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Note

Begging to Defer: OSHA and the Problem of Interpretive Authority

Government agencies¹ today crowd all facets of American life.² They possess expertise needed for regulating complex matters such as workplace health and safety.³ Agencies are not, however, computer-like data processors; they make important policy decisions in choosing among regulatory options.⁴

1. The federal government began using agencies to regulate the economy in the nineteenth century. See D. NELKIN & M. BROWN, *WORKERS AT RISK: VOICES FROM THE WORKPLACE* 125 (1984). Agency regulation, however, sprawls well beyond the economic sphere. One commentator suggests that agencies serve a variety of "functions and malfunctions." See Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 272-74 (1986) (noting regulation may police discriminatory practices, redistribute wealth, promote economic efficiency, shape public preferences, or "may reflect little or nothing more than interest-group pressures and thus serve no public purpose"); see also DeLong, *New Wine For A New Bottle: Judicial Review in the Regulatory State*, 72 VA. L. REV. 399, 401-403 (1986) (taxonomizing federal agencies on the basis of their policy functions). Most regulatory agencies "are located within a cabinet department and are subject to the control of administrative superiors who are political appointees." F. HEFFRON & N. MCFEELEY, *THE ADMINISTRATIVE REGULATORY PROCESS* 130 (1983).

2. Compare Sjoberg, Vaughan & Williams, *Bureaucracy as a Moral Issue*, 20 J. APP. BEH. SCI. 441, 441 (1984) (stating that "[t]he advance of bureaucracy . . . has accompanied a rise in the standard of living and quality of life for significant segments of the world's people . . . [but] has generated the major moral problems of our time") with Milward & Rainey, *Don't Blame the Bureaucracy!*, 3 J. PUB. POL'Y 149, 164 (1983) (stating that "[a]ll advanced modern societies have large public sectors, and in fact the United States ranks about eight among the major industrialized democracies in percentage of gross domestic product accounted for by the public sector") and Newitt, *In Search of the Bloated Bureaucracy*, 8 AM. DEMOG. 26 (March 1986) (noting that between 1954 and 1986, public employment grew by just 14% in the United States while total jobs increased 74%).

3. See, e.g., *In re Permanent Surface Mining Regulatory Litig.*, 653 F.2d 514, 522 (D.C. Cir. 1981) (en banc) (commenting that judicial respect for agency expertise "is particularly appropriate when a complex regulatory statute emerges from a process of difficult legislative gestation"), *cert. denied*, 454 U.S. 822 (1981).

4. See Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 472 (1985). According to Pierce, agencies make three types of sweeping decisions in formulating regulations: "(1) how to maximize aggregate social welfare; (2) how to distribute society's wealth

Courts limit agency discretion by requiring agencies to act within the scope of their authority.⁵ Because the courts themselves are isolated from the electorate, however, their review of agency decisions is deferential.⁶

The tension between controlling agencies and deferring to them creates a dilemma for courts interpreting regulations under the Occupational Safety and Health Act of 1970 ("OSHA").⁷ Congress delegated authority to the Secretary of Labor to set standards for workplace health and safety,⁸ and created the Occupational Safety and Health Review Commission ("OSHRC") to adjudicate disputes arising from violations of those standards.⁹ When the Secretary and OSHRC render conflicting interpretations of an OSHA regulation, the circuits are divided over which interpretation to follow.¹⁰ This Note proposes a resolution to the circuit split based on a policy analysis of judicial review of agency decisions. Part I explains agency rulemaking procedure, examines judicial standards of review of agency interpretations, and introduces the controversy over OSHA interpretations. Part II analyzes this controversy in light of legislative intent, precedent, and policy. The Note concludes that courts should defer to the Secretary's interpretations rather than OSHRC's, and formulates a standard of review designed to delineate the proper scope of judicial and agency authority.

I. THE PROCEDURAL AND PRECEDENTIAL CONTEXT OF INTERPRETIVE REVIEW

A. AGENCY RULEMAKING

1. Rulemaking in General

Agencies make law through congressional grants of

among competing groups and regions; and (3) how to resolve the inevitable conflicts between the goals of wealth maximization and equitable distribution of wealth." *Id.* at 472; see also Cass, *Models of Administrative Action*, 72 VA. L. REV. 363, 364-67 (1986) (analyzing models of administrative decisionmaking process).

5. See *infra* notes 57-62 and accompanying text (describing judicial methods of reviewing agency actions).

6. See *infra* notes 63-80 and accompanying text (describing judicial standards for review of agency rule interpretations).

7. 29 U.S.C. §§ 651-678 (1982).

8. *Id.* § 651.

9. *Id.* § 659(c).

10. See *infra* notes 82-91 and accompanying text.

power¹¹ by promulgating rules and enforcing them, and by adjudicating disputes.¹² In exercising those powers, agencies are bound by the Administrative Procedure Act (APA),¹³ which prescribes several forms of rulemaking. To make a rule under the "formal rulemaking" procedure, an agency must conduct a public hearing, evaluate evidence, and make findings on the record.¹⁴ An agency must use this formal rulemaking process, however, only if the statute empowering the agency requires it.¹⁵

Some agencies need follow only the APA's "informal rulemaking" formula. Under this procedure, the agency must give public notice of the proposed rulemaking, solicit participation of interested persons, and incorporate in the final rule a concise statement of its basis and purpose.¹⁶ The multiple steps

11. In delegating power to agencies, Congress employs vague statutory language, leaving room for agencies to exercise discretion and develop policy. See D. RILEY, *CONTROLLING THE FEDERAL BUREAUCRACY* 83 (1987) (noting that "structural questions [decided by agencies have] significant policy implications"); Pierce, *supra* note 4, at 473 (noting statutory language can establish more or less precise policy standards for agency to follow).

12. See F. SCHWARTZ, *ADMINISTRATIVE LAW* § 4, at 7 (1976) (noting "the outstanding characteristic of the administrative agency is its possession of legislative and judicial powers").

13. 5 U.S.C. §§ 551-559 (1982).

14. See *id.* § 556(b) (governing rulemaking hearings); § 557 (governing determination of tentative and final decisions regarding proposed rules and requiring record of factfinding and reasons for adopting or rejecting proposed rules); see also F. HEFFRON & N. MCFEELEY, *supra* note 1, at 235-37 (stating that §§ 556 and 557 require "that an agency hold a trial-type hearing on the proposed rule, follow all the procedural requirements for such a hearing . . . , and base the final rule on 'substantial evidence in the record' of the hearing").

15. See F. HEFFRON & N. MCFEELEY, *supra* note 1, at 236.

16. Section 553 states that:

General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include — (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except when notice or hearing is required by statute, this subsection does not apply — (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.

5 U.S.C. § 553(b) (1982). The section also specifies that:

After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

Id. § 553(c).

required to promulgate a regulation under either the formal or the informal procedure guarantee notice to members of the public, opportunity for outsiders to participate, and agency accountability.

The APA also provides for the adjudication of disputes arising from violations of agency rules or matters within the jurisdiction granted agencies by statute.¹⁷ Agencies therefore can establish law either through promulgation of general rules by formal or informal process¹⁸ or on a case-by-case basis through adjudication.¹⁹

Not all agency rules have legal effect, however.²⁰ Courts distinguish between "legislative" and "interpretive" rules. Legislative rules "prescribe, modify, or abolish duties, rights or exemptions."²¹ Interpretive rules clarify a rule or agency policy for the public, agency staff, and political leaders, but do not have legal effect.²²

17. See *id.* § 554. Although the distinction between rulemaking and adjudication sometimes becomes foggy, "'adjudication' resembles what a court does in deciding a case," while "'rulemaking' resembles what a legislature does in enacting a statute." 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 7:2, at 7 (1979).

18. Once rules are made, agencies can use informal means to seek compliance, including threats of prosecution, publicity, or nonrenewal of a license. See Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 923-24 (1965); see also F. HEFFRON & N. MCFEELEY, *supra* note 1, at 201 (enumerating possible agency tactics).

19. See Note, *Administrative Adjudication—A New Legal Standard for its Use—Ford Motor Co. v. FTC*, 58 WASH. L. REV. 633, 633 n.1 (1983) (noting that "[a]gencies use rulemaking and adjudication to formulate legislative-type rules, and to secure compliance with existing rules and regulations").

20. Something has legal effect if it derives from proper authority and prescribes a penalty or course of conduct, confers a right, privilege, authority, or immunity, or imposes an obligation. Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L. J. 381, 383 n.13 (quoting 1 C.F.R. § 1.1 (1984)).

21. *Id.* at 383. Legislative rules may have the force of law. See F. HEFFRON & N. MCFEELEY, *supra* note 1, at 235 (presenting three criteria under which legislative rule has force of law).

22. See *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977) (stating that "a court is not required to give effect to an interpretive regulation"); *Seneca Oil v. Department of Energy*, 712 F.2d 1384, 1396 (Temp. Emer. Ct. App. 1983) (noting that interpretive rulings are not binding on courts, while legislative regulations have force of law); see also *British Caledonian Airways v. Civil Aeronautics Bd.*, 584 F.2d 982, 992 n.20 (D.C. Cir. 1978) (noting that interpretive order is "more subject to invalidation than a legislative rule of the agency would be"); 2 K. DAVIS, *supra* note 17, at 57 (distinguishing "agency action which carries out delegated power" from "agency action which is not based on delegated power," and noting this "is the essence of the difference between

2. OSHA Rulemaking

The Occupational Health and Safety Act of 1970²³ authorizes the Secretary of Labor to set mandatory health and safety standards for the workplace.²⁴ The Secretary promulgates regulations,²⁵ inspects job sites,²⁶ identifies employers who violate the regulations,²⁷ and notifies such employers of proposed penalties.²⁸ The Act creates a separate body, the Occupational Safety and Health Review Commission, to adjudicate disputes that arise when employers contest the Secretary's citations or penalties.²⁹

The original occupational safety and health bill delivered to the Senate Committee on Labor and Public Welfare in 1969³⁰ gave the Secretary power to set nationwide occupational safety and health standards,³¹ to enforce the standards by conducting inspections and investigations,³² and to hold hearings for violations.³³ As reported by the committee, the bill vested in the Secretary all three regulatory powers of rulemaking, enforce-

legislative rules and interpretative rules"); Asimow, *supra* note 20, at 394-401 (describing judicial tests for determining whether rule is legislative or interpretive).

23. 29 U.S.C. §§ 651-678 (1982). OSHA regulations cover five million employment establishments. See Mangum, *Murder in the Workplace: Criminal Prosecution v. Regulatory Enforcement*, 39 LABOR L. J. 220, 228 (1988).

24. 29 U.S.C. § 651 (1982).

25. *Id.* § 651(b)(3).

26. *Id.* § 657.

27. *Id.* § 659(a).

28. *Id.* The Secretary may compromise or settle the amount of penalty with the employer. See Dale M. Madden Constr. v. Hodgson, 502 F.2d 278, 280 (9th Cir. 1974).

29. 29 U.S.C. § 659(c) (1982). OSHRC refers the dispute to an administrative law judge ("ALJ"), 29 U.S.C. § 661(d), who conducts hearings in which employers, employees, and the Secretary potentially may participate. 29 U.S.C. § 665. The ALJ's conclusion then becomes OSHRC's final order unless a commissioner requests review. 29 U.S.C. § 661(j). OSHRC may affirm, modify, or vacate a citation or proposed penalty on the basis of findings of fact. 29 U.S.C. § 659(c). Both employers and the Secretary have the right of appeal to the United States Court of Appeals. 29 U.S.C. § 660(b).

30. Senator Williams introduced S. 2193, a bill "[t]o authorize the Secretary of Labor to set standards to assure safe and healthful working conditions for working men and women." S. 2193, 91st Cong., 1st Sess., (1969).

