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WHEN THE JUDGE IS NOT THE PRIMARY OFFICIAL WITH
RESPONSIBILITY TO READ: AGENCY
INTERPRETATION AND THE PROBLEM
OF LEGISLATIVE HISTORY

PETER L. STRAUSS*

As the other pages of this journal reflect, writing about statutory interpretation commonly builds on unarticulated assumptions about the occasion for interpretation, the identity of the interpreter, and the character of the interpreted text. In this paradigm, the occasion for interpretation is a litigated case—an episode has occurred for which the application of the statute is problematic. The interpreter is a judge, a person who resolves litigation—typically episodic, typically backwards—working outside of politics, and bearing no generic responsibility (that is, responsibility outside the decision of the case before her) for the statutory regime. And the interpreted text is imagined to have the characteristic of resolving the problem at hand—to interpret is to find the meaning in the statute that itself answers the question presented.

For a large and increasing body of interpretations, however, these assumptions are false. These interpretations occur as an element of ongoing activity, as part of continuing and integrated courses of conduct determining and exercising authority; the interpreters are executive officials, administrative agencies with programmatic responsibility for implementing statutory regimes, and subject to oversight that may be political as well as judicial; and, finally, the interpreted texts are intransitive in character—rather than provide answers to the problems that induced it to act, the legislature has created official bodies to deal with those problems on a continuing basis, within parameters it sets by statute.¹ This essay seeks to begin an examination of the difficulties that may

* Betts Professor of Law, Columbia University. Among the friends who read early drafts and made helpful comments, special thanks are owed to Bernie Black, Philip Frickey, Kent Greenawalt, Jeff Lubbers, Eben Moglen, Henry Monaghan, Richard Pierce, Rick Pildes, Steven Ross, Roy Schotland, Richard Thomas, and Seth Zinmann. This paper was submitted to this Symposium in the Summer of 1990, and does not consider developments since then. The Abraham M. Buchman Fund for Administrative Law's financial support is gratefully acknowledged.

1. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369 (1989); see also Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 551 n.11 (1985). Some judicially administered statutes have the same characteristic—the Sherman Act come quickly to mind. We treat such statutes as providing a framework for common-law development. They will not be further considered here.

be created by using the paradigm of episodic, judicial interpretation of a determinate text when dealing with the very different world of the administered statute. Its immediate concern is with the implications of the recent judicial flight from reliance on legislative history in interpretation, yet more general problems also exist.

The general problem that motivates this paper is one often worried about for judges, but that has particular difficulty and significance for administrative agencies—that of distinguishing successfully between the worlds of politics and law, and providing ourselves with some assurance that an agency will act in accordance with “law.” Politics has an open and conceded role in administrative government, as it does not for courts; and yet we also expect an agency to act according to law. Perhaps especially at a time when the abuses of political oversight and the political side of agency action are much in public view—the savings and loan debacle, and the scandals at the Department of Housing and Urban Development, for example—attending to how a “rule of law culture”² might be maintained against these pressures is a useful exercise. The burden of this paper is that the use of legislative history may have an importance in the agency context for maintaining law against politics, however one regards its use at the judicial level.³

I. THE SIGNIFICANCE OF THE AGENCY READER

Two examples may sharpen and make concrete some of the differences between agency and judicial reading of statutes, and their increasing significance in American law. The Railway Safety Appliance Act of 1893⁴ (“RSAA”) was a largely transitive statute that imposed on American railroads the requirement to adopt a number of specified safety improvements. Among them was a provision making it unlawful after a future date, extendable by order of the Interstate Commerce Commission (“ICC”), “to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of

2. Shane, *The Separation of Powers and the Rule of Law: The Virtues of “Seeing the Trees”* 30 WM. & MARY L. REV. 375 (1989).

3. The relative indifference of the text to the question of how judges interpret statutes is artificial. Judicial condemnation of judicial use of legislative history as “rummag[ing] through unauthoritative materials,” *Public Citizen v. Department of Justice*, 109 S. Ct. 2558 (Kennedy, J., concurring) would inevitably affect the psychology of agency use, whether or not an agency was ever reversed for “error” in relying on such materials in its own decisional processes. History teaches us, moreover, that judicial refusals to consider the political history of legislation easily turn into the substitution of judicial pleasure to that of the legislative body. See *infra* text accompanying note 25.

