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Notes

Regulatory Reform and the *Chevron* Doctrine: Can Congress Force Better Decisionmaking by Courts and Agencies?[†]

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This Note examines recent legislative proposals for reform of the *Chevron* doctrine[1] in federal administrative law and suggests an alternative solution that sets more definite boundaries delineating the roles of courts, agencies, and the public in questions of statutory interpretation. Part I of this Note provides background information on the problem of determining when courts should defer to government agencies on questions of statutory construction. It asserts that past legislative proposals are a valuable resource for addressing this problem. Part II uses the various opinions in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*[2] to describe the interpretive confusion the *Chevron* doctrine has generated and the disagreement it has provoked among Supreme Court Justices and in the lower courts. Part III describes four major versions of Senate Bill 343,[3] the 1995 Senate regulatory reform legislation, and examines how similar statutory modifications to the *Chevron* two-step review process would affect agencies and reviewing courts. Part IV combines elements of the specific proposals made in Senate Bill 343 in an attempt to improve on the existing *Chevron* doctrine by setting up a new framework for when a high level of deference to agency statutory interpretations is appropriate. The proposed system contains the following elements: (1) a specific part of the agency rulemaking record devoted to the explanation of its chosen statutory interpretation, (2) a limitation of judicial review of permissible interpretations to those contained in the record, (3) placement of the burden for presenting alternative interpretations on outside commenters to a proposed rule, (4) broad deference to agency statutory interpretations that satisfy the new procedural requirements, and (5) only prospective application of the new requirements. If removed from the strict cost-benefit analysis requirements elsewhere in Senate Bill 343, a new system for reviewing agency statutory interpretations could address public concerns about government agencies' power and discretion, yet prevent destabilization of the post-Great Society regulatory state. The next time that regulatory reform resurfaces in Congress is an opportunity to improve upon the decisionmaking processes of both agencies and their reviewing courts.

I. Background: Agency Deference in the Courts and Congress

The American political tradition includes an almost continual thread of distrust toward concentrations of government power, a distrust that even predates the founding of the republic.[4] In the post-New Deal era, the most

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1. *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

2. 115 S. Ct. 2407 (1995).

3. S. 343, 104th Cong. (1995).

4. *See, e.g.*, MICHAEL F. HOLT, THE POLITICAL CRISIS OF THE 1850S, at 211 (1978) (recounting successful efforts by the Republican party during the 1850s to increase opposition to slavery by por-

notable expansion of government power has been through the creation and expansion of federal administrative agencies.[5] One could reasonably argue that these agencies constitute a headless "fourth" branch of government that violates the fundamental principle of separation of powers by mixing legislative, executive, and judicial functions under one roof.[6] While no one seriously believes that modern agency functions could be handled directly by Congress, courts, or the White House staff, there is an increasing uneasiness over the extent of power assumed by government agencies.[7]

A. *Defining the Problem*

Of particular difficulty are those instances when an administrative agency must interpret ambiguities in one of the statutes that Congress has assigned it to administer. The judiciary, of course, is the final authority

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traying it as an "attempt of Southerners to pervert 'a republican Constitution [into] an aristocratic one'"); ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 377-419 (1973) (finding a dangerous concentration of power in the Vietnam War and Watergate-era presidencies); HARRY L. WATSON, LIBERTY AND POWER: THE POLITICS OF JACKSONIAN AMERICA 44-45 (1990) (asserting that early nineteenth-century Americans were "unduly suspicious, even paranoid" about concentrations of governmental power); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 150-61 (1969) (describing the emphatic belief in separation of powers that influenced the drafting of the first state constitutions); *see also* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 656 (1989) ("The American political tradition is, for good or ill, based in large measure on a healthy mistrust of the state.").

5. *See* STEPHEN BREYER, REGULATION AND ITS REFORM 1 (1982) (recounting how "the number of federal regulatory agencies and the scope of regulatory activity vastly expanded" during the past several decades). To administer the huge number of programs and agencies within the federal government, a recent count found that the executive branch had 2,037,437 employees. Arleen Jacobius, *Lawyers Buck Downsizing Trend: Executive Branch Workforce Being Reduced as Attorneys Are Added*, 81 A.B.A. J. 24 (Nov. 1995).

6. *See, e.g.*, Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 667 (1984) (arguing that agencies are a valid fourth branch of government, but that recognizing them as such requires abandoning the traditional constitutional interpretation of three branches alone); Peter Marra, Comment, *Have Administrative Agencies Abandoned Reasonability?*, 6 SETON HALL CONST. L.J. 763, 783-85 (1996) (noting that the constitutionality of administrative agencies would be questionable under a strict separation of powers doctrine and observing that the modern judiciary has been unwilling to enforce the separation of powers doctrine against administrative agencies).

7. *See, e.g.*, PHILIP K. HOWARD, THE DEATH OF COMMON SENSE 25-29 (1994) (arguing that the advent of the modern regulatory state has created an extremely powerful, detailed, and unwieldy system of administrative agencies that focuses on documenting complicated solutions to all conceivable problems at the expense of flexibility and efficiency); Marra, *supra* note 6, at 769-70, 767 n.20 (noting the inability of Congress to handle technical issues or issues that require ongoing supervision, and stating that "today, agencies are individual mini-governments, encompassing the power of the executive, the legislature and the judiciary"). The executive branch itself has recognized a problem with both how government programs are run and how they are perceived by the public. *See* AL GORE, CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS: REPORT OF THE NATIONAL PERFORMANCE REVIEW 1 (1993) ("Public confidence in the federal government has never been lower. The average American believes we waste 48 cents of every tax dollar. Five out of every six want 'fundamental change' in Washington. Only 20 percent of Americans trust the federal government to do the right thing most of the time—down from 76 pereent 30 years ago.").

on issues of statutory construction;[8] however, a lengthy and complex statute such as the Clean Air Act[9] or a broadly written statute such as the Securities Act of 1933[10] may give rise to more interpretive disputes than the federal court system could likely handle in a reasonable amount of time.[11] Moreover, by enacting such enabling statutes—laws that authorize certain agency programs or actions—Congress demonstrably intended to leave a certain amount of discretion to the agencies to interpret and carry them out.[12] If a reviewing court gives no deference at all to these interpretations, much of the efficiency advantage of having executive agencies is lost. Conversely, if a court gives absolute deference to the agency interpretation, then it has violated the pronouncement in *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[13] The fact that the answer lies somewhere in the middle is obvious; precisely *where* in the middle is one of the most difficult questions in administrative law.

After several decades of vague standards and often inconsistent decisions in this area, the Supreme Court in 1984 appeared to clarify the standard of judicial review in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[14] The Court laid out a two-step process for determining the validity of an agency's statutory construction. First, if the intent of Congress in enacting a statute is clear, then the court must ensure that the agency has given effect to the unambiguously expressed intent of Congress.[15] If, however, a statute is silent or ambiguous with respect to the specific issue, then a court must apply a second step and ask whether

8. *See, e.g.*, FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 31-32 (1981) (noting that an interpretation of the Federal Election Campaign Act by the agency charged with administering it "is entitled to deference, but the courts are the final authorities on issues of statutory construction" (citations omitted)); FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965) (finding that although the Federal Trade Commission's judgment is to be given "great weigbt" in interpreting the Federal Trade Commission Act, the words of the Act "set forth a legal standard and they must get their final meaning from judicial construction"); Webster v. Luther, 163 U.S. 331, 342 (1896) (noting the Court's duty to determine the purpose of a statute, especially where "the practice of an Executive Department . . . defeat[s] the obvious purpose of the statute").

9. 42 U.S.C. §§ 7401-7671q (1994).

10. 15 U.S.C. §§ 77a-77aa (1994).

11. For example, in 1996 the total number of pages of regulations implementing the Clean Air Act exceeded 6500. *See* 40 C.F.R. §§ 50.1-95.4 (1996).

12. *See* Morton v. Ruiz, 415 U.S. 199, 231 (1974) ("The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.").

13. 5 U.S. (1 Cranch) 137, 177 (1803); *see also* Cass R. Sunstein, *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 368 (1987) ("Administrative agencies are constrained by statute, that is, law, and the mere fact that the statute is ambiguous shouldn't give the agency, of all people, the authority to decide on the meaning of the limitation.").

14. 467 U.S. 837 (1984).

15. *Id.* at 842-43.

the agency's interpretation is based on a permissible construction of the statute.[16] *Chevron*, if read literally, is a broad grant of deference to any "reasonable" interpretation of an agency-administered statute by the administering agency.[17]

In the years following *Chevron*, problems arose with the application of its seemingly simple rule. In 1995, two events highlighted these problems. First, on February 2, Senate Bill 343, entitled "The Comprehensive Regulatory Reform Act of 1995," was introduced.[18] Second, on June 29, the United States Supreme Court handed down its decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.[19] The decision in *Sweet Home* illustrates the impracticality of using the *Chevron* analysis to define the boundaries of the interpretive roles of agencies and courts, and Senate Bill 343 illustrates an attempt by Congress to redefine those boundaries and the difficulty Congress faced in doing so.

The two-step *Chevron* analysis, while arguably clear on its face, has given rise to such divergent interpretations that it may be of little practical use in the future. *Sweet Home*, which involved the interpretation of the Endangered Species Act by the U.S. Fish and Wildlife Service,[20] demonstrates the current problem of interpreting *Chevron* and suggests that the doctrine as presently formulated seems doomed to failure. While both the majority and the dissent in *Sweet Home* agreed that *Chevron* governed the analysis of the case,[21] the steps by which they each came to a final decision were strikingly different, as were their diametrically opposite results. Indeed, but for the similarity of the two sides' case citations, a casual observer might believe that they were using completely different standards of review.

In 1995, Congress considered modifying the standard of review. Regulatory reform was a topic discussed at great length in the 104th Congress, and the Comprehensive Regulatory Reform Act of 1995 was the

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16. *Id.* at 843.

17. *See id.* at 865 (deferring to the Environmental Protection Agency's (EPA) interpretation of the Clean Air Act because the agency's interpretation was reasonable in light of the competing interests involved). By *Chevron*'s own terms, however, this deferential review standard applies only to "an agency's construction of the statute which it administers" itself. *Id.* at 842. For example, while an EPA interpretation of the Clean Air Act (which the EPA administers) would be given substantial deference, an EPA interpretation of the Occupational Safety and Health Act (which the Department of Labor administers) would not be given deference. *Cf.* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and Courts?*, 7 YALE J. ON REG. 1 (1990) (describing limits on the application of *Chevron* deference).

18. 141 CONG. REC. S2056 (daily ed. Feb. 2, 1995) (recording the introduction of S. 343 by Senator Dole).

19. 115 S. Ct. 2407 (1995).

20. *Id.* at 2409-10, 2410 n.2.

21. *Id.* at 2416; *id.* at 2421 (Scalia, J., dissenting).

centerpiece of the debate, proposing a dramatic overhaul of the federal Administrative Procedure Act (APA).[22] As introduced, Senate Bill 343 contained provisions for substantially changing the scope of judicial review of federal administrative agencies' interpretations of law—a change in the *Chevron* doctrine.[23] The bill was referred separately to the Judiciary Committee[24] and the Governmental Affairs Committee.[25] Both committees ultimately reported out favorably their own substitute versions of the bill, which differed substantially from both the original version and from each other.[26] A few months later, on the Senate floor and with the consent of both committees, Senator Dole offered Amendment 1487, which entirely replaced both of the committee substitutes and became the basis for the remainder of the debate.[27] The variety of the proposals presented in these different versions[28] of the same legislation illustrates the fact that remedying the weaknesses of *Chevron* is no easy task. Senate Bill 343 went through countless changes during the legislative process,[29] but its evolution is best represented by the four major milestones of the Senate's 1995 debate on Senate Bill 343: (1) the introduction of the original bill, (2) the bill as reported out by the Senate Judiciary Committee, (3) the bill as reported out by the Senate Governmental Affairs Committee, and (4) Amendment 1487, the substitute amendment that replaced both committee versions and became the basis for the bulk of the debate on the Senate floor.

B. Using Prior Legislative Proposals to Find a Solution

Ultimately, no version of Senate Bill 343 passed the Senate because of a threat of filibuster and a failure to obtain the necessary sixty votes to cut off floor debate.[30] As the 104th Congress came to a close, regulatory reform and statutory revision of the *Chevron* doctrine seemed to be a dead letter. So why should the provisions of an unenacted regulatory reform bill

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22. 5 U.S.C. §§ 551-559, 701-706 (1994).

23. S. 343, 104th Cong. § 628, 141 CONG. REC. S2059 (daily ed. Feb. 2, 1995).

24. *See* 141 CONG. REC. S2034 (daily ed. Feb. 2, 1995).

25. *See id.* at S2145 (daily ed. Feb. 3, 1995).

26. *See id.* at D403 (daily ed. Mar. 23, 1995) (reporting on the bill by the Governmental Affairs Committee); *id.* at D522 (daily ed. Apr. 27, 1995) (reporting on the bill by the Judiciary Committee).

27. *See id.* at S9509 (daily ed. June 30, 1995).

28. *See infra* Part III for a discussion of differences among the four proposals.

29. *See, e.g.*, 141 CONG. REC. S10,011-66 (daily ed. July 14, 1995). On one of the final days of debate alone, seventy amendments to the bill were offered on the Senate floor. *Id.* The vast majority of these amendments were ordered to lie on the table after submission and were never considered by the full Senate. *Id.*

30. *See id.* at S10,400 (daily ed. July 20, 1995) (statement by Sen. Dole) ("I want to thank my Republican colleagues and four of our colleagues on the other side who voted for regulatory reform and congratulate those who stuck together to bury it. It seems to me they have been successful.").

be of any interest to the legal community? Senate Bill 343 is worth evaluating for at least four reasons. First, the current proposals for comprehensive regulatory reform are the offspring of an idea that has percolated through the halls of Congress since the mid-1970s,[31] and this persistence suggests a greater possibility of eventual enactment than is typically the case with "dead" legislation. It is accordingly more important than usual to analyze and understand past regulatory reform proposals. Considering the substantial changes in American law and society in the past quarter century and the strong opposition that the idea of regulatory reform has engendered in some circles,[32] this staying power is remarkable.