All the OSHA legislative history materials cited in notes 30-55 are reprinted in SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUB. WELFARE, 92D CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at 1 (1971) [hereinafter LEGISLATIVE HISTORY].

31. *Id.* § 3.

32. *Id.* § 5.

33. *Id.* § 6.

ment, and adjudication.³⁴ The committee voted down a proposal to create a rulemaking board independent of the Secretary. It expressly rejected arguments that such a board would have greater rulemaking expertise than the Secretary and would represent a needed separation of powers between rulemaking and enforcement,³⁵ although some members of the committee disapproved of the reported bill³⁶. The committee also rejected a compromise amendment, proposed by Senator Javits, that would have vested policymaking authority in the Secretary but vested adjudicatory power in a separate panel.³⁷ Under the Javits Amendment, later offered by the senator as an amendment on the floor,³⁸ this panel primarily would make "findings as to the facts."³⁹ The panel's rulemaking authority would extend only to making "such rules as are necessary for the orderly

34. S. REP. NO. 1282, 91st Cong., 2d Sess. 14-15, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 5177, 5784-85.

35. *Id.* With regard to expertise, the committee conceded that "professional and technical expertise must be involved in the development and promulgation of a standard," but concluded that "such expertise would be fully available to the Secretary." *Id.* Moreover, the committee concluded that a sound program

will result if responsibility for this formation of rules is assigned to the same administrator who is also responsible for their enforcement and for seeing that they are workable and effective in their day-to-day application, thus permitting cohesive administration of a total program. In the committee's view, the question of separation of power is not so much one of whether the Secretary should be separated from the power to set standards, but whether he should be separated from the power to administer an integral program, and from the power of Congress and the public to hold him accountable for the overall implementation of that program.

Id.

36. Senator Javits noted, for example, that controversy over the Secretary's powers had become "the key issue . . . which has polarized labor and management." *Id.* at 54 (separate statement of Sen. Javits).

37. *See id.* at 55-56 (separate statement of Sen. Javits) (arguing that provision for three-person "independent panel" would speed up enforcement and accord more closely "with traditional notions of due process than would hearing and determination by the Secretary," through which the Secretary would be "essentially acting as prosecutor and judge"). The committee rejected the amendment by a 10-7 vote. *Id.* 16 at.

38. S. AMEND. NO. 1061, 91st Cong., 2d Sess., 116 CONG. REC. 36, 531-32 (1970).

39. LEGISLATIVE HISTORY, *supra* note 30, at 392 (statement of Sen. Javits). Senator Javits reiterated the justifications for taking adjudication away from the Secretary: increased procedural expediency and "traditional notions of due process." *Id.* Expressing confidence in the ability of the Secretary to safeguard due process, he concluded nonetheless that "[t]he important thing is to inspire confidence in the community we expect to obey this law." *Id.* at 469. *See also id.* at 473 (statement of Sen. Holland) (emphasizing need to foster "public confidence and acceptance").

transaction of its proceedings."⁴⁰

Advocates of the original committee bill countered on the floor, arguing that such a division of power was unnecessary and counterproductive. Through enforcement, they contended, the Secretary would develop more expertise and would make better rules.⁴¹ Creating more agency divisions would merely add to the nation's bureaucratic web without providing any greater due process than the APA.⁴² Further, allowing the Secretary to promulgate rules would let workers more easily grasp how standards were being set.⁴³ Moreover, by avoiding "unnecessary legal steps," the committee bill sought to prevent litigious delay that could threaten "the life of the worker."⁴⁴

Senator Dominick also offered a substitute bill⁴⁵ that would have divided responsibility three ways, creating an Occupational Safety and Health Board to promulgate rules, authorizing the Secretary of Labor to enforce them, and empaneling an Occupational Safety and Health Appeals Commission to adjudicate disputes.⁴⁶ Advocates of this substitute criticized the

40. S. AMEND. NO. 1061, *supra* note 38 § 11(g).

41. LEGISLATIVE HISTORY, *supra* note 30, at 428-30 (statement of Sen. Williams).

42. *Id.*

43. *Id.* at 432 (arguing that workers are "entitled to know").

44. *Id.* at 433.

45. S. 4404, 91st Cong., 2d Sess. (1970), *reprinted in* LEGISLATIVE HISTORY, *supra* note 30, at 73-140.

46. *Id.* Proponents of this substitute voiced their opposition to allowing the Secretary to exercise all three regulatory powers. Senator Saxbe, for example, stated that:

[A]t the present time the bill requires that the Secretary of Labor . . . set safety standards. These standards, once set, will be enforced by whom? The Secretary of Labor. If a violation is found in a plant and a complaint is made, to whom do they go? The Secretary of Labor. And if the plant needs to be closed, there is a provision for a court procedure, but there is also a relief valve providing that the Secretary of Labor can close the plant in an emergency.

LEGISLATIVE HISTORY, *supra* note 30, at 320 (statement of Sen. Saxbe). *See also id.* at 335-36 (statement of Sen. Saxbe) (arguing that to give the Secretary so much power would be "unseemly"); *id.* at 420 (stating that "concentration of power gives rise to a great potential for abuse"); *id.* at 472 (arguing that dividing power would prevent the Secretary from running an inquisitorial "star chamber"). Senator Tower expressed concern that with "no checks and safeguards placed on the power of the Secretary, an "enormous amount of power . . . could easily be abused, culminating in a breakdown of existing Government neutrality in labor-management relations." *Id.* at 448 (statement of Sen. Tower). Senator Dominick explained:

One of the things I am trying to avoid is to try to put everything in one heap and say that because it is in one heap, it is obviously going to be a nice one, filled with sweet perfume, which will do great things

committee bill's "simplistic approach of placing all functions in the Secretary of Labor."⁴⁷

The Senate rejected the Dominick substitute bill,⁴⁸ and focused on the Javits compromise amendment.⁴⁹ The Senate eventually passed the bill in that form.⁵⁰

In the House, the Committee on Education and Labor reported a companion bill to the version introduced in the Senate.⁵¹ This committee also rejected any splitting of the Secretary's power.⁵² On the House floor, opponents of the bill voiced the same concerns as Senate opponents.⁵³ The House re-

for the rest of the country. We can do it far better in setting up an independent board.

Id. at 486 (statement of Sen. Dominick). Critics of the Secretary advanced an amendment to the committee bill, proposing a separate board for rulemaking. S. AMEND. NO. 1053, 91st Cong., 2d Sess., 116 CONG. RES. 36,530 (1970). Supporters of the amendment argued that it would foster a "balanced governmental structure," and would break up an "undesirable monopoly of functions." LEGISLATIVE HISTORY, *supra* note 30, at 363 (statement of Sen. Dominick). The Senate later tabled the amendment. *Id.* at 449. The Appeals Commission's "only function would be to conduct hearings on alleged violations discovered by the Secretary." *Id.* at 298 (statement of Senator Saxbe).

47. LEGISLATIVE HISTORY, *supra* note 30, at 298 (statement of Sen. Saxbe) (comparing proposed system to "having the Chief of Police, in addition to . . . conducting inspections, also write the criminal laws and then act as judge and jury").

Throughout debate, members of both houses confronted and contested the issue of the Secretary's policymaking power. In the Senate, the issue was the "nut in the coconut." *Id.* at 464 (statement of Sen. Javits).

The issue of rulemaking power also remained central throughout the House's debate. *See, e.g., id.* at 979-90 (statement of Rep. Smith) (discussing proposal to create separate Occupational Safety and Health Board with rulemaking authority).

48. *Id.* at 461.

49. *Id.* at 478 (noting that Senate passed Javits amendment by vote of 43-38).

50. *Id.* at 528 (by vote of 83-3).

51. H.R. 16785, 91st Cong., 2d Sess., 116 CONG. REC. 10,656 (1970).

52. *See* HOUSE COMM. ON ED. AND LABOR, 91ST CONG., 2D SESS. (1970), REPORT ON THE OCCUPATIONAL SAFETY AND HEALTH ACT 18, reprinted in LEGISLATIVE HISTORY, *supra* note 30, at 831, 848. The committee

considered and unequivocally rejected any provision for a National Occupational Safety and Health Board to promulgate standards

The Committee agrees that professional and technical information must precede the decision to establish a standard, but experts would be used in an advisory capacity with decision-making as part of the Secretary's authority. In this way, the focal point of responsibility is more easily identified.

Id.

53. *See, e.g., id.* at 53-54 (minority views of Reps. Scherle, Ashbrook, Eshleman, Collins, Landgrebe, and Ruth) (characterizing lack of power separation as "specific defect" in house bill); *see also* LEGISLATIVE HISTORY, *supra* note 30,

ceived the bill passed by the Senate and amended it to include a policymaking board independent of the Secretary.⁵⁴

The Senate version ultimately passed both the House and Senate, and became the Occupational Safety and Health Act of 1970.⁵⁵ The final version of the Act vested policymaking and enforcement authority in the hands of the Secretary, while vesting adjudicatory power in OSHRC.⁵⁶

B. JUDICIAL REVIEW OF AGENCY DECISIONS

1. Generally

Judicial review of agencies takes several forms. Courts can invoke constitutional delegation doctrine, reverse agency actions that do not conform to procedural requirements, and scrutinize agency rule interpretations.

Courts occasionally invoke "delegation doctrine" to strike down agency-creating legislation.⁵⁷ According to this doctrine, Congress unconstitutionally surrenders its article I lawmaking powers when it gives an agency too much discretion through an excessively vague statutory standard for agency action.⁵⁸

at 1050 (statement of Rep. Michel) (objecting to lack of power separation "on the grounds that it would place unlimited power in the hands of the Secretary of Labor"); *id.* at 1062 (statement of Rep. Silkes) (stating that "[t]he enormous amount of power given to the Secretary of Labor by the Committee bill could easily be abused").

54. LEGISLATIVE HISTORY, *supra* note 30, at 1146.

55. *Id.* at 1225.

56. *See supra* notes 24-29 and accompanying text.

57. *Compare* *Mistretta v. United States*, 109 S. Ct. 647, 675 (1989) (upholding congressional delegation of authority to an independent sentencing commission to promulgate sentencing guidelines) *with* *Bowsher v. Synar*, 478 U.S. 714, 734 (1986) (striking portions of Gramm-Rudman Act on separation of powers grounds because it vested too much authority in Comptroller General). Because of the doctrine's ambiguity, courts today rarely invoke it. *See, e.g.*, Stewart, *Beyond Delegation Doctrine*, 36 AM. U.L. REV. 323, 324 (1987) (arguing that "courts are justified in refusing to invoke this long somnolent doctrine in any but the most unusual and infrequent circumstances").

58. Delegation doctrine entwines courts in the difficult line-drawing problem of deciding how vague is too vague. *See, e.g.*, *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 543, 545 (1981) (Rehnquist, J., dissenting) (suggesting that OSHA itself is unconstitutional, because Congress delegated legislative authority through vague grant of power); *see also* *Humphrey v. Baker*, 848 F.2d 211, 216 n.7 (D.C. Cir.) (noting static condition of doctrine: "no recent doctrinal developments have undermined the Supreme Court's treatment of delegation questions, which has remained essentially unchanged since the constitutional triumph of the New Deal"), *cert. denied*, 109 S. Ct. 491 (1988); Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1249-74 (1985) (proposing new judicial test for delegation doctrine problems).

