
JUDICIAL REVIEW OF QUESTIONS OF LAW AND POLICY

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From the early 1930s to the present day, those studying the growth of the administrative state have sounded two conflicting themes. The first is that of "the need for regulation." Complex modern social, economic and technical problems require governmental intervention, particularly into the private marketplace. Intervention means regulation by administrators acting under generally worded congressional delegations of broad policymaking authority.

The second theme is that of "the need for checks and controls." These same necessary administrators must be checked in the exercise of their broad powers lest their shortsightedness or overzealousness lead to unwise policies or unfair or oppressive behavior.

Congressional action in the late 1960s and early 1970s reflected the first of these themes. Congress created many new agencies charged with problems of health, safety and environmental protection.¹ Perhaps in reaction to the sudden, large growth in federal regulatory activity, however, public debate during the past decade has focused on the second theme: How can government guarantee wiser or fairer regulatory policies? How can it regulate the regulators?

One can find several general topical answers to these latter questions. One kind of answer focuses upon the substance of particular regulatory programs and advocates dramatic individual substantive changes such as economic deregulation of airlines,² trucking,³ or financial insti-

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¹E.g., 42 U.S.C. §§ 4321-4370 (1969) (National Environmental Policy Act of 1969); 29 U.S.C. §§ 651-678 (1970) (Occupational Safety and Health Act).

²Airline Deregulation Act of 1978, Pub. L. 95-504 92 Stat. 1705.

³Motor Carrier Act of 1980, Pub. L. No. 96-296 94 Stat. 793.

tutions⁴ or increased reliance on taxes to control environmental pollution.⁵ Another sort of answer focuses more generally upon the government's institutional structure. It advocates changes in structure that would, for example, increase the supervision and control of regulators by Congress,⁶ by the White House⁷ or by the courts.⁸

A comprehensive analysis of current regulatory problems would require an examination of both these approaches. It would require a review of many individual regulatory programs and also a detailed comparative account of the abilities of Congress, the White House and the courts to effectively supervise the actions of administrative regulators.⁹ This article, while not comprehensive, is related to this needed broad general account. It examines a small portion of that large picture, namely court efforts to control agency action¹⁰ and the basic principles of law that govern judicial review of agency action. To be more specific, the article examines two important general legal doctrines that, in part, govern that review. The first doctrine concerns the appropriate attitude of a reviewing court towards an agency's interpretations of law, such as the law embodied in the statute that grants the agency its legal powers. To what extent should a court make up its own mind, independently, about the meaning of the words of the statute? The second doctrine concerns a reviewing court's attitude toward an agency's regulatory policy. How willing should a court be to set aside such a policy as unreasonable, arbitrary or inadequately considered?

The conclusions that emerge from the examination of current doctrines or principles are threefold. First, current doctrine is anomalous. It urges courts to defer to administrative interpretations of regulatory

⁴Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132.

⁵42 U.S.C. § 7420 (1977) (Clean Air Act Amendments of 1977).

⁶The legislative veto was one notable attempt to increase Congress' supervisory control over administrative action. It gained in popularity until it was declared unconstitutional in *INS v. Chadha*, 462 U.S. 919 (1983).

⁷*E.g.*, Exec. Order 12,291, 46 Fed. Reg. 13,193 (1981), reprinted in 5 U.S.C. § 601 app. 301-305 (1981), greatly expanded the supervisory role of the Office of Management and Budget over the federal bureaucracy.

⁸*E.g.*, S. 1080, 98th Cong., 1st Sess. (1983) (the Bumpers Amendment) which proposed adding the word "independently" to the judicial review section of the Administrative Procedure Act, 5 U.S.C. § 706, so that it would read: "[T]he reviewing court shall *independently* decide all relevant questions of law . . ." (emphasis added). See also *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983) (discussed in Part II of this article).

⁹See Breyer, *Reforming Regulation*, 59 TUL. L. REV. 4 (1984).

¹⁰For examination of another portion, see Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785 (1984) (discussing prospects for increased congressional supervision of agency action).

statutes, while also urging them to review agency decisions of regulatory policy strictly. Since courts have responded, like other governmental institutions, to two basically conflicting pressures, the need for regulation and for checks on regulators, this anomaly may not be surprising. Yet, law that embodies so skewed a view of institutional competence is inherently unstable and likely to change. Second, the courts, as presently limited by rules requiring the presentation of information through public adversary procedures, are not particularly well suited to determine the wisdom of agency policy. Thus, if one wishes to use the courts as important instruments for controlling agency policy, one must consider whether, or how, they can obtain better information or a more global, comprehensive view of an agency's objectives and its work. Third, judges are encouraged to make up their own minds more, and to rely upon agency judgments less, when determining the lawfulness of agency policies. This recent approach to regulatory reform is embodied in Senator Dale Bumpers' proposal to add the word "independently" to the Administrative Procedure Act so that its sentence concerning judicial review reads: "[T]he reviewing court shall *independently* decide all relevant questions of law"¹¹ The discussion in this article suggests that this approach is not likely to work.

I. QUESTIONS OF LAW

A. Two Opposite Judicial Attitudes

We first examine a court's attitude when reviewing a claim that an agency's action violates a particular provision in a statute, or that it lacks a necessary statutory authorization. How should it treat the agency's decision about the relevant interpretation of law? Should the court "defer" to the agency or should it give special weight to the agency's legal views? The single most interesting observation about this question concerning judicial review of an agency determination of law is that of Judge Friendly. He points out that there is no consistent "law" of "proper judicial attitude." Rather, there "are two lines of Supreme Court decisions on this subject which are analytically in conflict."¹²

Perhaps one should expect to find attitudinal inconsistency: relevant legal questions vary widely in both nature and importance. One agency, for example, may decide that a United States employer has

¹¹S. 1080, 98th Cong., 1st Sess. (1983) (emphasis added).

¹²*Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 49 (2d Cir. 1976) (*aff'd sub nom.*) *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977); see also 5 K. DAVIS, ADMINISTRATIVE LAW § 29.16 (2d ed. 1984). Similarly, Judge Edwards has declared that "the results at times seemed to be jabberwok." Edwards, *Judicial Review of Deregulation*, 11 N. KY. L. REV. 229, 240 (1984).

placed an employee whose private rowboat sinks during a Sunday pleasure outing on a Korean lake in a "zone of special danger."¹³ The legal question, the meaning of the quoted phrase, is highly specialized, fact specific, and unlikely to have broad legal or practical implications. Alternatively, a different agency may decide that cable television systems are not engaged in "broadcasting"; therefore the agency has the legal power to regulate them as "common carriers."¹⁴ The legal question, the scope of the quoted words, is of great importance for television viewers, for the communications industry, and for American political, social and cultural life. Why should one expect a legal system to provide one consistent method for deciding legal questions of such varying importance?

Nonetheless, the cases seem inconsistent. One set of cases displays an attitude towards agency decisions of law that must be described as "deferential." It is illustrated by *NLRB v. Hearst Publications, Inc.*,¹⁵ where the Supreme Court upheld a Labor Board decision that certain newspaper distributors were "employees" within the meaning of the National Labor Relations Act. In deciding a question of law, the Court emphasized the need to give special weight to the agency's decision. The agency's "[e]veryday experience in the administration of the statute gives it familiarity" with the practical problems and necessities involved in regulating the area.¹⁶ The Court wrote: "Where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited." The Court should only determine whether the agency's decision has "'warrant in the record' and a reasonable basis in law."¹⁷

A different set of cases exemplifies a judicial attitude that must be described as "independent." It is illustrated by the superficially similar case of *Packard Motor Car Co. v. NLRB*,¹⁸ where the Supreme Court reviewed a Labor Board determination that shop foremen were "employees" as that term is used in the National Labor Relations Act. The Court upheld the determination, but it did not simply look to see whether the Board's decision had "a reasonable basis in law." To the contrary, the majority and the dissenters each made their own legal

¹³*O'Keefe v. Smith, Hinchman and Grylls Assocs.*, 380 U.S. 359 (1965) (per curiam).

¹⁴*FCC v. Midwest Video Corp. (Midwest II)*, 440 U.S. 689 (1979).

¹⁵322 U.S. 111 (1944).

¹⁶*Id.* at 130 (citing *Gray v. Powell*, 314 U.S. 402, 411 (1941)).

¹⁷*Id.* at 131.

¹⁸330 U.S. 485 (1947).

analysis; neither suggested the agency's decision should receive any special weight or deference; and neither referred either to *Hearst* or to any of the cases on which *Hearst* relied.¹⁹

Each of these cases has spawned spiritual descendants. Many more recent Supreme Court cases, discussing the proper judicial attitude towards agency decisions of law, echo *Hearst*. In 1979, the Court wrote that, if the Labor Board's "construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute."²⁰ In 1980 the Court said it would uphold the Federal Reserve Board's interpretation of its governing statute as long as it was not "demonstrably irrational."²¹ In 1981, it said, with respect to a legal interpretation by the Federal Election Commission: "The task for the Court of Appeals was not to interpret the statute as it thought best but rather the narrower inquiry into whether the Commission's construction was 'sufficiently reasonable' to be accepted by a reviewing court."²²

Packard, however, also has children of its own. In 1983, for example, the Supreme Court cited the deference cases when it reviewed a legal interpretation of the Bureau of Alcohol, Tobacco and Firearms. The Supreme Court said that courts, when reviewing agency interpretations of law, must not "slip into . . . judicial inertia" or "rubber stamp" agency decisions.²³ It has stated unequivocally in many cases that the judiciary is responsible for the final determination of the meaning of statutes.²⁴ And, in numerous cases the Supreme Court, without citing the deference cases, has simply adopted what Judge Friendly, and other students of the subject, consider to be a more independent attitude.²⁵

¹⁹*E.g.*, *Gray v. Powell*, 314 U.S. 402 (1941).