4. 27 Stat. 531 (1893) (codified as amended at 45 U.S.C. §§ 1-43 (1982)). Cf. Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427 (1989).

men going between the ends of the cars.” Among the questions not immediately resolved on the face of this statute is whether the statute focuses on the equipment or on the event of coupling. If the former, it would not be a violation to use a car that could couple with some but not all cars it might encounter, or whose coupling mechanisms were out of repair, so that in particular instances men might have to go between the cars to effect a coupling or uncoupling; if the latter, any coupling or uncoupling not automatic-in-fact would be a violation.

Because the ICC had twice been persuaded to postpone the effective date of this requirement, it did not take effect until August 1, 1900. On August 5, 1900, a brakeman lost a hand while attempting to make a manual coupling between a Southern Pacific engine equipped with an automatic coupler type widely adopted for use on freight cars and a dining car equipped with an incompatible passenger car coupler. His suit for damages then put before the courts the question whether the act had been violated or not. In 1904, eleven years after the statute’s adoption, and after the Eighth Circuit reached the opposite conclusion,⁵ the Supreme Court concluded that the act *had* been violated, reasoning from purpose and to a limited extent legislative history that (among other conclusions) the statute required compatibility-in-fact.⁶

Notice, however, that this question had been urgent for several years before August of 1900, in forms carrying heavier economic consequences than the prospect of negligence liability to brakeman Johnson. The Southern Pacific, indeed all the nation’s interstate railroads, had to decide what investments to make in equipping cars with couplers, what policies were permitted or required for interline exchanges, and what might be the legal consequences of failing to keep coupler systems in repair. Against what might seem the obvious impulse to uniformity—variations between cars contributed heavily to the terrible carnage in the yards that generated the pressure for this legislation⁷—were a variety of concerns vivid in the history of the act and of the times: automatic coupling was an emerging technology, and dozens of designs competed; it was impossible to say which would be the best one, and for what purposes;⁸ each railroad was accustomed to make its own purchase decisions; and it

5. *Johnson v. Southern Pacific Co.*, 117 F. 462 (8th Cir. 1902).

6. *Johnson v. Southern Pacific Co.*, 196 U.S. 1 (1904).

7. The text account draws on materials collected in P. STRAUSS, *CASES AND MATERIALS ON LEGAL METHODS* 132-87 (prov. ed. 1990). See, in particular, *Kohn v. McNulta*, 147 U.S. 238 (1893); 24 CONG. REC. 1246-51, 1273-88, 1370-76, 1416-18 (1893).

8. One might wish different qualities for freight cars than for passenger cars, and durability was untested.

was feared by some that fixing on a single required design would defeat many entrepreneurs and confer monopoly profits on one.

In counseling their clients about the impact of the new law on their rolling stock, railroad lawyers might, of course, simply have attempted to project what judicial reasoning ultimately would be, to the extent technique permitted—as they might project the interpretation of a contract or will they were drafting.⁹ Yet the fact is that the railroads (and the railroad unions) were in a continuing relationship with a body, the ICC, that had been given some responsibility for implementing the statute, that was in a position to indicate its own understanding of the meaning of its provisions, and that (as a participant in the political process) was well situated to appreciate such legislative understandings as there may have been. That relationship invited negotiation and counseling, over time, as the industry worked toward understanding and meeting its obligations; and the character of the ICC permitted political as well as judicial dialogues about its developing understandings and implementation plans.

The ICC's annual reports and the decisions it made (after full hearings) on the requests for extension provided, as it were, formats for developing appreciation of these issues and expressing conclusions widely circulated and read within the communities most concerned.¹⁰ They reflected dialogue not only with industry but also with the Congress to which they were ostensibly addressed, and whose political interests they were written to satisfy. Of course, resistance to the positions the ICC took, or awareness that further legislation was required, might have emerged, but when neither did—the readings the ICC supplied were accepted and acted upon—one might reasonably treat the result as reflecting an accepted, evolving interpretation.

The experience within these communities was of taking judgments and making investments over time, under a statute whose meaning was, in an important sense, emerging with the years. Whatever it had

9. As they were not the drafters of the statute, however, they would have rather less capacity than in the case of contract or will personally to influence the outcome of an anticipated, later reading.