Courts also may reverse agency actions that do not conform to statutory procedural requirements imposed by Congress.⁵⁹ Courts may determine that an agency made a finding of fact based on inadequate evidence,⁶⁰ gave inadequate reasons for a decision,⁶¹ or committed a procedural error.⁶²

Finally, courts can hold that an agency wrongly interpreted a statute or regulation.⁶³ Unlike a reversal on procedural grounds, this type of reversal prevents an agency from simply fixing the defect and "tak[ing] the same action a second time."⁶⁴ The judicial standard of review depends on whether the agency is interpreting its enabling statute or its own regulations,⁶⁵ and on whether several organs of the same agency offer conflicting interpretations.⁶⁶

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council*,⁶⁷ the Supreme Court attempted to resolve confusion over the proper scope of judicial review of agency interpretation of enabling statutes.⁶⁸ *Chevron* involved an Environmental Protection Agency (EPA) interpretation of the Clean Air Act, which set stringent requirements for manufacturers seeking to install new *stationary sources* of air pollutants or to modify existing sources.⁶⁹ The EPA announced a "plantwide definition"

59. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-14 (1971). When an agency rule is challenged as arbitrary, capricious, or an abuse of discretion, courts may review the record to determine whether "substantial evidence" justifies the rule. See *id.* at 413-18. Courts may not, however, force agencies to employ more procedure than the APA requires. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 546 (1978).

60. See R. PIERCE, S. SHAPIRO & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* § 7.3, at 357-69 (1985).

61. See *id.* § 7.5, at 377-78.

62. See, e.g., *Babcock & Wilcox Co. v. Occupational Safety & Health Review Committee*, 622 F.2d 1160, 1166-68 (3d Cir. 1980) (reversing agency decision because agency did not follow circuit precedent as to definition of term *willfulness*).

63. See R. PIERCE, S. SHAPIRO, & P. VERKUIL, *supra* note 60, § 7.8.1, at 410-13.

64. *Id.* § 7.8.1, at 410.

65. See *infra* notes 67-80 and accompanying text.

66. See *infra* notes 81-84 and accompanying text.

67. 467 U.S. 837 (1984).

68. Before *Chevron*, courts deferred to agency interpretations in varying degrees. Some courts independently analyzed agency interpretations, while other courts upheld agency interpretations so long as they were reasonable. See Note, *A Framework for Judicial Review of an Agency's Statutory Interpretation*, 1985 DUKE L.J. 469, 471 & n.18.

69. *Chevron*, 467 U.S. at 840.

of the term *stationary sources*,⁷⁰ which the Court upheld after articulating an exceedingly deferential two-part test of agency interpretations.⁷¹ When faced with an agency's construction of its enabling statute, a court first must ask "whether Congress has directly spoken to the precise question at issue."⁷² If Congress clearly intended a certain meaning for a statutory provision, both agencies and courts must accept that meaning.⁷³ When congressional intent is ambiguous, however, "the question for the court is whether the agency's answer is based on a permissible construction of the statute."⁷⁴ The *Chevron* test marked a move toward greater judicial deference to agency interpretations of enabling statutes.⁷⁵

Courts accord even greater deference, however, to an

70. *Id.* at 840-41. Under the EPA's definition of *stationary source*, a company could install or modify a piece of equipment at a given plant without meeting permit requirements as long as the alteration did not increase the plant's total emissions. *Id.* at 853-59.

71. *Id.* at 866. The court of appeals had held the EPA's interpretations void as "inappropriate" in programs enacted to improve air quality." *Id.* at 841-42 (quoting *Natural Resources Defense Council v. Gorsuch*, 685 F.2d 718, 726 (D.C. Cir. 1982), *rev'd*, 467 U.S. 837 (1984)).

72. *Chevron*, 467 U.S. at 842.

73. *Id.* at 842-43.

74. *Id.* at 843. The Court underscored the degree of deference this standard provides by explaining that lower courts "need not conclude that the agency construction was the only one it permissibly could have adopted . . . , or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11.

75. See Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 300, 308-09 (1986) (describing "broader message" of *Chevron*); Note, *supra* note 68, at 495 (noting Court presented "a framework . . . that provides meaningful judicial review while prohibiting judicial infringement on an agency's legitimate authority"); see, e.g., *National Grain & Feed Ass'n v. OSHA*, 866 F.2d 717, 733 (5th Cir. 1989) (stating that "only where congressional intent is pellucid are we entitled to reject reasonable administrative construction of a statute"); *Isaacs v. Bowen*, 865 F.2d 468, 472 (2d Cir. 1989) (stating that where Congress has not directly resolved issue, "a court accepts the construction of a statute posited by the agency Congress has charged to administer it"); *Marathon Oil Co. v. United States*, 807 F.2d 759, 765 (9th Cir. 1986) (stating that "agency's interpretation of the applicable statute is entitled to substantial deference"), *cert. denied*, 480 U.S. 940 (1987); *Lugo v. Schweiker*, 776 F.2d 1143, 1148 (3d Cir. 1985) (noting that deference to Secretary's reasonable interpretation is "basic principle of administrative law and statutory construction"); *Sundberg v. Mansour*, 627 F. Supp. 616, 620 (W.D. Mich. 1986) (stating that court's task is merely to determine whether agency's interpretation is "reasonable" and "consistent with the statutory purpose"). *But cf.* *Dugan v. Ramsay*, 727 F.2d 192, 196 (1st Cir. 1984) (finding "the agency interpretation here at issue is so totally unreasonable as to be without support in the authorizing statute").

agency's interpretation of its own regulations.⁷⁶ In *Bowles v. Seminole Rock & Sand Co.*,⁷⁷ the Supreme Court accepted an agency's construction of a wartime price regulation.⁷⁸ The *Bowles* Court adopted a deferential standard of review for agency regulatory interpretations, stating that "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."⁷⁹ Following this standard, lower courts defer to agency interpretations of regulations.⁸⁰

76. See *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (stating that "[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order"); see also *Texas Mun. Power Agency v. Administrator, EPA*, 836 F.2d 1482, 1488 (5th Cir. 1988) (noting that agency's interpretations of its regulations are entitled to great deference); *National Ass'n of Regulatory Util. Comm'n v. FCC*, 746 F.2d 1492, 1502 (D.C. Cir. 1984) (same); *Jones v. Illinois Dep't of Rehabilitation Servs.*, 689 F.2d 724, 729 (7th Cir. 1982) (same); *Drummond Coal Co. v. Hodel*, 610 F. Supp. 1489, 1496 (D.D.C. 1985) (same), *cert. denied*, 480 U.S. 941 (1987); *Marathon Oil Co. v. United States*, 604 F. Supp. 1375, 1379 (D. Alaska 1985) (same).

77. 325 U.S. 410 (1945).

78. The Administrator of the Office of Price Administration had issued regulations under The Emergency Price Control Act of 1942. *Id.* at 411. The Court accepted the Administrator's interpretation because it was consistent with the language of the statute. *Id.* at 418.

79. *Id.* at 414. On several occasions, the Court has reaffirmed the *Bowles* standard of review for agency interpretations of regulations. See, e.g., *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*, 108 S. Ct. 427, 440 (1987); *Lyng v. Payne*, 476 U.S. 926, 939 (1986); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980); *United States v. Larionoff*, 431 U.S. 864, 872 (1977); *INS v. Stanisic*, 395 U.S. 62, 72 (1969); *Thorpe v. Housing Auth.*, 393 U.S. 268, 276 (1969).

80. See, e.g., *Town of Huntington v. Marsh*, 859 F.2d 1134, 1138 (2d Cir. 1988) (deferring to agency "regarding interpretation of regulations it participated in formulating"); *Wilder v. Prokop*, 846 F.2d 613, 619 (10th Cir. 1988) (relying on agency interpretations of regulations as "controlling law"); *National-Southwire Aluminum Co. v. EPA*, 838 F.2d 835, 838 (6th Cir.) (giving agency interpretations "special deference"), *cert. denied*, 109 S. Ct. 390 (1988); *California Dep't of Educ. v. Bennett*, 833 F.2d 827, 830 (9th Cir. 1987) (giving agency interpretations "substantial deference"); *New York v. Lyng*, 829 F.2d 346, 349 (2d Cir. 1987) (same) (citing *Lyng v. Payne*, 476 U.S. 926, 939 (1986)); *National Trust for Historic Preservation v. Dole*, 828 F.2d 776, 782 (D.C. Cir. 1987) (per curiam) (giving agency interpretations "great deference"); *Director, Office of Workers' Compensation Programs v. Mangifest*, 826 F.2d 1318, 1323 (3d Cir. 1987) (stating that court must defer unless an agency's interpretation is plainly erroneous or inconsistent); *Mast Indus. v. United States*, 822 F.2d 1069, 1073 (Fed. Cir. 1987) (affording agency interpretations "substantial weight"); *Hunter v. Director, Office of Workers' Compensation Programs*, 803 F.2d 800, 802 (4th Cir. 1986) (reciting *Bowles* standard); *United States v. Saade*, 800 F.2d 269, 271 (1st Cir. 1986) (according "considerable weight"); *Parker v. Bowen*, 788 F.2d 1512, 1518 (11th Cir. 1986) (agency interpretations holding that agency interpretation is "entitled to deference"); *Kickapoo Oil Co. v. Murphy Oil Corp.*, 779 F.2d 61, 67 (Temp. Emer. Ct. App. 1985) (reciting *Bowles* standard);

Sometimes separate organs of the same agency develop

Smith v. Sorensen, 748 F.2d 427, 432 (8th Cir. 1984) (giving agency interpretations "significant weight" and "great deference") (quoting Builders Steel Co. v. Marshall, 575 F.2d 663, 666 (8th Cir. 1978) and Murphy Oil Corp. v. Federal Energy Regulatory Comm'n, 589 F.2d 944, 948 (8th Cir. 1978)), *cert. denied*, 471 U.S. 1054 (1985); PPG Indus. v. Harrison, 660 F.2d 628, 633 (5th Cir. 1981) (giving agency interpretations "controlling weight"); International Soc'y for Krishna Consciousness, Inc. v. Rochford, 585 F.2d 263, 271 (7th Cir. 1978) (noting that "court should consider administrative interpretation"). *But cf.* United States v. Eastern Air Lines, 792 F.2d 1560, 1564 (11th Cir. 1986) (stating that court "should not mechanically adopt interpretation that exceeds the bounds of reasonableness"); Bahramizadeh v. INS, 717 F.2d 1170, 1173-74 (7th Cir. 1983) (per curiam) (rejecting agency interpretation under "great deference" standard because interpretation was "not consistent with the express wording of the regulation"); Izaak Walton League of Am. v. Marsh, 655 F.2d 346, 363 n.42 (D.C. Cir.) (noting that where interpretation is "contradicted by strong evidence, it need not be followed"), *cert. denied*, 454 U.S. 1092 (1981); Stewards Found. v. United States, 654 F.2d 28, 33 n.10 (Ct. Cl. 1981) (rejecting agency interpretation because agency failed to provide "sufficient, consistent application" of interpretation); Cardenas v. Walters, 633 F. Supp. 776, 777-78 (W.D. Pa. 1985) (stating that agency "interpretation cannot be upheld if it flies in the face of the regulation's intent").

Some courts adjust the level of deference they give agency interpretations according to the degree of technical expertise the subject matter of the regulation requires. *See, e.g.*, Bersani v. Robichaud, 850 F.2d 36, 45 (2d Cir. 1988) (assuming without deciding that less deference is due an agency interpretation involving a matter beyond the agency's special expertise), *cert. denied*, 109 S. Ct. 1556 (1989); Pacific Coast Medical Enter. v. Harris, 633 F.2d 123, 131 (9th Cir. 1980) (noting that "agency's expertise make[s] it particularly suited to interpret the language"); Firefighters Inst. for Racial Equality v. City of St. Louis, 616 F.2d 350, 358 n.15 (8th Cir.) (stating that agency interpretations are entitled to especially great deference "where . . . [the regulations] are highly technical"), *cert. denied*, 452 U.S. 938 (1981); Grossman v. Bowen, 680 F. Supp. 570, 575 (S.D.N.Y. 1988) (noting that "agency's interpretation is not entitled to great deference . . . if it rests upon general common-law principles and not upon expertise within the agency's particular field"); Roberts Constr. Co. v. Small Business Admin., 657 F. Supp. 418, 422 (D. Colo. 1987) (stating that "deference is especially appropriate if agency expertise or technical knowledge is involved"); Garner v. Office of Personnel Management, 633 F. Supp. 995, 999 (E.D. Pa. 1986) (noting degree of deference "is directly proportional to the complexity of the statutes and regulations involved").

