supra* note 333; Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1695-96 (1975); Stone, *The Twentieth Century Administrative Explosion and After*, 52 CALIF. L. REV. 513 (1964); Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984); Wright, *Beyond Discretionary Justice*, 81 YALE L. REV. 575 (1972). Proposed legislative remedies have included: the legislative veto declared unconstitutional in *Chadha*, 462 U.S. 919 (1984); the "Bumper's Bill" which, in its original form, would have barred deference to all administrative decisions involving statutory interpretations (*see* S. 2408, 94th Cong., 1st Sess., 121 CONG. REC. 29956 (1975)); and proposals to amend the review provisions of the Administrative Procedure Act (*see* Levin, *Scope-of-Review Doctrine*, *supra* note 16).

A. Towards a Model of Deference

The present paradigms that determine a court's initial approach to review are outmoded. The entitlement of an administrative statutory interpretation to deference should not turn on whether the interpretation is advanced as part of a rulemaking or adjudicatory proceeding.[337] Instead, the challenge is to identify the cases in which a court can be expected to defer to an agency's decision. If these cases can be identified, then we should also be able to identify the normative principles that differentiate them from cases in which courts fail to defer. Finally, when an agency decision is entitled to deferential review, the nature and level of judicial scrutiny must be defined.

The starting point of this analysis is to recognize that deference by courts to administrative decisions involving statutory interpretation is no longer purely a matter of judicial discretion.[338] A useful description of the deference process requires clarification first of the boundaries between judicial willingness to defer and its refusal to do so, and second, of the nature of deferential review. The boundaries establish the types of agency decisions to which a court can be expected to defer. The nature of deferential review refers to the criteria for judicial affirmance of a challenged agency decision.[339]

1. Professor Diver's Proposal: A Presumptive Rule of Deference

In a recent analysis of judicial deference to administrative statutory interpretations, Professor Colin Diver proposed that courts should presumptively defer to most agency decisions.[340] Under his "presumptive

337. *See* Levin, *Questions of Law*, *supra* note 16, at 23:

> In traditional scope-of-review doctrine, the review standards for administrative "orders," which are handed down through case-by-case adjudication, are usually analyzed apart from the review standards for "rules," which take the form of regulations of general applicability. This is unfortunate, because the dividing line between administrative and judicial authority should not necessarily be affected by the procedural devices an agency uses in implementing its program.

Id. (footnotes omitted).

338. Diver, *supra* note 15, at 598. *See infra* text accompanying notes 340-341.

339. So far as possible, this discussion will attempt to avoid the ambiguous rhetoric in current use, including the notions that administrative interpretations should be given "weight" and will be upheld if "reasonable."

340. Professor Diver's "presumptive rule of deference" should not be confused with the presumptive deference discussed in Part Two of this Article. Professor Diver's proposed rule refers to the instances when a court should defer to an agency's statutory interpretation when reviewing a challenge to that interpretation. Under a presumptive rule, the court should defer so long as the decision is within the agency's delegated decisionmaking responsibility and accumulated experience. Diver, *supra* note 15, at 592-93. Such deference, however, does not mean that the court should automatically accept the agency's decision without determining that the proposed interpretation is reasonable. In the cases discussed in Part Two, presump-

rule of deference," courts should limit review of agency statutory interpretation where the agency is acting within its delegated policymaking responsibility and accumulated expertise.[341]

Professor Diver's proposal is significant for two reasons. First, it would establish judicial deference as the norm without requiring the reviewing court to justify its decision to defer in terms of agency qualifications or congressional intention.[342] The proposal would thus greatly simplify the court's determination of whether to defer. A court need only review the authorizing statute to determine that the agency's decision is within its subject matter jurisdiction and its policymaking authority.[343] By drawing the deference rule so broadly, Professor Diver restricts the instances in which a court may engage in independent interpretation. At the same time, a broad deference doctrine limits the opportunity for judicial manipulation to reach the substantive results the judges may prefer.

The second notable feature of the Diver proposal is that it reaffirms the reviewing role of the court even in deference cases. Although the proposal is less explicit about the nature of the deferential review, it is evident that deference is not synonymous with abdication of the reviewing function. In large measure, the Diver proposal retains the "reasonableness" standard as the basis for judicial affirmance of an agency

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tive deference disguised the court's refusal to determine the compatibility between the agency's interpretation and the statutory text or legislative history. *See supra* notes 230-333 and accompanying text.

341. Diver, *supra* note 15, at 598. Professor Levin faults the Diver proposal for failing to distinguish between the different types of law questions presented to a reviewing court. Professor Levin's proposal abandons the "obsolete framework" in which all "questions of law" are rigidly distinguished from "questions of fact," *see supra* notes 42-44 and accompanying text, and identifies a question of law that remains the province of independent judicial determination. Thus, he proposes that questions of law for purposes of scope-of-review "should be defined as an issue that requires the making of normative judgments, unlike a question of fact, *and* that is open to independent reconsideration by a reviewing court, unlike a question of discretion." Levin, *Questions of Law supra* note 16, at 12. Questions of discretion, according to Levin, "are those normative issues which call for an inquiry into the 'rationality' of an agency's determination." *Id.* Courts recognize this category de facto when they insist on deferring to an agency's policy decision. *See supra* note 156 and accompanying text. In contrast to the Diver proposal, Professor Levin preserves a category of agency decisions for independent determination of correctness by a reviewing court. While Professor Levin makes a convincing case that some questions of law as he defines them can be separated from the law-fact decisions traditionally reviewed by the court, this author is unconvinced that it is possible or advisable to do so in the vast majority of administrative decisions involving an issue of statutory interpretation. For the extent to which the author disagrees with Professor Levin, see discussion *infra* notes 345, 356-370 and accompanying text & note 378.

342. *See supra* notes 168-229 and accompanying text.

343. Diver, *supra* note 15, at 594-95.

decision.[344] The drawback in this standard is that the elasticity in the reasonableness test, which Professor Diver admits is difficult to eliminate, permits a court to substitute its own interpretation at the same time the court claims to be deferring.[345]

Professor Diver, however, refines the reasonableness standard to limit the instances of judicial substitution. According to Professor Diver, a court would be permitted to overturn an agency interpretation only if it conflicts with the statutory text, history, or context explicitly provided by Congress. In particular, a court should reject an agency interpretation that will "unfairly surprise the statute's nonofficial audience" or that was considered and rejected by the enacting Legislature.[346]

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344. *See supra* note 162.

345. Diver, *supra* note 15, at 597. *See also supra* notes 168-191 and accompanying text. Professor Levin would remedy this potential for manipulation by assigning to courts the responsibility of identifying questions of law as a matter of law, not discretion. Levin, *Questions of Law*, *supra* note 16, at 16. With regard to such law questions, a court would be free to substitute its own judgment if it found the agency interpretation incorrect. *Id.* According to Levin, challenges to an agency's understanding of its statutory mandate or to the statutory requirements governing an agency decision, which a court finds are not left to agency discretion, are matters for a court's independent judgment. *Id.* at 25-33. Assuming the court could indeed separate the statutory interpretation from the application of that interpretation to the facts of a dispute, to a result-oriented court it need not matter whether it invalidates the challenged interpretation because it is incorrect or unreasonable. In effect, Levin appears to be arguing that where a court can, through interpretation of statutory text or context, notably congressional intent, determine that an agency is wrong, it may substitute its own judgment of what is correct. In such instances, however, a court is likely to reach the same result under the Diver model by concluding that the agency interpretation is unreasonable. *See infra* note 346 and accompanying text.

Nevertheless, a principal difference between Levin and Diver remains what each considers to be the appropriate degree of scrutiny in cases where the dispute centers on whether Congress intended to delegate discretion to the agency to decide a statutory interpretation-application question. In such cases, even though an agency is exercising its delegated responsibility for policymaking (which would merit deference under the Diver proposal), where a court and agency disagree over statutory meaning Levin suggests that the Court should win. Levin, *Questions of Law*, *supra* note 16, at 18. Neither proposal, however, adequately addresses the question of the role of a reviewing court in cases where congressional intent and language are vague and ambiguous such that a court could determine neither correctness nor reasonableness with any degree of certainty.