Second, the idea that something is "wrong" with the American system of administrative law is one that, justifiably or not, has resonated with the general public.[33] An observation about an earlier regulatory reform movement is equally applicable to the more recent one: "It cannot be intellectually dissected as an administrative law phenomenon without first acknowledging its political reflection of the frustration and grass-roots antipathy that federal administrative action has produced."[34] The continued persistence of such frustration[35] is why it behooves

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31. *See* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 473-74 (1989) (discussing congressional attempts, beginning in 1975, to increase judicial review of regulatory agencies' activities); James T. O'Reilly, *Deference Makes a Difference: A Study of Impacts of the Bumpers Judicial Review Amendment*, 49 U. CIN. L. REV. 739, 747-67 (1980) (describing Congressional attempts to amend the judicial review provisions of the APA during 1975-1980).

32. *See generally* O'Reilly, *supra* note 31, at 754-67 (describing opposition to particular regulatory reform proposals by members of Congress, judges, members of the executive branch, and organized labor).

33. Professor McGarity criticizes the motives of the political leaders of the current regulatory reform movement, but nonetheless finds that their topic has become pervasive:

> The radical assault on regulation in the 104th Congress has had a powerful impact on political discourse. More frequently than at any time since the first years of the New Deal, the debate over the proper role of government in society has been a topic of everyday conversation. In many ways, the scope of the debate is broader and the divisions in attitudes deeper than at any time since the early 1890s . . . .

Thomas O. McGarity, *The Expanded Debate over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463, 1483 (1996).

34. O'Reilly, *supra* note 31, at 749.

35. Public dissatisfaction with federal regulation has been recognized by leaders in both major political parties. *See, e.g.*, GORE, *supra* note 7, at 1 (finding in 1993 an enormous public distrust in the federal government as a mechanism to solve social problems). In his 1996 State of the Union address, President Clinton twice declared that the "era of big government is over." Alison Mitchell, *State of the Union: The Overview*, N.Y. TIMES, Jan. 24, 1996, at A1. Public frustration with the system is also echoed in some of Senator Dole's comments introducing Senate Bill 343:

> This legislation represents a comprehensive effort to inject common sense into a Federal regulatory process that is often too costly, too arcane, and too inflexible.
>
> . . . .
>
> . . . Our agenda will restore the true balance between Government and individual reflected in the 10th amendment, which leaves all powers not given to the Federal Government to the States or to the people.

141 CONG. REC. S2056 (daily ed. Feb. 2, 1995).

administrative law scholars to consider the relative merits of the recent reform proposals. If amendment to the Administrative Procedure Act becomes more likely than not, those with administrative law expertise should be prepared to help ensure the crafting of a workable and balanced system that nonetheless takes account of the very real public concerns about the reach of government. Even the fiercest foe of regulatory reform would do well to analyze aspects of the current proposals to understand both their constructive and questionable elements, because certain parts of them may well be enacted into law. An informed scholarly community increases the possibility that regulatory reform will be beneficial.[36]

Third, Senate Bill 343 and other proposals to modify the scope of judicial review in the administrative context are important because they address a fundamental means by which we balance our often conflicting desires for efficiency and deliberative democracy[37] in the administrative state. The *Chevron* doctrine is probably the most written-about and debated subject in federal administrative law[38] because it attempts to strike a balance between these two desires. Senate Bill 343 would arguably have shifted the balance. If one is concerned about the expansion (or limitation) of power in the hands of government, a logical and time-honored way to act on that concern is to tinker with the scope of judicial review.[39]

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36. *See* Ronald M. Levin, *Judicial Review and the Uncertain Appeal of Certainty on Appeal*, 44 DUKE L.J. 1081, 1102 (1995) [hereinafter Levin, *Uncertain Appeal*] (suggesting that the scholarly community bears "an unusually large share of the burden" in clarifying scope of review doctrine). It should be noted, however, that Professor Levin is not sympathetic to the view that Congress would be the best institution to straighten out the doctrinal vagueness and inconsistency. *Id.* at 1091-95. Professor Levin reiterated this view in a later discussion of Senate Bill 343. *See* Ronald M. Levin, *Scope of Review Legislation: The Lessons of 1995*, 31 WAKE FOREST L. REV. 647, 665 (1996) [hereinafter Levin, *Lessons of 1995*] (contending that the 1995 regulatory reform legislation "underscores some hazards" of modifying scope of review via Congress).

37. *See* Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEXAS L. REV. 83, 125 (1994) (describing deliberative democracy as "a process by which members of society seek both to define the public interest and to determine the best way to further that interest"). If all problems with transaction costs could be avoided, a perfect deliberative democracy would have all citizens considering and participating in all decisions. In the real world, the transaction costs inherent in such a process would make efficient operation of government an impossibility. In contrast, placing final and unappealable decisionmaking authority in the hands of one person would certainly be efficient, but it would leave no room for citizens to participate in the democratic process.

38. For example, a search of the texts and periodicals database of Westlaw (TP-ALL) yielded 810 entries that at least allude to the *Chevron* instruction to give deference to agency interpretations of statutes. The search used was "(CHEVRON W/30 DEFERENCE) & (CHEVRON W/30 AGENC!) & (CHEVRON W/30 STATUT!)" (search conducted Mar. 17, 1997).

39. For example, dissatisfaction with a system of review in Equal Protection Clause cases that was either "rational basis" or "strict scrutiny" led the Supreme Court itself to modify the scope of review in some cases to allow for "intermediate scrutiny." *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 67-69 (1981) (using intermediate scrutiny to evaluate a classification based on gender); Trimble v. Gordon, 430 U.S. 762, 767 (1977) (using intermediate scrutiny to evaluate a classification based on illegitimacy of birth); *see also* 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW:

Variant readings of the *Chevron* decision have done this to a limited extent, but a legislative attempt to modify or abrogate the doctrine could have a much greater impact. Analysis of the 1995 regulatory reform legislation can help us determine the relative values we assign to efficiency and deliberative democracy in an important and pervasive part of our government.

Fourth, and most significantly, the four versions of Senate Bill 343 actively considered by the Senate demonstrate a broad spectrum of approaches for dealing with the *Chevron* doctrine, ranging from iguoring it entirely (the Governmental Affairs Committee) to virtually abrogating it (the Judiciary Committee). If it is at all possible for Congress to produce a beneficial reformulation of the *Chevron* doctrine, perhaps such a proposal may be found within these major permutations of Senate Bill 343. They represent a range of legislative answers for those concerned with either minimizing or maximizing the scope of power of administrative agencies to interpret their own enabling statutes. It thus makes sense to examine the past efforts of Congress in a field as politically and socially important as administrative law in order to glean ideas for the future.[40]

In short, regulatory reform in the scope of review context is an important and persistent idea on the American political and governmental scene. It is not likely to go away any time soon, and it involves issues fundamental to the American system of government. Legislation in this area can be a learning experience on many fronts. Perhaps this examination and the proposals it produces can be a small step toward fixing the problems inherent in the *Chevron* doctrine.

II. The Problem of Setting Agency Boundaries on Questions of Law

The Supreme Court and lower courts have encountered difficulty in defining exactly when a court should defer to an agency's construction of its own enabling statute. The *Chevron* doctrine has given rise to at least two distinct interpretive camps. These two camps can reach completely opposite results depending on how or if they utilize canons of statutory construction. The confusion surrounding canons of construction is arguably the single largest impediment to the usefulness of *Chevron* as it is presently formulated.[41] The checkered history of and multiple opinions

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SUBSTANCE AND PROCEDURE § 18.3, at 16-19 (2d ed. 1992) (describing situations in which the Court has engaged in an independent analysis of legislative judgment that is less deferential than the rationality test, but something less than strict scrutiny).

40. *See* Levin, *Lessons of 1995*, *supra* note 36, at 648 (asserting that congressional scope of review proposals deserve comment because "Congress will undoubtedly revisit the subject of regulatory reform before long").

41. *See infra* subpart II(A).

in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* serve to illustrate this point in colorful detail.[42]

A. The Chevron *Doctrine and Canons of Construction*

The Supreme Court allegedly laid to rest—or at least simplified—the question of deference to statutory interpretation by administrative agencies in its opinion in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. Chevron* ostensibly set up a two-step test to be applied to all attempts by agencies to construct the meaning of the statutes they administer. The first step looks entirely to congressional intent, asking "whether Congress has directly spoken to the precise question at issue."[43] If the court finds clear congressional intent, then the analysis ends because the court, just like the agency, must give effect to "the unambiguously expressed intent of Congress."[44] The second step of the *Chevron* test addresses the situation in which an agency's enabling statute is ambiguous. In such a case, the court is to determine whether the agency's interpretation is "based on a permissible construction of the statute" and uphold any permissible interpretation by the agency.[45]

The *Chevron* two-step test sounds simple, but the Supreme Court itself has often split over whether to apply the two-step analysis in a way that grants the full amount of deference implied by a literal reading of the opinion's text.[46] The dispute revolves around when and to what extent a reviewing court should use traditional canons of statutory construction in step one of the test. A statute may not be clear on its face, but a court could "find" clear congressional intent by applying a variety of interpretive tools. Should a court do that when judging an agency-administered statute?

A look at the opinions by Justices Stevens and Scalia in a "*Chevron* case" illustrates the intellectual foundation of the dispute over the canons of statutory construction. In *Immigration and Naturalization Service v. Cardoza-Fonseca*,[47] the Supreme Court examined the INS interpretation of two statutory provisions that establish standards through which an otherwise deportable alien may claim asylum.[48] The INS argued that the two

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42. *See infra* subpart II(B).

43. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984).

44. *Id.* at 843.

45. *Id.*

46. *See* Thomas O. Sargentich, *The Scope of Judicial Review of Issues of Law:* Chevron *Revisited*, 6 ADMIN. L.J. AM. U. 277, 279 (1992) (finding a major debate between judges who would move quickly to step-two deference and those who would not).

47. 480 U.S. 421 (1987).

48. *Id.* at 423 (comparing the Immigration and Nationality Act § 243(h), 8 U.S.C. § 1253(h) (1994), with the Refugee Act of 1980 § 208(a), 8 U.S.C. § 1158(a) (1994)).

provisions, although worded differently, were substantively identical.[49] Citing *Chevron*, Justice Stevens announced that by "[e]mploying traditional tools of statutory construction," the Court had determined that Congress did not intend the two statutory standards to be identical.[50] Hence, the statutory interpretation by the INS was rejected because the case presented "a pure question of statutory construction for the courts to decide,"[51] and the Court's interpretation was inconsistent with the agency's. Thus, the agency's view lost under step one of *Chevron*.

Notably, Justice Stevens was also the author of *Chevron*. The reference to "traditional tools of statutory construction" invokes a footnote in the *Chevron* opinion that is the main bone of contention over what the Court meant in its step-one discussion of "the unambiguously expressed intent of Congress."[52] Footnote nine of *Chevron* says:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.[53]

This footnote, along with Justice Stevens's reasoning in *Cardoza-Fonseca*, illustrates the rationale behind readings of *Chevron* that tend to be less deferential to agencies. The so-called "traditional tools of statutory construction" are to be applied by the reviewing court in *Chevron* step one to determine congressional intent. Only if *that* exercise turns up ambiguity in the meaning of the statute is step two (deference to a reasonable interpretation by the agency) to be applied. In other words, this approach relies substantially on canons of statutory construction and nontextual indicators of congressional intent when applying step one, and it seems to move to step-two deference only if this examination is to no avail. The Stevens approach thus includes some significant reluctance to find that a statutory ambiguity exists that would require deference to the agency under step two of *Chevron*.

In his concurring opinion in *Cardoza-Fonseca*, Justice Scalia castigated the majority's approach, and in so doing laid out the rationale behind a highly deferential reading of *Chevron*. While agreeing that the INS's interpretation of the Immigration and Nationality Act was inconsistent with the plain meaning of the Act, Justice Scalia criticized the Court's discussion of

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49. *Id.* at 430.
50. *Id.* at 446.
51. *Id.*
52. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).
53. *Id.* at 843 n.9 (citations omitted).

deference—a concept from step two of *Chevron*—in a decision that purported to be based on step one: "[T]here is simply no need and thus no justification for a discussion of whether the interpretation is entitled to deference."[54] Thus, clear intent should have precluded any consideration of whether the INS interpretation was reasonable. Justice Scalia further disputed the notion "that courts may substitute their interpretation of a statute for that of an agency whenever, '[e]mploying traditional tools of statutory construction,' they are able to reach a conclusion as to the proper interpretation of the statute."[55] He found that a court's determining the reasonableness of an agency's statutory interpretation by reference to tools of statutory construction would be "not an interpretation but an evisceration of *Chevron*."[56] This version of step one would examine only the text of the statute to determine congressional intent, but if the text were ambiguous, step-two deference would be applied. Justice Scalia ignored footnote nine altogether as an aberration from the main command of *Chevron*.[57]

Both of these approaches to *Chevron* have inherent problems. Possibly the most famous demonstration of the weakness of statutory construction canons of the type used by Justice Stevens appears in a 1950 article by Karl Llewellyn.[58] Professor Llewellyn compiled a two-column list for the purpose of showing that "there are two opposing canons on almost every point" when interpreting a statute.[59] Thus, to justify a desired result, one need only invoke the appropriate canon. The outcome using the "traditional tools of statutory construction" therefore depends largely on who gets to choose the tools. On the other hand, Justice Scalia's approach has its defects and detractors as well. Professor Pierce has agreed with Scalia's call for applying strong *Chevron* deference,[60] but has been a sharp critic of his "hypertextual" approach to step one,[61]

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54. *Cardoza-Fonseca*, 480 U.S. at 453 (Scalia, J., concurring) (citing *Chevron*, 467 U.S. at 842-43 ("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.")). It is noteworthy that after quoting the aforementioned passage from *Chevron*, Justice Scalia's opinion contains a "footnote omitted" notation. That notation is his own omission of footnote 9—the reference to "traditional tools of statutory construction." *Id.* at 843 n.9.