²⁰*Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979).

²¹*Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980).

²²*FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981).

²³*Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983) (quoting *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965) and *NLRB v. Brown*, 380 U.S. 278, 291-92 (1965)).

²⁴*FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965) ("while informed judicial determination is dependent upon enlightenment gained from administrative experience," words setting forth "a legal standard . . . must get their final meaning from judicial construction").

²⁵*E.g.*, *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965); *NLRB v. Brown*, 380 U.S. 278, 291-92 (1965); *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 499-500 (1960); *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322 (1951); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144 (1944); see 5 K. DAVIS, *supra* note 12, § 29.16.

B. Reconciling the Conflict

One might try to reconcile this apparently conflicting case law by asking *why* a court should *ever* “defer” to an agency’s interpretation of the law? After all, judges are charged by statute and Constitution with deciding legal questions. Why should they ever pay *particular* attention to the agency’s legal views?

One can think of two possible jurisprudential answers to these questions. First, one might believe that judges should pay special attention to the agency because the agency knows more about the particular area of the law than does the court. This answer, in part, treats agency lawyers like expert tax lawyers or real estate lawyers to whom judges sometimes listen with particular attention when they must decide a difficult and complex case. In the context of administrative law, this jurisprudential answer may rest upon a particularly important, highly relevant legal fact, namely, the likely intent of the Congress that enacted the statute. The agency that enforces the statute may have had a hand in drafting its provisions. It may possess an internal history in the form of documents or “handed-down oral tradition” that casts light on the meaning of a difficult phrase or provision. Regardless, its staff, in close contact with relevant legislators and staffs, likely understands *current* congressional views, which, in turn, may, through institutional history, reflect prior understandings. At a minimum, the agency staff understands the sorts of interpretations needed to “make the statute work.” It is virtually always proper for a court to assume Congress wanted the statute to work and, at least, did not intend a set of interpretations that would preclude its effective administration.

This “better understanding of congressional will” is reflected in many court statements urging deference. The District of Columbia Circuit, for example, recently wrote:

Courts regard with particular respect the contemporaneous construction of a statute by those initially charged with its enforcement. . . . [W]here the agency was involved in developing the provisions, this principle applies with even greater force.²⁶

Similarly, courts have said they find an agency’s views more persuasive when they reflect a longstanding, consistent interpretation of the statute.²⁷ Congress’ reenactment of the statute, in the face of an agency interpretation, is also some evidence that the agency’s interpretation is

²⁶Middle South Energy, Inc. v. FERC, 747 F.2d 763, 769 (D.C. Cir. 1984) (citing cases); *see also* Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933).

²⁷*See, e.g.,* Mass. Trustees v. United States, 377 U.S. 235, 241 (1964).

correct;²⁸ at least it suggests that the agency's interpretation does not radically violate current congressional expectations—a fact that, in turn, offers some evidence about the understandings of relevant agency “client groups,” providing some (often weak) evidence about the original congressional understanding. There may also be some sense that because of “settled expectations,” a statute's words, legally speaking, *come* to mean what affected parties reasonably understand them to mean over a long period of time, irrespective of a legislature's original understandings.²⁹ Where all these considerations are absent, for example, where the agency adopts a radically new statutory interpretation, courts have sometimes said that the agency is not entitled to “deference.”³⁰

Of course, the strength and the relevance of these considerations varies from case to case. But they all reflect one type of answer to the question “why defer?,” namely, “*because the agency has a better understanding of relevant law.*”

A very different sort of answer to the question “why defer?” is, “Congress *told* the courts to defer in respect to this particular legal question; Congress delegated *to the agency* the power to decide the relevant question of law.” Indeed, Congress may have *explicitly* delegated rulemaking authority to an agency; the resulting agency rules, in a sense, are “laws”; and, to make “legislative rules” is to engage in a “law declaring” function.³¹ But, Congress is rarely so explicit about delegating the legal power to interpret a statute.

The Supreme Court nonetheless suggested as early as 1946 that Congress might delegate an interpretive, as well as a rulemaking, power to an administrative agency. In *Social Security Board v. Nierotko*,³² the Court held that the Social Security Board did *not* have the power to exclude a worker's back pay from his “wages” for the purpose of calculating benefits. The Court wrote that:

[When an Administration] interprets a statute so as to make it apply to particular circumstances[,] [it] acts as a delegate to the legislative power. Congress might have declared that “back pay” awards under the Labor Act should or should not be treated as wages. Congress might have delegated to

²⁸NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974).

²⁹See American Methyl Corp. v. EPA, 749 F.2d 826, 839 n.85 (D.C. Cir. 1984); Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 204 (1983) (discussing expectations and reliance interests that build up around regulatory scheme).

³⁰See Sunstein, *supra* note 29, at 204.

³¹5 K. DAVIS, *supra* note 12, § 28.6, at 279; Schweiker v. Gray Panthers, 453 U.S. 34, 43–44 (1981).

³²327 U.S. 358 (1946).

the Social Security Board to determine what compensation paid by employers to employees should be treated as wages. *Except as such interpretive power may be included in the agencies' administrative functions, Congress did neither.*³³

The italicized language suggests that through implication, courts may sometimes find that they should pay special attention to agency views on particular legal questions.

For the most part courts have used "legislative intent to delegate the law-interpreting function" as a kind of legal fiction. They have looked to practical features of the particular circumstance to decide whether it "makes sense," in terms of the need for fair and efficient administration of that statute in light of its substantive purpose, to imply a congressional intent that courts defer to the agency's interpretation. It is nothing new in the law for a court to imagine what a hypothetically "reasonable" legislator would have wanted (given the statute's objective) as an interpretive method of understanding a statutory term surrounded by silence.³⁴ Nor is it new to answer this question by looking to practical facts surrounding the administration of a statutory scheme.³⁵ And, there is no reason why one could not apply these general principles, not simply to the question of what a statute's words mean, but also to the question of the extent to which Congress intended that courts should defer to the agency's view of the proper interpretation.

Thus, courts will defer more when the agency has special expertise that it can bring to bear on the legal question.³⁶ Is the particular question one that the agency or the court is more likely to answer correctly? Does the question, for example, concern common law or constitutional law, or does it concern matters of agency administration?³⁷ A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.³⁸ A court may also look to see whether the language is "inherently imprecise," i.e.,

³³*Id.* at 369 (emphasis added).

³⁴*See* *Trailways, Inc. v. ICC*, 727 F.2d 1284, 1288-89 (D.C. Cir. 1984).

³⁵*See id.* at 1289-91.

³⁶*Montana v. Clark*, 749 F.2d 740, 746 (D.C. Cir. 1985); *Mayburg v. Secretary of Health & Human Servs.*, 740 F.2d 100, 105-06 (1st Cir. 1984); *Constance v. Secretary of Health & Human Servs.*, 672 F.2d 990, 995-96 (1st Cir. 1982).

³⁷*Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 914-15 (3rd Cir. 1981) *Montana*, 749 F.2d at 744-45.

³⁸*Montana*, 749 F.2d at 746; *Mayburg*, 740 F.2d at 106; *Constance*, 672 F.2d at 995-96; *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 566 n.20 (1979).

whether the words of the statute are phrased so broadly as to invite agency interpretation.³⁹ It might also consider the extent to which the answer to the legal question will clarify, illuminate or stabilize a broad area of the law.⁴⁰ Finally, a court might ask itself whether the agency can be trusted to give a properly balanced answer. Courts sometimes fear that certain agencies suffer from “tunnel vision” and as a result might seek to expand their power beyond the authority that Congress gave them.⁴¹ Of course, reliance on any or all of these factors as a method of determining a “hypothetical” congressional intent on the “deference” question can quickly be overborne by any tangible evidence of congressional intent, for example, legislative history, suggesting that Congress did resolve, or wanted a court to resolve, the statutory question at issue.⁴²

These factors help explain many cases. *Hearst* (the “news distributor/employee” case), for example, presented a minor, interstitial question of law, which was intimately bound up with the statute’s daily administration and was likely to be better understood by a technically expert agency than by a legally expert court. *Packard* (the “foreman/employee” case), on the other hand, presented a legal question of great importance in the field of labor relations: “Does the NLRA cover shop foremen?” This question raised political, as well as policy, concerns; it seems unlikely that Congress wished to leave so important and delicate a legal question to the Board to decide.

Using these factors as a means of discerning a hypothetical congressional intent about “deference” has institutional virtues. It allows courts to allocate the law-interpreting function between court and agency in a way likely to work best within any particular statutory scheme. Insofar as Congress is viewed as delegating the power to the agency, it gives the agency flexibility to adapt or to modify past policies. By contrast, a theory of deference based upon the agency knowing original congressional intent “better” than the court, tends to insulate administrative policies adopted early in a statute’s history from later change.⁴³ Of course, the “delegation” way of looking at deference tends to blur any clear distinction between “legislative” and “interpretive”

³⁹*Montana*, 749 F.2d at 746.

