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ESSAY

Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions

*Richard J. Pierce, Jr.**

In its 1984 opinion in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[1] the Supreme Court attempted to resolve the long standing conflict concerning the proper scope of judicial review of agency interpretations of statutory provisions.[2] *Chevron* concerned the Environmental Protection Agency's (EPA) interpretation of the Clean Air Act, which requires the EPA to limit emissions from all "stationary sources." The EPA interpreted the statutory term "stationary source" to mean an entire plant, rather than an individual piece of combustion equipment. That statutory interpretation was adopted as part of the EPA's "bubble concept," which is based on the EPA's belief that it can simultaneously further the inherently conflicting goals of the Clean Air Act—improved air quality and continued economic growth—most effectively by imposing emission limitations on an entire plant, and by conferring upon the owner of the plant both the obligation and discretion to determine the means by which to reduce plant emissions.

In defining the proper scope of judicial review of agency interpretations of statutory provisions, the *Chevron* Court established what one judge calls the "*Chevron* two-step."[3] The first step requires the court to determine "whether Congress has directly spoken to the precise ques-

* George W. Hutchison Professor of Law, Southern Methodist University; co-author, R. PIERCE, S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS (1985).

1. 467 U.S. 837 (1984).

2. *See* 5 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 29:9-29:16 (2d ed. 1984); Woodward & Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 ADMIN. L. REV. 329 (1979).

3. *See* Starr, Sunstein, Willard, Morrison & Levin, *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 360 (1987) [hereinafter *Judicial Review Debate*].

tion at issue," in which case "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[4] If the court concludes, however, that "Congress has not directly addressed the precise question at issue," the court must refrain from any statutory interpretation of its own and must simply determine "whether the agency's answer is based on a permissible construction of the statute."[5] The *Chevron* test established a simple approach to a traditionally complicated issue in administrative law. The court first decides whether the statute resolves the specific issue or is silent or ambiguous with respect to the issue. If it determines that the statute is silent or ambiguous, tbe court then affirms the agency's interpretation of the statute if that interpretation is "reasonable."

In the three years since the Court decided *Chevron*, the case has transformed dramatically the approach taken by courts in reviewing agency interpretations of statutory provisions.[6] The Supreme Court has continued to interpret and apply *Chevron* in the manner previously described,[7] or, in Professor Cass Sunstein's terminology, the "strong" reading of *Chevron*.[8] While appellate courts use *Chevron* as the starting point in reviewing agency interpretations of statutory provisions, appellate judges seem to have interpreted *Chevron* differently. Some judges have adopted the "strong" reading of *Chevron*, while others have adopted a "weak" reading that requires a court to resolve many of the ambiguities in regulatory statutes.[9]

Several distinguished scholars and judges have criticized either *Chevron* or the strong reading of *Chevron*. Professor Sunstein disagrees passionately with the strong reading of *Chevron* and has serious reser-

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4. *Chevron*, 467 U.S. at 842-43.

5. *Id.* at 843.

6. *Judicial Review Debate*, *supra* note 3, at 361. *Chevron* was cited in approximately 400 cases between 1984 and 1987. *See* 7B SHEPARD'S UNITED STATES CITATIONS 323 (1986 & Supp. 1987).

7. *See* Board of Governors v. Dimension Fin. Corp., 474 U.S. 361 (1986); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116 (1985); *see also Judicial Review Debate*, *supra* note 3, at 361-62.

8. *Judicial Review Debate*, *supra* note 3, at 367.