55. *Id.* at 454 (Scalia, J., concurring) (citation omitted).

56. *Id.* (Scalia, J., concurring).

57. *See supra* note 54.

58. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).

59. *Id.* at 401.

60. *See* 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.6 (3d ed. 1994) (endorsing Justice Scalia's recommendation in *Cardoza-Fonseca* that the Court should exereise a high level of deference towards administrative action under *Chevron*).

61. *See, e.g.*, Richard J. Pieree, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 776 (1995) (asserting that hypertextualism in the Supreme Court will serve to "maximize the workload of lawyers, judges, and agencies, and to minimize the coherence and efficacy of agency-administered programs").

finding that it allows courts too much leeway to ignore contrary evidence of congressional intent.[62] In a given case, the intent of Congress may be clarified by reference to legislative history outside the statutory text,[63] but Justice Scalia would not allow such references.[64] Professor Farina has criticized the strongly deferential reading of *Chevron* for creating a much greater risk of abuse of authority by the executive branch.[65] The validity of such a criticism increases or decreases depending on how much judicial deference one thinks the case is mandating.

An inherent structural problem with the *Chevron* opinion, then, is that it provides substantial support for at least two conflicting scopes of judicial review. Under the Stevens approach, courts play an active role in finding "clear" congressional intent and are more willing to uphold or overturn an agency on the basis of step one of *Chevron*. Under the Scalia approach, the role of the courts in step one is limited to examining the text of the statute in determining congressional intent. If that exercise turns up ambiguity, step-two deference to a reasonable interpretation is warranted. In *Cardoza-Fonseca*, the dispute over how to review the agency's statutory interpretation led to no substantive difference in the final outcome. The next subpart of this Note shows dramatically that this is not always the case.

B. Sweet Home*: Illustrating the Anarchy*

Babbitt v. Sweet Home Chapter of Communities for a Great Oregon illustrates the uncertainty and peril of relying upon *Chevron* as a means for defining when courts should defer to agencies on questions of statutory construction. Two statutory provisions formed the textual basis of the agency interpretation at issue in *Sweet Home*. Section 9(a)(1) of the Endangered Species Act (ESA) provides protection for endangered species by making it unlawful to "take any such species within the United States or the territorial sea of the United States."[66] The word "take" is a term of art defined in section 3(19) of the ESA as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage

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62. *Id.* at 763 (criticizing the Court's willingness to find textual "plain meaning" that is contrary to otherwise overwhelming evidence of Congress's intent).

63. *See, e.g.*, Bank One Chicago v. Midwest Bank & Trust Co., 116 S. Ct. 637, 644 (1996) (Stevens, J., concurring) (claiming that reference to legislative history can help "find the answer to an otherwise puzzling aspect of the statutory text").

64. *See id.* at 645 (Scalia, J., concurring) ("In my view a law means what its text most appropriately conveys, whatever the Congress that enacted it might have 'intended.' The law *is* what the law *says*, and we should content ourselves with reading it rather than psychoanalyzing those who enacted it." (emphasis in original)).

65. *See* Farina, *supra* note 31, at 523-26 (arguing that *Chevron* creates a greater imbalance of power within the federal government).

66. Endangered Species Act § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B) (1994).

in any such conduct."[67] On the authority of these sections, the Department of the Interior (through the Fish and Wildlife Service) promulgated the following regulation:

> Harm in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.[68]

Thus, all activities encompassed in the regulatory definition of "harm" were included in the statutory definition of "take" and therefore were illegal under section 9(a)(1).

The plaintiffs in *Sweet Home* were small "landowners, logging companies, and families dependent on the forest products industries."[69] Their complaint alleged economic injury on the basis of the Fish and Wildlife Service's application of the "harm" regulation to the red-cockaded woodpecker and the spotted owl so as to prevent modification or degradation of specific forest habitats of those species.[70] The plaintiffs challenged the regulation on several grounds, but only the *Chevron* issue will be addressed here. Table 1 summarizes the divergent findings of the courts and judges involved in this litigation:[71]

TABLE 1
Summary of the *Chevron* Rationales and Outcomes in the *Sweet Home* Litigation
(* denotes an opinion on the prevailing side)

Deciding Court	Opinion by	*Chevron* Doctrine Basis for Decision	Chosen Outcome
D.C. District Court[72]	Judge Johnson*[73]	Step one (clear intent from the statute); but in the alternative, step two (reasonable interpretation of statutory ambiguity).	Regulation upheld.

67. *Id.* § 3(19), 16 U.S.C. § 1532(19).

68. 50 C.F.R. § 17.3 (1995).

69. Babbitt v. Sweet Home Chapter of Communities for a Great Or., 115 S. Ct. 2407, 2410 (1995).

70. *Id.*

71. The Table does not include Justice O'Connor's concurring opinion because it did not address the *Chevron* issue of statutory interpretation. *See id.* at 2418-21 (O'Connor, J., concurring). It instead disputed Justice Scalia's characterization of the breadth and applicability of the regulation. *See id.* (O'Connor, J., concurring).

72. Sweet Home Chapter of Communities for a Great Or. v. Lujan, 806 F. Supp. 279, *aff'd sub nom.* Sweet Home Chapter of Communities for a Great Or. v. Babbitt, 1 F.3d 1 (D.C. Cir. 1993), *rev'd on reh'g*, 17 F.3d 1463 (1994), *rev'd*, 115 S. Ct. 2407 (1995).

73. *Id.* at 285, 287.

D.C. Circuit[74]	Chief Judge Mikva*[75]	Step two (reasonable interpretation of statutory ambiguity).	Regulation upheld.
	Judge Williams*[76]	Step one (clear intent from the statute).	Regulation upheld.
	Judge Sentelle[77]	Step two (unreasonable interpretation of statutory ambiguity).	Regulation invalid.
D.C. Circuit (rehearing)[78]	Chief Judge Mikva[79]	Step two (reasonable interpretation of statutory ambiguity).	Regulation valid.
	Judge Williams*[80]	Step one (against clear intent from the statute); but in the alternative, step two (unreasonable interpretation of statutory ambiguity).	Regulation overturned.
	Judge Sentelle*[81]	Step one (against clear intent from the statute).	Regulation overturned.
Supreme Court[82]	Justice Stevens*[83]	Step two (reasonable interpretation of statutory ambiguity).	Regulation upheld.
	Justice Scalia[84]	Step one (clear intent from the statute).	Regulation invalid.

In the trial, the district court found that the language, structure, and history of the ESA revealed that Congress intended an expansive interpretation of the word "take," and that the term included habitat modification.[85] The court also said that if it "were somehow to find the ESA 'silent or ambiguous' with respect to this issue, it would nevertheless uphold the

74. Sweet Home Chapter of Communities for a Great Or. v. Babbitt, 1 F.3d 1 (D.C. Cir. 1993), *rev'd on reh'g*, 17 F.3d 1463 (1994), *rev'd*, 115 S. Ct. 2407 (1995). The opinion of the court was a short per curiam opinion that included no rationale. *Id.* at 3.

75. *Id.* at 11 (Mikva, C.J., concurring).

76. *Id.* (Williams, J., concurring). This chart classifies Judge Williams's opinion as falling within step one, because of his reliance on Congress's "clear intent." However, the opinion also discusses whether the ESA amendments "support the inference" that the statute forbids habitat modification, suggesting a step-two analysis. Because the opinion is a short one that does not actually mention *Chevron* by name, Judge Williams may have either ignored *Chevron* or else collapsed its two steps into one. Thanks go to Sarah Donch for pointing out this ambiguity to me.

77. *Id.* at 12-13 (Sentelle, J., dissenting).

78. Sweet Home Chapter of Communities for a Great Or. v. Babbitt, 17 F.3d 1463 (1994), *rev'd*, 115 S. Ct. 2407 (1995).

79. *Id.* at 1476-78 (Mikva, C.J., dissenting).

80. *Id.* at 1465, 1467, 1472.

81. *Id.* at 1473 (Sentelle, J., concurring).

82. Babbitt v. Sweet Home Chapter of Communities for a Great Or., 115 S. Ct. 2407 (1995).

83. *Id.* at 2416, 2418.

84. *Id.* at 2422-23, 2431 (Scalia, J., dissenting).

85. Sweet Home Chapter of Communities for a Great Or. v. Lujan, 806 F. Supp. 279, 283 (D.D.C. 1992), *aff'd sub nom.* Sweet Home Chapter of Communities for a Great Or. v. Babbitt, 1 F.3d 1 (D.C. Cir. 1993), *rev'd on reh'g*, 17 F.3d 1463 (D.C. Cir. 1994), *rev'd*, 115 S. Ct. 2407 (1995).

Secretary's regulation as a reasonable interpretation of the statute."[86] Thus, the court upheld the regulation under step one of *Chevron* (clear congressional intent), but would also have upheld it under step two (reasonableness of the interpretation in the face of ambiguity).[87]

On appeal, a three-judge panel of the D.C. Circuit affirmed the district court's finding that the "harm" regulation was valid, but did so in a short *per curiam* opinion that included no rationale.[88] In a concurrence, Chief Judge Mikva indicated that he upheld the regulation under step two of *Chevron* as a "reasonable construction of the statute"[89] given the fact that the "take" definition in the statute is "generally ambiguous."[90] Judge Williams, on the other hand, apparently decided to uphold the regulation under step one of *Chevron*, discerning that congressional intent "forbids some such incidental takings, including some habitat modification," but he did so *solely* on the basis of the 1982 amendments to the Act, which created incidental takings permits.[91] Judge Sentelle, while finding that ambiguity existed in the statute, dissented on the basis of step two of *Chevron*, determining that the Interior Department's interpretation of the ESA was not reasonable.[92]

Judge Sentelle cited two canons of statutory construction as evidence of the agency's interpretive unreasonableness: *noscitur a sociis* and the presumption against surplusage.[93] First, the principle of *noscitur a sociis* suggests that a word may be known by the company it keeps and "in practical application means that a word may be defined by an accompanying word."[94] Under the facts of *Sweet Home*, Sentelle found that "all the other terms among which 'harm' finds itself keeping company relate to an act which a specifically acting human does to a specific individual representative of a wildlife species."[95] Thus, although the term "harm" is broad, he believed that its context did not allow it to include habitat modification. Second, the presumption against surplusage implies that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or

86. *Id.* at 285 (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984)).

87. *Id.*

88. *Sweet Home*, 1 F.3d at 3.

89. *Id.* at 8 (Mikva, C.J., concurring).

90. *Id.* at 10 (Mikva, C.J., concurring).

91. *Id.* at 11 (Williams, J., concurring).

92. *Id.* at 12 (Sentelle, J., dissenting) (arguing that the court "cannot cram the agency's huge regulatory definition into the tiny crack of ambiguity Congress left").

93. *Id.* at 12-13 (Sentelle, J., dissenting).

94. 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47.16 (5th ed. 1992).

95. *Sweet Home*, 1 F.3d at 12 (Sentelle, J., dissenting).

insignificant."[96] According to Judge Sentelle, the agency's statutory interpretation should not stand because it "renders superfiuous everything else in the definition of 'take.'"[97] Both *noscitur a sociis* and the presumption against surplusage are prime examples of the "traditional tools of statutory construction" permitted by the Supreme Court in *Chevron*.[98]

After granting a petition for rehearing, the D.C. Circuit altered its opinion and reversed the District Court, finding that the "harm" regulation failed under both prongs of *Chevron* as being neither clearly intended by Congress nor a reasonable interpretation of the statute.[99] Judge Williams, who was joined by Judge Sentelle, wrote the new opinion for the court while Chief Judge Mikva wrote a dissenting opinion. Judge Williams, having changed his mind about the impact of the 1982 amendments to the ESA, found the application of *noscitur a sociis* to preclude the expansive definition of "harm" promulgated by the Fish and Wildlife Service.[100]

Judge Sentelle concurred, but noted that he would not have resorted to any use of legislative history because the meaning of the statutory term "take" is "sufficiently clear" based on the language and structure of the act.[101] Notably, a finding of textual *clarity* seems to invoke step one of *Chevron*, rather than step-two's examination of reasonableness, contrary to Judge Sentelle's original opinion. Additional confusion as to the exact *Chevron* grounds for his concurrence arises from the fact that Sentelle made no mention of *Chevron* whatsoever in this second opinion. Chief Judge Mikva based his dissent on advocacy of the same broad *Chevron* deference under step two[102] that he had advocated in his original opinion. Given the multiplicity of views reported from the lower courts on the facts of this single case, perhaps no case called for a clarification of the *Chevron* doctrine from the Supreme Court as much as this one did. It was not forthcoming.

The Supreme Court reversed the D.C. Circuit and upheld the Interior Department's interpretation of "harm" in the ESA.[103] Given the obvious disagreement below over the meaning of the statute, the Court easily could

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96. SINGER, *supra* note 94, § 46.06 (citations omitted).

97. *Sweet Home*, 1 F.3d at 13 (Sentelle, J., dissenting).

98. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 n.9 (1984).

99. Sweet Home Chapter of Communities for a Great Or. v. Babbitt, 17 F.3d 1463, 1464 (D.C. Cir. 1994), *rev'd*, 115 S. Ct. 2407 (1995).

100. *Id.* at 1464-65.

101. *Id.* at 1473 (Sentelle, J., concurring).

102. *Id.* at 1473-74 (Mikva, C.J., dissenting) ("Surely the statute is silent, or at best ambiguous, on this question. . . . Under step two [of *Chevron*], the only question is whether the FWS's interpretation of the word 'harm' constitutes a 'permissible' reading of the ambiguous language.").

103. Babbitt v. Sweet Home Chapter of Communities for a Great Or., 115 S. Ct. 2407, 2416 (1995).

have required the highly deferential application of *Chevron* used by Chief Judge Mikva. Alternatively, it could have seized the opportunity to explicitly adopt a lower deference standard. The *Sweet Home* Court did neither. The Court, in both the majority and the dissent, instead further demonstrated the instability of the doctrine by detouring into a disconcertingly varied use of "traditional tools of statutory construction."