A special situation exists when an agency presents a particular construction of a regulation for the first time during litigation. The potential for bias against the opposing party then weighs against deferring to the agency construction. In addition, offering a new interpretation at the litigation stage may deprive a party of the notice necessary to comply with the regulation. Moreover, the policy of settling expectations that buttresses the deference principle, *see infra* notes 164-65 and accompanying text, is not present when an agency first offers a construction at the litigation stage. Courts therefore generally refuse to accord *Bowles* deference to the agency in this situation. *See, e.g.*, Alaniz v. Office of Personnel Management, 728 F.2d 1460, 1465 (Fed. Cir. 1984) (stating that "no deference is due to an agency 'interpretation' fashioned for the purposes of litigation"); Ames v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 567 F.2d 1174, 1177 n.3 (2d Cir. 1977) (rejecting agency's interpretation first of-

conflicting interpretations of a regulation, however.⁸¹ Such a conflict creates problems even for courts willing to defer to the agency. In *Potomac Electric Power Co. v. Director*,⁸² the Supreme Court rejected the Benefits Review Board's (BRB) interpretation of a provision of the Longshore and Workers' Compensation Act in favor of the Secretary of Labor's interpretation.⁸³ The Court ruled that the BRB deserved no interpretive deference because it is merely an adjudicatory body with no policymaking authority.⁸⁴

ferred as "litigating position"); *Massy v. United States*, 214 F.2d 935, 940 (8th Cir. 1954) (refusing to accord deference to agency interpretation not offered until regulation ceased to be in effect, not published in Federal Register, and not issued until beginning of trial); *Morabito v. Blum*, 528 F. Supp. 252, 270 n.17 (S.D.N.Y. 1981) (stating that "where an agency files an *amicus curiae* brief setting forth its opinion as to the proper reading of one of its regulations, such an expression of opinion is not an 'interpretation' within the meaning of the [deference] rules"). *But cf.* *Kickapoo Oil Co. v. Murphy Oil Corp.*, 779 F.2d 61, 67 (Temp. Emer. Ct. App. 1985) (recognizing that *Bowles* logic does not apply, but accepting agency interpretation advanced in *amicus* brief as "persuasive in its own right").

81. *See infra* notes 87-91 and accompanying text (documenting conflicting judicial approaches to interpretations under OSHA). Benefits Review Board (BRB) cases pose a similar problem. Under both the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1982), and the Black Lung Benefits provision, 30 U.S.C. §§ 901-945, of the Mine Safety and Health Act, 30 U.S.C. §§ 801-962, the Secretary of Labor sets policy regulations, while the BRB adjudicates disputes. 30 U.S.C. §§ 811(a), 921(b), 932(a) (incorporating by reference 33 U.S.C. § 921(b)), 939(a). *See* *Bethlehem Mines Corp. v. Director, Office of Workers' Compensation Programs*, 766 F.2d 128, 130 (3d Cir. 1985) (noting that "[t]he BRB . . . is merely an adjudicatory tribunal, and Congress has conferred upon it no authority to make rules or formulate policy").

82. 449 U.S. 268 (1980).

83. *Id.* at 274.

84. *Id.* at 278 n.18 (noting that BRB "is not a policymaking agency; its interpretation . . . thus is not entitled to any special deference from the courts"). Lower courts have followed the Supreme Court's distinction between rulemaking and adjudicatory authority in the context of BRB cases, deferring to the Secretary of Labor rather than to the BRB. *See* *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 723 (11th Cir. 1988) (according BRB no "special deference"); *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 841 F.2d 1085, 1087 (11th Cir. 1988) (same); *William Bros. v. Pate*, 833 F.2d 261, 264 (11th Cir. 1987) (same); *Director, Office of Workers' Compensation Programs v. Hill*, 831 F.2d 635, 637 (6th Cir. 1987) (per curiam) (stating that BRB is "entitled to no deference" because it is "quasi-judicial body empowered to resolve legal issues, but not to engage in . . . rulemaking"); *Director, Office of Workers' Compensation Programs v. Mangifest*, 826 F.2d 1318, 1323 (3d Cir. 1987) (deferring to "the Director of the Office of Workers' Compensation Programs, not to the BRB, for the Director is the maker of policy"); *Old Ben Coal Co. v. Luker*, 826 F.2d 688, 696 n.4 (7th Cir. 1987) (distinguishing "independent adjudicatory capacities" from "rulemaking authority"); *Saginaw Mining Co. v. Mazzulli*, 818 F.2d 1278, 1283 (6th Cir. 1987) (stating that "the Director's statutory interpretation is the one entitled to judicial deference, since he is the one charged with administra-

2. Judicial Review of OSHA Interpretations

Congress divided administrative power between the Secretary and OSHRC under OSHA⁸⁵ as it divided power between the Secretary of Labor and the BRB in the *Potomac* case.⁸⁶ After the Secretary promulgates a regulation and cites a violator, OSHRC adjudicates the case.⁸⁷ If OSHRC's interpretation differs from that of the Secretary, courts cannot simply defer to the agency as the Supreme Court directed in *Bowles*⁸⁸ and *Chevron*.⁸⁹ Courts instead must decide whether to give effect to the Secretary's or to OSHRC's interpretation, or to take some third path.⁹⁰ The circuits disagree over which interpretation to follow. Some circuits defer to the Secretary,⁹¹ others follow

tion"); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537 n.2 (D.C. Cir. 1986) (noting interpretive discretion lies with policymaker not adjudicator); *Peabody Coal Co. v. Blankenship*, 773 F.2d 173, 175 (7th Cir. 1985) (deferring to Director's interpretations unless plainly erroneous); *Bethlehem Mines Corp. v. Director, Office of Workers' Compensation Programs*, 766 F.2d 128, 130 (3d Cir. 1985) (deferring to Director as delegate of Secretary of Labor, rather than to BRB); *Providence Wash. Ins. Co. v. Director, Office of Workers' Compensation Programs*, 765 F.2d 1381, 1384 (9th Cir. 1985) (noting that "because the [BRB] does not make policy, its interpretations . . . are not entitled to any special deference"); *Strachan Shipping Co. v. Nash*, 751 F.2d 1460, 1462 n.2 (5th Cir. 1985) (same); *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1288 (9th Cir. 1983) (same), *cert. denied*, 466 U.S. 937 (1984). *But see* *Long v. Director, Office of Workers' Compensation Programs*, 767 F.2d 1578, 1580 (9th Cir. 1985) (deferring to BRB interpretation "'where that interpretation is reasonable and reflects the policy underlying the statute'") (quoting *National Steel & Shipbuilding Co. v. Dep't of Labor*, 606 F.2d 875, 880 (9th Cir. 1979)).

85. See *supra* notes 24-29 and accompanying text.

86. See *supra* notes 81-84 and accompanying text.

87. See *supra* note 29 and accompanying text.

88. See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945); *supra* notes 77-80 and accompanying text (discussing *Bowles*).

89. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 866 (1984); *supra* notes 67-75 and accompanying text (discussing *Chevron*).

90. See *Brock v. L.R. Willson & Sons*, 773 F.2d 1377, 1383 (D.C. Cir. 1985) (noting agency's interpretation of its own regulations generally gets "controlling weight," but "[t]his principle is not easily adapted to OSHA regulations . . . because OSHA divides responsibilities between the Secretary of Labor, who promulgates the regulations, and [OSHRC], which adjudicates their meaning in specific cases"); *Donovan v. A. Amorello & Sons*, 761 F.2d 61, 63 (1st Cir. 1985) (asking: "Whose opinion about the rule's meaning is entitled to greater weight? OSHA's? OSHRC's? Or should the court make up its mind independently about the rule's meaning?").

91. See *Brock v. Williams Enters.*, 832 F.2d 567, 570 (11th Cir. 1987) (according "significant deference" to Secretary's interpretation and noting that deference is due only to OSHRC's "findings of fact and not to its interpretation"); *United Steelworkers v. Schuylkill Metals Corp.*, 828 F.2d 314, 319 & n.3 (5th Cir. 1987) (deferring to "reasonable interpretation of the Secretary," and

OSHRC,⁹² and several apparently indulge in independent review, deferring to neither interpretation.⁹³ One circuit has avoided deciding the issue.⁹⁴

identifying circuit split); *Brock v. Chicago Zoological Soc'y*, 820 F.2d 909, 912 (7th Cir. 1987) (deferring to Secretary and according OSHRC "no special deference"); *Brock v. Schwarz-Jordan, Inc.*, 777 F.2d 195, 197-98 (5th Cir. 1985) (per curiam) (finding Secretary's reasonable interpretation is "entitled to great weight"); *A. Amorello & Sons*, 761 F.2d at 66 (finding that OSHA "speaks with greater authority [than OSHRC] when the interpretation of OSHA's substantive rules is at issue"); *Marshall v. Southwestern Indus. Contractors & Riggers, Inc.*, 576 F.2d 42, 45 (5th Cir. 1978) (deferring to Secretary's reasonable interpretation); *Brennan v. Occupational Safety & Health Review Comm'n (Kessler & Sons Constr.)*, 513 F.2d 553, 554 (10th Cir. 1975) (same); *Brennan v. Verne-Woodrow Co.*, 494 F.2d 1181, 1182 (5th Cir. 1974) (per curiam) (same); *Brennan v. Southern Contractors Serv.*, 492 F.2d 498, 501 (5th Cir. 1974) (same).

92. See *McLaughlin v. Asarco, Inc.*, 841 F.2d 1006, 1010 (9th Cir. 1988) (stating in dicta that "[t]his court defers to [OSHRC's] interpretation when it is 'at odds' with the Secretary's"); *Brock v. Bechtel Power Corp.*, 803 F.2d 999, 1000 (9th Cir. 1986) (finding that Secretary's interpretation of regulation "carries much less weight when at odds with the Commission's"); *Donovan v. Castle & Cooke Foods*, 692 F.2d 641, 646 (9th Cir. 1982) (deferring to OSHRC, rather than Secretary, based on OSHRC's "expertise in exercising the independent adjudicatory function"); *Donovan v. Anheuser-Busch, Inc.*, 666 F.2d 315, 325 (8th Cir. 1981) (stating in dicta that "[w]hen the Secretary and [OSHRC] differ with respect to the interpretation of a standard promulgated by the Secretary, the interpretation by [OSHRC], and not that of the Secretary, is usually entitled to deference"); *Usery v. Hermitage Concrete Pipe Co.*, 584 F.2d 127, 132 (6th Cir. 1978) (stating in dicta that when "the Secretary of Labor and [OSHRC] differ over the construction of the Act . . . [OSHRC's] ruling is entitled to great deference"); *Marshall v. Western Electric, Inc.*, 565 F.2d 240, 244 (2d Cir. 1977) (deferring to OSHRC's reasonable interpretation); *Dunlop v. Rockwell Int'l*, 540 F.2d 1283, 1289-90 (6th Cir. 1976) (according "great deference" to OSHRC's interpretation when it conflicts with Secretary's); *Brennan v. Occupational Safety & Health Review Comm'n (Fiegen, Inc.)*, 513 F.2d 713, 715-16 (8th Cir. 1975) (deferring to OSHRC's reasonable interpretation); *Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 1261-62 (4th Cir. 1974) (reasoning that because "Congress has chosen [OSHRC] as the enforcing agency, the choice between [alternative interpretations] is appropriately committed to it"); *Brennan v. Occupational Safety & Health Review Comm'n (Gerosa)*, 491 F.2d 1340, 1344 (2d Cir. 1974) (deferring to OSHRC's reasonable interpretation). *But cf.* *Brennan v. Occupational Safety & Health Comm'n (Underhill Constr. Co.)*, 513 F.2d 1032, 1038 (2d Cir. 1975) (rejecting OSHRC interpretation as "unreasonable").