9. For illustrations of the differing interpretations of *Chevron*, see Marathon Oil Co. v. United States, 807 F.2d 759 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1593 (1987); Center for Auto Safety v. Peck, 751 F.2d 1336 (D.C. Cir. 1985); Middle S. Energy, Inc. v. FERC, 747 F.2d 763 (D.C. Cir. 1984), *cert. dismissed*, 473 U.S. 930 (1985). Chief Judge Wald describes the D.C. Circuit's approach to *Chevron* in the following manner: "[O]ur circuit initially took a fairly rigid approach to the case, deferring to agencies in a wide array of situations. . . . Today, however, our court is inching back towards a more halanced stance, allowing greater space for judicial legal interpretations. . . ." Wald, *The Contribution of the D.C. Circuit to Administrative Law* (manuscript to be published in Spring 1988 issue of 40 ADMIN. L. REV.). Judge Wald describes a similar transformation in the Fifth Circuit. *Id.*; *see also Judicial Review Debate*, *supra* note 3, at 367.

vations about its entire analytical framework.[10] Judge Breyer has expressed similar reservations.[11] In addition, at least some members of the United States Court of Appeals for the District of Columbia Circuit have narrowly interpreted the scope of *Chevron*. In *Union of Concerned Scientists v. Nuclear Regulatory Commission*[12] the D.C. Circuit held that the *Chevron* test applies only "in circumstances in which an agency is required to apply a legal standard to a particular set of facts."[13] In all other cases in which an agency interprets an ambiguous provision in the statute that grants the agency its legal power, the court's role is "to use traditional tools of statutory construction to ascertain congressional intent."[14] The D.C. Circuit based this holding on dictum in a recent Supreme Court opinion.[15]

This Essay views *Chevron* as an exceedingly important development in administrative law that represents a dramatic improvement over prior attempts to grapple with the proper scope of judicial review of agency interpretations of statutory provisions.[16] This Essay argues that the strong reading of *Chevron* is the proper interpretation because agencies are the best equipped institutions to resolve policy questions in the statutes that grant the agency its legal power. In addition, a strong reading of *Chevron* will result in a number of positive consequences in the process of policy making in the modern administrative

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10. *Judicial Review Debate, supra* note 3, at 366-71; *see also* Bresgal v. Brock, 833 F.2d 763 (9th Cir. 1987) (weak interpretation of *Chevron*).

11. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372-82 (1986).

12. 824 F.2d 108 (D.C. Cir. 1987).

13. *Id.* at 113.

14. *Id.*

15. *See* INS v. Cardoza-Fonseca, 107 S. Ct. 1207 (1987). The *Cardoza-Fonseca* majority's alleged intent to narrow the scope of *Chevron* is difficult to discern. Justice Stevens' opinion on behalf of a five Justice majority contains language that lends some support to the D.C. Circuit's interpretation. *Id.* at 1220-22. The three dissenting Justices in *Cardoza-Fonseca* obviously rejected the majority's position, *id.* at 1225-32 (Powell, J., dissenting), as did Justice Scalia in his concurrence. *Id.* at 1224-25 (Scalia, J., concurring). Most significantly, Justice Blackmun both joined in the majority opinion and filed a concurring opinion in which he emphasized that the agency's statutory interpretation was "strikingly contrary to [the] plain language and legislative history [of the statute]." *Id.* at 1223 (Blackmun, J., concurring). If Justice Blackmun based his support only on the agency's particularly erroneous interpretation of the statutory term in *Cardoza-Fonseca*, then *Chevron*'s scope is unchanged. If, however, Justice Blackmun intended no such reservation, then *Cardoza-Fonseca* may limit the applicability of *Chevron*. Depending on the interpretation given Justice Blackmun's position, the Court could have decided either five-to-four in favor of, or five-to-four against, a narrowing of the scope of *Chevron*. In a concurring opinion in NLRB v. United Food & Commercial Workers Union Local 23, 108 S. Ct. 413, 426 (1987), four Justices explicitly emphasized the "continuing . . . vitality" of *Chevron* and characterized as "mistaken[]" the D.C. Circuit's interpretation of *Cardoza-Fonseca* in *Union of Concerned Scientists*.

16. *See* R. PIERCE, S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 405-09 (1985); Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 486-88, 494-96, 505-07 (1985) [hereinafter Pierce, *Political Theory*].

state.