⁴⁰*Mayburg*, 740 F.2d at 106.

⁴¹*Hi-Craft*, 660 F.2d at 916 (“government agencies have a tendency to swell, not shrink, and are likely to have an expansive view of their mission” and “therefore, an agency ruling that broadens its own jurisdiction is examined carefully”).

⁴²*Montana*, 749 F.2d at 746.

⁴³See S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 287 (2d ed. 1985); EDWARDS, *supra* note 12, at 257–58.

rules. It suggests that Congressional intent to make agency decisions of law binding is really a question of *how much* deference Congress intended courts to pay to the agency's decisions, a matter of degree, not kind, and a matter to be considered by examining a particular statute in light of the various practical factors mentioned.

In sum, one can reconcile apparent conflict in case law descriptions of a proper judicial attitude towards agency decisions of law. The reconciliation process consists of asking the question, "Why should courts *ever* defer?" The reconciliation consists of two answers to this question, answers that are not mutually exclusive, and which may apply in different cases. One answer rests upon an agency's better knowledge of congressional intent. The other rests upon Congress' intent that courts give an agency legal interpretations special weight, an intent that (where Congress is silent) courts may impute on the basis of various "practical" circumstances.

C. The Problem of the Chevron Case

A recent Supreme Court case, *Chevron, U.S.A. v. Natural Resources Defense Council*,⁴⁴ is particularly important because it suggests a somewhat different test for determining the proper judicial attitude, the degree of deference, towards an agency's legal decisions. The case concerned the Environmental Protection Agency's interpretation of the words "stationary source" in the EPA's governing statute. EPA interpreted these words to refer (in part) to an entire plant. That interpretation allowed EPA to make rules⁴⁵ that treated an entire plant as a single "source," thereby allowing its owner to emit more pollutant than ordinarily permissible from one stack, provided it emitted less pollutant from another. The Court (reversing the District of Columbia Court of Appeals) upheld the EPA's interpretation.

The Court in *Chevron* described the relation of court to agency when interpreting a statute as follows:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question

⁴⁴104 S.Ct. 2778 (1984).

⁴⁵EPA possessed legislative rulemaking power delegated to it in a different part of the statute, 42 U.S.C. § 7601(a)(1) (1982).

for the court is whether the agency's answer is based on a permissible construction of the statute.⁴⁶

The Court added:

Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.⁴⁷

This language *may* be read as embodying the complex approach set out above; it speaks of "implicit" delegation of interpretative power, and the word "permissible" is general enough to embody the range of relevant factors. Yet, the language may *also* be read as embodying a considerably simpler approach, namely, first decide whether the statute is "silent or ambiguous with respect to the specific issue" and, if so, accept the agency's interpretation if (in light of statutory purposes) it is "reasonable."

Recent cases in the District of Columbia Circuit Court of Appeals indicate that the lower courts may have accepted this second interpretation of *Chevron*.⁴⁸ As so seen, *Chevron* offers a simpler view of proper judicial attitude, but a view that conflicts and competes with that offered above. Despite its attractive simplicity, however, this interpretation seems unlikely in the long run, to replace the complex approach described above for several reasons.

First, there are too many different types of circumstances, including different statutes, different kinds of application, different substantive regulatory or administrative problems, and different legal postures in which cases arrive, to allow "proper" judicial attitudes about questions of law to be reduced to any single simple verbal formula. Legal questions dealing with agencies come in an almost infinite variety of sizes, shapes and hues. To read *Chevron* as laying down a blanket rule, applicable to all agency interpretations of law, such as "always defer to the agency when the statute is silent," would be seriously overbroad, counterproductive and sometimes senseless.

To understand why this is so, one must understand the degree of complexity of the details in a typical administrative law case, a difficult task, for the details are often voluminous and the relevant administrative law issues often seem but the tiny tip of a vast legal iceberg. Yet, a

⁴⁶104 S.Ct. at 2781-82.

⁴⁷*Id.* at 2782.

⁴⁸*Railway Labor Executives' Ass'n v. United States R.R. Retirement Bd.*, 749 F.2d 856, 860 (D.C. Cir. 1984); *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133, 141 (D.C. Cir. 1984).

recent First Circuit case, *Avery v. Secretary of Health and Human Services*⁴⁹ (a simpler case than most), may help give the reader an impression of the legal and practical facts that underlie this statement.

In *Avery*, a class of Massachusetts residents who had received federal social security benefits for disabled people sued the Secretary of HHS claiming that HHS was using an improper standard in deciding when, or whether, to terminate the benefits of persons already receiving them. They argued that the Secretary would sometimes, when deciding whether to continue or to terminate benefits, reopen the question of whether the recipient had been disabled in the first place. They said the Secretary should not reexamine the merits of what might initially have been a close question; rather, she should continue payment in the absence of a "medical improvement," i.e., a medical *change* for the better. The Massachusetts suit was one of several class actions brought throughout the nation.

While these suits were pending, Congress passed a special law that dealt with the underlying problem.⁵⁰ The law specifically required the Secretary to use a "medical improvement" test in the future. And, it also said that the judges dealing with pending class actions should remand those actions to the Secretary so that the members of the class could have their terminations reconsidered under the new "medical improvement" standard.

The reconsideration of these past terminations raised practical administrative problems. The members of the class might not actually *know* they were members. The Massachusetts class, for example, consisted of:

all SSI and SSDI beneficiaries residing in Massachusetts who have been or are receiving disability benefits and who, having presented claims of continuing disability, have been or will be disqualified from receiving benefits as a result of the Secretary's failure to adhere to a medical improvement standard when evaluating claims of continuing disability.⁵¹

To decide whether a person belongs to the class would require notifying *all* persons whose disability benefits had been terminated and finding out *why* they had been terminated. The cases of those terminated for the relevant reason would be sent to the Secretary for reconsideration.

All this background is necessary to understand the legal issue in the First Circuit case and to understand how minor that issue was. The

⁴⁹762 F.2d 158 (1st Cir. 1985).

⁵⁰Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 (1984).

⁵¹*Avery v. Heckler*, 584 F. Supp. 312, 322 (D. Mass. 1984).

district judge had reviewed the notices that the Secretary proposed to send to those persons whose disability payments had been terminated. He had decided that they were written in “gobbledygook,” and had ordered the Secretary to send a notice written by plaintiffs’ counsel, a notice that he thought was clearer. He also had laid down certain procedural rules that would provide a more expeditious procedure for determining class membership.

The Secretary appealed these procedural determinations. She pointed to a sentence in the new Act that said, “The *Secretary* shall notify [an individual class member] that he may request a review of” his termination. She said this sentence impliedly meant that the district court lacked the power to impose any procedural rules or to order the sending of any particular sort of notice. It was up to the “Secretary” to decide the form and content of the notice, and the procedures for determining class membership.

In considering the Secretary’s claim, the First Circuit did not refer to *Chevron*, nor did it discuss the “deference due” to an agency’s interpretation of its own statute. It upheld the district court’s decisions, for roughly the following reasons:

First, it makes sense to allow district courts in pending class actions to enter procedural orders that expedite resolution of the underlying controversy. The procedural order contained a provision designed to expedite the segregation of the relevant subgroup (those that might have been affected by a “medical improvements” standard) from the main group notified (those whose benefits had been terminated). Since class membership carried with it the right to interim benefits, this segregation was important and likely to be controversial. The district court’s order provided that HHS would make an initial decision about class membership within a day of receiving a claimant’s request; plaintiffs’ counsel would be notified, and the U.S. Attorney would be asked to help resolve disagreements. The district court review could then be obtained. The alternative was to allow HHS to decide the question of class membership on its own timetable, and then to face a less orderly set of court appeals. The court’s procedure offered an administratively practical way, consistent with the court’s broad and flexible powers under the Federal Rules of Civil Procedure,⁵² to carry out the new law’s remand and redetermination requirements.

Secondly, neither the court’s notice requirements nor the other related procedural requirements would interfere significantly with the

⁵²See Fed. R. Civ. P. 23(d) (“[T]he court may make appropriate orders: 1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication . . . ; 2) requiring, for the protection of the members of the class or otherwise

Secretary's ability to administer the Act. At most, the Secretary would have to reprogram her letterwriting computers so that they would send Massachusetts residents a letter somewhat different from the letter sent elsewhere. Telling a computer to write a different letter is an easy task.

Furthermore, the district court was correct in believing that the letter written by plaintiffs' counsel was written in better, clearer, simpler English than the letter prepared by HHS. It is more likely that the men and women for whose benefit the notice was intended would *understand* plaintiff's counsel's notice explaining their rights under the new statute.

The three reasons that the First Circuit found convincing have nothing at all to do with *Chevron*. Indeed, the court did not refer to *Chevron*, or to the "deference" owed a reasonable administrative interpretation of a statute. Why not? After all, even though the Secretary's interpretation of the relevant sentence in the statute (reading it as meaning *only* the Secretary can determine the content of a notice and the procedural rules for determining class membership) seems unnatural, the statute is *silent* on the particular point.