346. Professor Diver writes:

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

Diver, *supra* note 15, at 597-98.

The limited review defined by Professor Diver fails, however, to address the most problematical cases. Reviewing courts faced with an absence of statutory guidance are unable to determine with any assurance the compatibility, let alone the correctness, of an agency's interpretation of the statute. Professor Diver's definition of reasonableness may translate into a judicial standard that requires a challenger to show affirmatively that the agency's interpretation contradicts an explicit provision in the statutory text or history. This refinement of the reasonableness standard would thus limit the instances of independent judicial interpretation by placing an almost impossible burden on the challenger.

2. Modification of Present Practices and Professor Diver's Proposal

The deference dilemma and the problematical cases examined in the preceding parts of this Article suggest several modifications of the present reviewing practices and refinements of the Diver proposal. One change would eliminate presumptive deference. This would reinforce the principle that a court retains a reviewing responsibility in every case in which it defers to an agency interpretation. Another change would require the agency to make an affirmative showing of the reasonableness of its challenged interpretation, thus clarifying the issues that both challenger and agency should address upon appeal. A third change would require a court finding an agency interpretation unreasonable to remand the decision to the agency for additional consideration. This approach would both emphasize the agency's interpretive responsibility as the recipient of delegated legislative authority and further restrict the temptation of courts to substitute their independent judgment of statutory meaning.

Finally, the problem posed by statutes that lack any basis for determining the reasonableness of the agency-assigned meaning must be resolved. In such cases, deference is inappropriate because the court is incapable of exercising any reviewing responsibility. The analysis in this Article suggests that the solution rests outside of the Diver proposal even as modified. In such cases, the Court should define and enforce the congressional responsibility in the legislative process, so that reviewing courts can evaluate the reasonableness of an agency's decision. While a delegation doctrine, as a corollary to the deference rule, is examined in the following section, the remainder of this section will examine further each of the modifications suggested above.

a. Elimination of Presumptive Deference

The first modification eliminates presumptive deference, or the notion that an agency interpretation is entitled to more than "mere deference,"[347] which has served as a subterfuge for upholding an agency interpretation that is unlikely to withstand stricter judicial scrutiny. Moreover, presumptive deference has been accorded an agency decision for which there is no basis to determine whether it is reasonable. The elimination of presumptive deference essentially requires that a reviewing court determine in every case whether a challenged agency decision should be upheld, by examining the basis of the agency's decision, rather than simply concluding the decision is reasonable.

Congressional amendment of the Administrative Procedure Act would further emphasize courts' reviewing responsibility. In particular, the provision foreclosing judicial review of agency action "committed to agency discretion by law" has been a source of confusion and ought to be repealed.[348] The delegation of legislative authority to an administrative agency always includes the power to exercise discretion. If Congress can constitutionally foreclose judicial review, it should do so explicitly in the delegating statute where appropriate. Congress may further amend the Administrative Procedure Act to clarify that the statute is not an independent source of judicial jurisdiction where Congress has explicitly foreclosed review.[349] Only where a court is satisfied that Congress has

347. *See supra* Part II; *see also supra* note 336.

348. 5 U.S.C. § 701(a)(2) (1982). *But see* Pierce, *supra* note 83. Professor Pierce proposes that courts should refrain from reviewing the conformance of an agency's policy decision with a statute drawn in such vague terms as to thwart meaningful review. In such instances, Pierce argues that a court should hold that Congress has committed the challenged decision to agency discretion as defined in section 701(a)(2) and has foreclosed review. *Id.* at 514. While the Pierce proposal primarily addresses the review of agency choice of policy and does not explicitly argue for deference to an agency's interpretation of its statutory mandate (including its jurisdiction), Pierce implies that a court's declination to review is appropriate where Congress has failed to provide the specificity necessary to enable meaningful review.

Interestingly, Professor Pierce argues that his proposal for extreme judicial restraint will have the same consequences as the delegation proposal advanced in this Article. *See infra* notes 362-417 and accompanying text. Both proposals seek to require Congress to provide greater legislative specificity. According to Professor Pierce, Congress would be moved to such action to prevent the President from "accumulating too much control" over agency decisionmaking. Pierce, *supra* note 83, at 525. Whereas Professor Pierce relies upon "moral suasion," the delegation model proposed here is more directive: it calls for judicial enforcement of the congressional responsibility by preventing agency action until Congress provides the requisite statutory guidance. For Professor Pierce's argument against resurrection of the traditional nondelegation doctrine, see *id.* at 489-504.

349. Califano v. Sanders, 430 U.S. 99 (1977). *See* Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion"*, 82 HARV. L. REV. 367 (1968); Verkuil, *Congressional Limitation on Judicial Review of Rules*, 57 TULANE L. REV. 733 (1983).

intentionally and constitutionally foreclosed judicial review should a court decline to review the agency statutory interpretation. A court's decision to defer to an agency interpretation should not masquerade as review of the substance of the agency decision.

The benefit of judicial review to a challenger of an agency decision is reduced, however, if the challenger must carry the entire burden of showing that the agency interpretation is unreasonable or incorrect.[350] While it is difficult to define the reasonableness standard that is universally applicable to agency interpretations, the court could make the review process more uniform by formalizing the burden of providing the court with sufficient information upon which to render judgment.[351]

b. Shifting the Burden of Adequate Support to the Agency

The second modification of the Diver proposal calls upon the court to insist that an agency demonstrate there is adequate support for its statutory interpretation.[352] This requirement would not create an excessive burden, since the agency need only expand its statement of explanation which must currently accompany the issuance of a rule or order.[353] A separate section of that statement should cite any affirmative support for the interpretation found in the statutory text or its history, explain the compatibility of the interpretation with the statutory purpose or intent, demonstrate how the interpretation furthers the agency's policymaking responsibilities, and conclude that the interpretation is not contrary to statutory text, history, or purpose. Such an agency explanation will permit challenges to be raised at the administrative level, as part of either comments to an agency's proposed rule or order, or a motion

350. The Diver proposal would limit the instances in which a court could overrule an agency interpretation to cases in which the interpretation is contradicted by the statutory text, history, or context. One consequence of this standard is that the challenger can demonstrate the agency interpretation is unreasonable only by showing it is incorrect.

351. Diver, *supra* note 15, at 598.

352. Admittedly, an adequate support standard for affirmance is potentially as ambiguous as the reasonableness standard. A conclusion of adequacy may be based upon subjective judicial judgment. However, two factors will minimize the potential for judicial subjectivity aimed at ensuring a particular outcome. One is that the court can identify the kinds of documentation that will satisfy the adequacy standard. Another factor is that the deference model suggested in this Article seeks to discourage rationalizations for outcome determinative judicial decisionmaking by requiring remand to the agency of decisions that courts find lack adequate support. *See infra* notes 356-360 and accompanying text.

353. Administrative Procedure Act, 5 U.S.C. § 553(c) (1982): "After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." The record of a formal adjudication resulting in the issuance of an order or rule must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." *Id.* at § 557(c)(3)(A).

for agency reconsideration.[354] The agency's response will frame the issues for a subsequent judicial challenge. Moreover, the agency's statement should provide the basis for the judicial findings associated with a court's decision to defer. Admittedly, requiring an agency to make an affirmative showing of adequate support for its interpretation gives a court more leeway to reject the agency's decision even as it embraces the concept of deference.

Professor Diver predicts that the presumptive rule of deference is likely to reduce the instances in which dissatisfied parties appeal.[355] Yet, reduction of appeals is even more likely where a prospective challenger is given a full explanation of the agency's reasoning enabling her to evaluate the potential for a successful appeal. Where an appeal is taken, the agency's explanation is likely to focus the issues to be addressed by the challengers, defenders, and reviewers of the disputed interpretation.

c. Remand to the Agency

The third modification of the Diver proposal limits judicial substitution of independently determined statutory meaning without unduly restricting the opportunity to challenge an agency's decision. Under this modification, a court that is not sufficiently convinced that the agency's interpretation has adequate support should remand the decision to the agency for additional consideration.

Remand under a deferential review model would thus permit the agency either to try again to convince the court to uphold the agency-assigned meaning or to offer a different interpretation. Judicial remand may also encourage an agency to seek more specific congressional authorization for its proposed regulatory action. Statutory specificity would be desirable both at the inception of the legislative program as well as when experience reveals the need for changes.