93. See, e.g., *Marshall v. Anaconda Co.*, 596 F.2d 370, 374 (9th Cir. 1979) (rejecting Secretary's interpretation based on "plain wording of the [regulatory] standard"); *Bethlehem Steel Corp. v. Occupational Safety & Health Review Comm'n*, 573 F.2d 157, 160 (3d Cir. 1978) (relying on "plain wording" of regulations, reasoning that split between OSHA and OSHRC interpretations demonstrates that "no authoritative agency interpretation" exists).

94. See, e.g., *Brock v. L.R. Willson & Sons, Inc.*, 773 F.2d 1377, 1383 n.7 (D.C. Cir. 1985) (stating that court need not decide which interpretation warrants deference "because OSHRC's interpretation [in this case] would be re-

A Ninth Circuit case, *McLaughlin v. Asarco, Inc.*,⁹⁵ illustrates the dilemma a court faces when the Secretary and OSHRC offer conflicting interpretations of an OSHA regulation. The Secretary promulgated a "medical removal protection benefits" regulation⁹⁶ requiring employers to maintain the "earnings" of employees removed from employment due to lead exposure as though the employees had not been removed.⁹⁷ The Secretary argued that such employees were entitled to the overtime pay they would have received in the regular course of their jobs.⁹⁸ OSHRC urged that "earnings" meant a worker's regular hourly wage, exclusive of projected overtime.⁹⁹ Although Ninth Circuit precedent suggested that OSHRC's interpretation should control,¹⁰⁰ the court held that "earnings" included projected overtime,¹⁰¹ reasoning that the "plain language" and "plain meaning" of the regulation required this re-

jected even if it were accorded the full measure of deference due an agency which had drafted the regulation").

The D.C. Circuit, however, has resolved the analagous question of whether to defer to the Secretary of Labor or to the Federal Mine Safety and Health Review Commission when they present conflicting interpretations of regulations under the Federal Mine Safety and Health Act. In these cases, the D.C. Circuit defers to the Secretary's interpretation. *See, e.g., Brock v. Peabody Coal Co.*, 822 F.2d 1134, 1146 n.41 (D.C. Cir. 1987) (deferring to Secretary); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537 n.2 (D.C. Cir. 1986) (stating that "we see no reason to depart from the view we announced . . . in *Carolina Stalite*, which leaves interpretive discretion where it normally resides, with the policy-maker [the Secretary] rather than the adjudicator") (citing *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552 (D.C. Cir. 1984)).

The D.C. Circuit, however, once faced a conflict between the Secretary and an administrative law judge on interpretation of an OSHA rule, and followed the administrative law judge. *See Donovan v. A.A. Beiro Constr. Co.*, 746 F.2d 894, 905 (D.C. Cir. 1984) (reasoning that "we cannot say the ALJ's interpretation of the regulation is unreasonable").

95. 841 F.2d 1006 (9th Cir. 1988).

96. 29 C.F.R. § 1910.1025(k)(2)(ii) (1988).

97. 841 F.2d at 1007.

98. *Id.* at 1007.

99. *Id.* at 1008-09.

100. *See id.* at 1010 (citing *Brock v. Bechtel Power*, 803 F.2d 999, 1000 (9th Cir. 1986) (holding court should defer to OSHRC where Secretary's and OSHRC's interpretations conflict)).

101. *Id.* at 1007, 1008-09. The Ninth Circuit's *McLaughlin* decision accorded with the result in a prior Fifth Circuit ruling interpreting the same regulation. *See United Steelworkers of Am. v. Schuylkill Metals Corp.*, 828 F.2d 314, 320-23 (5th Cir. 1987) (holding that "earnings" includes overtime). The Fifth Circuit, however, explicitly followed the Secretary's interpretation rather than OSHRC's, because that circuit defers to the Secretary rather than to OSHRC as long as the Secretary's interpretation is "reasonable." *Id.* at 319. The *McLaughlin* court acknowledged the conflict between Fifth and Ninth circuit deference standards, but concluded that this "disagreement . . . as to the degree of

sult.¹⁰² The court thereby avoided granting express deference either to the Secretary or OSHRC.

Invoking the "plain meaning" principle¹⁰³ allowed the *McLaughlin* court to skirt the issue of a conflict in interpretive authority. Such a court independently chooses a meaning for a regulation, and perhaps will voice deference to whatever agency organ advocates that meaning the court chose.

Courts also may use a "reasonableness" test to broaden their own interpretive discretion.¹⁰⁴ Such courts often uphold

deference to be paid to the Secretary's views does not require a further circuit division on the merits of this dispute." *McLaughlin*, 841 F.2d at 1010.

102. 841 F.2d at 1007, 1010.

103. This canon of statutory construction requires that courts adhere to the express terms of an unambiguous statute or regulation. See *Rubin v. United States*, 449 U.S. 424, 430 (1981) (stating that when "the terms of a statute [are] unambiguous, judicial inquiry is complete"); see also *Murphy, Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1300-17 (1975) (discussing effect and significance of plain-meaning rule's exclusion of legislative history in interpreting statutes). *But cf.* *Watt v. Alaska*, 451 U.S. 259, 266 (1981) ("the plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of [other] persuasive evidence if it exists'") (quoting *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928) (Holmes, J.)). Courts differ over how plain the meaning of a regulation must be before the principle applies. See *Nutting, The Ambiguity of Unambiguous Statutes*, 24 MINN. L. REV. 509, 511-20 (1940) (detailing methodological problems of characterizing plain meaning of statute).

Applying the principle becomes less plausible when more than one interpretation of a given provision is possible. See *Rickard v. Auto Publisher, Inc.*, 735 F.2d 450, 455 (11th Cir. 1984) (noting that "[a]n obvious prerequisite to application of the 'plain meaning' rule . . . is that the statutory language be unambiguous"); *Student Pub. Interest Research Group v. Monsanto Co.*, 600 F. Supp. 1474, 1476 (D.N.J. 1985) (noting that when "statute is somewhat equivocal, . . . the 'plain meaning' rule cannot be of much relevance"). The amorphous quality of the plain meaning principle guarantees wide discretion and flexibility to courts invoking it.

Courts will disregard the principle altogether when applying it would produce an absurd or unreasonable result. See *Barbee v. United States*, 392 F.2d 532, 535 n.4 (5th Cir.) (stating that "courts have been willing to look behind otherwise clear language when a literal reading of a statute was inconsistent with its congressional purpose"), *cert. denied*, 391 U.S. 935 (1968); see also *Watt*, 451 U.S. at 266 n.9 (stating that "one of the surest indexes of a mature and developed jurisprudence is not to make a fortress out of the dictionary") (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (Hand, J.), *aff'd*, 326 U.S. 404 (1945)); *Interstate Commerce Comm'n v. J-T Transp. Co.*, 368 U.S. 81, 107 (1961) (Frankfurter, J., dissenting) (stating that "the 'plain meaning' rule as an automatic canon of statutory construction is mischievous and misleading and has been long ago rejected").

104. See, e.g., *Brennan v. Occupational Safety & Health Comm'n (Gerosa)*, 491 F.2d 1340, 1345 (2d Cir. 1974). In the *Gerosa* case, the Secretary had issued a safety regulation governing business use of cranes and derricks. *Id.* at 1341-

an agency interpretation only if they cannot produce a better or more reasonable one.¹⁰⁵

Other courts conclude that a disagreement between the Secretary and OSHRC indicates that no "authoritative agency interpretation" exists.¹⁰⁶ Lacking an authoritative agency interpretation, these courts generally provide their own interpretations.¹⁰⁷

Resolving the division among the circuits requires closer examination of the policies underlying Supreme Court decisions on judicial review,¹⁰⁸ the legislative history of OSHA,¹⁰⁹

42. The regulation required that an employer "designate" an employee to ensure that such machinery was in safe condition. *See* 29 C.F.R. § 1926.550(a)(5) (1988). The Secretary interpreted *designate* to require an explicit designation, 941 F.2d at 1344; OSHRC held that under industry practice, assigning a competent oiler and operator to a crane was a tacit, "albeit not specifically stated," designation within the meaning of the rule. *Id.* at 1343. The Second Circuit held that OSHRC's interpretation was unreasonable because it did not guarantee the congressional purpose of "accident prevention" embodied in OSHA. *Id.* at 1344. Deriving authority from the vague congressional purpose, the court trumped the agency interpretation and made its own determination of effective regulation.

105. *See, e.g.,* *Marshall v. Western Elec., Inc.*, 565 F.2d 240, 241-45 (2d Cir. 1977). The Second Circuit will uphold an OSHRC interpretation unless it is "unreasonable and inconsistent with [the OSHA regulation's] purpose." *Id.* at 244. In *Western Electric*, the Secretary had promulgated a rule requiring employers to *monitor* for carcinogenic vinyl chloride in the air at work sites. *Id.* at 242. The Secretary interpreted the regulation to require certain technical inspections and cited *Western Electric* for failing to use these specific measures. *Id.* at 243. OSHRC interpreted the word *monitor* in the regulation to give more discretion to *Western Electric*, holding that the company could "reliably predict from the physical circumstances that the concentration of vinyl chloride in the air . . . would be well below the danger level set by the Secretary." *Id.* at 244. On appeal, the Second Circuit found OSHRC's interpretation unreasonable by weighing it against the Secretary's interpretation in light of the general purposes of OSHA. *Id.* at 244-45. OSHA, the court stated, was designed to assure "every working man and woman . . . safe and healthful working conditions." *Id.* at 245. Wading through technical information, the court concluded that the Secretary's interpretation was "better calculated than the Commission's to achieve . . . accident prevention and protection against potential danger." *Id.* at 245.

106. *See, e.g.,* *Bethlehem Steel Corp. v. Occupational Safety & Health Review Comm'n*, 573 F.2d 157, 160 (3d Cir. 1978) (finding no authoritative agency interpretation existed because OSHRC's decision conflicted with Secretary's interpretation).

107. *See id.* (relying on plain meaning of regulation to conclude OSHRC erred in finding violation); *see also* *Marshall v. Anaconda Co.*, 596 F.2d 370, 374 (9th Cir. 1979) (independently analyzing regulation based on its language because OSHRC's and Secretary's interpretations differed).

108. *See infra* notes 118-19 and accompanying text.

109. *See infra* notes 144-51 and accompanying text.

and practical policy considerations.¹¹⁰

II. REFORMULATING THE STANDARD OF REVIEW IN OSHA CASES

Existing precedent requires that courts defer to reasonable agency interpretations of their own regulations and enabling statutes.¹¹¹ OSHA presents a twist, however, because two organs of the same agency sometimes offer conflicting interpretations. The circuits differ over the appropriate standard of review in such cases.¹¹² The resulting inconsistency makes results unpredictable¹¹³ and perpetuates unwarranted judicial policymaking.¹¹⁴ This Note argues that a court should defer to the Secretary's reasonable interpretations, even though other interpretations may seem to the court better or more reasonable.¹¹⁵ This standard of review minimizes judicial policymaking, respects the Secretary's authority and expertise, and fosters more consistent, predictable law.

A. THE NEED FOR JUDICIAL DEFERENCE

The judiciary makes policy when it interprets administrative regulations.¹¹⁶ Judges are equipped poorly, however, for making policy decisions in technical areas.¹¹⁷ The Supreme

110. See *infra* notes 156-57 and accompanying text.

111. See *supra* notes 67-80 and accompanying text.

112. See *supra* notes 85-107 and accompanying text.

113. See *infra* notes 158-65 and accompanying text (identifying unpredictability resulting from inconsistent judicial standards of review).