One can imagine a list of reasons for not deferring to the Secretary's interpretation: (1) Congressional silence here meant what congressional silence usually means: *not* that Congress intended the agency to decide a question of law, but that Congress *never thought about* the question. (Why should it have thought explicitly about such a narrow and technical matter?) (2) To defer to the Secretary here means additional pointless delay; it interferes with a court's efforts to create sensible procedures that will help expeditiously resolve a controversy; so *why* should the court defer? (3) There is nothing the Secretary knows about the legal question that the court doesn't know; if there is something, she can tell the court. (4) Far from delegating broad new interpretive power to the Secretary, the new Act was instead designed to curb the Secretary's power and alter her past SSI-eligibility policies. (5) The Act expressed special concern about resolving pending class actions in the courts, and spoke not of judicial "dismissals" of pending suits, but of judicial "remands," technical jurisdictional language suggesting the permissibility of continuing court involvement to assure the speedy and just resolution of the claims of class members.⁵³ (6) There

for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action . . . ; 5) dealing with similar procedural matters.").

⁵³See, e.g., *Zambrana v. Califano*, 651 F.2d 842, 844 (2d Cir. 1981) (remanding court is "vested with equity powers" and "may adjust its relief to the exigencies of the case in accordance with . . . equitable principles").

was no special need here for nationally uniform “notice” and “procedure” rules promulgated by the Secretary. Instead, the new Act was to apply to a wide variety of pending class actions, in widely different procedural postures. Appropriate management of these cases to achieve the objectives of Congress would be likely to require different notices and orders in different cases. And, individual district judges accustomed to dealing with complicated class actions were likely to be in the best position to determine exactly which notices and procedures would make the most sense in the particular class actions before them. These final factors suggest that, if Congress *had* been asked about “deference,” it probably would have said that the “administrator” to whom courts of appeals should generally defer on “notice” and “procedure” questions is the district judge, not the Secretary.

Further, to have deferred to the Secretary would have conflicted with the court’s more general obligation to see that the human conflicts and controversies before them are handled expeditiously and fairly. The *Avery* case had already been in progress for several years; the appeal on these trivial issues had added additional months. To have deferred to the agency’s views of the case would have delayed resolution even further. It would have rejected an appreciation of the human element of the controversy in favor of a mechanical application of a “deference” rule to circumstances where there was no good reason to apply it.

These factors suggest that “deference” was inappropriate. More importantly, this long discussion of one case is necessary to show how *unimportant* the deference issue can be in context. The discussion shows that the *Chevron* or deference issue cannot reasonably apply to *all* questions of statutory interpretation, particularly not to trivial questions embedded deep within other, more important issues in a case. By example, it is meant to suggest that the way in which questions of statutory interpretation may arise are too many and too complex to rely upon a single simple rule to provide an answer.

A second reason why a strict interpretation of *Chevron* is undesirable is that it will often add unnecessary lapses of delay, complexity and procedure to a case. Consider, for example, the recent case of *Railway Labor Executives Association v. United States Railroad Retirement Board*.⁵⁴ The District of Columbia Court of Appeals was asked to interpret a statutory provision that exempted certain employers from the retirement and unemployment sections of the Railway Labor Act in respect to certain employees. The provision reads:

⁵⁴749 F.2d 856 (D.C. Cir. 1984).

An individual not a citizen or resident of the United States shall not be deemed to be in the service of an employer when rendering service outside the United States to an employer who is required under the laws applicable in the place where the service is rendered to employ therein, in whole or in part, citizens or residents thereof.⁵⁵

The question was whether this provision applied to American railroads operating in Canada, whose laws allowed an immigration officer to refuse employment authorization if “in his opinion” employment of, say, an American, would “adversely affect employment opportunities” for Canadians. Did the immigration law mean the American railroad “is required under the laws . . . to employ [in Canada] in whole or in part citizens [of Canada]?” This question, the court believed, might turn upon whether the phrase “is required under the laws” means “is expressly required” or “is *in effect* required.” The court believed that the statute was silent on the particular question, but that under *Chevron* it should see if the agency had a reasonable interpretation of the words. It found, however, that the agency had no coherent account of what the words meant; it had not considered the question in sufficient depth. The court then remanded the case to the district court, in part to determine the effects of the Canadian law, and in part to give the agency a chance to develop a “reasonable” interpretation of the statute.

One can understand the need to develop a record about the effect of Canadian law, at least if the American statute is interpreted in a way that makes the question of effect determinative. But, it is more difficult to see why the court should remand to allow the agency to develop a view about the meaning of the statutory term. The opinion suggests that the court believed the “in effect” interpretation was correct. It certainly seems correct on the basis of the court’s description of the case. What, then, does the court expect the agency to learn about the statute that the court does not already know? Why is the agency’s general counsel any more likely to come up with a “correct” interpretation than the court? All this is to suggest that the remand (for *this* purpose) is a waste of time. And, given the extra months or years that a remand may involve, the problem of further delay is a serious one.

The court’s opinion also makes it clear that its remand order simply reflects a good faith effort to comply with its strict interpretation of *Chevron*. If a “reasonable” interpretation of law by an agency is due “respect” or “deference,” must the agency not have an opportunity to *make* its interpretation? Must it not do so carefully after considering different points of view? Must not a court then, remand rather than

⁵⁵45 U.S.C. §§ 231(d)(3), 351(e)(1946).

decide the question itself if the agency fails, procedurally or substantively, to act “reasonably” in making an interpretation? One can imagine a host of new judge-made laws developing around the question: “What must an agency do to guarantee that its interpretation is ‘reasonable?’”⁵⁶

A simpler course of judicial action, (and one that avoids the procedural thicket just mentioned) would be based upon a less literal reading of *Chevron*. The congressional “instruction” hypothetically implied from silence (and possibly other features of the situation) might be read, not as (1) “We delegate to the agency the power to create the law,” but rather as (2) “Court, Pay particular attention to a reasonable agency interpretation of the law.” This second instruction implies that, if the agency has not offered a reasonable interpretation of the statute in this case; if it has not considered the matter thoroughly; if, in *Skidmore’s* words, the agency’s brief lacks “the power to persuade”; then the court should simply decide the question on its own. This second view makes practical sense from the perspective of *judicial* administration.

A third reason why neither a strict view of *Chevron*, nor any other strictly defined verbal review formula requiring deference to an agency’s interpretation of law can prove successful in the long run, is that such a formula asks judges to develop a cast of mind that often is psychologically difficult to maintain. It is difficult, after having examined a legal question in depth with the object of deciding it correctly, to believe both that the agency’s interpretation is legally wrong, *and* that its interpretation is reasonable. More often one concludes that there is a “better” view of the statute for example, and that the “better” view is “correct,” and the alternative view is “erroneous.” There is not much room in this kind of thinking for the notion of “both this view and its contrary are reasonable,” a notion with which one is more “at home” when, for example, juries apply standards to facts or agencies promulgate rules under a general delegation of authority.⁵⁷ Thus, one can find many cases in which the opinion suggests the court believed the agency’s legal interpretation was correct and added citations to “deference” cases to bolster the argument.⁵⁸ One can also find cases in which the court believed the agency’s interpretation was wrong and

⁵⁶See also *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133 (D.C. Cir. 1984).

⁵⁷See *Pattern Makers’ League v. NLRB*, 53 U.S.L.W. 4928, 4934 (White, J., concurring) (U.S. June 27, 1985).

⁵⁸See, e.g., *Atlanta Gas Light Co. v. FERC*, 756 F.2d 191, 196–97 (D.C. Cir. 1985); *Defense Logistics Agency v. FLRA*, 754 F.2d 1003, 1013–14 (D.C. Cir. 1985); *South Dakota v. CAB*, 740 F.2d 619, 621 (8th Cir. 1984).

overturned the agency, often citing non-deference cases.⁵⁹ But, it is more difficult to find cases where the opinion suggests the court believed the agency was wrong in its interpretation of a statute and nonetheless upheld the agency on “deference” principles.

A further relevant psychological fact (or institutional pressure) consists of a need felt by judges to “make sense” of the administrative law case before their court. Such cases have typically been pending for a long time; they are complex; they have enormous records; and they require a detailed understanding of facts and policy. Then, finally, after days or weeks spent trying to master the case, the judge may feel that the legal issues, in the context of the entire regulatory proceeding or litigation, are trivial. One can just begin to appreciate the problem by reviewing *Avery*. One might also begin to understand the pressure to dispose of the case fairly, with proper respect for the law, but not to allow the litigation to drag on endlessly because of controversies over trivial points.

There is no particular reason to believe that automatically accepting the agency’s interpretation of a statute would simplify, or make easier, the judge’s task. Carrying out the ordinary judicial appellate task involves looking to both facts and existing law; looking to both equity in the particular case and the need for uniform, effective and fair rules applicable to similar cases; and looking to the development of a fair rule of decision for the individual case that does not tangle the web of existing interpretations, including interpretations of rules, standards, statutory meanings and interpretive practices. Added to this set of factors are the need for reasonably expeditious decisions so that agencies can act, the need to resolve individual challenges fairly, and the vast range of different litigation contexts in which questions of statutory interpretation can arise. The way in which an attitude toward review of agency interpretation of law relates to this complex task varies, depending upon the circumstances. Insofar as a single, simple approach to review of agency interpretation of law, such as “defer to the agency,” interferes with the apparent accomplishment of this task in a particular case, the judge feels at least psychological pressure to disregard it. At a minimum there is little reason to think that a single simple approach will help to bring about sensible, proper court-agency working relationships.⁶⁰

These factors will tend to force a less univocal, less far-reaching interpretation of *Chevron* and the other “show deference on questions

⁵⁹See, e.g., *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97–98 (1983).