Courts should refrain in most instances from substituting their interpretation for that of the agency. Given the relatively few instances of plain meaning, a court's insistence that a statutory text supports a single

354. Although a motion to reconsider is generally not essential to the exhaustion of administrative remedies that must precede a petition for judicial review, where a challenger has a strong argument that the agency interpretation is incorrect or unreasonable based upon the agency's explanation, it may be worthwhile to pursue administrative reconsideration. The administrative route would be particularly efficient if courts adopt the proposal of remanding agency interpretations found unreasonable for further agency consideration. *See infra* notes 356-360 and accompanying text.

355. Diver, *supra* note 15, at 591.

correct interpretation is rarely convincing.[356] Remand, by contrast, forces an agency to offer more convincing support for its choice of statutory meaning while addressing the court's concerns. If it cannot do so, the proposed agency action must await congressional authorization.[357]

The deferential review-remand model does not resolve every potential inconsistency or ambiguity associated with judicial review of agency statutory interpretation. The nature of the deferential review—the criteria upon which a court bases its decision to uphold or remand an agency decision—is likely to vary from case to case. Designation of a uniform standard that requires an agency interpretation to be adequately supported or to be reasonable does not simplify the process of determining the level of judicial scrutiny of a challenged decision.[358]

Not all agency decisionmakers possess the same qualifications. Similarly, a reviewing court may be better able to evaluate the agency's decisions in some cases than in others. A model of judicial review would be useless, however, if the nature of the court's evaluation of whether to sustain an agency decision remained essentially subjective, dependent upon the particular knowledge or political philosophy of the reviewing judges. Judicial scrutiny should depend upon objective criteria that account for agency expertise and experience with the subject matter of the decision.[359] As a general rule, the greater the agency's special competence, the less probing need be the court's evaluation of the compatibility of agency interpretation and statute. For example, an agency interpretation rendered in the agency's regulatory capacity, based upon knowledge gained from either experience or technical expertise not possessed by judges, warrants limited scrutiny.[360] Once the court assures itself that

356. In remanding, a court may include its own suggested interpretation. Not infrequently, the agency may have the opportunity to consider a variety of possible interpretations suggested in majority, concurring, and dissenting opinions. Remand, however, should discourage judges from manipulating deference issues and statutory interpretation techniques to achieve judicially desired modifications in congressionally established regulatory programs.

357. It is possible that in a few cases a judicial conclusion that the statute cannot support the interpretation essential to the agency's proposed action may render remand futile.

358. Whatever the rhetorical standard, the reviewing court must still determine whether to uphold the agency's interpretation. Deferential review, however, means that the court need not be convinced that the agency's choice of meaning is the only correct interpretation.

359. Many factors upon which a court bases its decision whether to defer reappear as criteria for determining the nature of the deferential review. *See supra* Part II; *see also* Diver, *supra* note 15, at 562 n.95.

360. For example, where an agency with delegated responsibility to regulate the banking industry has been exercising that responsibility over many years, it has presumably acquired both intimate knowledge and experience. When called upon in its regulatory capacity to decide whether banks can sell commercial paper without violating statutory prohibitions, and the statute is silent as to definition of the terms in question, judicial scrutiny should be limited. *Cf.*

the agency explanation accords with either the statute or overall agency policy, the court's interpretive responsibilities should end.

By contrast, judicial scrutiny that subsequently leads to disagreement with an agency interpretation is more significant where the challenged interpretation is based upon judicial precedent or traditional interpretive techniques. Particularly where the agency's experience in a specific matter is minimal, judicial remand permits further agency consideration in light of the court's suggested interpretation.

The remand requirement of deferential review minimizes both the opportunity and temptation for a court to manipulate the criteria that justify intense judicial scrutiny. In the absence of statutory plain meaning, the remand requirement reduces the occasions for courts to ignore agency judgments. Remand also affords both the challengers and defenders of the disputed interpretation the opportunity to respond to the court's conclusion.

The deferential review-remand model will not unduly jeopardize agency regulatory flexibility. The desire to maintain this flexibility requires that the nature of the deferential review remain somewhat subjective. Nevertheless, under the proposed model the predictability of judicial responses to agency decisions will be enhanced. In most cases, deference will ultimately result in acceptance of the agency judgment, although the review process may cause a modification of the agency's initial judgment.[361]

No rule of deference, however, can adequately cure the dilemma created by legislation that yields no clue as to its meaning or applicability. In some cases a statute is simply inadequate to permit an agency to make a satisfactory showing that its interpretation is reasonable. In such an instance, however, a court can be no more confident of the correctness of a judicial interpretation than that of an agency.

Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys. I, 468 U.S. 137 (1984) (discussed *supra* notes 288-320 and accompanying text).

361. If the agency persists in its interpretation without offering more convincing substantiation, the court is likely to invalidate again the agency interpretation. Presumably, the agency would then be left with a choice of changing its interpretation or foregoing its proposed action. The agency may, however, offer a new argument to justify the previously disapproved interpretation. This may prove adequate to overcome a second challenge where the earlier remand was prompted by the agency's failure to offer adequate justification or by its reliance upon reasoning not deserving of limited judicial scrutiny. The newly explained interpretation might be entitled to limited evaluation if grounded on policies or other matters within agency expertise. Deference would require a court to sustain an agency decision even though it might disagree with the agency's interpretation. On the other hand, where a court still finds the interpretation unacceptable, the second (or third) remand would notify the agency that it must change its interpretation or abandon its proposed action.

For this reason, efforts to define and enforce the congressional responsibility in the legislative process remain important. A delegating statute that contains a discernible meaning is essential to meaningful judicial review of an agency's interpretation. A reincarnated "delegation doctrine" would foreclose transfers of lawmaking power that relieve elected legislators of accountability for fundamental legislative decisions. Particularly in light of a presumptive rule of deference, such a doctrine is essential to preserving the integrity of the constitutionally defined legislative process in which Congress may share, but not abdicate, its lawmaking power. Analysis of the deference dilemma suggests some dimensions of a reincarnated delegation doctrine, although full elaboration of such a doctrine is beyond the scope of this Article.

B. Dimensions of a Delegation Doctrine

If deference is to be more than unconstrained administrative discretion, courts must be able to apply identifiable criteria for evaluating the reasonableness of the agency's statutory interpretation. Judicial evaluation of the conformity of the agency's statutory interpretation with a standard is a charade unless there is a discernible meaning. As long as we maintain that Congress should have some role in the legislative-administrative process, it falls to the judiciary to define and enforce the legislators' responsibility.

The debate over judicial deference to an administrative statutory interpretation suggests a delegation doctrine that would require Congress to retain some responsibility for the legislative decisions of its delegate, offering a reviewing court a third choice when confronted with the deference dilemma. Instead of having to choose between whether to defer[362] or impose a judicially determined interpretation, a court could choose to invalidate the statutory delegation. This third choice would be appropriate in certain cases where statutory vagueness or ambiguity prevents a court from either evaluating the reasonableness or adequacy of the agency's interpretation, or judicially determining statutory meaning.

For purposes of fashioning a model of deference, we need go no further than discussing those aspects of a delegation doctrine relating to judicial review of challenges to agency statutory interpretations.[363] De-

362. Under the model presented in the preceding section, if a court chooses to defer, it faces the additional choice of either upholding the agency interpretation or rejecting and remanding the interpretation to the agency for further consideration.