114. See *infra* notes 93-107 and accompanying text (discussing judicial policymaking resulting from courts' interpretation of regulations).

115. See *infra* notes 168-71 and accompanying text.

116. Cf. 5 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29:15, at 394 (2d ed. 1984) (observing "The political limit [on judicial assumption of policymaking power] is generally weak and . . . [c]ourts refrain from substituting their own policies only to the extent that they believe they should do so."); 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:13, at 60 (1979) (stating "[O]ne of the most important factors in each decision on what weight to give an interpretative rule is the degree of judicial agreement or disagreement with the rule . . ."); Pierce, *supra* note 4, at 485 (stating "The statutory interpretation adopted by a judge . . . almost invariably coincides with the judge's political philosophy.").

117. See F. HEFFRON & N. MCFEELEY, *supra* note 1, at 314 (noting that when courts "become too deeply enmeshed in 'Monday morning quarterbacking' of administrative decisions they do not make better technical decisions than the agencies"); Starr, *supra* note 75, at 309 (noting "[a]n agency obviously enjoys a more thorough understanding [than a court] of how . . . different interpretations of a particular provision affect relevant parties").

Because most agency decisions never reach a court, however, the judiciary never will receive the opportunity to broadly manage policymaking. See D.

Court recently recognized this judicial deficiency by limiting the scope of judicial oversight of agencies,¹¹⁸ reflecting its abandonment of the notion that courts should vigorously review and willingly reverse agency actions. This new philosophy of deference mandates that courts respect agency authority and avoid substituting judicial policy decisions for those of agencies.¹¹⁹

In OSHA cases involving conflicting interpretations by the Secretary and OSHRC, however, some lower courts have avoided deferring to the agency by relying on the vague plain meaning rule,¹²⁰ a reasonableness test,¹²¹ or the division of authority between the Secretary and OSHRC.¹²² Sometimes courts delve into technical, value-laden analysis that is better left to agency authority and expertise.¹²³ Such activism contradicts Supreme Court precedent requiring deference to the agency.¹²⁴ Moreover, sound political analysis suggests that agencies, although imperfect, are more legitimate and politically responsive policymakers than courts.

Advocates of aggressive judicial review decry the bureaucratic monster,¹²⁵ arguing that agencies are unduly insulated from public control.¹²⁶ Some scholars insist that this insularity

RILEY, *supra* note 11, at 136 (noting most bureaucratic decisions are never reviewed by courts).

118. See *supra* notes 67-75 and accompanying text (discussing *Chevron* case).

119. See *supra* note 75 and accompanying text (surveying impact of *Chevron* in lower federal courts).

120. See *supra* notes 95-102 (discussing *McLaughlin v. Asarco*, 841 F.2d 1006, 1007, 1009-10 (9th Cir. 1988), in which court strained concept of plain meaning to conclude that word *earnings* in a regulation included projected overtime pay).

121. See *supra* notes 104-05 and accompanying text.

122. See *supra* notes 102-103 and accompanying text.

123. See, e.g., *Marshall v. Western Elec., Inc.*, 565 F.2d 240 (2d Cir. 1977); *supra* note 105.

124. See *supra* notes 67-80 and accompanying text (reviewing deference cases).

125. See J. DeLong, *supra* note 1 at 429. According to DeLong:

The steady growth of the Regulatory State has greatly increased the number of grants of authority that agencies may exploit. Also, the very fact that there has been an explosion of regulatory authorities means that any specific statute, and any specific exercise of authority, is less visible than it would have been two or three decades ago.

Id.

126. Commentators emphasize the danger unguarded agency power poses to a government supposed to be responsive to the electorate. See F. HEFFRON & N. MCFEELEY, *supra* note 1, at 143 (arguing "regulatory agencies are [frequently] allowed to operate for long periods of time without either Congress or the President paying any substantial attention to them or making any attempt to oversee or intervene in their activities"); see also D. RILEY, *supra*

note 11, at 173 (stating "two rather important political values—concern for a general public interest and competence—can easily be casualties of this highly professionalized, agency-centered policymaking process"). Critics charge that because of agencies' insularity, agencies need not be competent and efficient. See, e.g., C. BEZOLD, R. CARLSON, & J. PECK, *THE FUTURE OF WORK AND HEALTH* 143 (1986) (arguing that special interests have caused agencies to pursue inefficient "cure" policies rather than efficient "prevention" policies); Calavita, *The Demise of the Occupational Safety and Health Administration: A Case Study in Symbolic Action*, 30 *SOC. PROBS.* 437, 437 (1983) (noting that labor and management have criticized OSHA for "inefficiency and lack of meaningful impact").

DeLong identifies six reasons to limit and control agency action. DeLong, *supra* note 1, at 406-10. First, concern for the twin values of procedural fairness and equal protection requires control of agency action. Second, society benefits from agencies only as long as they perform their delegated tasks competently. Third, agencies should refrain from exercising more power than Congress granted them and should resist stepping beyond their institutional role. Fourth, agency procedures should be scrutinized to determine the extent to which agencies tolerate their own errors. Fifth, the voluminous number of agency functions must be coordinated to ensure the government works as smoothly and expeditiously as possible. Finally, because societal resources are scarce, agencies should not consume resources unless they are producing a concomitant benefit. *Id.*

Although society holds agencies to a higher standard than their private sector business counterparts, agencies have performed reasonably well. See Milward & Rainey, *supra* note 2, at 151-52 (noting "economic markets can fail, and fail badly, to provide all of the goods, services, and outcomes which we want and need," but "heavy emphasis on operating efficiency may distort the role, purpose, and value of government in our society").

Nonetheless, the costs of agency actions often are more glaring and publicized than their benefits. See Vaupel, *On the Benefits of Health and Safety Regulation*, in *THE BENEFITS OF HEALTH AND SAFETY REGULATION* 1, 12 (A. Ferguson & E. Leveen ed. 1981). Moreover, society requires tremendous openness from agencies and subjects them to a number of procedural obstacles that private sector actors need not face. Milward and Rainey note that:

GM does not have to hold 'citizen participation' hearings before every major decision they make. Having to manage in a fishbowl and to have your files constantly open for public inspection—as the Freedom of Information Act allows—may be wonderful if judged from the criterion of accountability but it makes it very difficult to be efficient.

Milward & Rainey, *supra* note 2, at 156. Milward and Rainey conclude that "the public bureaucracy in the United States is more valuable, and is performing more effectively, than many people assume." *Id.* at 163.

Furthermore, the public can influence agency government. See D. RILEY, *supra* note 11, at 123-30 (discussing methods by which public can influence agencies). Federal policy on workplace health and safety provides an example of public influence over regulatory policy. See C. NOBLE, *LIBERALISM AT WORK: THE RISE AND FALL OF OSHA* 69-97 (1986) (tracing political origins of OSHA to popular desire in 1960s for workplace safety, which led to support from other political entities such as labor unions and executive branch); Szasz, *The Reversal of Federal Policy Toward Worker Safety and Health*, 50 *SCI. & SOC'Y* 25, 34-35 (1986) (noting that "political mass movement" led to deregulation and gutting of OSHA in 1980s); Szasz, *Industrial Resistance to Occupational Safety and Health Legislation: 1971-1981*, 32 *SOC. PROBS.* 103, 104-06

fosters policies contrary to the public interest.¹²⁷ These theo-

(1984) (describing how public pressure led to passage of OSHA despite opposition of industrial interests).

Finally, bureaucrats are not homogeneous, but represent the populace, with a wide variety of personal backgrounds. See Stone, *Whither the Welfare State? Professionalization, Bureaucracy, and the Market Alternative*, 93 ETHICS 588, 591 (1983) (noting that "upper-level administrators and street-level employees have divergent outlooks and interests"). Professional bureaucrats are guided by professional norms and standards that provide an "inner check on their behavior" and allow them to respond "neutrally and competently to competing interests." Stone, *supra*, at 575 (concluding that "the profession provides the professional administrator with a Rosetta Stone for deciphering and responding to various elements of the public interest"). Arguably, therefore, professional standards control bureaucrats at least as well as they control judges.

127. Political commentators long have criticized the "iron triangles" among congressional committees, regulatory agencies, and the private actors they regulate. See, e.g., Miller, *Pretense and Our Two Constitutions*, 54 GEO. WASH. L. REV. 375, 382 (1986) (arguing that iron triangles "provide the means by which much public policy is made"); Schoenbrod, *supra* note 58, at 1245 (asserting that "[t]he iron triangle represents the most powerful forces at work in the administrative process"). Iron triangle theory suggests that these policy trios operate outside of public recognition and accountability, and therefore generate self-serving regulations; in return for regulated parties' political support, congressional committee members increase the budgets and authority of the agencies, who in turn suit regulations to the demands of the regulated parties. See, e.g., Miller, *The Administration's Role in Deregulation*, 55 ANTI-TRUST L. J. 199, 200 (1986) (describing "the traditional paradigm of the iron triangle").

A similar argument contends that agencies become "captured" by the interests they regulate. Representatives of the agency and of the regulated industry together formulate policy "in a closed environment with a limited number of participants who share common views, information, and interests. The agency's bonds with the regulated industry are constantly strengthened as personnel are interchanged, and a relationship of interdependency is fostered between the agency and the regulatee." F. HEFFRON & N. MCFEELEY, *supra* note 1, at 155-56.

The iron triangle model fails, however, to provide an accurate analysis of United States government today. Increased openness in government and the rise of numerous public advocacy groups shed sufficient light on the regulatory process to discourage self-serving deals among members of Congress, agencies, and regulated parties. According to one study:

Several fundamental social and economic trends have led to the rise of . . . citizen groups. The growth of a vast, educated middle class in the years since the Second World War has greatly expanded their potential membership, and that has also created a large new audience for ideological appeals. A revolution in communications technology has provided the means by which this new element of the population can be reached. New patrons of political action provided needed organizational stability, and many controversial regulatory and redistributive issues crowded onto the political agenda.

Gais, Peterson & Walker, *Interest Groups, Iron Triangles and Representative Institutions in American National Government*, 14 BRIT. J. POL. SCI. 161, 183 (1984). These changes have expanded the number of actors able to influence

rists ignore the volatility of bureaucracy as a political issue,¹²⁸ as well as legislators' superior bargaining power¹²⁹ and the clout elected officials hold over agencies.¹³⁰

Congress can exert control over the federal bureaucracy by creating, modifying, or revoking agency authority.¹³¹ Moreover,

the legislative process, and have opened this process to closer public oversight, as citizen groups monitor agency actors and distribute information. *Id.* at 163-66, 177-80. Consequently, a greater "number and variety of interests . . . have achieved formal representation in the American system." *Id.* at 163. Such openness, and the active observation of Congress by public groups, undermines the secrecy needed for closet dealmaking. *Id.* at 178-79. As a result, the House and Senate make more decisions on the floor of the legislature, which "does not allow for coherence, attention to detail, or control by substantive experts." *Id.* at 180. Congress still sets broad policy guidelines through legislation, but leaves control over the details of policy implementation to the executive branch. *Id.*; see also *infra* notes 134-42 and accompanying text (assessing methods of executive control of agencies). Finally, iron triangle theory assumes cooperation between the agency and the client; often, however, the two are at odds. See, e.g., Stone, *supra* note 126, at 592 (stating that "[t]he agency/client nexus is less one of reciprocity than of mutual antagonism").

128. See, e.g., Milward & Rainey, *supra* note 2, at 149 (characterizing bureaucracy as "major theme" in recent elections). A desire for reelection presumably motivates legislators, and votes for expanding agency bureaucracy can brand a candidate a supporter of big government. Moreover, when an agency decision ultimately disadvantages a particular party, that party will know which legislators supported the agency. Deferring policymaking to an agency therefore does not sweep an issue under the political carpet. Further, members of Congress have long-term political incentives to oversee agency policymaking:

Congress as a whole may be happy to delegate these . . . questions to bureaucrats, but specific members of Congress want to keep an eye on, sometimes even a hand in, the action. The reasons are two. Such questions can have a significant impact on a member's re-election chances, and they are critical to the success of a particular policy.