⁶⁰See *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

of law” cases. Inevitably, one suspects, we will find the courts actually following more varied approaches, sometimes deferring to agency interpretations, sometimes not, depending upon the statute, the question, the context, and what “makes sense” in the particular litigation, in light of the basic statute and its purposes. No particular, or single simple judicial formula can capture or take into account the varying responses, called for by different circumstances, and the need to promote a “proper,” harmonious, effective or workable agency-court relationship.

One might reformulate the two general points embodied in this brief discussion as follows. First, the main criticism that one might make of the Supreme Court’s case law describing appropriate judicial attitudes toward traditional agency interpretations of the law is that it overstates the degree of deference due the agency. If taken literally, the Court’s language suggests a greater abdication of judicial responsibility to interpret the law than seems wise, from either a jurisprudential or an administrative perspective. Second, the problem case law language poses is not serious, for one can work out a unified set of principles roughly consistent with existing case law that allow a court to formulate a “proper” judicial attitude in individual cases. And, these principles seem reasonably satisfactory from both a jurisprudential and administrative point of view.

Finally, one might ask what this discussion implies about the need for Bumpers-type reform, the need to enact new legislation instructing courts to decide all questions of law “independently.” In light of the discussion one might have either of two reactions. First, one might believe that the legislation will satisfy a need to reform the law radically, i.e., to return to a period before *Grey v. Powell*, *Hearst* and *Skidmore*, when courts gave no special weight to agency views on a question of law. One might argue for such a return on the ground that any citizen affected by agency action should be entitled to a court’s *independent* determination that the law authorizes the agency’s conduct.

Alternatively, one might view the amendment simply as an effort to tone down recent judicial rhetoric. To state that an agency’s interpretation of its governing statute will control unless “demonstrably irrational”⁶¹ or as long as it is “reasonably defensible”⁶² sounds like judicial overkill. *Chevron*, too, might be limited to its factual and statutory context, where it is well suited; for, given the difficulties associated with environmental regulation, and the problem of devising workable, ef-

⁶¹Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980).

⁶²Ford Motor Co. v. NLRB, 441 U.S. 488, 497 (1979).

fective regulation, an inference that Congress intended the courts to listen carefully to EPA's broad interpretation of the statute seems reasonable. Under this view, the Bumpers Amendment will not have much substantive effect, at least in the (more strictly defined) "question of law" areas so far discussed. If one accepts the argument that congressional intent to delegate power to decide questions of law can be a matter of degree, and if one adds that the "degree of respect" courts should show to agencies on these matters can and should vary (depending upon practical factors of the sort outlined), there is little need for the Bumpers proposal. The pressures discussed in section IIC of this paper will tend to build a jurisprudence of "degree and difference" into *Chevron's* word "permissible."

The first of these views is neither desirable nor practical. Why should courts ignore agency views on questions of law, especially when they involve minor, technical matters occurring within a complex statutory scheme, such as whether to apply an "earned income disregard" to non-needy caretaker parents under the Social Security Act?⁶³ If Congress instructs the courts to pay particular attention to the agency's views, the courts should obey. And, this fact is sufficient to destroy the plausibility of *totally* independent judicial review. The second view is more acceptable. It sharply implies, however, that there is little for the Bumpers Amendment to accomplish in the "review of law" area as it has been strictly defined in this portion of the article.

II. REVIEW OF AGENCY POLICY DECISIONS

We turn now to the question of when courts will hold an agency *policy* decision unlawful because it is "unreasonable." The question is difficult to answer, in part, because there is no set legal doctrine called "review of policy questions"; consequently, the case law does not purport to authoritatively govern judicial attitude in conducting a policy review.

Nonetheless, one can focus upon two sets of legal decisions that often amount in practice to a review of the wisdom and the "reasonableness" of agency policy.⁶⁴ First, a court sometimes will directly substitute its judgment for the agency's, on a matter of substantive policy, on the ground that the agency's decision is "arbitrary, capricious, [or] an

⁶³*Drysdale v. Spirito*, 689 F.2d 252 (1st Cir. 1982).

⁶⁴Of course, sometimes the wisdom of agency policy becomes relevant to the interpretation of the agency's authorizing statute. If so, review ought to be governed by the principles discussed in Part I, *supra*.

abuse of discretion” under section 706(2)(A) of the Administrative Procedure Act. Suppose, for example, the Labor Board decides that it will permit a union business agent to buy drinks for voters before a representation election. Can a reviewing court simply find this Board policy unreasonable in light of the need for fair elections?⁶⁵ When writing an administrative law case book in the late 1970s, the authors could find only a handful of cases that faced so directly an agency policy decision and held it “arbitrary”; by the time the second edition was published in 1985, they found many more.⁶⁶

Second, courts more and more frequently have applied a set of procedural principles that, in effect, require the agency to take a “hard look” at relevant policy considerations before reaching a substantive decision. These principles require that the agency examine all relevant evidence,⁶⁷ to explain its decisions in detail,⁶⁸ to justify departures from past practices,⁶⁹ and to consider all reasonable alternatives⁷⁰ before reaching a final policy decision. In practice, these principles have far greater substantive impact than one might at first realize. A remand of an important agency rule (several years in the making) for more thorough consideration may well mean several years of additional proceedings, with mounting costs, and the threat of further judicial review leading to abandonment or modification of the initial project irrespective of the merits.⁷¹ Courts and agencies alike are aware that these “more thorough consideration” and “hard look” doctrines have substantive impact. To that extent, in examining the attitude with which the courts apply the doctrines, one is, in an important sense, examining the attitude with which they review the wisdom or reasonableness of agency substantive decisionmaking.

The important attitudinal question is how *closely* the court will examine the agency’s policy decisions. To what extent will it defer to the agency’s expertise? How “hard” will the court “look” at the agency’s

⁶⁵See *NLRB v. Labor Services, Inc.*, 721 F.2d 13 (1st Cir. 1983).

⁶⁶Compare S. BREYER & R. STEWART, *supra* note 43, at 336 n.107 (citing cases), with S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 289 n.86 (1st ed. 1979) (citing cases).

⁶⁷*Scenic Hudson Preservation Conf. v. FPC (Scenic Hudson I)*, 354 F.2d 608 (2d Cir. 1965).

⁶⁸See Sunstein, *supra* note 29, at 181.

⁶⁹See *id.* at 182.

⁷⁰See *id.*

⁷¹One notable example is that of Consolidated Edison’s Storm King Project, the subject of the *Scenic Hudson* litigation. “Hard look” review resulted in the demise of the project despite the Second Circuit’s ultimate go ahead. See *Scenic Hudson Preservation Conf. v. FPC (Scenic Hudson II)*, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972); S. BREYER AND R. STEWART, *supra* note 43, at 349–50.

“look”? With what state of mind is the reviewing judge to approach the question of whether the agency has inadequately thought through policy considerations, or failed to take a “hard look” at evidence or alternatives, or simply adopted an unreasonable policy?

The language in several important cases decided in the last two decades suggests an increasingly less hesitant judiciary, courts that are more ready to overturn agency policy decisions that they consider unreasonable. The D.C. Circuit speaks of the need for a “thorough, probing, in-depth review,”⁷² and the need for a “substantial and searching” inquiry.⁷³ The Supreme Court has vacillated linguistically, sometimes speaking of a “thorough, probing” review⁷⁴ and sometimes speaking more traditionally about the need for courts to hesitate before substituting their judgment for that of the agency on matters of policy.⁷⁵

A. State Farm: An Example of “Strict Policy Review”

The “airbags” case, *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co.*,⁷⁶ provides an example of a fairly strict judicial attitude toward review of substantive agency policy. The issue in the case was whether the National Highway Traffic Safety Administration (NHTSA) acted reasonably in rescinding Motor Vehicle Safety Standard 208, a standard requiring automakers to install “passive restraints” in new cars. The regulation has a complex and convoluted history. In 1967, the Department of Transportation (DOT) required manufacturers to install ordinary lap seat belts in all cars. In 1969, it proposed a “passive restraint” standard that would have allowed carmakers to install *either* (1) seat belts that would automatically surround the driver and passenger, or (2) airbags, which would inflate automatically in a crash and cushion the front seat occupants. Unlike standard seat belts which passengers had to buckle, these “passive” devices required no affirmative conduct by the passenger. From 1973 to 1975, DOT required automakers to install either (1) these passive restraints or (2) lap and shoulder belts with an “interlock” preventing the driver from starting the car when the belts were unbuckled. Most carmakers chose the interlock option; drivers became angry; and Congress then prohibited DOT from making the interlock

⁷²*Pacific Legal Found. v. DOT*, 593 F.2d 1338, 1343 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979).

⁷³*Specialty Equip. Mktg. Ass'n v. Ruckelshaus*, 720 F.2d 124, 132 (D.C. Cir. 1983).

⁷⁴*Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

⁷⁵*Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 103 (1983).

⁷⁶463 U.S. 29 (1983).

option a choice. After various further proposals, DOT finally required automakers to install either (1) airbags or (2a) detachable or (2b) spoolable (nondetachable) lap and shoulder belts that would automatically surround the front seat occupants. Most automakers indicated they would take the "detachable belt" option.