The forceful criticisms of *Chevron* and the attempts to limit or redefine the *Chevron* test are predicated on a misunderstanding of the nature of the statutory interpretation issues that agencies and courts frequently must resolve. Historically, interpretation of terms used in a regulatory statute has been characterized as an issue of law. Thus, some commentators distinguish between the proper scope of judicial review of issues of law, including all agency interpretations of statutory provisions, and judicial review of issues of policy.[17] Professor Sunstein argues that *Chevron* is inconsistent both with *Marbury v. Madison*[18] and the Administrative Procedure Act[19] because courts possess the exclusive responsibility to decide issues of law.[20]

This characterization of *Chevron* is based on a serious misunderstanding of the legislative process and the nature of the issue before a court when it reviews an agency's interpretation of a provision in a regulatory statute. Many instances of statutory interpretation require an agency to resolve policy issues, rather than legal issues. Viewed in this light, the first step in the *Chevron* test requires a court to determine whether the issue of statutory interpretation in question is an issue of law or an issue of policy. If the court determines that it is reviewing an agency's resolution of a policy issue, the court then moves to the second part of the test and affirms the agency's interpretation of the statutory provision—and its resolution of the policy issue—if the agency's interpretation is "reasonable."

In determining whether an agency's interpretation of a statute involves an issue of law or policy, it is useful to analyze and characterize the issue prior to Congress' enactment of the statute in question. For example, in *Chevron* most would agree that, prior to the enactment of

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17. *See, e.g.*, Breyer, *supra* note 11, at 364. According to Judge Breyer, two legal doctrines govern judicial review of agency action:

> The first doctrine concerns the appropriate attitude of a reviewing court towards an agency's interpretations of law, such as the law embodied in the statute that grants the agency its legal powers. To what extent should a court make up its own mind, independently, about the meaning of the words of the statute? The second doctrine concerns a reviewing court's attitude toward an agency's regulatory policy. How willing should a court be to set aside such a policy as unreasonable, arbitrary or inadequately considered?

Id. Judge Breyer cites *Chevron* as an example of a case in which the court must review an agency's interpretation of law. *Id.* at 372-82. According to Judge Breyer, the "airbags" case, Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983), is an example of judicial review of an agency's regulatory policy. Breyer, *supra* note 11, at 384-88. In the "airbags" case the Supreme Court held that the National Highway Traffic Safety Administration acted unreasonably in revoking Motor Vehicle Safety Standard 208, which required automobile manufacturers to install "passive restraints" in new cars. *State Farm*, 463 U.S. at 34.

18. 5 U.S. (1 Cranch) 137 (1803).

19. 5 U.S.C. § 706 (1982).

20. *Judicial Review Debate*, *supra* note 3, at 366-71.

the Clean Air Act, the question of whether to limit emissions at the plant level or the level of each piece of combustion equipment is a pure question of policy. This question is but one of hundreds of policy issues that some institution of government must resolve in order to implement any regulatory program to reduce air pollution. In the process of enacting the Clean Air Act, or any other regulatory statute, Congress invariably resolves some policy issues but leaves to some other institution of government the task of resolving many other policy issues.

As the Court recognized in *Chevron*, Congress declines to resolve policy issues for many different reasons: Congress simply may have neglected to consider the issue; Congress may have believed that the agency was in a better position to resolve the issue; or finally, Congress may not have been able to forge a coalition or simply may have lacked the political courage necessary to resolve the issue, given that a resolution either way might damage the political future of many members of Congress.[21] The general proposition that Congress cannot and does not resolve all the policy issues raised by its creation of a regulatory scheme probably is not at all controversial.

A more controversial point, however, may be that Congress resolves very few issues when it enacts a statute empowering an agency to regulate.[22] Rather, Congress typically leaves the vast majority of policy issues, including many of the most important issues, for resolution by some other institution of government.[23] Congress accomplishes this through several different statutory drafting techniques, including the use of empty standards, lists of unranked decisional goals, and contradictory standards.[24] Thus, Congress declines to resolve many policy issues by using statutory langnage that is incapable of meaningful definition and application.

When a court "interprets" imprecise, ambiguous, or confiicting statutory language in a particular manner, the court is resolving a policy issue. Courts frequently resolve policy issues through a process that purports to be statutory interpretation but which, in fact, is not.[25] For lack of a better term, this process will be referred to as "creative" inter-

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21. *See Chevron*, 467 U.S. at 865.