363. The legacy of the "nondelegation" decisions of 1935—in which the Supreme Court invalidated parts of the National Industrial Recovery Act—and the ensuing debate over the power of the "administrative state" create factions on both sides of the question: whether there should be rigid congressional control of the content of administrative decisions or flexible

fining a delegation doctrine in terms of the ability of courts to review administrative compliance with the delegating statute is not a novel idea. Less than a decade after the Supreme Court invoked the delegation doctrine to strike down portions of the New Deal legislation,[364] the Court redefined the doctrine to uphold broad delegations of wartime power using a standard of "reviewability."[365] The Court explained the standard for determining the constitutionality of a statutory delegation as follows:

> Only if we could say that there is an absence of standards for the guidance of the Administration's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding [the Administrator's] choice of means for effecting [the statute's] declared purpose.[366]

In evaluating whether the statute was adequate to allow for judicial review, however, the Court looked beyond the congressionally prescribed standards to the " 'Statement of Considerations' required to be made by the Administrator."[367] In so doing, the Court allowed the agency to provide the legislative specificity necessary to evaluate both the constitutional adequacy of the statute and administrative compliance. Thus, the Court concluded that the statute, read together with the administratively assigned meaning, was "sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the Administrator . . . has conformed to those standards."[368]

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administrative discretion to fashion policy. *See* Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985) (discussing the various positions advanced by participants in the debate). One side of the debate embraces a nondelegation doctrine that would curtail the congressional practice of broadly delegating decisionmaking authority to administrators. The opposing side favors abandoning virtually all constraints on both the substance and method of congressional statutory delegations. *See infra* note 373. While the so-called opponents of broad delegation are not as unrealistic about the existence and durability of the administrative state as the proponents might argue, focusing debate on the desirability of a nondelegation doctrine is misleading. Indeed, the name has been a misnomer since the doctrine was first addressed and developed by the Supreme Court. Moreover, rarely have Court opinions condemned the concept of discretionary lawmaking by the executive branch. Rather, the Court has struggled to define what, if any, procedural or substantive limitations restrict the congressional transfer of its legislative power to the Executive. The debate over the issue of judicial deference to administrative statutory interpretation suggests a limitation that forms a middle ground in the pro and antidelegation positions.

364. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

365. *See, e.g.*, Yakus v. United States, 321 U.S. 414 (1944).

366. *Id.* at 426.

367. *Id.*

368. *Id.*

With the advent of judicial deference,[369] the question of the statute's adequacy was transformed into an issue of statutory interpretation.[370] In deferring to the agency's interpretation, the courts implicitly confirmed that the statute was sufficiently explicit to enable judicial review. Courts less inclined to defer and those disagreeing with an agency decision simply maintained the discretion to substitute their own judicial interpretation whether the interpretive task involved finding or creating statutory meaning.

In this process of concentrating on the deference owed to an agency's interpretation, the standard for evaluating the constitutional adequacy of the statute was lost. The issue of whether the statute could be interpreted was subsumed by judicial deference to the administratively assigned meaning, whether or not the reviewing court ultimately accepted the agency's decision. The willingness of the Supreme Court and the lower courts to allow either the agency or the courts to create statutory meaning under the guise of interpretation inspired the Legislature increasingly to delegate power.[371] Consequently, to address the issue of deference without examining the role of Congress in the administrative-

369. The advent occurred not long after the relaxed application of the nondelegation doctrine. L. JAFFE, *supra* note 24, at 565 ("In the 1940's judicial deference . . . became one of the central credos of our administrative law.").

370. Federal courts deal with the problem of delegated authority as one of statutory interpretation to avoid gratuitous constitutional holdings against delegation. H. LINDE & G. BUNN, LEGISLATIVE AND ADMINISTRATIVE PROCESSES 537 (1975). *See also* Note, *Rethinking the Non-Delegation Doctrine*, 62 B.U.L. REV. 257, 281-86 (1982).

371. The Supreme Court's deparature from rigorous enforcement of the nondelegation doctrine, *see* Yakus v. United States, 321 U.S. 414 (1944) (discussed *supra* text accompanying notes 365-368), and subsequent application of a presumption of statutory constitutionality, *see* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 195-96 (1978), means that legislators generally have little incentive to provide specific directives to administrators who receive delegated legislative power. Consequently, legislators have availed themselves of the opportunity to "do something" about a pressing problem by passing vaguely or ambiguously worded statutes so that they can subsequently disassociate themselves from unpopular consequences of the legislative program as implemented by administrative agencies. For elected legislators, statutory specificity poses the risk of losing votes, campaign contributions, and even their office if a stand on some issue is sufficiently objectionable to a powerful interest group. *See* E. DREW, POLITICS AND MONEY (1983). One Congressman explained the reason for vague delegations as follows:

> "[T]hen we stand back and say when our constituents are aggrieved or oppressed by various rules and regulations, 'Hey, it's not me. We didn't mean that. We passed this well-meaning legislation and we intended for those people out there . . . to do exactly what we meant, and they did not do it.' "

Cited in J. ELY, *supra* note 335, at 132 (footnote omitted) (quoting Congressman Flowers).

The absence of a judicially enforced statutory specificity requirement enabled legislators to compromise on meaningless statutory language and consequently to pass more legislation, leaving to the delegate the task of creating statutory meaning. The statistics bear out the popularity of legislating by delegation. Agency regulations published in the Federal Register presently exceed congressional legislation in both volume and detail. *See* J. O'REILLY, *supra*

legislative process is to permit the trend toward congressional delegation to continue unabated.[372] Moreover, focusing solely on the deference question limits the debate to which of the other two branches should fill the legislative void.[373]

A rule of deference that retains the concept of meaningful review and thus promises some principled restraint of administrative discretion requires that the delegating statute permit judicial determination of whether an assigned meaning is reasonable. Enforcing the congressional responsibility for providing such a statute requires judicial willingness in appropriate circumstances to refuse both to defer and to assign independent judicial meaning. In certain cases, the courts should not hesitate to declare unconstitutional the statute claimed as authority for the challenged administrative decision to the extent that the statute may be interpreted to permit the action in question. A judicial declaration that the statute violates the delegation doctrine would effectively remand the statute to Congress for clarification. In effect, the Court would require affirmative evidence of Congressional authorization before santioning the agency interpretation. The challenge, of course, is to define the circum-

note 335, at 1-2. Regulations numbered under 3,000 pages in 1936; in 1977, they surpassed 65,000 pages. S. BREYER, *supra* note 335, at 1.

372. While many distinguished scholars have addressed the issue of the nondelegation doctrine, they have generally sidestepped the relationship of delegation to the judicial practices associated with review of agency lawmaking. Several commentators have, in varying forms, argued for retention, resurrection, resuscitation, or renewal of the nondelegation doctrine. *See, e.g.*, Aranson, Gellhorn & Robinson, *supra* note 336; S. BARBER, THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER (1975); A. BICKEL, THE LEAST DANGEROUS BRANCH 160 (1962); J. ELY, *supra* note 335, at 131-34; J. FREEDMAN, CRISIS AND LEGITIMACY (1978); Gewirtz, *The Courts, Congress, and Executive Policymaking: Notes on Three Doctrines*, 40 LAW & CONTEMP. PROBS. 46 (Summer 1976); L. JAFFE, *supra* note 24, at 28-85 (1965); Koslow, *Standardless Administrative Adjudications*, 22 ADMIN. L. REV. 407 (1970); Merrill, *Standards—A Safeguard for the Exercise of Delegated Power*, 47 NEB. L. REV. 469 (1968); Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223 (1985); Schotland, *After 25 Years: We Come to Praise the APA and Not to Bury It*, 24 ADMIN. L. REV. 261, 263-64 (1972); B. SCHWARTZ, *supra* note 22, at 41-44; Schwartz, *Of Administrators and Philosopher-Kings: The Republic, the Laws, and Delegations of Power*, 72 NW. U.L. REV. 443 (1978); Wright, *supra* note 336.

373. Administrative standards and procedural safeguards have been suggested as alternatives to vigorous enforcement of a nondelegation doctrine. *See, e.g.*, Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969). In many instances they may no doubt function effectively to constrain administrative discretion, particularly where the standards provide judicially enforceable self-constraint. *See* United States v. Nixon, 418 U.S. 683 (1974); Vitarelli v. Seaton, 359 U.S. 535 (1959); United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954). Professor Diver suggests that departure from a consistent administrative policy or change in a previously assigned statutory meaning may result in a finding by a reviewing court that an administrative interpretation is unreasonable. *See* Diver, *supra* note 15, at 587-89.

stances in which the court should make this choice.[374]

Judicial use of such a delegation doctrine would be appropriate in two instances. One is in cases where there is no evidence that Congress has authorized the agency's arrogation of subject matter jurisdiction. Such a case arises when an agency that has received an express delegation of authority over a particular matter asserts authority over other subject matter not found in the language or history of the delegating statute. The arrogation of jurisdiction may take two forms. In one form, the agency asserts that its regulatory jurisdiction implicitly includes the matter in question because such jurisdiction is reasonably ancillary to performance of its specified task.[375] A second form of agency arrogation of jurisdiction is an agency's invocation of concerns outside the subject matter of its delegated authority to justify regulation of a matter arguably

374. If we accept that an administrative agency's authority to legislate includes fashioning policy and creating legal commands, then challenges to an agency's statutory interpretation raising constitutional issues involve questions of the boundaries of an agency's power. When the statutory language and history are inadequate to permit a court to discern these boundaries, meaningful review is futile. Deference in such instances would mean acceptance of the agency's interpretation without any determination of reasonableness. Similarly, a judicially supplied interpretation is no more accurate or compatible than its administrative counterpart where the statute admits of no determinable meaning.