Justice Stevens's opinion for the majority, when read along with the opinions of the D.C. Circuit, demonstrates a persistent weakness in the use of canons of statutory construction—the possibility of diametrically opposed results. As mentioned previously, Karl Llewellyn's two-column list of opposing canons demonstrated this weakness almost a half-century ago.[104] For purposes of the *Sweet Home* case, the two canons in item twenty-one of Llewellyn's list are noteworthy: "General terms are to receive a general construction," and general terms "may be limited by specific terms with which they are associated or by the scope and purpose of the statute."[105] The Supreme Court went a step further than Llewellyn's opposing canons and found contradictory results from the *same* canons relied upon by the D.C. Circuit. *Noscitur a sociis* still suggested, as it did for the lower court, that a word "gathers meaning from the words around it."[106] However, rather than finding this canon to require a restrictive meaning of the term "harm," the Court said that "[t]he statutory context of 'harm' suggests that Congress meant that term to serve a particular function in the ESA, consistent with but distinct from the functions of the other verbs used to define 'take.'"[107] As to the presumption against surplusage, the Court turned Judge Sentelle's reasoning (that terms in a definition should be given consistent meanings)[108] on its head and determined that "unless the statutory term 'harm' encompasses indirect as well as direct injuries, the word has no meaning that does not duplicate the meaning of other words that section 3 uses to define 'take.'"[109] Thus, Justice Stevens found that terms in a definition should be given *in*consistent meanings.

In dissent, Justice Scalia found under *Chevron*'s step one that Congress clearly did not intend to authorize a regulation as broad as the one promulgated by the Fish and Wildlife Service. "There is neither textual support for," he said, "nor even evidence of congressional consideration of" the interpretation of the ESA upheld by the Court.[110]

104. *See supra* notes 58-59 and accompanying text.

105. Llewellyn, *supra* note 58, at 405.

106. *Sweet Home*, 115 S. Ct. at 2415 (quoting Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961)).

107. *Id.*

108. *See* text accompanying notes 96-97.

109. *Sweet Home*, 115 S. Ct. at 2413.

110. *Id.* at 2431 (Scalia, J., dissenting).

Under his analysis, which included a reference to the *noscitur a sociis* canon analogous to Judge Sentelle's opinion below,[111] the regulation should be found invalid. Canons and methods of statutory construction thus produced a split in the Supreme Court analogous to that which occurred in the D.C. Circuit.

In sum, both the majority and the dissent agreed that the *Chevron* analysis governed the case, but their respective results bear little resemblance to one another. Justice Stevens cited reasons for determining that the Interior Department's interpretation was "reasonable" based upon the "text of the Act" and thus implied a decision based on step two of *Chevron*.[112] Interestingly, Stevens, the author of the *Chevron* decision, made no reference to its *first* step—determining whether Congress had spoken on the matter at issue. Perhaps he considered it a foregone conclusion that Congress had not spoken. Justice Scalia's dissent, on the other hand, seems to be based on step one of *Chevron*, finding that Congress clearly did not intend to delegate the particular power being utilized by the Secretary; thus, he concluded, while the Court should not substitute its judgment for that of the agency, it also "may not uphold a regulation by adding to it even the most reasonable of elements it does not contain."[113]

To a significant extent, *Chevron* has fulfilled the prediction made by Professor Sunstein in a 1986 panel discussion. He said that the decision "threatens . . . to confuse rather than clarify the law governing judicial deference to statutory interpretation by administrative agencies."[114] The state of the law in this area is indeed confused, as the various *Sweet Home* opinions illustrate, and it is therefore difficult to predict the amount of deference that a court will grant an agency's construction of its authorizing statute. Under the present state of the law, there is the strong possibility, as Professor Pierce posits, for "cacophony and incoherence throughout the administrative state."[115]

III. Senate Bill 343 on the *Chevron* Issue

The opinions in *Sweet Home* illustrate the confused present state of the *Chevron* doctrine. One possible solution to most problems of inconsistent or indeterminate case law is to enact or modify a statute. Indeed, with regard to the *Chevron* issue, some scholars have suggested that "as a threshold matter, reform of substantive review should come in statutory

111. *Id.* at 2424 (Scalia, J., dissenting).
112. *Id.* at 2412.
113. *Id.* at 2430 (Scalia, J., dissenting).
114. Sunstein, *supra* note 13, at 366.
115. Pierce, *supra* note 61, at 752.

form, as an amendment to . . . the Administrative Procedure Act."[116] Analyzing the four major versions of Senate Bill 343, the 1995 regulatory reform statute,[117] will help identify the potential problems and benefits of each version with regard to the judicial review of agency statutory interpretations. Ultimately, this exercise will form the basis of the proposals for reformation of the *Chevron* doctrine made at the end of this Note.[118] This Part will review the versions in detail, and Table 2 provides an overview of the similarities and differences among the four versions of Senate Bill 343 that are pertinent to the *Chevron* issue:

TABLE 2
Comparison of the Four Major Versions of the Senate's 1995 Regulatory Reform Legislation (S. 343)

Regulatory Reform Bill Version	(1) Requires Cost-Benefit Analysis?	(2) Addresses Statutory Construction?	(3) Must Agency Classify Statutory Interpretations?	(4) Minimum Violation for Agency Rule To Be Arbitrary and Capricious	(5) "Supermandate" To Override Enabling Statutes?
Original	Yes	Explicitly	Yes	chosen agency rule is outside permissible interpretive range	Yes
Judiciary Committee	Yes	Explicitly	Yes	any interpretation is misclassified as permissible or impermissible	Yes
Governmental Affairs Committee	Yes	No	No	chosen agency rule is contrary to clear Congressional intent	No
Amendment 1487	Yes	Implicitly	Yes	chosen agency rule is outside permissible interpretive range	Unclear

116. Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1073 (1995).

117. *See supra* notes 22-29 and accompanying text.

118. *See infra* Part IV.

The column on cost-benefit analysis shows the greatest commonality among the four statutes. Although cost-benefit analysis is not the focus of this Note, it deserves mention here because most of the reform proposals require that agency statutory interpretations be made in accordance with a cost-benefit analysis in order to be valid. The second column shows which versions of Senate Bill 343 address statutory construction by agencies—the *Chevron* issue—and whether they do so explicitly or implicitly. The third column shows which proposals create a new requirement for agencies to classify conceivable interpretations of an ambiguous enabling statute as being either "permissible" or "impermissible."[119] The column explaining when a court will find an agency interpretation of its statute to be "arbitrary and capricious" describes the *minimum* (but not only) interpretive violation an agency could commit that would force a court to invalidate an agency's rule. The last column shows which versions of Senate Bill 343 contain a "supermandate" provision whereby any restrictions on statutory construction in the revised APA would arguably forbid otherwise permissible interpretations by an agency of a statute it administers.[120] Each of these issues will be addressed in more detail in the examination of the four regulatory reform statutes that follows.

A. *The Original Bill: Leveling the Canons of Statutory Construction at Administrative Agencies*

The original version of Senate Bill 343 attempted to deal with the confusion in *Chevron* jurisprudence, but ultimately failed because of its reliance on "traditional principles of statutory construction"[121] as a means of defining the reviewing court's job. Although this version would have eliminated the reading of *Chevron* that gives the most deference to agencies, it retains and even codifies the less deferential version of *Chevron* that relies heavily on canons of statutory construction. The lessons to be learned from this statute are largely negative ones—the problems with agency statutory construction are not likely to be eliminated simply by choosing one interpretation of *Chevron* over another.

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119. *See infra* subpart III(B) for a discussion of the adverse implications of requiring an agency to describe all possible interpretations of a statutory ambiguity in such a manner.

120. It is not always clear whether a particular regulatory reform statute creates a supermandate. For example, in the case of Amendment 1487, a further revision was offered on the Senate floor to clarify that the bill did not contain a supermandate. *See* 141 CONG. REC. S9697 (daily ed. July 11, 1995). However, the initial version of Amendment 1487 discussed in this Note could be interpreted as providing a supermandate. *See id.* at S9542 (daily ed. June 30, 1995) (containing a provision that the rulemaking requirements in a revised APA § 553 apply to "every rulemaking" with only narrow exceptions). Thus, I have classified Amendment 1487 as "unclear" for its supermandate classification. One possible reading of the text, described in subpart III(D), *infra*, is that there is a supermandate but that it has prospective application only. As will be shown in Part IV, *infra*, a supermandate is not necessarily a disaster for agency rulemaking if its application is narrowly tailored.

121. *Id.* at S2059 (daily ed. Feb. 2, 1995) (quoting § 628 of the introduced version of S. 343).

For present purposes, the most relevant part of the original version of Senate Bill 343 was the proposed addition of section 628, a completely new section, to the APA.[122] The latter part of subsection (a), along with subsection (b), states the opposite sides of a tautology: an agency, like a court, must give effect to the clearly expressed intent of Congress by upholding correct statutory interpretations and rejecting erroneous ones. However, the fact that both subsections require the court to use "traditional principles of statutory construction" to determine when Congress "clearly" intends something seems to be a tip of the hat to *Chevron*'s reference to "traditional tools of statutory construction."[123]

Subsection (c) is the heart of this statute. It sets forth three requirements for an agency interpretation of its enabling statute to be valid. First, the agency must have "correctly identified the range" of possible interpretations; second, the interpretation chosen must be within that range; and third, the chosen interpretation must, by process of "reasoned decisionmaking," be the one that "maximizes net benefits" to society.[124]

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122. The proposed § 628, in its entirety, reads:

> § 628. Standard for review of agency interpretations of an enabling statute
>
> (a) In reviewing a final agency action under section 706 of this title, or under a statute that provides for review of a final agency action, the reviewing court shall affirm the agency's interpretation of the statute granting authority to promulgate the rule if, applying traditional principles of statutory construction, the reviewing court finds that the interpretation is clearly the interpretation of the statute intended by Congress.
>
> (b) If the reviewing court, applying traditional principles of statutory construction, finds that an interpretation other than the interpretation applied by the agency is clearly the interpretation of the statute intended by Congress, the reviewing court shall find that the agency's interpretation is erroneous and contrary to law.
>
> (c) (1) If the reviewing court, applying established principles of statutory construction, finds that the statute gives the agency discretion to choose from among a range of permissible statutory constructions, the reviewing court shall affirm the agency's interpretation where the record on review establishes that—
>
> (A) the agency has correctly identified the range of permissible statutory constructions;
>
> (B) the interpretation chosen is one that is within that range; and
>
> (C) the agency has engaged in reasoned decisionmaking in determining that the interpretation, rather than other permissible constructions of the statute, is the one that maximizes net benefits to society.
>
> (2) If an agency's interpretation of a statute cannot be affirmed under paragraph (1), the reviewing court shall find that the agency's interpretation is arbitrary and capricious.

S. 343, 104th Cong. § 628, 141 CONG. REC. S2059 (daily ed. Feb. 2, 1995).

123. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 n.9 (1984).

124. S. 343, 104th Cong. § 628(c)(1), 141 CONG. REC. S2059 (daily ed. Feb. 2, 1995).

If any of these three requirements are not met, then the interpretation will be found "arbitrary and capricious."[125] Under longstanding case law, when a court finds an agency's decision—whether the agency made the decision by rulemaking or adjudication—to be arbitrary and capricious, the remedy is that the court will remand the agency's wrongly considered decision back to the agency for proper consideration.[126]

The fact that all three requirements must be met raises the possibility of huge new procedural hurdles for agency decisionmaking without the benefit of increasing certainty of outcome. Under the present APA and the *Chevron* doctrine, an agency must first determine whether an interpretive ambiguity exists in its statute. Under subsection (c), an agency must do that and then also proceed to identify "the range of permissible statutory constructions," presumably by using the same "established principles of statutory construction"[127] that a reviewing court would subsequently use. The agency must then conduct a cost-benefit analysis of *each* competing construction and choose the one "that maximizes net benefits to society." Under (c)(1), moreover, evidence that all of these steps have been followed must appear in "the record" that is before the court. Only then is the court allowed by this provision to affirm the agency's interpretation of its statute. In effect, this version of Senate Bill 343 ratifies the existing uncertainty in the Stevens reading of *Chevron* that relies upon canons of statutory construction by making them the first and foremost method to discern "clear" congressional intent. It also duplicates the uncertainty by requiring the agency to engage in a similarly expansive and uncertain analysis.

The message to agencies under this statute is clear—hire more administrative lawyers and stock up on paper. In the long-established rule of administrative law set forth in *SEC v. Chenery Corp.*,[128] an agency may not rely upon post-hoc rationalizations for an action that is challenged

125. *Id.* § 628(c)(2), 141 CONG. REC. S2059 (daily ed. Feb. 2, 1995).

126. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 46 (1983) (holding that a decision by the Department of Transportation to rescind a rule requiring passive restraints in automobiles was arbitrary and capricious, and that "further consideration of the issue by the agency is therefore required"); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419-20 (1971) (declaring that if the district court finds the decision to locate a federally funded highway was arbitrary and capricious, then the district court can remand the decision to the Department of Transportation).

127. The reference to "traditional principles of statutory construction" in subsections (a) and (b) and the reference to "established principles of statutory construction" in subsection (c)(1) are eerily similar to the Supreme Court's endorsement of "traditional tools of statutory construction" in the infamous footnote nine of *Chevron*. *Chevron*, 467 U.S. at 843 n.9. The multiplicity of opinions in the *Sweet Home* litigation, discussed in subpart II(B), *supra*, shows the uncertainty inherent in such an approach.