22. *See* Pierce, *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U.L. REV. 391, 398-403 (1987); Steward, *Beyond Delegation Doctrine*, 36 AM. U.L. REV. 323, 325-27 (1987).

23. *See* Pierce, *Political Theory*, *supra* note 16, at 489-96. *But see* Breyer, *supra* note 11, at 370.

24. Pierce, *Political Theory*, *supra* note 16, at 473-81.

25. *See* Posner, *What Am I? A Potted Plant?*, THE NEW REPUBLIC, Sept. 28, 1987, at 23; *see also* R. ALDISERT, THE JUDICIAL PROCESS 88-235 (1976) (collecting excerpts from renowned scholars and jurists explaining the manner in which judges act as "lawmakers" in the process of interpreting ambiguous statutes).

pretation. Judicial decisions under the Sherman Act provide a good example of judicial policy making through creative statutory interpretation. Whether through congressional inadvertence or by design, courts have interpreted the substantive standard stated in the Sherman Act—whether a restrictive practice should be prohibited as imposing an unreasonable "restraint of trade or commerce"—in many different and inconsistent ways.[26]

As long as courts follow a process of reasoned decision making, judicial policy making through creative interpretation and application of ambiguous statutory provisions is generally appropriate. The function of a court is to resolve cases or controversies. By enacting a statute that raises but does not resolve myriad policy issues, and by permitting parties to bring judicial actions pursuant to that statute, Congress has created a large number of cases or controversies that courts have no choice but to resolve through a process that can only be characterized as judicial policy making. In the context of the Sherman Act, for example, courts and commentators seem increasingly to recognize that judges make antitrust policy.[27] Because Congress has declined to resolve many of the policy decisions raised by the Sherman Act, and because no other institution of government is available to fill that policy making void, the courts regularly must make policy decisions in the guise of interpreting the Sherman Act.

Some judicial policy making in the guise of statutory interpretation seems superficially different from the typical judicial opinion interpreting the Sherman Act. Occasionally courts interpret statutory provisions through lengthy discussions of congressional goals and legislative history. In some cases, this analysis undoubtedly is an exercise in what may be termed "real" statutory interpretation; the judge is honestly convinced from reading the language of the statute and its legislative history that Congress resolved a policy issue in a particular manner. When Congress has resolved a policy issue, the court is dealing with an issue of law, in which case the court's role is limited to implementing congressional intent.

In a high proportion of cases, however, an honest analysis of the language, the congressional goals, and the legislative history of the statute will not support a holding that Congress actually resolved the policy issue presented to the court.[28] This situation often arises because Con-

26. *See* Rogers, *Perspectives on Corporate Mergers and the Antitrust Laws*, 12 Loy. U. Chi. L.J. 301 (1981). *Compare* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) *with* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967). *See generally* E. Gellhorn, Antitrust Law and Economics in a Nutshell (1986).

27. *See supra* note 26.

28. *See, e.g.*, Weinberger v. Bentex Pharmaceuticals, Inc., 412 U.S. 645 (1973).

gress frequently uses ambiguous or conflicting statutory language and invariably promulgates inconsistent congressional goals. While sometimes helpful, the legislative history of a statute is often unclear, inconsistent, or untrustworthy.[29]

In many cases in which a search for congressional intent is futile, courts nevertheless purport to resolve conflicts concerning the meaning of specific provisions in a statute through the process of statutory interpretation. In actuality, however, these courts are resolving a policy issue that Congress raised but declined to resolve.[30] The judge's personal political philosophy influences greatly his resolution of the policy issue. As in the context of the Sherman Act, policy making is an appropriate and inevitable judicial role, because the judiciary, as the only institution empowered to resolve cases or controversies, must make the policy decisions necessary to decide a particular case or controversy. The exception to this proposition is in the context of administrative law.