375. *See, e.g.*, United States v. Southwestern Cable Co., 392 U.S. 157 (1968); Permian Basin Area Rate Cases, 390 U.S. 747 (1968); American Trucking Ass'n v. Atchison, Topeka & Santa Fe Ry. Co., 387 U.S. 397 (1967). The most notable example of this type of jurisdictional extension is the regulation of cable television by the Federal Communications Commission under a statute passed before the existence of cablecasting. In *United States v. Southwestern Cable Co.*, the Supreme Court upheld the FCC's jurisdiction over cable television to the extent that regulation of cable was "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." 392 U.S. at 178. Congress had refused the Commission's requests both for legislative guidance on the extent and scope of its jurisdiction over cable operators and, subsequently, for confirmation of its regulatory efforts. *See Southwestern Cable Co.*, 392 U.S. at 164-72. The Supreme Court nevertheless upheld the Commission's interpretation of its delegating statute, which effectively expanded federal jurisdiction over cablecasters. Eventually, the Court apparently abandoned the ancillary jurisdiction limitation of FCC authority over cable. In its 1984 decision in Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984), the Court indicated that the Commission had plenary authority over cable telecasting as part of its " 'broad responsibilities' to regulate all aspects of interstate communication by wire." *Id.* at 700. This decision was part of a process of FCC extension of jurisdiction which a former FCC Commissioner summarized as follows: "The FCC's regulation of cable television is justifiable only by reference to a kind of common-law tradition that gives regulatory agencies organic independence from their original legislative mandates." Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 174 n.13 (1978). The problems raised by judicial failure to confront honestly the jurisdictional issues present in various challenges to FCC rules are examined in Krattenmaker & Metzger, *FCC Regulatory Authority Over Commercial Television Networks: The Role of Ancillary Jurisdiction*, 77 NW. U.L. REV. 403, 486-91 (1982).

within its statutory jurisdiction.[376]

Under the delegation doctrine described here, a court confronted with either form of agency arrogation of jurisdiction should selectively invalidate the statute claimed as authority. The court's ruling would require a declaration that the statute is constitutionally inadequate to permit the agency action. Thus, before an agency could again act on the matter, Congress would need to delegate explicit jurisdiction. Opening the issue to congressional scrutiny would presumably make legislators provide the necessary guidance for the agency's exercise of the delegated regulatory authority.

A second instance for judicial use of a delegation doctrine is in cases where the agency's choice of means or methods for regulating the subject matter over which it has jurisdiction represents a new agency policy not specifically authorized by statute. For example, a statute authorizing the use of quotas to control oil imports would be constitutionally suspect to the extent it can be interpreted to permit the imposition of a tax on imported oil.[377] Whereas deference and a liberal statutory reading may permit a court to find reasonable the agency's assertion that it is effectuating the statutory purpose by choosing a method other than that specified in the statutory text, the asserted authority should be declared constitutionally impermissible.[378] Congress has neither considered nor

376. For example, the Civil Service Commission argued that its broad authority to regulate the government workforce included the authority to ban employment of all aliens. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976). Its justification, however, was based upon considerations of immigration policy, economic consequences, and foreign affairs, which were not matters within its jurisdiction. Although the Court reversed the Commission's decision, it supplied its own interpretation of agency authority rather than holding the statute unconstitutional to the extent it could be interpreted to permit the agency action. The Court used this jurisdictional argument to disqualify the administrative decisionmaker from entitlement to deference, thus permitting the Court independently to supply statutory meaning. Significantly, the dissent stressed that the Commission's interpretation was entitled to deference, thus highlighting the absence of a normative judicial choice that would return the matter to Congress. *Id.* at 124-26 (Rehnquist, J., dissenting). Consequently, if the dissent's deference argument prevails in a similar type of case, or the ideology of the Court shifts slightly and the agency tries again, it is possible that an administrative-legislative program might receive judicial sanction despite the absence of congressional consideration of the agency's asserted mandate. Although the Court's interpretation appears to bar the administrative action in question without additional congressional action, the uniqueness of the judicial reasoning leaves the decision vulnerable to distinction, if not extinction. The Court's reasoning has been described as "obscure." *See* G. ROBINSON, E. GELLHORN & H. BRUFF, THE ADMINISTRATIVE PROCESS 76-78 (2d ed. 1980).

377. *See, e.g.*, FEA v. Algonquin SNG, Inc., 426 U.S. 548 (1976).

378. Since most modern commentators and many courts hold that an agency policy decision deserves deference from a reviewing court (*see, e.g.*, Levin, *Questions of Law, supra* note 16; Pierce, *supra* note 83; Monaghan, *supra* note 1), an agency could assert that its choice of means—in this case, levying a tax—is a policy choice for effectuating the purpose of the statute

acknowledged the consequences of the administratively declared legislative change. In addition, the courts have no basis for evaluating the substantive basis of the agency's decision, such as the reasonableness of the tax rate imposed.[379]

Similarly, the Federal Trade Commission's use of legislative rulemaking—after more than forty years of exclusively using adjudication to identify unfair and deceptive trade practices—should be constitutionally impermissible without congressional authorization.[380] The agency's use of this new regulatory methodology constituted a policy change that effectively expanded agency power causing potentially dramatic consequences for regulated interests.[381]

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and thus, is entitled to judicial deference. The problem is that the statute's history may indicate that Congress considered one or more different methods of accomplishing its statutory objective without considering that method chosen by the agency. The traditional choices for the reviewing court in such a case would be either to defer to the agency's policy decision on the grounds that Congress delegated policymaking authority to the agency, or to interpret the statute for itself and conclude that Congress did not intend to authorize the agency's choice in this case. The latter judicial choice, although probably achieving the objective of forbidding the challenged agency action unless eventually specifically authorized by Congress, has two drawbacks. One is that it conflicts with Professor Diver's presumptive rule of deference since the agency interpretation underlying its choice of methods is not prohibited by the statute. Second, the agency remains free to try the taxation method at a later date and hope that its decision either will not be challenged (this may be arranged through negotiations with regulated interests, *see, e.g.,* Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977) (the court sanctions the agreement reached in ex parte meetings between agency officials and television and advertising interests that restricted but did not ban advertising to children)), or will receive deference by a different appellate panel, which will either ignore or distinguish earlier contrary decisions. A judicial declaration that a statute is selectively unconstitutional to the extent that it may be interpreted to authorize the challenged regulatory method offers a way out of the dilemma between deference and independent interpretation which results in unpredictable judicial choices and searches for a mythical coherent congressional intent regarding the extent of an agency's delegated policymaking authority.

379. The approach suggested here accords with the *Yakus* standard, *see supra* text accompanying notes 365-368, because the Court has no basis for evaluating whether the agency's decision is within the statutory boundaries other than to conclude that the agency's argument—that its proposed action will achieve the general statutory objective—appears reasonable. If review is limited only to the latter question of apparent reasonableness, Congress need only write statutes that identify a problem, such as too much imported oil, and delegate authority to do something about it—anything that to the agency appears to ameliorate the problem.