128. 318 U.S. 80, 95 (1943).

in court.[129] Rather, under *Chenery*, the rationale for a final action must exist somewhere in the agency's prelitigation files.[130] The original version of Senate Bill 343 does not appear to modify or abrogate the *Chenery* rule, yet it adds significant new requirements for an agency to document its legal rationale. Not only must an agency identify a permissible statutory construction to justify its action[131] (as it must do now), but it must also identify all of the other permissible interpretations that it did *not* use.[132] Section 628 also makes reference in subsection 628(c)(1)(C) to cost-benefit analysis and requires that the record contain evidence that "the agency has engaged in reasoned decisionmaking" in picking an interpretation that arguably "maximizes net benefits to society."[133] Creating a comprehensive list of permissible constructions for every agency action built upon a statutory ambiguity would surely require a massive number of lawyer hours at the agency as well as proof on paper of what those hours produced. The debate over the use of cost-benefit analysis in the regulatory process is beyond the scope of this Note. It is safe to say in this context, however, that it would put yet additional strains on agency resources. The main source of interpretive difficulties in this original version of Senate Bill 343 is nonetheless its endorsement of "established principles of statutory construction" for the reviewing courts.[134]

The widely differing opinions in *Sweet Home*, for example, would remain largely untouched by the original bill, and that is precisely its problem. Although this version of Senate Bill 343 does address the *Chevron* issue as a noteworthy part of regulatory reform, its biggest downfall is that it codifies a terribly indeterminate scope of review grounded in the all-too-malleable canons of statutory construction.

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129. *Id.* at 95.

130. *See id.* at 87 ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.").

131. *See* S. 343, 104th Cong. § 628(c)(1)(B), 141 CONG. REC. S2059 (daily ed. Feb. 2, 1995).

132. *See id.* § 628(c)(1)(A), 141 CONG. REC. S2059 (daily ed. Feb. 2, 1995).

133. *See id.* § 628(c)(1)(B)-(C), 141 CONG. REC. S2059 (daily ed. Feb. 2, 1995).

134. This version of Senate Bill 343 shares a characteristic with the Judiciary Committee's version of the bill, a characteristic that is especially problematic in the latter version: the possibility of an agency misclassifying as permissible or impermissible a statutory interpretation that is neither required nor actually used. In other words, an agency might choose a permissible interpretation of its statute, yet incorrectly classify an unused interpretation and on that basis alone have its rule remanded. *See infra* subpart III(B). That problem is not dealt with here because I believe that it is overshadowed in the original version of S. 343 by that bill's endorsement of established principles of statutory construction. The Judiciary Committee bill contains no similar endorsement, so more emphasis is given to the misclassification problem with that version.

B. *The Judiciary Committee: Statutory Interpretation as Apples and Oranges*

Like the original bill, the Judiciary Committee's version of Senate Bill 343[135] recognized the problem of conflicting interpretations of the *Chevron* doctrine and sought to avoid "blank check" deference to government agency interpretations of law.[136] Unlike the original bill, however, it had the virtue of not directing agency and court attention to canons of statutory construction. Rather, agencies were directed to engage in a particularized process of statutory interpretation that was geared toward labeling all conceivable interpretations as permissible or impermissible under the agency statute.[137] Although this Note will later recommend that agency statutory interpretations be channelled into a special process as is done in this version of the bill,[138] the particular process used here does more harm than good for at least two reasons. First, the statutory interpretation and review process is unnecessarily intertwined with the cost-benefit analysis provisions of the bill. Second, the requirement that agencies identify and then classify *all* possible interpretations as permissible or impermissible is a waste of intellectual resources that channels effort into an exercise developing policies that may not have even the slightest constituency supporting them.[139]

Given the Judiciary Committee's subject-matter expertise, it is not surprising that the committee focused a substantial portion of its report on judicial review.[140] The committee endorsed the "landmark" *Chevron* decision as the appropriate standard for how courts should review agency interpretations of their enabling statutes, but expressed a concern about some interpretations of the doctrine.[141] The committee particularly derided deference advocates who, in the report's words, saw *Chevron* "as if it were a blank check for an agency to adopt any interpretation that it

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135. The Comprehensive Regulatory Reform Act of 1995 was referred to the Senate Judiciary Committee on February 2, 1995. *See* 141 CONG. REC. S2068 (daily ed. Feb. 2, 1995). After hearings and testimony before both the Subcommittee on Administrative Oversight and the full committee, the bill was reported favorably to the full Senate on April 26, 1995. *See* S. REP. NO. 104-90, at 35-37 (1995) (describing the legislative history of S. 343 in the Senate Judiciary Committee).

136. S. REP. NO. 104-90, at 107.

137. *See* S. 343, 104th Cong. § 706(c)(2)(A)(i), S. REP. NO. 104-90, at 22 (1995) (instructing courts to hold arbitrary and capricious an agency action in which the agency "improperly classified" any interpretation as being permissible or impermissible).

138. *See infra* Part IV.

139. *See infra* subpart IV(B) (discussing the value of requiring a minimal constituency as a threshold for when to mandate agency consideration of a plausible statutory interpretation).

140. *See* S. REP. NO. 104-90, at 101-12.

141. *See id.* at 106-09.

sees fit."[142] Such an interpretation, it said, "ignores the principle, laid down in *Marbury v. Madison*, and applied in later cases over almost two centuries, that the judiciary has the ultimate authority to interpret whether the actions of the executive branch are in accord with the law."[143] Instead, the proper role of the judiciary is to examine the "reasonableness" of an agency's statutory interpretation as a matter of policy.[144]

The committee thought that the facts of the *Chevron* case itself were an ideal example of a situation that calls for judicial deference. The issue in *Chevron* was the Environmental Protection Agency's (EPA) interpretation of the term "stationary source" as used in the Clean Air Act Amendments of 1977.[145] The EPA adopted a "bubble" definition under which all pollution-emitting devices would be grouped together for initial permitting and permit-modification purposes, while an environmental group claimed that the statute required the EPA to adhere to its prior definition of "stationary source" under which any increase in emissions by a particular device, even if offset by a reduction elsewhere in the plant, would require a permit or a modification.[146] The Court held that the EPA's second definition was entitled to substantial deference.[147] After

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142. *Id.* at 107. The Judiciary Committee drove home its disapproval of the strongly deferential reading of *Chevron* by critiquing a passage out of one of the most prominent administrative law treatises:

> An example of what, in the committee's view, is a misreading of the *Chevron* doctrine is the second sentence in the following passage: "Under *Chevron*, an agency's construction of a statutory provision it is responsible to implement is binding on a court if it is a 'permissible construction of the statute.' It is a 'permissible construction' unless Congress has 'unambiguously' addressed the 'precise question' in a manner inconsistent with the agency's construction."

Id. at 108 (quoting 1 DAVIS & PIERCE, *supra* note 60, § 6.3, at 235 (3d ed. 1994) (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984))). If the committee report is to be taken seriously as an interpretive guide, then this version of S. 343 would abrogate one of the most popular readings of *Chevron*.

143. *Id.* at 107.

144. *Id.* As the Judiciary Committee explained:

> The court must determine in all cases whether the agency's interpretation is permissible within the bounds of the discretion that Congress has delegated to the agency in the statute. Even where Congress has not directly spoken to the issue, certain agency interpretations may not, in the reviewing court's construction of the parameters of the statute, be a "reasonable policy choice for the agency to make." *Chevron*, 467 U.S. at 845. This "reasonableness" test reflects a proper degree of judicial deference to the agency to which Congress has delegated authority, but it is not absolute deference because it is grounded in a statute; it is not an abdication of the judiciary's responsibility under the Constitution to interpret the laws that Congress makes.

Id.

145. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 839-40 (1984) (reviewing the EPA interpretation of "statutory source" as used in the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 129, 91 Stat. 685, 747 (1977)).

146. *Id.* at 857-59.

147. *Id.* at 866.

agreeing with the Supreme Court's "step-one" analysis that Congress had not directly addressed the issue,[148] the Judiciary Committee described the "step-two" test as hinging on the process that the agency used to reach its policy decision:

> The basis of the Court's decision in the second step was its independent "examination of the legislation and its history." Only after conducting that examination, and reviewing the agency's *explanation* for its choice and its rejection of alternative interpretations, did the Court conclude that the Administrator's actions represented "a reasonable policy choice for the agency to make."[149]

Thus, the committee believed that the agency should have a specific burden for placing materials in its records that deal with statutory interpretation, and must then explain how it used them. If the reviewing court, on the basis of the agency paper trail, cannot find that an agency's decision was a reasonable accommodation of the congressional policy goals manifested by the enabling statute, then that decision is not entitled to *Chevron* deference. Indeed, the decision is "arbitrary and capricious" as a matter of law, and the remedy for arbitrary and capricious agency action is a remand to the agency for further consideration.[150]

The most relevant and significant parts of the Judiciary Committee's version of Senate Bill 343 are its amendments to sections 553[151] and

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148. In the Judiciary Committee's words,

> After determining that Congress had not "directly spoken to the precise question at issue," [*Chevron*, 467 U.S.] at 842, the Court concluded that "the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests" since "the regulatory scheme is technical and complex, the agency considered the matter in *a detailed and reasoned fashion, and the decision involves reconciling conflicting policies*." *Id.* at 865 (footnotes omitted) (emphasis added by the committee).

S. REP. NO. 104-90, at 107-08 (1995).

149. *Id.* at 108 (emphasis in original) (quoting *Chevron*, 467 U.S. at 845).

150. *See supra* note 126 and accompanying text.

151. The relevant parts of § 553, as amended by this version, read as follows:

> § 553. Rulemaking
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> . . . .
>
> (c) . . . .
>
> (4) An agency shall publish any final rule it adopts in the Federal Register, together with a concise statement of the basis and purpose of the rule and a statement of when the rule may become effective. The statement of basis and purpose shall include—
>
> . . . .
>
> (C) (i) an explanation of whether the specific statutory interpretation upon which the rule is based is expressly required by the text of the statute; or
>
> (ii) if the specific statutory interpretation upon which the rule is based is not expressly required by the text of the statute, an explanation that the interpretation is within the range of permissible interpretations of the statute as

706[152] of the APA. Section 553(c)(4) contemplates that an agency will conduct a statutory-construction analysis of all of the possible interpretations of the statute upon which an agency is basing its rule. Under section 553(c)(4)(C), the agency is required to conduct its own *Chevron* step one to determine whether Congress "expressly required" the interpretation given by the agency. If Congress was less than clear on the matter, the agency must explain how its interpretation falls within the range of permissible constructions of the statute. Moreover, the agency must justify its rejection of other possible statutory constructions, or at least the ones "proposed in comments to the agency." Notably, all of these findings are to be published in the *Federal Register*. Although this would add substantial bulk to that publication by expanding the already lengthy preambles that agencies now publish along with their proposed and final rules,[153] it would have the benefit of putting the agency's interpretive rationale in a widely distributed, easily accessible publication for all to see.

> identified by the agency, and why the agency has rejected other interpretations proposed in comments to the agency . . . .

S. 343, 104th Cong. § 553, S. REP. No. 104-90, at 2-3 (1995).

152. The relevant portions of § 706, as amended by this version, read as follows:

> § 706. Scope of Review
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> . . . .
>
> (c) In reviewing an agency interpretation of a statute governing the authority for an agency action, including agency action taken pursuant to a statute that provides for review of final agency action, the reviewing court shall—
>
> (1) hold erroneous and unlawful—
>
> (A) an agency interpretation that is other than the interpretation of the statute clearly intended by Congress; or
>
> (B) an agency interpretation that is outside the range of permissible interpretations of the statute; and
>
> (2) hold arbitrary, capricious, or an abuse of discretion—
>
> (A) an agency action as to which the agency—
>
> (i) has improperly classified an interpretation as being within or outside the range of permissible interpretations; or
>
> (ii) has not explained in a reasoned analysis why it selected the interpretation and why it rejected other permissible interpretations of the statute; or
>
> (B) in the case of agency action subject to chapter 6, an interpretation that does not give the agency the broadest discretion to develop rules that will satisfy the [cost-benefit analysis] decisional criteria of section 624.
>
> (d) Notwithstanding any other provision of law, the provisions of this subsection shall apply to, and supplement, the requirements contained in any statute for the review of final agency action which is not otherwise subject to this subsection.

Id. § 706, S. REP. No. 104-90, at 21-22 (1995).

153. *See, e.g.*, Land Disposal Restrictions, 61 Fed. Reg. 2337, 2337-75 (1996) (proposing amendments to the Environmental Protection Agency's hazardous waste land disposal restrictions). The preamble explaining the basis and purpose of the rule filled 33 pages while the text of the rule itself filled only 5 pages.

The proposed section 706(c)(1)(A) is analogous to step one of *Chevron* in that it requires the reviewing court to invalidate a statutory interpretation "that is other than the interpretation of the statute clearly intended by Congress." Section 706(c)(1)(B) parallels step two of *Chevron* by invalidating a construction "that is outside the range of permissible interpretations of the statute." The main virtue of these subsections over the current *Chevron* doctrine is that they do not require or endorse "traditional tools of statutory construction."[154] The most noteworthy problem with this version is section 706(c)(2). After an agency has developed a comprehensive list of possible interpretations (as is required under both this version of the bill and the original version), it must then go a step further than the original bill required and label each statutory interpretation as either "permissible" or "impermissible," subject to an "arbitrary, capricious, or an abuse of discretion" review standard.[155] As mentioned previously, the finding by a court that an agency action is arbitrary and capricious requires that the agency's action, whether the result of rulemaking or adjudication, be remanded to the agency for "better" reasoning than the agency conducted the first time around.[156] Section 706(c)(2)(A) would require a remand if "the agency has improperly classified an interpretation as being within or outside the range of permissible interpretations," and it makes no difference whether the agency actually used the misclassified interpretation.[157] Thus, if an agency mistakenly classifies as "permissible" a particular interpretation that is actually "impermissible," but adopts a different, yet permissible interpretation in its rulemaking, any agency action based on the unquestionably permissible interpretation actually used by the agency must be found arbitrary and capricious and subject to remand. The "arbitrary and capricious" penalty would apply *regardless* of whether the interpretation actually used by the agency was valid in and of itself.

The members of the Judiciary Committee voting in the minority were highly critical of these provisions in the bill, voicing concern about "the undefined scope of policymaking authority we will blindly cede to the Federal courts . . . ."[158] They claimed that the bill would "actually require judges to be the 'judicial activists' many of the proponents . . . have decried over the years"[159] and cited a comment from Professor Sunstein's testimony before the committee asserting that Senate Bill 343

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154. *See supra* notes 52-59 and accompanying text.