In 1981, the new administration simply rescinded Standard 208 on the ground that it was ineffective. Because carmakers then planned to install permanently detachable seat belts in 99 percent of all new cars, NHTSA thought that few lives would be saved.

The court of appeals found the agency's action was unreasonable, but only after it applied an especially *strict* standard of review, a standard it felt justified in applying because of the legislative history of the agency's authorizing statute. The Supreme Court held that the court of appeals should not have applied a *special* review standard. It wrote that the ordinary "arbitrary and capricious" standard should apply. The Court, however, found the agency's action unreasonable even under this standard. An examination of the court's opinion in light of NHTSA's arguments suggests the court is holding that "ordinary" reasonableness review can itself be quite strict.

The Court believed NHTSA's rescission was unreasonable in three respects. First, it thought that NHTSA had failed to adequately consider whether the passive detachable belts' safety benefits would justify their cost. It accepted NHTSA's view both that driver use of existing lap belts was low and that current usage rates would have to more than double, from 11 percent to 24 percent, before the benefits of the more expensive nondetachable belts would outweigh their cost. The Court doubted, however, whether NHTSA was reasonable in rejecting studies showing that usage more than doubled when passive, detachable belts replaced lap belts in Volkswagen Rabbits and in Chevettes. The Court thought that NHTSA should have considered the generalizability of these studies more carefully. In particular, it thought that NHTSA should study whether the "inertia" factor (the fact that passive, detachable belts require driver action to be *decoupled*, while existing lap belts require driver action to be coupled) would lead to higher usage.

NHTSA had argued that it was *not* unreasonable in failing to gather this extra information before rescinding the standard. It argued that it had to act quickly: automakers needed to know soon whether or not they had to comply with the standard. NHTSA said that it had no evidence that the "inertia" factor would make a difference and that it could not find such evidence without conducting an elaborate experiment of the sort that a previous administration had rejected in 1977.

NHTSA further argued that the Volkswagen and Chevette studies did not contradict, but, rather, supported, its position. Drivers of such small cars, it said, tend to use seat belts far more often than others; their passive detachable belts had “interlocks” which made the belts unusually difficult to detach; and the car owners in the studies had *voluntarily paid* more money for passive belts. NHTSA pointed out that, for these reasons, the passive belts usage figures could be interpreted in its favor. The studies showed that the car owners studied used passive belts 2.1 to 2.3 times more often than other drivers used ordinary lap belts in similar models; but the studies simultaneously showed that nearly one-third of those who *voluntarily* had sought (and *paid more* for) passive belts with “interlocks” nonetheless disconnected them. NHTSA presumably thought that a significantly higher percentage of those who were *forced* to use detachable belts against their will would decouple the belts. To that extent, the studies supported rescission.

Second, the Court thought that NHTSA had acted unreasonably in not considering whether to require *nondetachable* “spool-type” passive belts instead of rescinding Standard 208. NHTSA had argued, however, that nondetachable belts may make it more difficult to rescue unconscious drivers; that public fears of being trapped in an accident might lead car owners to remove nondetachable belts from their cars or lead Congress to prohibit requiring them; and that Congress’ responses to NHTSA’s earlier “interlock” proposals, forbidding NHTSA from requiring them even as an option, showed legislative hostility to “use-compelling” devices. The Court did not say why it thought these arguments unreasonable. But it remanded for a more “reasoned” analysis.

Third, the Court unanimously⁷⁷ felt NHTSA erred in failing to consider an “airbags-only” alternative to Standard 208. Here the Court was on strong ground, for NHTSA had said virtually nothing about this possible alternative when it rescinded the standard. Still, NHTSA could point to several factors militating in favor of calling its decision not to consider the “airbags only” alternative a reasonable one. For one thing, the specific decision NHTSA had to make was whether or not to rescind a rule that, in practice, was a “seatbelt-only” rule. Although carmakers in theory could have chosen to comply by installing airbags, few, if any, intended to do so. For another thing, NHTSA had historically considered airbags to be but one way of satisfying a passive restraint standard. When NHTSA first promulgated the standard, it

⁷⁷The Court’s first two decisions were by a vote of 5 to 4.

stated that it in no way “‘favored’ or expected the introduction of airbag systems to meet the [Standard 208] requirements.”⁷⁸ It added that there were other “equally acceptable” ways to meet its passive restraint standard.⁷⁹ Thus, it may have seen the “airbags-only” alternative as a new and different idea.

Moreover, an “airbags-only” rule is a very costly way to save lives. The court of appeals mentioned cost estimates of \$200 to \$330 per car. The yearly cost to the economy would have ranged from \$2 billion to \$5 billion (for the annual new fleet of 10 to 15 million cars) depending upon which figures one picked. Deciding whether *all* car buyers should pay these costs becomes difficult (even when doing so would save 9,000 lives per year) once one realizes that a buckled seatbelt achieves virtually the same result at a fraction of the price.

Further, NHTSA’s authorizing statute mandates performance standards, not design standards. An “airbags-only” rule would have come close to the latter because it would have told manufacturers *how* to make their cars safer, not *how safe* their cars must be. Finally, full consideration of an “airbags-only” rule would have taken time, and manufacturers needed to know quickly what they had to do. Unless NHTSA rescinded Standard 208 soon, they would have had to start preparing to install passive belts in all cars.

NHTSA’s answers to the court’s three objections did not, of course, necessarily show that its action was “reasonable,” but, the Supreme Court’s opinion does not show them to be obviously fallacious either.⁸⁰ It seems safe to conclude that, in finding NHTSA’s arguments insufficient, the Supreme Court applied a fairly strict review standard. Regardless of the words it used to describe what it was doing, it had to conduct a fairly thorough, detailed and searching review of the agency’s action under the “arbitrary and capricious” standard in order to undermine the plausibility of the “justification” for NHTSA’s action. The case therefore illustrates rather strict judicial scrutiny of agency policy decisions. It has been taken as authorization for such scrutiny in several later lower court cases.⁸¹ In light of these cases, *State Farm*

⁷⁸35 Fed. Reg. 16,927 (1970) (to be codified at 49 C.F.R. §571).

⁷⁹*Id.*

⁸⁰The Court refused to accept the agency’s “airbags” arguments in part because they were contained in the agency’s brief: the agency itself had not considered them. *Cf. Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

⁸¹*E.g.*, *Public Citizen v. Steed*, 733 F.2d 93 (D.C. Cir. 1984); *International Ladies’ Garment Workers’ Union v. Donovan*, 722 F.2d 795, 804 (D.C. Cir. 1983), *cert. denied*, 105 S. Ct. 93 (1984).

should not be seen as an unusual case, but rather as one example of many cases that reveal a "strict" review attitude.⁸²

B. Comparative Institutional Competence

One might ask with the "airbags" case in mind whether the judiciary is institutionally well suited for strict policy scrutiny. To what extent can a group of men and women, typically trained as lawyers rather than as administrators or regulators, operating with limited access to information and under the constraints of adversary legal process, be counted upon to supervise the vast realm of substantive agency policy-making?

First, to what extent are judges likely to sympathetically understand the problems the agency faces in setting technical standards in complex areas. In the "airbags case," for example, the Supreme Court faulted NHTSA for not having more studies or more accurate studies. But was the Court fully aware of how difficult it is for an agency seeking to set standards to obtain accurate, relevant, unbiased information? Where is the agency to look? Industry information is often "suspect," insofar as industry's economic interests are at stake. Consumer groups may be as "suspect" or biased, though perhaps in a different direction. Independent experts may not have sufficiently detailed information or may have gotten it from industry. And, it may not be practicable administratively for an agency to duplicate in-house all the expertise of others outside the federal government. Some information may, in fact, be unobtainable. For instance, was there any practical way for NHTSA to estimate the true cost of airbags or to find out what reactions drivers would likely have to the "spool-type" belt? More important perhaps, how could it "objectively" define the likely reaction of Congress to the likely reaction of drivers? Is it then forbidden to take this factor into account? Why?

The agency must also deal with a host of complex questions in deciding what *type* of standard to promulgate. Should the standard aim directly at the evil targeted (traffic deaths) or at a surrogate ("buckling-up")? How specific should the standards be? Should it try to force technological change by making the industry achieve goals beyond its present technological capabilities? Should it use a more flexible "performance standard" or a more administrable "design standard"? The agency must have an enforcement system that will test compliance with

⁸²*E.g.*, *South Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974); *Texas v. EPA*, 499 F.2d 289 (5th Cir. 1974); *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971); *Palisades Citizens Ass'n v. CAB*, 420 F.2d 188 (D.C. Cir. 1969).

the eventual standard. But this, too, is far easier said than done. The agency must design the standard with other enforcement needs and development costs in mind. Is it unreasonable to weaken or simplify standards in order to increase the likelihood of voluntary compliance or to stretch an already tight development budget?

The agency may also have to consider various competitive concerns. How will a new standard affect industry? Will it favor some existing firms over others or will it favor all existing firms by making entry into the industry more difficult?

Industry, moreover, is only one group whose interests the agency must consider. Whenever it regulates, the agency finds before it different groups, the industry, suppliers, consumer groups, members of Congress, and its own staff, with somewhat different interests. At the very least, each group may see different aspects of the problem as important: industry may focus on costs, suppliers on competitive fairness, and consumers on safety. Each group, moreover, has a different weapon with which to threaten the agency. The staff can recommend changed standards. Industry can withhold or produce critical information or threaten legal or political action. Consumer groups can threaten to appeal to Congress or to the public through the press. A wise agency may recognize the weapons that the various parties wield and may shape its standards to minimize opposition. It can thus increase the likelihood of voluntary compliance and diminish the likelihood of court delays. The agency's final decision is likely to reflect some degree of compromise among all these interests. Such "compromise" decisions are, in a sense, "political." They may not be able to be supported through pure logic, but are they unreasonable?