380. National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

381. In many cases, an agency's initial choice of regulatory methods would be entitled to deference in the face of statutory ambiguity. The interpretation can be upheld as reasonable where it is relatively contemporaneous with passage of the statute, and the agency participated in the legislative process that developed statutory content. Legislative specificity in such cases may be desirable but not constitutionally required. On the other hand, where the agency choice represents new policy uncontemplated by Congress, and poses potentially unfair sur-

This third choice of selective or limited statutory invalidation is an alternative to setting aside an administrative rule as ultra vires based upon a judicially supplied statutory interpretation.[382] While the immediate outcomes of the two judicial conclusions would be the same, the effects and consequences differ.[383] A court that nullifies only the agency action has concluded that the statute is capable of interpretation, although it cannot support the interpretation asserted by the agency. The agency, however, is not barred from trying to take the same or substantially similar action in the future despite the court's disapproval. It may offer another interpretation or advance new support for the same interpretation. With a presumptive rule of the deference-remand model, discussed in the previous section, an agency should not be discouraged in most cases from trying again to achieve the objective of its original proposal.[384] Moreover, the agency may negotiate with its opponents in the earlier judicial challenge and develop a program of action designed to avoid further litigation. Consequently, the judicial decision provides little incentive for congressional clarification unless the agency concludes

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prise to affected interests, the statutory authority should be declared constitutionally inadequate.

382. *See supra* note 370.

383. An implicit reason for refusing deference in such cases, either by exercising the traditional independent interpretory function or by applying the delegation doctrine suggested here, is that the agency arrogation of power or employment of new regulatory methods may pose unfair surprise to and undue hardship for potential regulated interests. The adversely affected interests receive greater protection uner the proposed delegation doctrine since one purpose of the proposed doctrine is to compel Congress to exercise its constitutionally assigned function in the legislative process. Thus, this greater protection is in effect a constitutional guarantee.

384. The court could, of course, repeatedly hold that the agency has failed to meet its positive burden of showing that the statute gives it the jurisdiction or authority it claims. Thus, the immediate effect would be to prohibit agency action until Congress authorizes the action. These repeated scenarios, however, are not only an inefficient use of both human and economic resources, but they present the court with an opportunity to change its position. *See supra* note 378. Since the question of what constitutes sufficient justification is not objectively definitive, judges, particularly those who tend to be result-oriented, may accept a modified agency justification similar to one rejected by a previous court even though the statutory language remains vague or ambiguous. While the potential creation of this guessing game is an undesirable aspect of the deference-remand model, it is outweighed by the likelihood that most responsible judges would use remand to emphasize the need for further congressional action. This Article proposes application of a delegation doctrine that would eliminate the guessing game in those instances where it potentially carries more serious consequences for adversely affected interests. *See supra* note 383.

When weighed against the potential loss of a constitutional protection by a regulated interest, the seemingly "drastic" remedy of declaring a statute unconstitutional is not unacceptably extreme. Moreover, since the declaration of unconstitutionality suggested in this Article is a selective nullification of the statute, which serves only to prohibit the action in question and does not prevent Congress from authorizing the very action that the agency had attempted, it is no more extreme than repeatedly rejecting an agency interpretation. It is, however, arguably a more efficient remedy. *See infra* note 386.

that judicial resistance is likely to frustrate all further administrative efforts.[385]

On the other hand, a declaration of statutory unconstitutionality stays agency action pending congressional consideration. The court's conclusion need only nullify the statute with respect to the preferred interpretation. The statute survives as authority for other agency action either previously approved or evidently permitted.[386]

Limited nullification of the statute is preferable to overruling the agency interpretation where either of two conditions are present. The first is where the agency legislative decision regarding its methodology would have a serious impact on those interests required to comply with the administrative command, and there is no evidence in the statute or its history that the impact and its attendant consequences were contemplated by Congress. Selective nullification may also be appropriate in other cases without regard to the impact of the administrative legislation. Yet where Congress has considered and acknowledged the potential consequences of its delegation of broad regulatory authority, judicial remand to the agency for reconsideration of an interpretation would not severely disadvantage adversely affected interests. Presumably, where Congress has considered the impact of possible agency decisions when enacting the statutory delegations, those adversely affected by agency action had notice and an opportunity to respond to both the proposed legislation and its consequences during proceedings on the legislative and administrative levels.

On the other hand, where administrative legislation will carry consequences that were contemplated neither by the affected interest nor by its elected representatives, the court should forbid further administrative action without congressional authorization. Judicial deference or independent judicial interpretation, even if it results in remand to the agency, could completely eliminate congressional participation in the legislative process.[387] An adversely affected interest would be unable effec-

385. In the absence of a clear statutory meaning, the court is urged to exercise restraint in imposing a judicial interpretation that would render agency reaction futile. *See supra* notes 347-351 and accompanying text.

386. The normal judicial reluctance to address the constitutional issue when the case may be decided on nonconstitutional grounds should not apply for two reasons. First, the presumption of constitutionality is rebutted by the fact that the effect of the constitutionally based decision is different than that of a decision based on a nonconstitutional statutory interpretation. Second, selective statutory invalidation does not encroach upon legislative prerogatives or upset the system of checks and balances. Not only can the statute survive in part, but Congress is not barred from relegislating the same program so long as it supplies greater statutory specificity. *Cf.* Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978).

387. *See supra* note 384.

tively to hold its elected representatives accountable. Moreover, deference or remand reduces incentives for prompt congressional attention.[388]

A second circumstance for the judicial choice of statutory nullification over independent interpretation is where Congress has deliberately or "quasi-intentionally" evaded making a fundamental decision concerning the extent of an agency's jurisdiction or methodology. Where delegation of the statutory interpretive responsibility to an agency appears to be motivated primarily by legislators' desire to escape or to settle a political controversy, the court should refuse to allow a nonlegislative branch to resolve the matter.[389]

A motivation test will pose some difficulty in its initial application. Over time, however, courts can formulate objective criteria both to aid its reviewing task and to guide Congress in understanding its duty of legislative specificity.

For example, a court should evaluate whether the matter in question is one in which administrative expertise or regulatory flexibility, or both, warrants the challenged broad delegation. Congress can assist the court's evaluation by explaining the reasons for its failure to specify the extent of an agency's jurisdiction or powers. Congress should also acknowledge the scope and consequences of the interpretive decisions inherent in the agency's application of the statute to a specific matter. By contrast, a delegation in which there is no evidence that Congress was incapable of addressing the matter is suspect and should be declared unconstitutional.[390]

Admittedly, all delegations of legislative authority emerge as compromises between legislators' conflicting desires to direct the administrative action and to permit regulatory flexibility. Particularly with respect to ongoing regulatory programs, constraining administrative discretion

388. Even a judicial interpretation that appears to render futile further administrative action without congressional action does not necessarily bar future agency attempts to take the same or substantially similar action. Another court may limit, distinguish, overrule, or ignore an earlier judicial interpretation. A Congress aware of the possibility of judicial modification has little incentive to achieve the consensus required to guide administrative action. A case in point is the FCC's regulation of cable television. United States v. Southwestern Cable Co., 392 U.S. 157 (1968). The Court, after initially rejecting the FCC's claim of jurisdiction, acquiesced after Congress failed to act on the Commission's repeated request for statutory guidance. *See supra* note 375 and accompanying text.

389. *See supra* notes 282-283 and accompanying text; *see also* Gewirtz, *supra* note 372.

390. Where the legislative record indicates that Congress considered or rejected the interpretation upon which the challenged agency action is based, judicial refusal to uphold the agency interpretation theoretically will have the same effect as limited statutory nullification. In practice, however, this may not be true. *See supra* note 388.

and limiting governmental intrusion into private activity often conflicts with the desire to let someone else find solutions to the problem pressing for legislators' attention. Statutes resulting from the process of compromise, not surprisingly, often tend to be a muddle of contradictory directions and ambiguously defined discretion.[391] Thus, the delegate either receives or claims the authority to make those decisions that Congress is either unwilling or politically unable to make. Where the issue concerns the jurisdictional boundaries or regulatory authority of the administrative agency, however, the courts should not sanction the congressional giveaway of these decisions without a justification supplied by the legislators. Moreover, the problem is not resolved by refusing deference and supplying a judicial interpretation. The search for legislative intent amidst the compromise of "opposing 'forces' of 'radicalism and reaction' "[392] is largely metaphysical.[393]

The *Chevron* case[394] illustrates judicial sanction of congressional evasion of decisionmaking. In that case the failure of Congress to supply a definition of "major stationary [air pollution] source[s]" that the Environmental Protection Agency was charged with regulating did not result from Congress' lack of either knowledge or ability to understand the issues involved. In fact, the Court, while lamenting the absence of congressional guidance, acknowledged that the omission may have been intentional due to the legislators' inability to forge a political consensus.[395] Nevertheless, the Court stresses that even deliberate congressional evasion of statutory direction warrants judicial deference to the administrative interpretation.[396]

An evident interpretation of the statutory directive included regulation of each individual stationary pollution source.[397] To the extent that deference required acceptance of the EPA's choice to use a plantwide bubble concept balancing environmental and economic interests, rather

391. *See, e.g., infra* note 411; see also Pierce, *supra* note 83, at 473-81, for discussion and examples of statutory standards in congressional delegations of legislative authority to administrative agencies.