Like a court, an agency frequently makes policy when it interprets ambiguous or imprecise terms in the statute that grants the agency its legal powers. *Chevron* provides a good illustration. In defining "stationary source" to mean a plant, rather than an individual piece of combustion equipment, the EPA did not "interpret" the statutory language by determining that Congress intended "stationary source" to mean a plant. Congress used the imprecise term "stationary source" without defining the term at all. The EPA decided, as a matter of policy, that it would interpret "stationary source" to mean a plant because, in the agency's view, such an interpretation would further Congress' conflicting goals.[31] In addition, as the Supreme Court recognized, the agency's choice of policy was influenced by the President's political philosophy.[32]

Once a court realizes that it is reviewing an agency's resolution of a policy issue, rather than an issue of law, comparative institutional analysis demonstrates that the agency is a more appropriate institution than a court to resolve the controversy. Because agencies are more accountable to the electorate than courts, agencies should have the domi-

29. *See, e.g.*, Hirschey v. FERC, 777 F.2d 1, 7 n.1 (D.C. Cir. 1985) (Scalia, J., concurring); *see also The Role of Legislative History in Judicial Interpretation: A Discussion Between Judge Kenneth W. Starr and Judge Abner J. Mikva*, 1987 DUKE L.J. 361.

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

31. Understood in this manner, *Chevron* concerned the same type of issue as was involved in the "airbags" case, Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983). Although the policy decision in *State Farm* took the form of an agency's decision to rescind a safety standard, while the policy decision in *Chevron* took the form of an agency's interpretation of an imprecise statutory provision, the distinction is functionally irrelevant. Contrary to Judge Breyer's position, *see supra* note 17, both *State Farm* and *Chevron* involved an agency's resolution of a policy issue.

32. *Chevron*, 467 U.S. at 865-66.

nant role in policy making when the choice is between agencies and courts.[33] A court's function in reviewing a policy decision made by an agency should be the same whether the agency policy decision is made by interpreting an ambiguous statutory provision or by any other means of agency policy making. The court should affirm the agency's policy decision, and hence its statutory interpretation, if the policy is "reasonable." The court should reverse the agency's policy decision if the policy is arbitrary and capricious. Of course, in deciding whether the agency's policy decision is "reasonable," the court should review the agency's decision making process by which the agency determined that its choice of policy was consistent with statutory goals and the contextual facts of the controversy in question.

This characterization of the nature of statutory interpretation by an agency is entirely consistent with the Court's two-step approach to judicial review of agency interpretations of statutory provisions established in *Chevron*. The first step under *Chevron* is for the court to determine if Congress has resolved the policy issue that corresponds to the interpretive issue resolved by the agency. The court should engage in "real" statutory interpretation to determine whether Congress resolved the specific issue that the agency purported to resolve through statutory interpretation. If Congress resolved the specific issue presented, the court is dealing with an issue of law, and the case is at an end because the court is limited to implementing congressional intent.

In the process of applying *Chevron*'s first step, the court should refrain from teasing meaning from the statute's ambiguous or conflicting language and legislative history; it should eschew the process of "creative" statutory interpretation that is otherwise essential and appropriate in judicial decision making. Creative statutory interpretation is not appropriate in the administrative law context because creative statutory interpretation permits judges to make policy decisions that should be made instead by agencies. If the process of "real" statutory interpretation does not produce a determination that Congress resolved the specific issue, the court is dealing with a policy decision made by an agency. Although the court still must insure that the agency made its policy decision through a process of reasoned decision making, the court's role should be influenced greatly by the recognition that it is reviewing a policy decision made by another branch of government.[34]

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33. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366 (1984); Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. L. ECON. & ORGANIZATION 81 (1985); Pierce, *Political Theory*, *supra* note 16, at 504-13; *see also* Breyer, *supra* note 11, at 388-97; Strauss & Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181 (1986).

34. *See* Breyer, *supra* note 11, at 382-97.