155. S. 343, 104th Cong. § 706(c)(2), S. REP. NO. 104-90, at 22 (1995).

156. *See supra* note 126 and accompanying text.

157. *See* S. 343, 104th Cong. § 706(c)(2)(A), S. REP. NO. 104-90, at 22 (1995).

158. S. REP. NO. 104-90, at 143.

159. *Id.*

was a "Full Employment Act for both Lawyers and Accountants."[160] Perhaps trying to drive home their point by sheer quantity, the committee Democrats also attached an appendix entitled "120 Items to Litigate Under S. 343."[161] Included among the 120 items were two questions squarely related to "the *Chevron* problem" of agency statutory interpretation, and they are illustrative of the new directions that *Chevron* litigation might move toward under this version of Senate Bill 343:

> 57. If statute ambiguous, did agency correctly identify range of permissible statutory constructions?
> 58. Is agency interpretation of statute within permissible range?[162]

Both of these questions, though awkwardly phrased, nonetheless go directly to the problem of agency interpretive classification errors.

The scope of review provisions in the Judiciary Committee's bill do not present a practical solution to the *Chevron* problem. Instructing agencies to classify all conceivable statutory interpretations as permissible or impermissible without regard to the fact that some interpretations may have no constituency is a waste of agency resources, and allowing post-hoc challenges to otherwise valid rules on the basis of minor interpretive misclassifications is an equal waste of judicial resources. Intertwining *Chevron* review with cost-benefit analysis unnecessarily complicates an already difficult problem with additional controversy.[163] Nonetheless, this bill contains useful concepts that will resurface later. Specifically, the ideas of a special agency process for statutory interpretation[164] and a legislatively defined active role for the reviewing court[165] reappear in more refined forms in the proposals at the end of this Note.

C. *The Governmental Affairs Committee: Driving Past the* Chevron *Station*[166]

Unlike the other three major versions of Senate Bill 343, the substitute bill offered by the Governmental Affairs Committee made no reference at

160. *Id.* at 157 (quoting Professor Cass Sunstein).

161. *Id.* at 159.

162. *Id.* at 160.

163. The relative merits and detriments of cost-benefit analysis are beyond the scope of this Note. For a summary of proposals in which cost-benefit analysis came up in the 104th Congress, see Robert M. Simon, *Issues in Risk Assessment and Cost-Benefit Analysis and their Relationship to Regulatory Reform*, 63 U. CIN. L. REV. 1611 (1995).

164. *See infra* subpart IV(A).

165. *See infra* subpart IV(D).

166. As best as I have been able to determine, this pun was first used in Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984.

all to the *Chevron* problem and would thus presumably keep the muddled case law intact.[167] However, even this *Chevron*-less form of regulatory reform contains some key lessons for improving the scope of judicial review for agency-interpreted statutes. The lessons come primarily from a provision that expressly limits the applicability of the APA amendments.[168]

This version adds other new provisions of the APA that, at first, could seem to inject a new variable into step one of the *Chevron* analysis. Like the original and Judiciary Committee versions of Senate Bill 343, the Governmental Affairs bill elevates cost-benefit analysis to a higher level of concern in the rulemaking process.[169] If enacted, these provisions could imply that the "unambiguously expressed intent of Congress"[170] component of the first step of *Chevron* for most agency-administered statutes should be construed as including cost-benefit analysis. Such a legislatively endorsed canon of construction, if true, would have a tremendous effect on *Chevron* deference, as it would open the door for courts to eviscerate the second, deferential step of *Chevron*. Any rule that did not satisfy the reviewing court as properly weighing costs and benefits would be deemed contrary to congressional intent and remanded to the agency. Ultimately, however, that reading of the cost-benefit provisions would fail because this version of the bill contains specific limiting language that prevents its cost-benefit requirements from overriding the specific provisions of an enabling statute. Both the cost-benefit analysis provisions and the important limiting language are in the proposed section 622.[171]

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167. The version of Senate Bill 343 produced by the Governmental Affairs Committee received, at least initially, the benefit of broad bipartisan support. *See* S. REP. NO. 104-89, at 10 (1995). This version actually substituted the entire text of Senate Bill 291, a regulatory reform bill introduced by committee chair Senator William Roth, in place of the original draft of Senate Bill 343 that was referred from the Senate floor. *Id.* The net result of this maneuver was that the committee reported favorably upon the text of Roth's bill twice. *Id.*

168. *See* S. 343, 104th Cong. § 622(h), S. REP. NO. 104-89, at 78 (1995).

169. *See id.* §§ 621-626, S. REP. NO. 104-89, at 73-82 (1995).

170. Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc., 467 U.S. 837, 843 (1984).

171. The relevant portions of § 622, a new section proposed by this version, read as follows:

§ 622. Rulemaking cost-benefit analysis

. . . .

(d) (1) When the agency publishes a final major rule, the agency shall also issue and place in the rulemaking file a final cost-benefit analysis, and shall include a summary of the analysis in the statement of basis and purpose.

(2) Each final cost-benefit analysis shall contain—

. . . .

(B) if not expressly or implicitly inconsistent with the statute under which the agency is acting, a reasonable determination, based upon the rulemaking file considered as a whole, whether—

(i) the benefits of the rule justify the costs of the rule; and

Section 622(h) is the most concise statement of this rule of nondisplacement, but other provisions demonstrate that it is a thread running throughout the text of the bill.[172] In a single stroke, it prevents cost-benefit analysis from becoming a supermandate that overlays every organic statute. The initially apparently restrictive power of section 622(d) would thus be to no avail in many specific statutory schemes.[173]

Therefore, although the Governmental Affairs Committee bill does not address the *Chevron* issue, it nevertheless contains a valuable reminder that any type of regulatory reform, whether involving agency statutory interpretations or not, should be limited in scope. Careful limitation of the applicability of otherwise sweeping legislation will increase its functionality—not to mention its chances of political survival.[174] This Note later argues that judicial review of agency statutory interpretations should have an explicitly defined scope[175] and that any reform of the *Chevron* doctrine should have prospective applicability only.[176] The model for these limitations is the clear nondisplacement provision in this version of Senate Bill 343 that prevents it from being a supermandate.

D. *Amendment 1487: Using a Defined Record*

Generally, Amendment 1487 omits the stringent interpretive classifications that the Judiciary Committee version includes, but it does not ignore the *Chevron* problem as the Governmental Affairs Committee did.[177] For

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> (ii) the rule will achieve the rulemaking objectives in a more cost-effective manner than the alternatives described in the rulemaking . . . .
>
> . . . .
>
> (h) The requirements of this subchapter shall not alter the criteria for rulemaking otherwise applicable under other statutes.

S. 343, 104th Cong. § 622, S. REP. NO. 104-89, at 75-78 (1995).

172. *See, e.g.*, *id.* § 622(d)(2)(B), S. REP. NO. 104-89, at 77 (1995) (requiring cost-benefit analysis only "if not expressly or implicitly inconsistent with the statute under which the agency is acting"); *see also* S. REP. NO. 104-89, at 69 (statement by Democratic members of the committee) ("The bill is fair because, while requiring agency analysis and certification of whether the benefits of the rule justify the costs, it does not override the statutory scheme upon which the rule is based.").

173. One of the most notable unaffected statutes would be the Endangered Species Act, because the Supreme Court has already determined that it actually *prohibits* the use of cost-benefit analysis in the agency decisionmaking process. *See* TVA v. Hill, 437 U.S. 153, 183-88 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.").

174. *Compare* S. REP. NO. 104-89, at 1 (describing the unanimous bipartisan support of the Governmental Affairs Committee members for its version of S. 343), *with* 141 CONG. REC. S10,400 (daily ed. July 20, 1995) (statement by Sen. Dole) (conceding that the final version of S. 343 fell 2 votes short of the 60 needed for cloture).

175. *See infra* subpart IV(B).

176. *See infra* subpart IV(E).

177. The version of Senate Bill 343 most debated on the Senate floor was Amendment 1487. It was, with a few modifications, the version of the bill being considered when the vote to close debate fell two votes short on July 20, 1995. *See* 141 CONG. REC. S10,399-400 (daily ed. July 20, 1995).

present purposes, the most notable features of this version of the bill are (1) its creation of special parts of the rulemaking record that deal with statutory interpretation, and (2) its placement on the general public of the responsibility for suggesting statutory interpretations in opposition to the one suggested by the agency in its proposed rule. Both of these concepts return in the reform proposed at the end of this Note.[178]

As it relates to the *Chevron* doctrine, the most relevant parts of Amendment 1487 are its changes to sections 553 and 706 of the APA. The rulemaking record provisions in the proposed section 553[179] reflect a

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The vote of 58 yeas and 40 nays fell 2 votes short of the 60 needed to close debate. *See id.* The vote fell almost entirely along party lines, with Republicans supporting the measure 54-0, and Democrats opposing it 4-40. *See id.* In addition to considering the Judiciary and Governmental Affairs Committee proposals, this amendment had significant input from Senator J. Bennett Johnston, a Louisiana Democrat. *See id.* at S10,400 (statement by Sen. Dole) (singling out Senator Johnston for his "tireless efforts" in creating a more broadly acceptahle bill). In his postmortem on the failed cloture vote, Johnston gave much credit to the Administrative Law Committee of the American Bar Association for the final version of Senate Bill 343. *See id.* at S10,505 (daily ed. July 21, 1995). Given this input, Amendment 1487 may also be the version of the bill that best represented the ideas of the administrative law bar.

178. *See infra* subparts IV(A-B).

179. The relevant portions of § 553, as amended by this version of S. 343, are as follows:

§ 553. Rulemaking

. . . .

(b) NOTICE OF PROPOSED RULEMAKING.—General notice of proposed rulemaking shall be published in the Federal Register, unless all persons subject thereto are named and either personally served or otherwise have actual notice of the proposed rulemaking in accordance with law. Each notice of proposed rulemaking shall include—

. . . .

(3) a succinct explanation of the specific statutory basis for the proposed rule, including an explanation of—

(A) whether the interpretation is clearly required by the text of the statute; or

(B) if the interpretation is not clearly required by the text of the statute, an explanation that the interpretation is within the range of permissible interpretations of the statute as identified by the agency, and an explanation why the interpretation selected by the agency is the agency's preferred interpretation;

. . . .

(g) STATEMENT OF BASIS AND PURPOSE.—An agency shall publish each final rule it adopts in the Federal Register, together with a concise statement of the basis and purpose of the rule and a statement of when the rule may become effective. The statement of basis and purpose shall include—

. . . .

(3) a succinct explanation of whether the specific statutory basis for the rule is expressly required by the text of the statute, or if the specific statutory interpretation upon which the rule is based is not expressly required by the text of the statute, an explanation that the interpretation is within the range of permissible interpretations of the statute as identified by the agency, and why the agency has rejected other interpretations proposed in comments to the agency;

. . . .

substantial change from current law. Section 553(b) of this proposal requires an agency to publish a "notice of proposed rulemaking" in the *Federal Register*.[180] While this is a common practice in current notice and comment rulemaking, this statute also introduces the step-one *Chevron* concept into section 553(b)(3)(A) by requiring publication of an agency determination of "whether the interpretation is clearly required by the text of the [agency-administered] statute."[181] An extended step two of *Chevron* is created by the requirement in section 553(b)(3)(B) that an agency determine whether its chosen interpretation "is within the range of permissible interpretations of the statute as identified by the agency, and an explanation why the interpretation selected by the agency is the agency's preferred interpretation."[182] This language calls to mind the classification scheme of the Judiciary Committee, but there is a substantial difference. While this text seems to presume the development of an agency list of permissible and impermissible interpretations, the agency need only *publish*

> (j) RULEMAKING FILE.—
>
> (1) The agency shall maintain a file for each rulemaking proceeding conducted pursuant to this section and shall maintain a current index to such file.
>
> (2) Except as provided in subsection (k), the file shall be made available to the public not later than the date on which the agency makes an initial publication concerning the rule.
>
> (3) The rulemaking file shall include—
>
> (A) the notice of proposed rulemaking, any supplement to, or modification or revision of, such notice, and any advance notice of proposed rulemaking;
>
> (B) copies of all written comments received on the proposed rule;
>
> (C) a transcript, summary, or other record of any public hearing conducted on the rulemaking;
>
> (D) copies, or an identification of the place at which copies may be obtained, of factual and methodological material that pertains directly to the rulemaking and that was considered by the agency in connection with the rulemaking, or that was submitted to or prepared by or for the agency in connection with the rulemaking; and
>
> (E) any statement, description, analysis, or other material that the agency is required to prepare or issue in connection with the rulemaking, including any analysis prepared or issued pursuant to chapter 6 [provisions relating to cost-benefit analysis, risk assessment, and statutorily authorized executive oversight of agency actions].
>
> The agency shall place each of the foregoing materials in the file as soon as practicable after each such material becomes available to the agency.

S. 343, 104th Cong. § 553, 141 CONG. REC. S9542-43 (daily ed. June 30, 1995).

180. *Id.* § 553(b), 141 CONG. REC. S9542 (daily ed. June 30, 1995).

181. *Id.* § 553(b)(3)(A), 141 CONG. REC. S9542 (daily ed. June 30, 1995).

182. *Id.* § 553(b)(3)(B), 141 CONG. REC. S9542 (daily ed. June 30, 1995).

a finding at the initial rulemaking stage that its own interpretation is permissible.