392. Fullilove v. Klutznick, 448 U.S. 448, 490 (1980).

393. Such a search transcends ordinary methods of statutory interpretation requiring one to search the recondite aspects of legislators' and Legislature psychology, and to consider highly abstract and abstruse behavioral models. Ultimately, discovery of a cogent and coherent intent is likely to remain a mystery.

394. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). *See supra* notes 239-287 and accompanying text.

395. 467 U.S. at 847.

396. *Id.* at 844.

397. The statute directed the agency to develop a permit program under which new or modified stationary sources of air pollution would be required to meet the "lowest achievable emission rate." *Id.* at 853.

than regulating individual pollution sources, the Court should have declared the Act unconstitutional. The legislative record not only lacked any evidence that Congress considered the acceptability or consequences of the EPA's choice of regulatory methods, it lacked criteria for judicial evaluation of the reasonableness of the EPA's decision.

By contrast, Congress lacked neither the technical nor technological expertise to decide whether the bubble concept should be an option in the Agency's regulatory arsenal. Moreover, Congress would be the appropriate body to make the policy decision as to which factors should be considered in the balancing of economic and environmental interests. Were the Court to deprive the Agency of its claimed power, the Agency has the choice of either seeking congressional amendment or establishing a permit program for each major stationary source, or both. All regulatory efforts need not cease while the Agency seeks to clarify the nature of its authority.[398]

A judicial declaration that the agency interpretation cannot withstand constitutional scrutiny would not have irreversible consequences. In some cases it may be appropriate for the court to consider whether the effect of its nullification of agency action would be to frustrate all regulatory efforts unless or until Congress acted. The possibility that political stalemate might bar further congressional action because of legislators' inability to agree on specifics, however, is insufficient justification for a court's refusal to insist on congressional clarification. The judicial discretion inherent in all decisions would still permit the court to defer to an apparent arrogation of regulatory authority when the need for immediate action is warranted. The Court has long recognized the need

398. Selective nullification under the delegation model suggested here would allow the Court to hold that the "source" clause of the Clean Air Act is unconstitutional to the extent that it is assumed to authorize a bubble as the basis for the permit program. Since the case did not present the issue of whether the agency could justify an interpretation of "source" as a single source for purposes of the permit program, the Court need not consider whether the entire clause is unconstitutional on its face. Although Congress did not define "source," in the proper case it may be possible for the agency to cite legislative history that reveals how legislators expected the program to operate and what they believed would be the consequences of agency regulatory decisions. Such history could support an agency interpretation that "source" reasonably includes single source.

It is no doubt true that in some cases, a selective or partial statutory invalidation may imply a judicial interpretation of the disputed statutory language. This is also true in many cases where a court rejects an agency interpretation and remands the matter to the agency. In both cases, the agency can choose to accept the court's suggested interpretation or can ask Congress for clarification of its delegated authority. In the case of remand, the agency has the additional option of trying to convince the court that the court's suggested or implied interpretation is incorrect by repromulgating the rule and offering additional justification. *See supra* notes 382-385 & 388 and accompanying text.

for the Executive to respond to an emergency, particularly in the area of foreign affairs, as a justification for a broad congressional delegation.[399]

In contrast to the Court's deference in *Chevron* stands the only Supreme Court case in recent years to evoke serious discussion of the classical nondelegation doctrine. In *Industrial Union Department, AFL-CIO v. American Petroleum Institute*,[400] a plurality reversed an agency's statutory interpretation and provided a tortured independent interpretation ostensibly to avoid a delegation problem. In a concurring opinion, Justice Rehnquist argued that the statute was unconstitutional.[401]

The consequences of the deference dilemma and the shortcomings of the classical nondelegation doctrine are illustrated by the five opinions in the case.[402] In three of the opinions, the Justices' insistence on different interpretations of the statute[403] highlights their failure to address whether the statute has a congressionally assigned meaning sufficient to permit judicial review.[404]

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399. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654 (1981); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

While "necessity" should continue to justify upholding an executive assertion of authority under a questionable statutory interpretation, it should be carefully circumscribed. The need for the federal government to respond to an emergency situation should be distinguished from a case in which government intervention is merely an expedient solution.

Judicial review of a challenged executive legislative action justified by necessity poses different considerations from a challenge to the constitutionality of a delegating statute. In the latter instance, the issue of necessity concerns whether Congress was justified in making a broad or vague delegation due to either the circumstances or subject matter of the legislation. Absent a showing of necessity, the court should require that Congress justify its failure to provide statutory specificity sufficient to permit judicial evaluation of compatibility of agency interpretation and statutory text or legislative history.

400. 448 U.S. 607 (1980).

401. *Id.* at 671-87 (Rehnquist, J., concurring).

402. For an analysis of the various opinions, see Nathanson, *Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the "Independent" Agencies*, 75 NW. U.L. REV. 1064, 1065-74 (1981).

403. The plurality, in an extraordinary approach to statutory interpretation, discovers in the statute's definitions section a threshold finding requirement that limits the occasions on which the Administrator may exercise the delegated regulatory authority. 448 U.S. at 639-40.

In a concurrence, Justice Powell argues that the statute requires the Administrator to conduct a cost-benefit analysis before issuing regulations. *Id.* at 667 (Powell, J., concurring). Such a requirement is not explicit in the statute.

The dissenters agree with the agency interpretation, but they do so in nondeferential language. They argue that the agency interpretation is correct rather than merely reasonable. *Id.* at 705 (Marshall, J., dissenting) (citing *Overton Park*). The dissenters would only defer to the Administrator's findings that the regulations conform to the statutory requirements. Significantly, this deference does not excuse judicial review. Rather, the dissenters would excuse the Administrator's imprecision in substantiating his conclusions because the issue is "on the frontiers of scientific knowledge." *Id.* at 704.

404. In a separate concurrence, Chief Justice Burger admits that "[p]recisely what [the Act] means is difficult to say." *Id.* at 663 (Burger, C.J., concurring). Nevertheless, he explains

By contrast, Justice Rehnquist notes that the varying interpretations support his claim that the statute lacks sufficient congressional direction for a court to determine whether the administrative interpretation is reasonable. The flaw in Justice Rehnquist's analysis, however, is that he fails to explain adequately why in this case deference is uniquely inappropriate.

Justice Rehnquist correctly notes that Congress failed to make "important choices of social policy."[405] Moreover, the absence of congressionally supplied criteria to govern the Administrator's decision regarding the content of promulgated regulations leaves the Administrator to make a choice that Congress was politically unable or unwilling to make. Where that choice involves the balancing of regulatory costs against the risks to human lives, it is undoubtedly desirable for elected legislators to provide guidance to administrative decisionmakers. According to Justice Rehnquist, however, the failure of Congress to answer the question of "whether the statistical possibility of future death, should ever be disregarded in light of the economic costs of preventing those deaths"[406] rendered the statute unconstitutional. The answer is indeed "legislative policy" and thus, Congress has delegated an important policy decision. Yet what distinguishes this legislative policy from other such policy decisions regularly delegated to administrative officials is not convincingly explained in Justice Rehnquist's opinion.[407]

Significantly, the delegation in question did not permit the Administrator, in the name of statutory interpretation, either to arrogate subject matter jurisdiction or to order behavior of a regulated interest in a manner other than that which could be expected from passage of the enabling legislation. Moreover, the statute both defined the administrative task (standard setting) and the general category of private activity (employee exposure to hazardous substances in the workplace) to which the standards should be directed.[408] The legislative history revealed that Congress considered and acknowledged the consequences of possible

that he is joining the plurality's attempt "to decode the message of the statute as to guidelines for administrative action." *Id.* at 662. In a subsequent challenge to regulations issued under the statutory provisions disputed in *Industrial Union*, the Chief Justice joined a dissent by Justice Rehnquist arguing that the statutory ambiguity amounts to an unconstitutional delegation. American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting).