The *Chevron* approach can be illustrated in the context of the D.C. Circuit's recent decision in *Union of Concerned Scientists v. Nuclear Regulatory Commission*,[35] which involved the Nuclear Regulatory Commission's (NRC) interpretation of the Atomic Energy Act. The Atomic Energy Act requires the NRC "to ensure that any use or production of nuclear materials 'provide[s] adequate protection to the health or safety of the public.' "[36] The NRC issued a rule that seemed to permit it to consider the cost of a safety precaution in implementing this standard in certain contexts. The Union of Concerned Scientists challenged the rule claiming that any consideration of cost by the NRC was inconsistent with the statutory "adequate protection" standard.

The majority opinion in *Union of Concerned Scientists* held that the *Chevron* test did not apply to the interpretation of the statutory language at issue.[37] The majority interpreted dictum in a recent Supreme Court opinion as an indication that the Supreme Court has confined the *Chevron* test to circumstances in which an agency applies a statutory term to a particular set of facts. The D.C. Circuit's interpretation of *Chevron* seems inherently implausible, since *Chevron* did not even involve application of statutory language to a specific set of facts.[38]

Nevertheless, once the majority in *Union of Concerned Scientists* concluded that *Chevron* did not apply, it felt free to "use traditional tools of statutory construction to ascertain congressional intent."[39] The majority then held that Congress intended to preclude the NRC from taking cost into account in the implementation of the adequate protection standard.[40] Its evidence of congressional intent necessary to support this holding is extraordinarily meager. The majority referred to several ambiguous excerpts from the statute's lengthy legislative history[41] and buttressed that flimsy manifestation of congressional intent with evidence that Congress did not *explicitly* authorize the NRC to consider costs.[42]

As an exercise in pure policy making, the majority in *Union of Concerned Scientists* may persuasively argue that the NRC should not consider costs in setting safety standards. As an exercise in "real" statutory interpretation, however, the majority opinion is not persuasive. Congress' use of the adjective "adequate" in the regulatory statute sug-

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35. 824 F.2d 108 (D.C. Cir. 1987).

36. *Id.* at 114 (quoting 42 U.S.C. § 2232(a) (1982)).

37. *Id.* at 113.

38. The case relied upon by the majority of the D.C. Circuit, however, may be interpreted as a decision to reduce the scope of *Chevron*. *See supra* note 15.

39. *Union of Concerned Scientists*, 824 F.2d at 113.

40. *Id.* at 117.

41. *Id.* at 115-16.

42. *Id.* at 115.

gests that it intended for the NRC to have some discretion in determining how much protection to accord the public.[43] One of the most obvious means of determining the adequacy of a safety measure is to compare its beneficial effects on safety with its costs.[44] The term "adequate," however, could just as easily support any number of alternative meanings. The evidence of congressional intent amassed by the majority seems far more consistent with a conclusion that Congress did not resolve the policy issue of whether and to what extent the NRC can consider costs in requiring safety precautions. The majority in *Union of Concerned Scientists* engaged in "creative" statutory interpretation, and, as is almost invariably the case when courts engage in "creative" statutory interpretation, the judges interpreted the ambiguous statutory language to require a policy consistent with their personal political philosophies.[45]

The concurring opinion in *Union of Concerned Scientists* argued persuasively that *Chevron* does apply to the NRC's interpretation of the phrase "adequate protection" and that Congress did not resolve the issue of whether the NRC can consider costs in determining the degree of protection to incorporate in the NRC's safety standards.[46] If all three judges had applied the *Chevron* test in *Union of Concerned Scientists*, the court would have held unanimously that Congress did not resolve the issue presented. The court then would have addressed the question of whether the NRC's policy was reasonable.

The *Chevron* test represents a framework for judicial decision making that could change the results of judicial review in many cases. The principal effect of the *Chevron* two-step is to allocate policy making responsibility from judges to agencies—an effect with significant benefits.[47] Under the *Chevron* analysis, several Supreme Court cases decided

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43. *Id.* at 114 (indicating that the Atomic Energy Act "allows the NRC to consider costs in devising or administering requirements that offer protection beyond [the adequate protection] level").