Subsection (g) of section 553 defines another *Federal Register* document for the rulemaking agency to produce and publish: "a concise statement of the basis and purpose" of the *final* rule.[183] Like subsection (b) does for proposed rules, this subsection incorporates *Chevron* analysis into the promulgation of final rules. The step-one finding of whether a certain statutory interpretation is "expressly required" is the same as for proposed rules. The take on step two of *Chevron* is quite different: if the agency finds that a particular interpretation is not expressly required, then it must develop and publish "an explanation that the interpretation is within the range of permissible interpretations of the statute as identified by the agency, and why the agency has rejected other interpretations *proposed in comments to the agency.*"[184] The fact that the agency need only respond to statutory interpretations suggested by commenters prior to the final rulemaking has the effect of shifting the true burden of developing the list of permissible constructions from the agency to those persons who would later challenge the agency's proposed rule. Unlike the Judiciary Committee version, Amendment 1487 does not impose upon the agency the onerous and unnecessary task of developing, classifying, and explaining away *every* possible statutory interpretation where ambiguity exists.[185]

Subsection 553(j), defining the parameters of an agency file for each rulemaking proceeding, is what makes the subsequent judicial review of statutory interpretations possible, as a practical matter.[186] Subsection (j)(3) requires inclusion of the notice of proposed rulemaking, copies of all written comments (thus including suggested statutory interpretations), and "any statement, description, analysis, or other material that the agency is required to prepare or issue in connection with the rulemaking."[187] This record is the real key to the judicial review provisions of Amendment 1487 because it defines precisely what a reviewing court may look at when a rulemaking is challenged. Table 3 summarizes the most important components of the rulemaking record.

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183. *Id.* § 553(g), 141 CONG. REC. S9542 (daily ed. June 30, 1995).

184. *Id.* § 553(g)(3), 141 CONG. REC. S9542 (daily ed. June 30, 1995) (emphasis added).

185. The Judiciary Committee proposal also contains language requiring response to the specific comments proposed to the agency. *See* S. 343, 104th Cong. § 553(c)(4)(C), S. REP. NO. 104-90, at 3 (1995). However, my discussion of the Judiciary Committee bill focuses on its requirement that the agency classify all potential statutory interpretations as permissible or impermissible. *See supra* subpart III(B).

186. *See* S. 343, 104th Cong. § 553(j), 141 CONG. REC. S9543 (daily ed. June 30, 1995).

187. *Id.* §§ 553(j)(3)(E), 553(j)(3)(A)-(B), 141 CONG. REC. S9543 (daily ed. June 30, 1995).

TABLE 3
The Rulemaking Record Under Amendment 1487

Statutory Authority	Published in *Federal Register*?	Contents of the Record
§ 553(b)	Yes	"Notice of proposed rulemaking" with explanation of the agency's interpretation as either *required* or *permissible*.
§ 553(g)	Yes	"Concise statement of basis and purpose" of the final rule, explaining why the agency has rejected other interpretations proposed in comments to the agency.
§ 553(j)(3)(B)	No	Copies of all written comments.
§ 553(j)(3)(C)	No	Transcript, summary, or other record of public hearing on the rulemaking.
§ 553(j)(3)(D)	No	Factual or methodological materials relied upon in creating the rule, or where to locate such materials.
§ 553(j)(3)(E)	No	Materials prepared by the agency for cost-benefit analysis, risk assessment, and statutorily authorized executive oversight.

Section 706[188] brings this new rulemaking record into the interpretive process as a more concrete source for determining "relevant questions of law."[189] This provision would allow a reviewing court to

188. The relevant portions of § 706, as amended by this version of Senate Bill 343, are as follows:

§ 706. Scope of Review

(a) To the extent necessary to reach a decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

. . . .

(D) without observance of procedure required by law;

. . . .

(F) without substantial support in the rulemaking file, viewed as a whole, for the asserted or necessary factual basis, in the case of a rule adopted in a proceeding subject to section 553;

. . . .

(b) In making the determinations set forth in subsection (a), the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Id. § 706, 141 CONG. REC. S9550 (daily ed. June 30, 1995).

189. *Id.* § 706(a), 141 CONG. REC. S9542 (daily ed. June 30, 1995).

set aside agency actions found to be "without substantial support *in the rulemaking file*, viewed as a whole, for the asserted or necessary factual basis, in the case of a rule adopted in a proceeding subject to section 553."[190] By this single stroke, section 706 judicial review expressly includes every item in the agency's mandated rulemaking file, including the explanations of statutory interpretation developed by the agency at the proposed and final rulemaking stages. Thus, Amendment 1487 has two steps of statutory analysis that stand in for a *Chevron* review of agency rulemakings:

(1) At the proposed rule stage, the agency must determine whether a specific interpretation of its enabling statute is required (§ 553(b)(3)(A)). If it is not, then the agency must develop an interpretation within the range of permissive interpretations and explain why that is its preferred choice (§ 553(b)(3)(B)); and
(2) At the final rule stage, if the statute was found to be ambiguous under step (1), then the agency must explain why its chosen statutory interpretation is preferable to other interpretations suggested by written comment (§ 553(g)(3)).

If a final rule is litigated, then the court would review the agency's statutory interpretation at steps (1) and (2) as published in the *Federal Register* in order to determine if the interpretation fits the asserted or necessary factual basis claimed by the agency under section 706(a)(2)(F).[191] The record before the court would contain the agency's justification of its statutory interpretation for its final rule and explanations of why its interpretation of the statute is better than those suggested in written comments. This last determination would be on the basis of provisions set out elsewhere in the bill, including cost-benefit analysis and risk assessment. Keep in mind, however, that a future regulatory reform bill dealing with the *Chevron* issue in a manner such as this would not necessarily need to have cost-benefit analysis and risk assessment as its determinative criteria. Reform of the *Chevron* doctrine need not be tied together with cost-benefit analysis.

The proposed section 625 contains language that could allow a separate process for dealing with rules that predate regulatory reform.[192]

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190. *Id.* § 706 (a)(2)(F), 141 CONG. REC. S9550 (daily ed. June 30, 1995) (emphasis added).

191. *See id.*, 141 CONG. REC. S9550 (daily ed. June 30, 1995).

192. Subsection (d) of § 625 contains the following relevant language:

§ 625. Jurisdiction and judicial review

. . . .

(d) STANDARDS FOR REVIEW.—In any proceeding involving judicial review under section 706 or under the statute granting the rulemaking authority, failure to comply with [the cost-benefit, risk analysis, and related statutory interpretation provisions] may be considered by the court solely for the purpose of determining whether the final agency action is arbitrary and

The question of whether an agency's statutory interpretation by rulemaking is valid under the new cost-benefit analysis scheme is subject to "judicial review under section 706 *or under the statute granting the rulemaking authority*."[193] The emphasized language in section 625 can be read to incorporate the "old" (present) APA and the specific agency's enabling statute as the basis for reviewing the existing and unamended regulations.[194] In other words, judicial review of the rule is to be under the statutes, including the APA, that granted the rulemaking authority *at the time* the rule was promulgated. The effect of this subsection is to limit the application of the new section 706—which requires a court to analyze the newly required rulemaking record developed under the new section 553—to only those regulations that have been promulgated or amended since the enactment of the regulatory reform bill.[195] Is this a strained reading of the statute? Probably. But the consequences of a court finding that the new provisions have retroactive application would be dire. The status of so many regulations could be called into question that the work of many agencies would grind to a halt. In such a situation, a court would probably latch onto *any* reasonable means of limiting the effect of the new APA to subsequent regulations.

Amendment 1487 faces the *Chevron* problem, but in a much more subtle way than any of its predecessors. It contains two interesting proposals for decreasing the uncertainty surrounding agency statutory interpretations. First, it creates a section in the rulemaking record that is expressly devoted to statutory interpretation. Second, it delegates responsibility to

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> capricious or an abuse of discretion (or unsupported by substantial evidence where that standard is otherwise provided by law).

Id. § 625(d), 141 CONG. REC. S9546 (daily ed. June 30, 1995).

193. *Id.*, 141 CONG. REC. S9546 (daily ed. June 30, 1995) (emphasis added).

194. *See* 5 U.S.C. § 553(c) (1994). The present section 553 is a generally applicable statute authorizing and defining the scope of agency rulemaking. Most of its procedural requirements, however, are not found directly in its text, but in an extensive case law overlay. *See generally* STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 572-73 (3d ed. 1992) (describing the judiciary's development of § 553 into an elaborate "paper hearing" process, requiring the agency to justify the rule with extensive documentation that will serve as a basis for judicial review).

195. While I believe that this interpretation of the proposed § 625(d) is correct, I concede that it is far from self-evident. Section 625(a) states that its judicial review provisions relate only to agency compliance with "this subchapter and subchapter III"—the cost-benefit analysis and risk assessment provisions. S. 343, 104th Cong. § 625(a), 141 CONG. REC. S9546 (daily ed. June 30, 1995). At first glance this would seem to exclude consideration of the § 553 rulemaking record which is in an entirely different chapter. In this version of the bill, however, the most significant challenges to statutory interpretations under a revised APA would involve whether the agency conducted proper cost-benefit analysis in interpreting its statute. In such an instance both § 553 and § 625 would be applicable. It is unfortunate that prospective applicability arises from such a roundabout reading of the proposed statute. A future proposal to reform the *Chevron* doctrine ought to make its prospective applicability explicit, and that prospective applicability should be independent of cost-benefit analysis provisions (if any) in the legislation.

the interested public for proposing alternatives to the agency's proposal. The most unfortunate fault in this bill is that it leaves unanswered many questions regarding the extent of the new APA's procedural mandate to agencies. The benefits of Amendment 1487 will be combined in the next Part with some more express boundaries between courts and agencies in order to shape a concrete proposal. In light of the lessons learned from all four versions of Senate Bill 343, I believe that the proposal is a workable replacement for the *Chevron* doctrine.

IV. Improving Upon Senate Bill 343: Determinacy Plus Deference

This Part looks to the strengths and weaknesses of the four versions of Senate Bill 343 in order to formulate a system of judicial review of agency statutory interpretations free of some of the faults[196] that characterize the present state of the *Chevron* doctrine.

An initial reason to be skeptical about any such proposal is the fact that the indeterminacy and lack of precision in substantive-review doctrines like the *Chevron* doctrine is a problem "that has plagued administrative law since its inception."[197] A number of prominent writers have concluded that tinkering with the scope of judicial review in the *Chevron* context is at best fruitless, and at worst, counterproductive.[198] Nevertheless, I would contend that the effort to achieve more determinacy in judicial review of agency statutory interpretations is a worthy one. If revisions to the APA are drafted carefully and with one eye toward public opinion and another toward functionality, the result could be productive and beneficial in at least two ways. First, a more determinative system of judicial review would increase the American public's confidence in and acceptance of the system of administrative law. The importance of this benefit should not be underestimated. While wrestling with inconsistent, irrational, or unfair legal outcomes may serve as a valuable mental exercise for law students and their professors, awareness of such systemic quirks is more likely to be a source of anger and frustration for the nonlawyer. Second, perhaps we really can get a consistently higher quality of decisions from our

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196. *See generally supra* Part II.

197. Shapiro & Levy, *supra* note 116, at 1079.

198. For example, in reacting to a proposal by Professors Shapiro and Levy to amend the judicial review provisions of the APA, Professor Levin expressed fear that "the authors' commitment to 'determinacy' has led them to endorse a plan that could have far worse consequences than the situation it seeks to cure." Levin, *Uncertain Appeal*, *supra* note 36, at 1091 (responding to Shapiro & Levy, *supra* note 116). Justice Stephen Breyer, writing about regulatory reform legislation several years before he joined the Supreme Court, concluded that "at a minimum, . . . 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." Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 397-98 (1986).

government agencies under a more determinative judicial review system. It is a foregone conclusion in this era of administrative agencies that Congress can delegate vast amounts of power to departments of the executive branch by means of ambiguous enabling statutes. Because courts traditionally have the institutional expertise for dealing with questions of statutory interpretation, and because agencies tend to possess expertise in a given field and must implement policy by statutory interpretation, it makes sense to find a determinate common ground on which these two spheres of expertise can benefit each other.[199]

The proposal detailed in this Part contains five elements: (1) a specific part of the agency rulemaking record devoted to the explanation of its chosen statutory interpretation, (2) placement of the burden for presenting alternative interpretations to a proposed rule on outside commentators, (3) a "hard look" form of judicial review for rule challenges based on permissible interpretations contained in the record, (4) broad deference to agency statutory interpretations that satisfy the new procedural requirements, and (5) only prospective application of the new requirements. For the most part, these ideas are culled from the four major versions of Senate Bill 343—some directly, some tangentially. Taken as a whole, they attempt to place the courts and agencies in complementary but limited roles on questions of statutory interpretation, each institution drawing from its inherent strengths. Although no system could eliminate unpredictability, this one would be more determinative than the current system under the *Chevron* doctrine.

A. *A Rulemaking Record for Statutory Interpretation*

First, an amended APA should require an agency rulemaking that involves statutory interpretation to produce specific items related to that interpretation for the rulemaking record. This proposal closely tracks Amendment 1487,[200] although the Judiciary Committee bill contains some related but less specific provisions.[201] Specifically, the agency would prepare an explanation of whether its interpretation is required or permissible. This explanation would be published in the *Federal Register* along with the proposed rule. It would include an invitation for comments disputing the particular interpretation and suggesting specific alternatives. At the final-rule stage, the agency would publish an explanation of reasons

199. The emphasis on the interpretive process in this Part implicitly assumes that most agency delegated statutes contain ambiguities and would thus not reflect clear Congressional intent in a "*Chevron* step-one" sense. The basis for this assumption is the fact that this proposal would *not* call on courts to use "traditional tools of statutory construction" to determine clear Congressional intent. *See supra* subpart II(A).

200. *See supra* notes 179-88 (quoting § 553 and § 706 of Amendment 1487).

201. *See supra* note 151 (quoting § 553(c) of the Judiciary Committee's version of S. 343).

under the particular enabling statute why the interpretation embodied in its final rule was chosen over the alternatives presented in written public comments.

The usefulness of this documentation in later interpretive disputes comes largely from its utilization under the remaining elements of this reform proposal. Two benefits of this specialized record are nonetheless noteworthy at the outset: it would satisfy the restrictions of the *Chenery* rule,[202] which prohibits post-hoc rationalizations for agency actions, and it would more efficiently focus the attention of all parties in statutory interpretation disputes. Agencies today must already do business under *Chenery*, so this first benefit is probably minimal.[203] The second benefit is stronger only to the extent that litigants and reviewing courts would voluntarily exclude items contained in the rulemaking record outside of this particular documentation when making arguments and issuing decisions. If, however, a statutory interpretation record is to be of any significant value in reforming the *Chevron* doctrine, it ultimately must combine with other requirements, such as those that follow.