D. RILEY, *supra* note 11, at 65.

129. Cf. Eavey & Miller, *Bureaucratic Agenda Control: Imposition or Bargaining?*, 78 AM. POL. SCI. REV. 719, 719, 724-31 (1984) (concluding on basis of experiment that agencies do have impact on legislation, but that agencies are only small number of variety of actors able to lobby legislators, and therefore do not impose policy agendas on legislature); see also D. RILEY, *supra* note 11, at 59 (arguing that "pattern of cooperation" between Congress and agencies affords Congress influence over agency policy).

130. See *infra* notes 131-33 (assessing methods by which Congress can control agencies).

131. See D. RILEY, *supra* note 11, at 81 (stating that through enabling legislation, Congress controls scope of agency power); cf. Milward & Rainey, *supra* note 2, at 160 (noting that Congress must clarify legislative goals so bureaucracies can "translate legislative intent into an implementable program"). Moreover, by systematically overseeing agency activity, Congress effectively can monitor agencies' power and efficiency. See D. RILEY, *supra* note 11, at 69-80 (explaining three forms of oversight). In this manner, Congress can act as a manager of agency activities, holding agencies accountable for their actions and ensuring that agencies follow the policy goals set through the legislative

members of Congress can publicize an issue and thereby draw public attention to it as a counterweight to agency insularity.¹³² By manipulating the budget process, Congress also can demand that agencies implement particular policies, and can increase or constrain bureaucratic activity.¹³³

The president also can control agency action.¹³⁴ Like the legislature, the executive can influence the political agenda,¹³⁵ thereby shaping legislation affecting agencies and funneling public attention toward particular regulatory policies. In addition, the executive can control agencies effectively through the appointment process.¹³⁶

process. See Ink, *The President as Manager*, in ANALYZING THE PRESIDENCY 36 (R. DiClerico ed. 1985):

For a few examples of how deeply Congress has become involved in management, consider the ability of appropriations subcommittees to determine how a department head organizes his or her immediate office, the ability of these same subcommittees to decide that an effort to improve auditing is unwarranted, or congressional blocking of decentralization of a function within an agency.

Id.

132. See Gais, Peterson & Walker, *supra* note 127, at 165 (discussing how direct congressional involvement in debate attracts public attention).

133. See D. RILEY, *supra* note 11, at 90-92 (discussing congressional use of budget to control agency activity); Bendor & Moe, *An Adaptive Model of Bureaucratic Politics*, 79 AM. POL. SCI. REV. 755, 772 (1985) (same); Calavita, *supra* note 126, at 440-41, 443 (giving examples of how congressional budget policy controlled agencies during 1980s). In recent years, Congress has implemented budgetary reforms to afford even greater control of agency activity. See Staats, *Improving Congressional Oversight of Administration Through Evaluation and Analysis*, in PROBLEMS IN ADMINISTRATIVE REFORM 13, 13-15 (R. Miewald and M. Steinman eds. 1984) (enumerating budgetary reforms). Staats suggests that these budget reforms open the door for Congress to use better evaluation techniques, considering agency effectiveness at meeting specific goals with specific resources, and thereby exerting even more control over bureaucracy. *Id.* at 13, 15-21.

134. The president's ability to control agencies depends on a variety of factors. See Mars, *The Constitution, the President, and Administrative Reform*, in D. CALISTA, BUREAUCRATIC AND GOVERNMENTAL REFORM 91 (1986). (suggesting that president's powers of administrative reform depend on personality and leadership style, relations with Congress and its leaders, relations with bureaucracy, relations with his or her party and its leaders, prestige and public reputation, importance he or she assigns to reform, mastery of administrative style, tenacity, and willingness to bargain and compromise); cf. D. RILEY, *supra* note 11, at 18-19 (observing that executive often lacks interest and information necessary to manage bureaucracy).

135. See *supra* note 132; Page, *Presidents as Opinion Leaders: Some New Evidence*, 12 POL'Y STUD. J. 649, 658 (1984) (stating that "[p]residents, at least popular presidents, can indeed bring about changes in the policy preferences of the American public"). But cf. *id.* (noting that unpopular presidents . . . have no effect at all or maybe even a negative impact").

136. Each president appoints approximately 2,500 agency personnel, includ-

Finally, the president can influence agency policy regularly through management.¹³⁷ The president can select and guide agency personnel, evaluate agency performance in the light of clear presidential policy statements, coordinate the various agencies and branches of government,¹³⁸ propose reorganization of the bureaucracy, and initiate resource allocation through the budget process.¹³⁹ Although a president attempting to achieve broad control of agency programs will encounter obstacles,¹⁴⁰

ing the people to fill critical agency head posts. D. RILEY, *supra* note 11, at 24. Although the appointment power has limits, *see id.* at 34, presidents have used it effectively to reshape agency policy. *See* Nathan, *Administrative Tactics Under Reagan*, in ANALYZING THE PRESIDENCY, *supra* note 131, at 146, 150-51, 155 (describing how former President Reagan used careful selection process and "indoctrination" of appointees "in advancing [the Reagan administration's] domestic goals"); Bollier, *The Emasculation of OSHA*, 51 BUS. & SOC'Y REV., Fall 1984, at 37, 38 (noting that Reagan's appointment of Thorne Auchter as OSHA assistant secretary resulted in "one of the sharpest policy reversals in the federal government"); D. NELKIN & M. BROWN, *supra* note 1, at 126 (noting that former President Carter's appointment of Eula Bingham as OSHA assistant secretary brought about "substantial administrative changes"); Calavita, *supra* note 126, at 441-43 (enumerating specific policy changes engineered by Reagan OSHA appointees); DeLong, *supra* note 1, at 439 (noting that "the power to fire the agency head, without more, is probably enough to allow a President to impose his will on the agency"). *But cf.* Humphrey's Ex'r v. United States, 295 U.S. 602, 632 (1935) (noting that Congress can create agency whose head can be fired only "for cause"); *see also* Pierce, *supra* note 4, at 510-12 (arguing *Humphrey's Ex'r* should be construed narrowly).

137. *Cf.* Ink, *supra* note 131, at 135 (suggesting constitutional basis for executive as governmental manager). Moreover, other tools also exist. *See, e.g.*, D. RILEY, *supra* note 11, at 35 (discussing executive use of legislative clearance process to force agencies to bargain on policy).

138. *See* Ink, *supra* note 131, at 137-45 (suggesting management techniques); *see also* Ingraham, *Building Bridges or Burning Them? The President, the Appointees, and the Bureaucracy*, 47 PUB. ADMIN. REV. 426, 425 (1987) (describing impact of recent increased efforts at presidential control).

139. *See* D. RILEY, *supra* note 11, at 40 (discussing reorganization); Hammond & Miller, *A Social Choice Perspective on Expertise and Authority in Bureaucracy*, 29 AM. J. POL. SCI. 1, 6 (1985) (noting some scholars suggest "executive leadership" in form of budgetary control and administrative reorganization, to give central direction to bureaucratic action); *see also* N. HEFFRON & N. MCFEELEY, *supra* note 1, at 124 (noting that although "Congress has the final word on the amount and allocation of monetary resources" to agencies, president has "the first word, . . . [which] has proven to be a potent tool in controlling agencies"). *But see* D. RILEY, *supra* note 11, at 50 (discussing limits on executive use of budget process).

140. Ingraham argues that past executive attempts to manage the bureaucracy have failed because presidents have appointed political officials to agency posts who lack expertise and respect for agency personnel. Such officials are unprepared for service and serve only a short time. Ingraham, *supra* note 138, at 426-30. The executive branch, however, is flexible enough to counteract those problems. The Senior Executive Service (SES), created in 1979, provides for increased evaluation of career bureaucracy executives by political agents of

the executive is best suited politically and constitutionally to manage the federal bureaucracy.¹⁴¹ The executive certainly is more politically accountable than the judiciary.¹⁴²

This analysis corroborates the wisdom of Supreme Court precedent requiring judicial deference to agencies.¹⁴³ In the context of OSHA, courts therefore lack interpretive authority and should defer to the reasonable interpretation of either the Secretary or OSHRC. They must not engage in independent review. Deciding which of the two administrative bodies deserves deference is a more difficult problem requiring further examination of legislative history, precedent, and policy.

B. THE SECRETARY'S INTERPRETIVE AUTHORITY

The legislative history of OSHA demonstrates that Congress had many opportunities to confront the issue of policymaking authority.¹⁴⁴ Legislators rejected the idea of taking

the executive. *Id.* at 426, 430. Although it has proven somewhat difficult to implement, the SES offers "increased potential for political control" of the agencies. *Id.* at 430. Ingraham further suggests that presidents educate appointees on policy and bureaucratic practices, and ask them to sign a contract committing them to two years at their posts and to pursuit of their agencies' policy purposes. *Id.* at 433.

141. See Ink, *supra* note 131, at 136 (arguing that "no true accountability [exists] in these areas short of the President"). DeLong, *supra* note 1, at 425, notes "the Executive Office has a better chance of achieving the broad inter-agency policy coordination that courts cannot." *Id.* Such coordination is necessary to make the agency structure function effectively. *Id.* at 431.

142. See *Public Citizen v. Burke*, 843 F.2d 1473, 1477 (D.C. Cir. 1988) (requiring deference to agency on grounds that "the Executive Branch, populated by political appointees, is thought to have greater legitimacy than the non-political Judiciary in resolving statutory ambiguities, in light of policy concerns, when congressional intent is unclear") (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 864-66 (1989)); *Pierce*, *supra* note 4, at 506 (arguing that comparative institutional analysis favors executive branch over judiciary for making policy choices because judiciary is "least politically accountable branch").

Courts effectively can police agency bias, however. The potential for bias arises because agencies often are able to make rules, enforce them, and adjudicate disputes, while sometimes becoming interested parties in the adjudication. See F. SCHWARTZ, *supra* note 12, at 11 (noting that "[i]n a major proportion of administrative law cases, the agency is itself one of the parties to the dispute which it is empowered to resolve"). Courts provide a primary check on agency bias by ensuring that agencies strictly follow the procedures of the APA. For example, courts must prevent unofficial agency communications with interested parties which leave "the door to biased decision making wide open." D. RILEY, *supra* note 11, at 146.

143. See *supra* notes 67-80 and accompanying text.

144. See *supra* notes 30-56 and accompanying text (tracing OSHA's legislative history).

that authority away from the Secretary of Labor on several occasions.¹⁴⁵ Moreover, Congress created OSHRC mainly as a factfinding body, to relieve the Secretary of Labor of responsibility for conducting hearings and to assure the public a fair proceeding. Senate floor debate clarified the Senate's understanding that OSHRC would serve merely a factfinding role, and not become an adjudicative lawmaker.¹⁴⁶ The legislative history thus suggests, as some courts have recognized,¹⁴⁷ that in a conflict of interpretation between the Secretary and OSHRC, a court should defer to the Secretary—the policymaking body—rather than to OSHRC—the factfinder.

Courts favoring the Secretary's interpretations over those of OSHRC argue that Congress vested greater policymaking authority in the Secretary, pointing to the legislative history¹⁴⁸ and express wording¹⁴⁹ of OSHA. Courts favoring OSHRC interpretations suggest that Congress intended OSHRC to have interpretive authority,¹⁵⁰ pointing to the credentials and exper-

145. See *supra* notes 35, 46-50, 52, 54 and accompanying text.

146. See *supra* notes 37-47 and accompanying text.

147. See, e.g., *Donovan v. A. Amorello & Sons*, 761 F.2d 61, 65 (1st Cir. 1985) (reasoning that Congress intended Secretary to have rulemaking power); *Dale M. Madden Constr. v. Hodgson*, 502 F.2d 278, 280-81 (9th Cir. 1974) (noting that OSHA "imposes policy-making responsibility upon the Secretary . . . [and] limits [OSHRC] to adjudication").