10. The ICC's view that compatibility-in-fact would be required was first expressed in its Seventh Annual Report—the report for 1893, the year in which the statute was adopted. 7 ICC ANN. REP. 76 (1893). Over the years, the compatibility theme (which had also marked the legislative history, see P. STRAUSS, *supra* note 7, was frequently repeated. See, e.g., 10 ICC ANN. REP. 94 (1896), 13 ICC ANN. REP. 53 (1899). The problem of keeping the couplers in repair, about which no hint can be found in the original legislative history, first appears in the last of these, with the remark that “such a coupler is not automatic in the sense contemplated by the law.” 13 ICC ANN. REP. at 53. This report is the first in which a Commission inspector is mentioned, and following reports recount successful requests to Congress for additional inspection forces, and recognition of the value of this effort—without, however, any change being made in the underlying statute. 14 ICC ANN. REP. 79-84 (1900); 16 ICC ANN. REP. 57-59 (1902).

“meant” in 1893, the body of actions that had been taken by August 1, 1900—by the ICC and by the railroads and the railroad unions, with Congress regularly informed—gave the statute a working meaning at that time that inevitably was richer than had obtained at the legislative moment. While in the instance the Supreme Court reached the same point with respect to brakeman Johnson’s hand, as commission and industry had been reaching for together under Congress’s watchful eye in considering the nation’s car fleet, that coincidence ought not to obscure the very different processes involved.

The impact of the presence of an agency reader is the more striking when one moves to a statute that could not reasonably be imagined itself to have resolved the issues with which industry and agency were required to deal. The National Traffic and Motor Vehicle Safety Act of 1966 (“NTMVSA”),¹¹ like the Railroad Safety Appliances Act of 1893, sought to force the development and deployment of safety technology. Where Congress in 1893 could visualize the general problem and the solution to be pursued, the Congress of 1966 could not; it was not prepared to decide what measures should be taken to render cars acceptably safe. Authority was given to an agency within the Department of Commerce (soon to be transferred to the Department of Transportation) to decide, following rather elaborately stated procedures, what safety standards would be “reasonable, practicable, and appropriate for the particular type of motor vehicle . . . for which it is prescribed,” would “meet the need for motor vehicle safety” and could “be stated in objective terms.”¹² This Congress had neither time nor capacity to attend to legislative detail; it identified the seriousness of the problem, provided parameters and procedures for action, and specified an executive actor to see to it, under its supervision and the courts’, that something would be done. This is, then, an excellent example of an intransitive statute.¹³

Like its near-contemporary, the Occupational Safety and Health Act of 1970,¹⁴ the text of the NTMVSA occasionally reflects what might euphemistically be described as legislative compromise. Unable, for example, to agree precisely on the extent to and manner in which costs should be taken into account in the pursuit of safety, Congress provided

11. Pub. L. No. 89-563, 80 Stat. 718 (1966) (codified as amended at 15 U.S.C. §§ 1381-1431 (1982 & Supp. IV 1986)).

12. 15 U.S.C. §§ 1392(f)(3), 1391(2), 1392(a).

13. See Rubin, *supra* note 1. The materials on which the text discussion of the NTMVSA is based are drawn from P. STRAUSS, *supra* note 7, at 531-751. See also J. MASHAW & D. HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990).

14. 29 U.S.C. § 651; see also *Industrial Union Dep’t, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980).

a formula that could be administered, having been assured by the intended administrator that he understood a balance had to be struck in some fashion.¹⁵ While recognition that Congress often fails to decide important matters has led a few to revived interest in the delegation doctrine,¹⁶ the prevailing view is to accept the resulting intransitivity in the belief that procedures and other commitments to regularity by administrators can substitute for the law Congress cannot be thought itself to have created.¹⁷ Of course, Congress does decide *some* issues, and determining which they are and how they were resolved present questions of statutory interpretation.¹⁸ That process threatens a similar skew between the judicial paradigm and the agency-regulation reality.