405. 448 U.S. at 686 (Rehnquist, J., concurring).

406. *Id.* at 672.

407. *Cf.* Nathanson, *supra* note 402, at 1073 ("Every difficult question of statutory interpretation suggests a congressional failure to communicate its meaning clearly, but that is not usually regarded as grounds of invalidation under the nondelegation doctrine.").

408. 448 U.S. at 639-41.

administrative decisions regarding what to regulate, at what exposure level, and consequently, what costs might be imposed upon regulated interests forced to comply.[409]

The absence of direction to the Administrator regarding the content of a safety standard does not challenge the boundaries of the agency's legislative authority. Moreover, unlike *Chevron*, the agency's decision does not represent a departure from a specified or an established regulatory methodology. There are no hidden costs in the agency's proposed regulation. Regulated interests may challenge whether a particular agency determination conforms with the statute by arguing that the statute does not authorize imposition of the particular costs that would be associated with compliance in an individual case. The challengers cannot complain, however, that they have not had the opportunity to address the issues associated with both the statutory language and the administrative application of that language before Congress and the agency.

Judicial evaluation of the reasonableness of the administrative interpretation of the congressionally assigned task in the context of specific performance is not impossible.[410] The opinions in *Industrial Union* indicate that eight out of the nine Justices were able to determine statutory meaning. Although they disagreed on that meaning, deference to the administrative interpretation presumably would have produced uniformity. The nature of the disagreement among the Justices is not one that should render the presumptive rule of deference inapplicable.

The foregoing is not meant to suggest that it is undesirable to fashion a new delegation doctrine that goes beyond the limited applicability outlined above. Justice Rehnquist's opinion in *Industrial Union* thus suggests an instance of broader application. Where Congress has evaded a critical policy decision fundamental both to the administrative implementation of the statutory scheme and to judicial review of the administrative exercise of discretion, the Court should declare the statute unconstitutional.[411] Indeed, as Justice Rehnquist notes, by embarking on such a course of action, the Court would "reshoulder the burden of en-

409. *Id.* at 642-52.

410. It is true that the legislative history reveals disagreement among lawmakers on how the statutory directive may apply in individual cases. *Id.* at 646-52. Nevertheless, it cannot be said that there is not adequate support for the agency's interpretation if the agency need not demonstrate that its interpretation is the only correct meaning to be derived from the statutory language.

411. A hypothetical example of questionable delegation is legislation that instructs the delegate to set standards for eligibility to participate in a congressionally established federal program. The determination of criteria to qualify for federal assistance does not require technical expertise beyond the competency of legislators or their staffs. On the contrary, the deter-

suring that Congress itself make the critical policy decisions."[412]

The problem posed by this broader formulation of a delegation doctrine lies with the ambiguity inherent in the terms used to articulate it. When is a policy decision critical? Indeed, what is meant by policy rather than interpretation and application of law to fact? Justice Rehnquist returns to the language of earlier nondelegation cases to define the congressional responsibility of providing an "intelligible principle"[413] and the judicial task of measuring administrative compliance by "ascertainable standards."[414] Since these phrases were first advanced by the Supreme Court as the basis for evaluating the constitutionality of a delegation, the Court has failed to find any delegation that lacked an intelligible principle or ascertainable standards.[415] In fact, challenges to the constitutionality of a delegation have ceased,[416] save for extraordinary congressional or administrative action that overtly threatens fundamental notions of separation of powers.[417]

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mination involves choices of a political, social, and economic nature which are fundamental to the establishment and implementation of program policy.

For example, the size and cost of the program will depend upon the number of qualified recipients as determined by the eligibility criteria. In addition, the choice of criteria will affect the eligibility of particular groups of people, each of which forms a political constituency. Where the choices raise emotionally charged issues, the delegation of decisionmaking insulates elected representatives from direct accountability. In the absence of a congressionally provided justification for delegating such fundamental decisions to the unguided discretion of an administrative official, the court might declare the delegation unconstitutional.

The alternative judicial approach of deferring to the administrative decision when that decision inevitably is challenged by a dissatisfied constituency would condone congressional evasion of a political-legislative decision. Moreover, it would permit the unelected delegate continuously to make policy that could be radically changed without consideration or approval by elected legislators.

412. *Industrial Union*, 448 U.S. at 687 (Rehnquist, J., concurring). *Cf.* McGowan, *supra* note 336, at 1128 (suggesting that invoking the nondelegation doctrine would serve as a judicially administered "shock treatment" to Congress).

413. 448 U.S. at 686 (Rehnquist, J., concurring). This language was first invoked by Chief Justice Taft in J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

414. 448 U.S. at 686 (Rehnquist, J., concurring).

415. For a criticism of the Rehnquist argument and a discussion of the possible effects of reviving the traditional nondelegation doctrine, see Pierce, *supra* note 83, at 489-504.

416. Professor Davis asserts that "lawyers who try to win cases by arguing that congressional delegations are unconstitutional almost invariably do more harm than good to their clients' interests." National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 353 n.1 (1974) (Marshall, J., dissenting) (citing K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.01 (1958)).

417. *See, e.g.*, Bowsher v. Synar, 106 S. Ct. 3181 (1986). In *Synar*, Congress delegated authority to the Comptroller General to calculate and report projected budget deficits and to present budget reduction calculations upon which the President is to issue a "sequestration" order containing the specified budget reductions thereby preventing government agencies from spending congressionally appropriated funds. The Court found that the Act did not unconstitutionally delegate legislative powers exclusively assigned to Congress, but held that the dele-

Conclusion

To ensure continued congressional participation in the legislative process, a presumptive rule of deference requires reinvigoration of a delegation doctrine. The deference-delegation model presented here calls for judicially prescribed limits to the great legislative power giveaway. As attention continues to focus on the issues associated with judicial review of agency lawmaking, the practices of judicial deference demand primary attention. To seek consistency and predictability in the judicial review of agency statutory interpretations by adopting a presumptive rule of deference-remand is to legitimize explicitly most of administrative lawmaking, heretofore implicitly tolerated.[418]

The constitutionally prescribed legislative process, however, demands that we not lose sight of the congressional responsibility in fashioning legislation. Consequently, the adoption of deference as a reviewing norm requires the Court not only to specify the boundaries of its deferential judicial review of administrative statutory interpretation, but also to limit the congressional malpractice of delegating broad discretionary authority.

Admittedly, the limited delegation proposal calling for selective statutory nullification will not make the legislative process any less sloppy as a consequence of the judicial enforcement of a congressional role. The modern legislative process involves all three branches in the effort to find as well as to create statutory meaning. The deference-delegation model defines a hierarchy of legislative responsibility among the branches for determining statutory meaning. In this hierarchy, the judiciary, while last for purposes of assigning meaning, has the essential duty of enforcing the legislative responsibilities of the other two branches.

Under the deference-delegation model, even where judicial refusal to assign meaning may result in the invalidation of a statute, the democratic nature of the lawmaking process will be strengthened. The model will improve congressional accountability and judicial predictability without unduly impeding the efficiency and desirability of delegating legislative power to administrative agencies. Undoubtedly the inefficiency and complexities associated with our constitutional democracy and political system will remain. However, one is hopeful that members of Congress will less frequently find themselves in the legislators' dilemma—that the Legislature has lost control of the legislative process—summed up by the

gation violated the separation of powers doctrine by vesting executive power in the Comptroller General.

418. *Cf. Chadha*, 462 U.S. at 985 (White, J., dissenting) ("The wisdom and the constitutionality of these broad delegations are matters that still have not been put to rest.").

phrase, "now we have them right where they want us."[419]

419. It is almost as if the executive recipients of legislative authority can assume that if a power is needed, it exists—a mentality exemplified by Watergate.