Is it surprising, then, that agencies and courts often disagree about what constitutes a "reasonable" decision? The court may not appreciate the agency's need to make decisions under conditions of uncertainty. Compromises made to secure agreement among the parties may strike a court as "irrational" because the agency cannot "logically" explain them.

Second, courts work within institutional rules that deliberately disable them from seeking out information relevant to the inquiry at hand. For, while a judge, expert in the law, is permitted to scan all forms of legal authority and learning in reaching conclusions of law (and is given the resources to do so in the form of libraries, computer research tools and trained law clerks), in factual matters he is limited to review of a cold record created by those over whom he has no control and who may have strong biases.

An appellate judge cannot ask an expert to answer his technical

questions or go outside the record to determine the present state of scientific or technical knowledge. But the record itself tells only part of the story, the part that the advocates have chosen to let the court see. Even if fairly complete, a cold record does not allow the judge to prove the case in great depth. A judge can spend three days reading a record of 4,000 pages and still feel somewhat unfamiliar with the facts. Docket pressures make it unusual for an appellate judge to have even three days available for record reading in an individual case. The First Circuit Court of Appeals, for example, has well over 1,000 cases per year, and each judge on the court writes fifty to sixty full published opinions each year. Even if one assumes that judges of courts that review more administrative agency cases need write only three or four, instead of five to seven, opinions per month, the judges will not have time to familiarize themselves with the enormously lengthy records. How can they analyze fully a record, for example, reflecting 10,000 comments made in response to a notice of proposed rulemaking?⁸³ Can judges, when faced with such complexity and detail, do more than ask, somewhat superficially, whether the agency's result is reasonable? Can they do more than catch the grosser errors? Can they conduct the thorough, probing, in-depth review that they promise?⁸⁴ These realities about court review provide little basis for any hope that such review will lead to significantly better policy.

Perhaps these arguments simply restate the traditional view that agencies are more "expert" on policy matters than courts, and courts should "defer" to their policy expertise. In recent years it has become fashionable to doubt agency expertise, but these considerations should lead us to ask whether these doubts offer reasons for greater reliance on judicial review or whether the substantive results of such doubts will properly deal with the substantive problem. In short, can we be confident, given the comparative institutional settings, that strong judicial review will lead to better administrative policy?

Those skeptical of the "real world" effectiveness of judicial review of agency policy decisions can find support in the long battle waged between the Court of Appeals for the District of Columbia Circuit and the Federal Communications Commission. The court, in trying to improve the quality of network broadcasting, tried to force the Commission to use intelligible "station-selection" standards. Whenever the court reversed an FCC decision, however, the FCC would typically

⁸³See, e.g., *International Ladies' Garment Workers' Union*, 722 F.2d at 804.

⁸⁴See, e.g., *Ethyl Corp. v. EPA*, 541 F.2d 1, 35 (D.C. Cir. 1976).

reach the same conclusion on remand, but simply support it with a better reasoned opinion.⁸⁵

Similarly, a recent Brookings study argues that the effect of court review of environmental regulation, an area where case law directs strict review of policy decisions, has been random. In some instances, court-imposed requirements aimed at protecting the environment have helped, but in other instances, by distorting agency enforcement priorities, they have hurt.⁸⁶ Further, there is reasonably strong evidence that court review of the Federal Power Commission's regulation of natural gas caused substantial economic harm.⁸⁷ In the "airbags" case itself, the Supreme Court wrote:

We think that it would have been permissible for the agency to temporarily suspend the passive restraint requirement or to delay its implementation date while an airbag mandate was studied.⁸⁸

If the issue in the case was whether Standard 208 should have been suspended for further study rather than rescinded, one might ask whether the Court's decision was likely to achieve any different substantive outcome. In fact, the agency responded to the decision with a rule that will require airbags unless states with two-thirds of the nation's population enact mandatory buckle-up laws. Whether this rule takes effect or, like NHTSA's previous proposals, is eventually set aside remains to be seen.⁸⁹

Moreover, strict judicial review creates one incentive that from a substantive perspective may be perverse. The stricter the review and the more clearly and convincingly the agency must explain the need for change, the more reluctant the agency will be to change the status quo. Consider, for example, the D.C. Circuit's recent review of the Federal Highway Administration's efforts to simplify the 30-year-old truck driver "logging" and reporting requirements, designed to help the agency enforce a different rule that limits the number of consecutive hours a truck driver may drive.⁹⁰ The major question before the

⁸⁵See *Central Fla. Enters., Inc. v. FCC (Cowles II)*, 683 F.2d 503 (D.C. Cir. 1982). See generally S. BREYER & R. STEWART, *supra* note 43, at 426-66.

⁸⁶R. S. MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT* (Brookings 1983).

⁸⁷Breyer & MacAvoy, *The Natural Gas Shortage and the Regulation of Natural Gas Producers*, 86 HARV. L. REV. 941 (1973).

⁸⁸463 U.S. at 50 n.15.

⁸⁹Some states have deliberately passed "buckle-up" laws that don't qualify as such under NHTSA's regulation, leaving open the possibility that drivers will face mandatory "buckle-up" laws and *also* payment for mandatory airbags.

⁹⁰*International Bhd. of Teamsters v. United States*, 735 F.2d 1525 (D.C. Cir. 1984).

agency was whether to allow the industry to use nonstandardized forms, a change that one consultant estimated would save about \$160 million per year. The agency decision came after its notice of the proposed change, its receipt of 1,300 comments, and its modifications of its initial proposal. About two years elapsed from the time of public notice until the conclusion of court review. The court allowed the agency to simplify much of its standardized form, but the court set aside two changes the agency wished to make.

FHA had decided that drivers still had to use a standardized grid showing hours driven and also to include on the form: date, total miles driven today, truck number, carrier name, signature, starting time, office address, and remarks. It said, however, that they could omit the name of any co-driver, total mileage today, home terminal address, total hours, shipping document number or name of shipper, or origin and destination points. The agency believed many of these items were redundant or "unnecessary" and that deletion would "reduce driver preparations by approximately 50 percent without affecting the enforcement capability." The court held to the contrary, concluding that the added items seemed useful. It would help an enforcement agency, for example, to check with a co-driver or shipper to see if a log was accurate. In any event, the court said FHA had not adequately explained the omissions.⁹¹

The agency also had decided to expand the scope of an exemption from its "log rules," an exemption that originally applied to "pick up and delivery" drivers, defined as those who drive within a radius of 50 miles and whose driving takes place within a 15-hour period each day. In 1980, perhaps recognizing that pick up and delivery now often extends beyond 50 miles, the FHA changed the definition to 100 miles, but reduced the hour period to 12. In 1982 it increased the hour period to 15. The court concluded that the agency had not adequately explained why it made these changes; it should have further investigated an "alternative," namely having two exemptions, one for "50 miles/15 hours" and another for "100 miles/12 hours."

One cannot tell from the opinion whether court or agency is correct about the wisdom of the agency's new policies. Yet, it is easy to imagine how the head of an agency might react to the court's strict review of the policy merits of what seem to be rather trivial changes in reporting and examination rules. The agency head might say, "Why bother? Why should I try to simplify paperwork? A decision about what specific

⁹¹FHA had explained its reasoning in its brief, but the court said that the brief was not a proper place for such explanation to appear for the first time. *See supra* note 80.

items to include on a log, or the exact point to draw an exemption line must, within broad limits, be arbitrary. I suppose I could do cost-benefit analyses, and hire experts to 'field-test' every possible change, but I haven't the money. I can't respond in depth to every argument made in 1,500 comments about every minor point in this record-keeping proposal. And, if I'm not even allowed to wait to see, as to these very minor matters, what a challenger says in a court brief, and then respond in my court brief, let's forget the whole thing. I'll keep whatever rules I've inherited and not try to make any minor improvements."

The reason agencies do not explore all arguments or consider all alternatives is one of practical limits of time and resources. Yet, to have to explain and to prove all this to a reviewing court risks imposing much of the very burden that not considering alternatives aims to escape. Of course, the reviewing courts may respond that only *important* alternatives and arguments must be considered. But, what counts as "important"? District courts often find that parties, having barely mentioned a legal point at the trial level, suddenly make it the heart of their case on appeal, emphasizing its (sudden but) supreme importance. Appellate courts typically consider such arguments as long as they have been at least mentioned in the district court. But district courts, unlike agencies dealing with policy change, do not face, say, 10,000 comments challenging different aspects of complex policies.⁹² And, when appellate courts "answer" an argument they write a few words or paragraphs, perhaps citing a case or two. A satisfactory answer in the agency context may mean factfinding, empirical research, detailed investigation. Accordingly, one result of strict judicial review of agency policy decisions is a strong conservative⁹³ pressure in favor of the status quo.⁹⁴

⁹²See *supra* note 83 and accompanying text.