148. See *A. Amorello & Sons*, 761 F.2d at 65 (noting that legislative "history suggests . . . OSHRC's mission is primarily factual in nature"). The court also noted that "Congress specifically rejected a plan to place rulemaking powers in a body independent of OSHA." *Id.*

149. See *Brock v. Williams Enter.*, 832 F.2d 567, 569-70 (11th Cir. 1982); *Brock v. Chicago Zoological Soc'y*, 820 F.2d 909, 912 (7th Cir. 1987); *Brennan v. Occupational Safety & Health Review Comm'n (Kessler & Sons Constr.)*, 513 F.2d 553, 554 (10th Cir. 1975); *Brennan v. Southern Contractors Serv.*, 492 F.2d 498, 501 (5th Cir. 1974).

150. The Fourth Circuit considered this issue in *Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255 (4th Cir. 1974). The court reasoned that Congress intended to allow OSHRC to adopt rules and policies in adjudication because "Congress deliberately created [OSHRC] separate and independent of the Secretary." *Id.* at 1262. The court argued further that OSHRC must receive deference or it "would be little more than a specialized jury . . . charged only with fact finding." *Id.* The court concluded that Congress intended OSHRC to "have the normal complement of adjudicatory powers possessed by traditional administrative agencies such as the Federal Trade Commission." *Id.* See also *Dunlop v. Rockwell Int'l*, 540 F.2d 1283, 1289 (6th Cir. 1976) (concluding that OSHA "empowers [OSHRC] to perform 'the final administrative adjudication of the Act'" (quoting *Brennan v. Occupational Safety & Health Review Comm'n (Fiegen, Inc.)*, 513 F.2d 713, 716 (8th Cir. 1985)); *Brennan v. Occupational Safety & Health Review Comm'n (Republic Creosoting Co.)*, 501 F.2d 1196, 1199 (4th Cir. 1974) (concluding OSHRC's "interpretations regarding the

tise of OSHRC commissioners.¹⁵¹ The Secretary, however, arguably possesses more interpretive expertise than OSHRC.¹⁵² Moreover, expertise is no substitute for authority.¹⁵³

In other contexts, courts have held that agencies with policymaking authority deserve more interpretive deference than adjudicatory bodies. In *Potomac Electric Power Co. v. Director*,¹⁵⁴ the Supreme Court accorded no deference to the BRB's statutory interpretations, because the BRB is merely an adjudicatory board while the Secretary of Labor possesses statutory authority to make policy.¹⁵⁵ Application of the same reasoning to a conflict of interpretations between the Secretary and OSHRC suggests that courts should defer to the Secretary's interpretations.

C. PRACTICAL POLICY

Rule interpretation involves value decisions and policymaking.¹⁵⁶ The Secretary is a better policymaker than OSHRC, partly because "formal adjudication is atrocious proce-

meaning of the Act should be given substantial deference by a court" because statute states that OSHRC's findings of fact shall be conclusive).

Congress's purpose in allowing final orders to issue from OSHRC, however, was to facilitate administrative expediency rather than to grant policymaking authority. See LEGISLATIVE HISTORY, *supra* note 30, at 194 (separate views of Sen. Javits); see also *id.* at 392 (remarks of Sen. Javits) (noting that finality of OSHRC orders would greatly increase "speed of enforcement," saving between six months and two years).

151. See *Brock v. Bechtel Power*, 803 F.2d 999, 1000 (9th Cir. 1986); (noting OSHRC commissioners are appointed by virtue of specialized training, education, or expertise); *Gilles & Cotting, Inc.*, 504 F.2d at 1262 (same); *Dunlop*, 504 F.2d at 1289 (same). Courts also suggest that adjudication breeds expertise. See, e.g., *Bechtel Power*, 803 F.2d at 1000 (deferring to OSHRC because of its "expertise in exercising the independent adjudicatory function"); *Donovan v. Castle & Cooke Foods*, 692 F.2d 641, 646 (9th Cir. 1982) (same).

152. See *A. Amorello & Sons*, 761 F.2d at 66 (noting that because Secretary chose regulatory language, Secretary is "more likely to have an institutional memory of the regulation's purposes and meaning"). The *A. Amorello & Sons* court reasoned that the Secretary would have comparatively more expertise than OSHRC, stating that: "OSHA's experience as both a 'legislating' and 'enforcing' agency provides it with expert knowledge of the likely practical outcomes of different interpretations [while OSHRC's] expertise . . . is likely factual in nature; and it necessarily concerns examples of rule violations (which are presumably less typical than instances of compliance)." *Id.*

153. See *supra* notes 144-47 and accompanying text (arguing that OSHA statute grants Secretary greater interpretive authority than OSHRC).

154. 449 U.S. 268 (1980).

155. *Id.* at 278 n.18.

156. See *supra* note 4 and accompanying text.

dures for policymaking affecting the multitude."¹⁵⁷

OSHA regulations apply nationwide and potentially encompass many employers.¹⁵⁸ OSHRC, however, bases its decisions on the facts of the case before it. The Secretary considers the broader application of rules¹⁵⁹ and provides potentially affected parties more notice and opportunity to participate.¹⁶⁰ The Secretary's regulations and interpretations, therefore, are likely based on more evidence and a broader perspective than those of OSHRC.¹⁶¹

Moreover, if OSHRC or a court interprets a regulation in a way contrary to the Secretary's interpretation, the new rule can apply retroactively to parties who relied on the Secretary's interpretation.¹⁶² Violating such reliance seems particularly unfair because an OSHRC decision will not change the express wording of a regulation.¹⁶³

Potential conflict of rule interpretations prevents regulated parties from predicting what they must do to comply with the law.¹⁶⁴ Predictability is essential, however, to a successful regu-

157. 2 K. DAVIS, *supra* note 17, § 7:6, at 33.

158. *See supra* note 23 and accompanying text (noting that OSHA covers five million workers).

159. *See* 2 K. DAVIS, *supra* note 17, § 7:6, at 33.

160. *See id.* § 7:25, at 119 (arguing that "[a]s a means of making new law, rulemaking is superior to adjudication . . . [because] adjudication procedure normally provides no . . . protection to nonparties"); *see also* D. RILEY, *supra* note 11, at 153 (arguing that adjudication procedures do not specify who must be notified of result, and that any notification is less formal than at policymaking stage).

161. *See infra* note 164 (characterizing agency interpretive rules as superior to adjudicatory interpretations).

162. *See* 2 K. DAVIS, *supra* note 17, § 7:6, at 34.

163. Changing the interpretation of a law without changing its wording detracts from the institutional integrity of legislators, agencies, and courts overseeing application of the law. A special problem arises when the Secretary urges a particular interpretation for the first time at a violator's hearing. *See supra* note 77. In such a case, the potential for bias would increase if OSHRC or courts yielded unquestioningly to the Secretary's interpretation. Perhaps the proper approach is to disregard the rule's application in the particular case if the wording of the regulation is too vague to provide notice that the Secretary's interpretation was what the regulation likely was intended to mean. *See Donovan v. Burger King Corp.*, 675 F.2d 516, 522 (2d Cir. 1982) (suggesting that Secretary should "reconsider the regulations as issued" rather than applying them to particular case through interpretation).

164. *See* F. HEFFRON & N. MCFEELEY, *supra* note 1, at 229 (noting that rulemaking through adjudication creates "uncertainty as to expected behavior" because standards may be constantly in flux); Asimow, *supra* note 20, at 408 (characterizing interpretive rules as "more accessible, more reliable, and, because of their generalized form, much more useful than interpretation supplied through formal or informal adjudication").

latory program.¹⁶⁵ Such predictability would result from all circuits deferring to the Secretary's interpretations.

Furthermore, an employer cited on the basis of the Secretary's interpretation of a rule is more likely to challenge the citation through litigation if OSHRC or the courts can alter the law by changing the interpretation. Increased litigation saps resources and postpones compliance.¹⁶⁶ Noncompliance is especially troublesome in the area of occupational health and safety.¹⁶⁷

Consequently, courts should treat the Secretary's interpretations as those of the "agency" under OSHA.¹⁶⁸ Courts should accept the Secretary's interpretation so long as it is reasonable, even if other interpretations seem better or more reasonable.¹⁶⁹ This formulation respects the Secretary's authority and exper-

165. Those affected by regulations need to calculate the costs of complying in order to manage efficiently in the marketplace. *See, e.g.,* Viscusi, *Reforming OSHA Regulation of Workplace Risks*, in *REGULATORY REFORM: WHAT ACTUALLY HAPPENED* 234, 237 (1986) (employers need to be aware of compliance costs and risks to calculate "compensating wage differentials" workers will demand to take particular job). Noble states:

[A]n effective occupational safety and health program must force employers to increase their investments in prevention and involve workers in plant governance. To accomplish these goals, the state must set standards that provide employers with clear and consistent signals about the appropriate levels and kinds of investment in protection Capital expenditures can be minimized if employers take health and safety into account when they purchase new equipment and design new plants. Capital goods producers are likely to comply with existing standards, and firms are likely to acquire state-of-the-art equipment routinely as they invest in new capital. In contrast, it is very costly to retrofit existing plants.

C. NOBLE, *supra* note 126, at 196-97.

166. *See* Kelman, *Bureaucracy and the Regulation of Health at Work: A Comparison of the U.S. and Sweden*, in *CRITICAL STUDIES IN ORGANIZATION AND BUREAUCRACY* 370-71 (F. FISCHER & C. SIRIANNI, eds. 1984) (arguing that increased OSHA litigation produces unnecessary transaction costs, sapping scarce enforcement resources). One commentator has noted:

Based both on recent legislation and the courts' willingness to concern themselves more and more with administrative actions, litigation against federal agencies has skyrocketed. Apart from the merit of individual cases, litigation often exerts a heavy impact on agency management through extended delays, higher costs, and hesitancy to take action.

Ink, *supra* note 131, at 136.

167. *See supra* note 44 and accompanying text (noting that worker safety requires expedient compliance).

168. Courts must accord great deference to "agency" interpretations. *See* *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *supra* notes 64-80 and accompanying text.

169. *Cf. supra* note 75 and accompanying text (describing formulations of

tise, affords predictability in rule interpretation,¹⁷⁰ and circumvents the policy pitfalls of judicial activism and adjudicatory policymaking.¹⁷¹

III. CONCLUSION

The judiciary makes policy when it actively interprets regulations. Agencies themselves, however, possess greater interpretive expertise and are more responsive to political control than courts. Courts therefore should give meaningful deference to agency interpretations. Deferring to agency interpretations becomes complicated, however, when various organs of one agency interpret that agency's regulations differently. OSHA presents such a situation.

This Note has demonstrated that when the Secretary of Labor and OSHRC develop conflicting interpretations of OSHA regulations, courts should defer to the Secretary's interpretation. Legislative history suggests that Congress vested the Secretary with policymaking authority. In analogous situations, courts have deferred to policymaking bodies rather than adjudicators. This solution allows the policymaker, rather than the adjudicator, to establish rules with nationwide application. Moreover, deferring to the policymaker fosters predictability, which is crucial to efficient regulation of occupational health and safety.

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Chevron standard); *Brennan v. Southern Contractors Serv.*, 492 F.2d 498, 500 (5th Cir. 1974) (adopting this standard).

170. *See supra* notes 164-65 and accompanying text.

171. *See supra* notes 116-19 and accompanying text (arguing that the more ambiguous a standard of review is, the more selectively a court can apply it). This proposed standard still allows courts to strike truly unreasonable agency interpretation—those that produce manifestly unfair or absurd results. Courts should not, however, simply compare various possible interpretations and choose the one that seems best.