44. *See* Pierce, *Encouraging Safety: The Limits of Tort Law and Government Regulation,* 33 VAND. L. REV. 1281, 1314-17 (1980). Even the most ardent critics of cost-benefit analysis recognize that an agency must consider costs in some manner. *See* McGarity, *Media-Quality, Technology, and Cost-Benefit Balancing Strategies for Health and Environmental Regulation,* 46 LAW & CONTEMP. PROBS., Summer 1983, at 159, 197-99.

45. The interpretation of statutes, court decisions, and even provisions of the Constitution in accordance with each judge's political philosophy is becoming a significant problem on the D.C. Circuit. A democratic and a republican interpretation seemingly exists for everything. *See* Bartlett *ex rel.* Neuman v. Bowen, 824 F.2d 1240, 1248 (D.C. Cir. 1987) (joint statement of Bork, Starr, Buckley, Williams & D.H. Ginsburg, J.J., accompanying per curiam orders) (purely partisan division of judges in three consolidated cases, with each side accusing the other of engaging in "sweeping and revolutionary" changes in legal doctrine).

46. 824 F.2d at 121 (Williams, J., concurring).

47. *See* Pierce, *Political Theory, supra* note 16, at 506; Mashaw, *supra* note 33, at 94.

prior to *Chevron* probably would have been decided differently. For instance, serious doubt exists that Congress actually intended to require a finding by the Occupational Safety and Health Administration (OSHA) that a toxic substance presents a "significant risk" before OSHA can regulate that substance, as a four Justice plurality of the Supreme Court held in the *Benzene* case.[48] Similarly, it is unlikely that Congress actually intended to preclude OSHA from taking costs into account in determining the permissible level of exposure to toxic substances in the workplace, as a five Justice majority of the Court held in the *Cotton Dust* case.[49] Based on the ambiguous language of the statute and the legislative history cited in the multiple opinions in both *Benzene* and *Cotton Dust*, it seems far more likely that Congress simply did not resolve the policy issues addressed by OSHA in either of those cases.

If the Supreme Court had adopted the *Chevron* test before it decided *Benzene* and *Cotton Dust*, the Court probably would have resolved each case with a single unanimous opinion. Instead, the political liberals on the Court tortured the statutory language and legislative history to support an interpretation consistent with their political philosophy, while the political conservatives on the Court engaged in a similar effort to support their preferred resolution of the policy issue. The dominance of judges' personal political views in the pre-*Chevron* process of policy making is both inappropriate and unnecessary in the administrative law context.[50]

Ironically, the *Chevron* test also helps to reconcile some of the Supreme Court's prior decisions that are cited as examples of the Court's prior inconsistent approach to judicial review of agency interpretations of statutory provisions.[51] In *NLRB v. Hearst Publications, Inc.*[52] the Court affirmed the National Labor Relations Board's interpretation of the term "employee" in the National Labor Relations Act to include newsboys, although newsboys are characterized as independent contractors for other purposes. The Court deferred to the agency's interpretation, holding that an agency's interpretation of a statutory provision must be affirmed if it has "a reasonable basis in law."[53] In *NLRB v. Bell Aerospace Co.*[54] a majority of the Court reversed the same agency's in-

48. Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980); *see* Pierce, *Political Theory*, *supra* note 16, at 475-77.

49. American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981); *see* Pierce, *Political Theory*, *supra* note 16, at 475-78.

50. *See supra* sources cited in note 33.

51. *See, e.g.*, J. MASHAW & P. MERRILL, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 252-67 (2d ed. 1985).

52. 322 U.S. 111 (1944).

53. *Id.* at 131.

54. 416 U.S. 267 (1974).

terpretation of "employee" to encompass some managerial employees who have no industrial relations role. In reversing the agency's interpretation, the Court relied upon the language and legislative history of the National Labor Relations Act.[55] In light of *Chevron*, *Hearst* and *Bell Aerospace* may have been decided both correctly and consistently; Congress may have decided explicitly to exclude all managerial personnel from the protections of the labor laws, but may not have decided whether to exclude all independent contractors from those protections.