⁹³Of course, the extraordinary conservative pressure exerted by strict judicial review can have worse effects. NHTSA, for example, introduced a head restraint standard in 1971. It aimed to prevent whiplash injuries by stopping the head from jerking backwards when the car was hit from behind. A series of studies however, later indicated that the standard had little safety value. NHTSA responded several times by proposing new standards, but because it could not obtain agreement from the interested parties and feared court review, it left the ineffective standard in place. There is no reason to think this kind of agency behavior is desirable.

⁹⁴Would a court have set aside airline deregulation under the former statute as "unwise"? Months of congressional hearings, detailed examination of the arguments, a lengthy report, and considerable study of the subject by experts and nonexperts alike had created a broad policy consensus in favor of reform, amply supported by economic logic and empirical data. The challengers would have asked whether the agency had considered adequately, for example, the effects on fuel supply, the environment, or

These arguments and instances are essentially anecdotal; they do not prove that strict judicial review of policy is, from a policy perspective, unhelpful or counterproductive. But they do seem strong enough to impose a burden upon those advocating such review as a means toward better or wiser substantive policy to identify, investigate, and catalogue its successes.

C. Toward Appropriate Policy Review Reconciliation

Unfortunately, unlike the review of *law* discussed in Part I, no ready resolution to the problem of judicial review of *policy* is apparent, at least within the existing institutional constraints. The social imperative for control of agency power is entirely consistent with existing institutional arrangements in the context of review of law. If one believes that the more important the legal decision, the greater the need for a check outside the agency, increased judicial scrutiny automatically seems appropriate. Courts are fully capable of rigorous review of agency determinations of law, for it is the law that they are expert in, and it is in interpreting law that their legitimacy is greatest.

In reviewing the policy area, however, the pressures for control of agency power on the one hand, and for proper use of existing institutions on the other hand, are dramatically opposed. One may believe that the more important the policy decision, the greater the need for a check outside the agency. But, for reasons of "comparative expertise," increased judicial scrutiny seems *less* appropriate. It is this dilemma that makes a stable, appropriate regime for court review of policy a nearly intractable problem.

That is to say, one might conclude on the basis of the discussion that when reviewing the reasonableness of agency policy courts should apply the traditional law (the "arbitrary, capricious" standard of section 706(2)(A) of the Administrative Procedure Act) with the traditional attitude of "deference" to agency expertise. Courts would hesitate to reverse the results of a major rulemaking proceeding or to remand for what is likely to amount to several years of new proceedings. They would do so only after finding major procedural violations or very unreasonable substantive results. Judges would approach cases like *State Farm* rather like they approach jury findings in a negligence action, asking whether reasonable regulators could reasonably have

airport congestion; the possibility that local regulators will create local monopolies by tying up airport slots; the risk that two large airlines will control reservation systems by writing a special computer program; and other features of the case that had not been examined in depth. Opponents could have multiplied plausible-sounding "alternative courses of action" for the agency to investigate or explain away.

come to this conclusion, given not only the evidence before them, but also the constraints of time and of the administrative environment in which the agency must work.

This type of standard, however, while coherent from a jurisprudential perspective, is not totally satisfactory, for it does not respond to the regulatory needs outlined at the beginning of this article. For one thing, in applying it the courts effectively abdicate their role in controlling agency policymaking. Yet, the fact remains that Congress has delegated to administrators in the past fifteen years vast additional regulatory powers, often under vaguely worded, open-ended statutes. Simple "retreat" takes little account of the *growth of agency power* that gave rise to the demand for control. After all, the substantive regulatory concerns that have created pressure for outside checks upon the exercise of agency power continue to exist.⁹⁵ One can still argue in favor of the courts by claiming that the President's efforts will be affected greatly by the politics of the day⁹⁶ and that congressional efforts may be incoherent. Judges tend to be somewhat more neutral politically; they will try to exert the force of reason on what are basically technical rules aimed at technocratic ends; and their prestige will lead the agencies to follow their guidance.

For another thing, can one be certain about the *overall* impact of judicial scrutiny of agency policy? Does its presence act as an incentive within the agency towards more reasonable decisionmaking, arming those who would fight an overly politicized decisionmaking process with a weapon, the specter of later court reversal? Would a relaxed judicial supervisory attitude be strong enough to catch the occasional agency policy decision that is in fact highly irrational?⁹⁷

These nagging doubts are sufficiently serious to point, vaguely and suggestively, without endorsement, to an alternative approach that may warrant more serious study than it has had to date. One might examine the practicality of removing some of the institutional constraints that now prevent a court from conducting effective policy review. Could reviewing courts be given the tools to produce coherent, better substantive agency policy? Suggestions have been made to create a specialized administrative court. But, to make the District of Columbia Court of Appeals a genuine administrative court, capable of reviewing the wisdom of substantive policy, it would need an investiga-

⁹⁵See *supra* text at notes 1-11.

⁹⁶This is a special concern of Judge Edwards. See Edwards, *supra* note 12, at 229-31; see also Breyer, *Reforming Regulation*, *supra* note 9.

⁹⁷See, e.g., *Aqua Slide 'N' Dive Corp. v. Consumer Product Safety Comm'n*, 569 F.2d 831 (5th Cir. 1978) (invalidating CPSC safety regulations for pool slides).

tive staff. It would need the power to compel the agency to produce facts not in the record. It would have to be able to question an agency about its entire enforcement program. And it would need some understanding of how that program fits in with the work of other agencies. It would need access to appropriate substantive experts. In sum, it would need many of the powers currently given to the Office of Management and Budget, insofar as it investigates and coordinates regulatory programs.

Other nations have followed this approach. Under the French system of administrative law, for example, the power to review administrative action resides in an institutional descendant of the King's Council, now an independent, nonpolitical administrative court, called the Conseil d'Etat.⁹⁸ Membership in the Conseil is supposed to reflect relevant expertise. Some become members after a distinguished career in the French civil service; others are recent top graduates of the highly prestigious Ecole Nationale d'Administration (ENA), where they have studied public policy and public administration. Upon entrance into the Conseil the ENA graduate is assigned the investigation of less important cases, and is privy to its deliberations; is rotated through various operating departments of the government on special assignments, and is then eventually returned to the Conseil. The result is a collegial body, familiar with the practical problems of creating and maintaining public policy through administration.⁹⁹

Moreover, the Conseil is not bound by the strictures of the adversary system. It has access to information throughout the administration. Its members conduct an independent investigation of each case and present the results without being confined to a formal record. The members charged with the investigation make full use of the Conseil's internal expertise and also are expected to consult outside agencies and experts.¹⁰⁰ In short, the Conseil is given a wide variety of tools which enable it to discern not only whether a given policy conforms to law (as in American courts) but also whether it is wise public policy, something that our discussion suggests may be beyond the reach of our judicial system as currently organized.

Whether one could transform an existing court of appeals into an institution more closely resembling the Conseil d'Etat is debateable. Much of the Conseil's effectiveness stems from its ability to obtain

⁹⁸See generally L. N. BROWN & J. F. GARNER, *FRENCH ADMINISTRATIVE LAW* 17-29 (Butterworths 1967).

⁹⁹See *id.* at 30-40.

¹⁰⁰See *id.* at 41-57.

information *ex parte* from within the administration and to conduct its deliberations among investigators and judges in private, without counsel present. Yet, American judicial rules against *ex parte* communications are not all constitutional in nature; the use of amici, special masters, law clerks all suggest that investigatory powers are not inherently beyond the judiciary's reach. And, there are certain advantages to looking at the judiciary rather than say, OMB, as the nucleus for such an institution, namely greater political independence, prestige that may mean public acceptability, the ability to process individual complaints against agency behavior, and more widespread review of agency policy within the same institution.

Analysis of such a radical transformation of existing methods of policy review is well beyond the scope of this article, nor does this article endorse that approach. It only points to the existence of the possibility; and it suggests that analysis be undertaken because, given the present institutional dilemma, it may be necessary to explore quite different approaches toward making judicial review an effective check on the wisdom of substantive policymaking by agencies.

III. CONCLUSIONS

Parts I and II taken together suggest at least three conclusions. First, the present law of judicial review of administrative decisionmaking, the heart of administrative law, contains an important anomaly. The law 1) requires courts to defer to agency judgments about *matters of law*, but 2) it also suggests that courts conduct independent, "in-depth" reviews of agency judgments about *matters of policy*. Is this not the exact opposite of a rational system? Would one not expect courts to conduct a stricter review of matters of law, where courts are more expert, but more lenient review of matters of policy, where agencies are more expert?

Second, in light of the anomaly, existing law is unstable. Change of some sort seems likely. The direction that the law might take as to review of matters of law can be spelled out with clarity. But no such clarity of direction is possible in respect to review of policy. On the one hand, that change might amount to "retreat," with the courts leaving it up to the other branches of government to control agency excesses. On the other hand, change might seek to make policy review more effective. But, that change implies the need for an examination of radical transformation of existing institutions of review. An examination seems warranted to determine whether such efforts should be made.

Third, one can conclude, at a minimum, that legislative proposals

that simply try to lead the courts to exercise a more “independent” judgment when reviewing agency decisions offer little promise as a direction for meaningful regulatory reform. In the area of traditional “review of agency decisions of law” such a proposal has only a limited scope for making a significant difference. In the area of judicial “review of agency decisions of policy” such a proposal would likely prove counterproductive. The problem seems more one of tailoring the courts’ legal obligations in their area to their institutional capacities and strengths.