B. The Public Burden for Alternative Interpretations

A second element that a revised APA should contain is an allocation to the general public of the burden of producing alternative statutory interpretations. This recommendation comes squarely from section 706(a)(2)(F) of Amendment 1487, which allows a reviewing court to set aside an agency interpretation "without substantial support in the rulemaking file, viewed as a whole."[204] Under both Amendment 1487 and the proposal in this Part, the rulemaking file must contain public comments on the agency's interpretation and responses to those comments explaining why a particular interpretation was not chosen.[205] If the agency provides no explanation or an inadequate explanation for an alternative proposed by public comment, then its rulemaking file as a whole is lacking and the rule should be remanded. On the other hand, the agency would bear no responsibility at all for dealing with statutory

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202. *See* SEC v. Chenery Corp., 318 U.S. 80, 94-95 (1943); *see also* FPC v. Texaco, Inc., 417 U.S. 380, 397 (1974); *supra* text accompanying notes 129-30.

203. As Judge Wald of the D.C. Circuit has observed, "We are constrained by *Chenery* to look at the agency rationale, not just the record itself, to decide if a rule is arbitrary and capricious, and indeed . . . we turn some back for failure to explain the rationale satisfactorily." Patricia M. Wald, *Judicial Review: Talking Points*, 48 ADMIN. L. REV. 350, 352 (1996). The Judiciary Committee was nevertheless concerned enough about agencies skirting the *Chenery* rule to address the matter in both its statute and report. *See* S. REP. NO. 104-90, at 53 (1995) ("Post hoc rationalizations serve to defeat the purpose of notice and comment rulemakings by permitting the one-sided articulation or creation of a 'rationale' without the opportunity for public examination or commentary.").

204. *See supra* note 188 (quoting § 706 of Amendment 1487).

205. *See supra* note 179 (quoting § 553 of Amendment 1487).

interpretations that were never brought to its attention during the rulemaking process.

Two ideas lie at the heart of this proposition. First, an otherwise plausible interpretation of an ambiguous statute is not worth considering unless it has at least some constituency among the general public. It is appropriate to preclude judicial consideration of a permissible interpretation that garnered zero support during the rulemaking process. Second, a balance must exist between efficiency and finality of rulemaking on one hand, and allowing an avenue for public input in areas where a statute leaves open several policy options on the other.[206] Placing the burden of presenting alternative statutory interpretations on the general public during a specified window of time incorporates both of these ideas. During the time a final rule is being formulated, all individuals and groups have the opportunity to present their views of sound policy to the agency. The agency must demonstrably consider these views and accept or reject them. Not surprisingly, the more controversial and costly rules will attract more input and those rulemakings will take longer, but that is arguably a desirable result in a deliberative democracy.[207] The rules attracting less interest will have a shorter rulemaking record that has fewer grounds on which to later challenge the statutory interpretation. Over time, this requirement that competing statutory interpretations be preserved during the rulemaking process would tend to channel more intellectual resources into rulemaking rather than subsequent litigation.

If the agency has explained the statutory interpretation embodied in its rule and the deficiencies of the rejected alternatives, the record will not be subject to attack on the basis of its omissions. Persons wishing to attack the statutory interpretation of a rule must do so on the basis of a specific alternative contained in the record, and the record would be closed on or shortly after the issuance of a final rule. If this proposal is to be a replacement for the *Chevron* doctrine, however, fundamental questions still loom: what scope of judicial review is to apply when a litigant asserts that an agency erred by not selecting an alternative interpretation that *is* in the record? What about an attack based on an interpretation that is *not* in the record?

C. The Specified Scope of "Hard Look" Judicial Review

The report of the Senate Judiciary Committee asserts that courts play an important and active role in the modern administrative state in

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206. *See supra* note 37 (describing a tension between deliberativeness and efficiency).

207. *See* Phillip J. Harter, *The APA at 50: A Celebration, Not a Puzzlement*, ADMIN. & REG. L. NEWS, Winter 1996, at 2, 2 (asserting that a fundamental value embodied in APA rulemaking procedure is that it "provides a democratic means by which the people who will be affected, either by being regulated or as a beneficiary, or even as a 'do-gooder,' can participate in the decision").

determining whether an agency's statutory interpretation is a reasonable policy choice.[208] Yet deference advocates are correct when they note that the policy decision embodied in such an interpretation is not a "question of law" in the traditional sense.[209] Treating it as such defeats many of the efficiency concerns that led Congress to delegate authority to an agency to begin with. Any plausible scope-of-review proposal needs to find a means to balance these concerns.[210]

When an agency's enabling statute is susceptible to more than one interpretation and the agency's chosen interpretation is challenged in court, this proposal would require one of two possible scopes of review. The first, described in this subpart, would apply when the basis for the challenge is an alternative statutory interpretation that was actually proposed to the agency and was therefore addressed by the agency in the *Federal Register*. In such a situation, express evidence reveals a statutory interpretation contrary to the one proposed by the agency. Evidence also exists that the contrary interpretation has a constituency. Under such circumstances, the court should engage in a "hard look" review of the agency's choice between the competing interpretations.

Unlike most standards of review, the name of the hard look review refers to the analysis expected from the agency rather than from the court.[211] The role of the court is to determine whether the agency itself has taken a hard look at the relevant policy alternatives under the statute and has made a reasoned exercise of discretion in making its actual choice.[212] In such a case, the reviewing court looks to the explanation given in the rulemaking record and determines whether the agency explained and justified its interpretive decision in light of suggested

208. *See* S. REP. NO. 104-90, at 107 (1995).

209. *See, e.g.*, 1 DAVIS & PIERCE, *supra* note 60, § 3.3 (asserting that when Congress leaves a policy dispute open to agency resolution by statutory construction, the agency is not resolving an issue of "law," but is rather resolving an issue of "policy").

210. *See* Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEXAS L. REV. 483, 523-24 (1997) (asserting that hard look review serves a valuable function if its application is restricted based upon "signals from interested parties, the regulators themselves, and Congress about what issues raised by a challenge to a rulemaking are significant"). *But see* Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEXAS L. REV. 525, 553-56 (1997) (contending that restrictions on the use of hard look review would do little to influence judges "with an anti-government ideological perspective").

211. Judge Leventhal of the D.C. Circuit is generally credited with announcing this formulation of hard look review in *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C.Cir. 1970). *See* Seidenfeld, *supra* note 37, at 128-29 ("[T]he 'hard look' test . . . asks courts to steep themselves in agency policy and the substantive debate framing the issue under consideration to ensure that the agency below gave a 'hard look' to all factors relevant to its decision."). As used here, hard look would not apply to "all factors" relevant to the agency's statutory interpretation, but only to those factors brought to its attention in the public comment stage of the rulemaking process.

212. *See* BREYER & STEWART, *supra* note 194, at 363-64.

alternatives. Under this proposal, a court would engage in a hard look review process using only the specific parts of the agency record that deal with statutory interpretation, and then by comparing the agency's chosen interpretation with only the one asserted as the better alternative by the party challenging the rule.[213]

Judicial economy would be enhanced by the fact that both the court and the challengers to a rulemaking would be limited in the materials to which they could refer for review of the agency's statutory interpretation. Both courts and agencies would engage in the process, but their respective roles would be more carefully defined. After the court finds that an enabling statute is ambiguous and that the record contains an alternative to the agency position advocated by the litigant, a challenge may be based only upon claims that the agency failed at the final rule stage to explain why its chosen statutory interpretation is superior to others suggested by written comment. The analysis in which courts would participate would bring the judicial expertise in statutory interpretation into the rulemaking process.[214] The agency's policymaking expertise would have entered the process in its response to proposed alternative explanations contained in the rulemaking record.

An interpretation might be "superior" based on consideration of cost-benefit analysis or risk analysis, but these would not necessarily be required. Although the prior examination of Senate Bill 343's statutory interpretation provisions in this Note was necessarily made in the shadow of cost-benefit analysis and risk analysis, these are issues independent of the scope of review.[215] Indeed, this process would just as easily permit agencies and courts to examine the policy rationale behind a rule within the context of the particular enabling statute that produced it.[216]

D. *Broad Judicial Deference to Satisfactory Procedures*

The fourth part of this regulatory reform proposal addresses the situation in which a regulation is challenged on the basis of an alternative statutory interpretation that is not contained in the rulemaking record. Under such circumstances, a reviewing court should give the agency's

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213. The party challenging the rule need not be the same person who actually proposed the competing statutory interpretation to the agency. The fact that someone was interested enough to propose the particular alternative asserted in the litigation means that it had a constituency, and that it is proper for the court to examine the agency's explanation of the competing interpretations.

214. *See* Seidenfeld, *supra* note 210, at 521 ("[J]udges are experienced in spotting weakness in factual support and soft spots in logieal reasoning.").

215. *See* Levin, *Lessons of 1995*, *supra* note 36, at 649 (setting aside cost-benefit analysis issues and asserting that S. 343's judicial review provisions "deserve comment in their own right").

216. *See* Richard J. Pierce, Jr., *The APA and Regulatory Reform*, 10 ADMIN. L.J. AM. U. 81, 85 (1996) (arguing that Congress should amend or repeal burdensome provisions of particular regulatory statutes if it wants to affect regulatory policy).

interpretation the most extensive deference. Unlike the ambiguity in the *Chevron* doctrine, however, this command to give deference should be in the clearest and most unequivocal terms. The express limitations of the Governmental Affairs bill are the model for this clarity, even though that bill did not address the *Chevron* issue.

Bowing to political realities, the Governmental Affairs version of Senate Bill 343 contains some very clear limiting language in its cost-benefit analysis provisions: "The requirements of this subchapter shall not alter the criteria for rulemaking otherwise applicable under other statutes."[217] The concern addressed in this language is that judges should not have free reign to substitute their own view of proper cost-benefit analysis so as to contradict an agency's particular enabling statute. The role that judges play in the rulemaking process is potentially much greater in the *Chevron* context of agency statutory interpretation. If specific parts of the process by which an agency interprets its enabling statute are subject to hard-look judicial review, then efficiency considerations demand that the rest of the process include strong protection against judicial interference.

In a sense, the fourth element of this regulatory reform proposal is merely the flip side of the third. After a statute enacting this proposal set the parameters of hard-look review, as in subpart IV(C), it would then explicitly require deference on all other questions related to statutory interpretation. As in the broadest readings of *Chevron*, courts would allow any reasonable interpretation by the agency to stand. Unlike the deferential version of *Chevron*, however, courts would engage in hard-look review of areas implicated in the rulemaking record.

E. Prospective Applicability of Regulatory Reform

One threshold problem that arises from any new regulatory-review process is what to do with the thousands of pages of regulations that were promulgated before the new process is put in place. The records supporting these rules would obviously not contain the substantive information required by a revised APA. Should they all be declared invalid if challenged in court? Assuming that the best answer to this question is no, the fifth part of this reform proposal seeks to change the system without destabilizing it.

This replacement for the *Chevron* doctrine would have only prospective application and would thus not apply to regulations predating the APA revision. Amendment 1487 was not expressly prospective in its application, but it had a plausible reading that would allow such an

217. *See supra* note 171 (quoting § 622(h) of the Governmental Affairs Committee bill).

interpretation.[218] A clearer wording of this idea is a necessary part of this reform proposal. Prospective applicability adds a considerable amount of stability to an otherwise sweeping overhaul of the system. It sets up a long-term process for converting judicial review of statutory interpretations into an "in-the-record" system in place of the *Chevron* inquiry.

The five elements described in this Part, taken together, would markedly change American administrative law. When the dust settled, a system would be in place that focuses courts and agencies in complementary and specifically defined roles, dealing with a limited set of issues related to statutory interpretation. This proposal would improve upon the *Chevron* doctrine in ways that should (but probably will not) please advocates for both of *Chevron*'s major readings. For deference advocates, a rule would be in place that provides consistent deference to the agency as a background norm. Current *Chevron* deference is far from consistent. For judicial oversight advocates, an important part of the rulemaking record would be open to hard-look review. Also, the number of plausible challenges that could be brought before the judiciary would be decreased by eliminating interpretations that had no demonstrable constituency, thus making judicial review more focused and effective.

V. Conclusion

Perhaps Justice Frankfurter best stated the difficulty of pinning down the scope of judicial review in any litigation context when he wrote that "[t]here are no talismanic words that can avoid the process of judgment."[219] Karl Llewellyn's famous table of opposing canons of statutory construction also vividly illustrates the impossibility—even if one wanted to do it—of achieving totally mechanized judicial review.[220] There will always be some play in the joints of the American legal system, no less in the review of agency decisions than anywhere else, but agency-administered statutes are particularly problematic because they raise fundamental concerns about governmental abuse of discretion under the guise of efficiency.

Although all four versions of Senate Bill 343 contain serious flaws, the legislation debated in the Senate in 1995 contains useful concepts for improving upon the existing *Chevron* doctrine by revising the APA. The system outlined in this Note takes steps in the right direction by directing more effective utilization of both court and agency institutional expertise in the rulemaking and statutory interpretation process. Moreover, the proposal in this Note tends to satisfy two criteria that are necessary for any

218. *See supra* subpart III(D).

219. Universal Camera Corp. v. NLRB, 340 U.S. 474, 489 (1951).

220. *See* Llewellyn, *supra* note 58, at 401-06.

statutory reform of the *Chevron* doctrine to be successful.[221] First, it would lead to increased determinacy in this important area of the law and would thereby lead to greater systemic confidence among the American public. Second, the more intense, yet expressly limited judicial scrutiny of the rulemaking record could result in statutory interpretations and agency rules that better reflect the policy concerns of the interested public. Given the present chaos in *Chevron* jurisprudence, this type of new system of judicial review for agency statutory interpretations is a risk worth taking.

—Mark Burge

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221. *See supra* text accompanying notes 196-99.