Several consequences logically follow from this Essay's interpretation of *Chevron* and characterization of the nature of the issues presented to courts when they review agency interpretations of statutory terms. First, courts should apply the *Chevron* test to all agency interpretations of provisions in the statutes that grant the agency its legal power. Courts should not confine the test to the unique context of agency applications of statutory terms to specific factual situations.[56] Indeed, according agencies deference when they apply statutory terms to specific facts but not when they define terms in general rules would create incentives for an agency to make policy through adjudication rather than through rule making. Yet, virtually all judges and administrative law scholars agree that agencies should make policy through rule making procedures rather than through adjudication.[57]

Second, courts should refrain from attempting to tease meaning from ambiguous statutory language and legislative history if the statute at issue establishes a regulatory scheme that is to be implemented by an agency. Agencies are more appropriate institutions to resolve policy issues than courts, which should avoid "creative" interpretation of regulatory statutes administered by agencies.

Third, when a court concludes that Congress left unresolved a policy issue in a statute that is not administered by an agency, the court should acknowledge explicitly that it must resolve the policy issue Congress raised but declined to resolve. In resolving that policy issue, the court should refer to Congress' goals. This is not to say, however, that the court's job is to determine congressional intent. If Congress did not resolve the policy issue, the court must undertake its own resolution of the issue in light of Congress' goals. Forthright recoguition by a court that it is resolving a policy issue is likely to yield better policy than judicial resolution of policy issues through a process disguised as statutory interpretation.

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55. *Id.* at 274-84.

56. *But see Union of Concerned Scientists*, 824 F.2d at 113.

57. *See, e.g.*, 1 K. DAVIS, *supra* note 2, at § 6.38 (2d ed. 1978); J. MASHAW & P. MERRILL, *supra* note 51, at 273-316, 385-413; R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 16, at 281-85.

Fourth, since many statutory interpretation issues are actually issues of policy rather than issues of law, an agency should have the ability to change its prior "interpretation" of a statutory provision. For example, an agency should possess the legitimate power to reassess its goals and policies in light of a change in presidential administrations.[58] This power to reassess an agency's policies should apply to agency policy making through interpretation of ambiguous statutory provisions as well as through the rule making process. Thus, if the next President appoints an EPA administrator who believes that the bubble concept requires an inordinate sacrifice of air quality goals, the administrator should have the discretion to redefine "stationary source" to refer to each piece of combustion equipment. Because Congress chose not to resolve that policy issue, the agency head may appropriately resolve the policy question in a manner consistent with the President's political philosophy "[a]s long as [he] remains within the bounds established by Congress."[59] Different agency heads appointed by Presidents with different political philosophies might reasonably reach different conclusions with respect to that policy issue.

Fifth, if courts apply the *Chevron* test universally, judges will have less room to infuse their personal political philosophies in the Nation's policy making process. The *Chevron* test will allow judges of widely differing political perspectives to agree in a large number of cases that Congress did or did not resolve a particular policy issue. This agreement should reduce the unfortunate tendency of judges to engage in policy making disguised as interpretation of ambiguous statutory language. The traditional approach to judicial review of agency interpretations frequently required judges to search for congressional intent with respect to a policy issue when, in fact, Congress had not made a decision on that policy issue. Such a search is illusory, of course, and invites judges to "interpret" creatively ambiguous language in accordance with their own political philosophies.

Sixth, the *Chevron* test notwithstanding, courts still will confront difficult cases in the process of reviewing agency interpretations of statutory provisions. In some instances courts will legitimately disagree as to whether Congress resolved the specific policy issue addressed by the agency's interpretation. The second part of the *Chevron* test also will present some difficulty. Often judges will differ on the question of whether an agency's decision to adopt a particular policy is reasonable or arbitrary and capricious.

58. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part).

59. *Id.*

The conceptual framework established by *Chevron* will not eliminate all difficult cases; nor will it eliminate completely the influence of each judge's personal political philosophy on the process of judicial review of agency actions. Those goals are unattainable through any means. They are important goals, however, and the *Chevron* framework provides a means to further those goals incrementally. The *Chevron* framework can reduce the number of difficult cases that courts must face and limit the influence of each judge's personal political philosophy on the process of policy making in the modern administrative state.