Take, for example, the NTMVSA's requirement that standards be "objective." A braking standard must be testable, and that implies that such a standard will specify vehicular speed, the traction qualities of the road surface, and stopping distances. As soon as one gets into this problem, one realizes that testing braking on a road surface in itself changes the quality of the surface, because bits of rubber will adhere to it and make it slicker. The stickiness coefficient of the road will change with use. An ongoing process in which such problems are recognized and discussed might produce as an accommodation the specification of a margin of error for the probable variation in road surface quality; that would permit a braking system to pass the required standard despite what might otherwise seem a somewhat subpar performance. One might

15. *E.g.*, The General Counsel of the Commerce Department stated in a letter to the Committee:

The tests of reasonableness of cost, feasibility, and adequate lead time should be included among those factors which the Secretary could consider in making his total judgment.

The Committee intends that safety shall be the overriding consideration in the issuance of standards under this bill. The committee recognizes . . . that the Secretary will necessarily consider reasonableness of cost, feasibility and adequate leadtime.

S. REP. NO. 1301, 89th Cong., 2d Sess. 6 (1966); *see also* 112 CONG. REC. 13601 (1966), and the risible dialogue on this subject among Senators Hart (Mich.), Ribicoff (Conn.), and Pastore (R.I.) in the Senate Hearings of March 15, 1966, reproduced in P. STRAUSS *supra* note 7, at 635-46.

16. *See Industrial Union Dep't.*, 448 U.S. at 671 (Rehnquist J., concurring); but compare the concession in the several opinions in *Mistretta v. United States*, 488 U.S. 361 (1989) that judicially manageable standards for delegation are unavailable.

17. *See, e.g.*, *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737 (D.D.C. 1971); 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 3:15 (2d ed. 1978). For a particularly candid Supreme Court recognition that Congress leaves important issues undecided, and is permitted to do so, *see Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

18. In the *Chevron* decision, the Supreme Court identified two steps to be taken in any case involving statutory interpretation by an agency of a statute within its mandate. The first step requires the Court to determine, using "traditional tools" of statutory construction, whether Congress has resolved the issue presented. 467 U.S. at 848 n.9. This is essentially the inquiry described in the text. If Congress is found not to have resolved the matter, then the court is to accept any reasonable agency construction. *Id.*

expect such outcomes from an agency that learns across a range of its activities about the inevitable imprecisions of testing measurements, and one might believe that industry could accommodate to, even welcome, them. That expectation might be enhanced by awareness that as these discussions are continuing, the agency is also in continuous political contact with the President and the Congress, to which (independently of the courts) it will have to justify the seriousness and appropriateness of its efforts.

On the other hand, litigation will present judges only with the particular stickiness coefficient problem, not its generalizable character; of necessity, they will encounter in the case *both* the standard *and* the acknowledgment by the agency that it does not expect it to be met precisely—that it is willing to make accommodations to varying testing conditions. By itself, this episode may seem quite strange. If the judges are persuaded that the requirement to state standards “in objective terms” embodies a discrete congressional decision that each standard must permit strict replication of results, not a working objective for the agency, then a braking standard that survives judicial scrutiny will be hard to come by.¹⁹ In their insightful new book, Jerry Mashaw and David Harfst persuasively make the case that the essential cessation of standard-generation by the National Highway Traffic Safety Agency can be ascribed in good part to just such judicial failures of understanding.²⁰

The examples of the RSAA and the NTMVSA are themselves dispute-oriented, and so only hint at what may be the largest of the differences between the ordinary judicial and agency contexts for statutory interpretation. For the courts, the statutes arrive with the particular disputes; agencies have a history and memory that courts lack for most statutory problems they see. Agencies are almost wholly the creature of their statutes, with an overlay of practices and understandings built on them and of judgments made and acted upon within the discretion that the statute is understood to confer. The agency’s daily course of business presents myriad opportunities for reexamining and possibly shifting the meanings ascribed to its statutes. Impetus for change is provided in part by the facts that happen to arise before the agency; facts drive it just as they do courts applying the common law. From year to year, in the dynamic of government, new statutes accrete, presidential administrations and the agency’s own political leadership change, the general char-

19. *Paccar, Inc. v. NHTSA*, 573 F.2d 632 (9th Cir. 1978), *cert. denied*, 439 U.S. 862 (1979); *see also Chrysler Corp. v. DOT*, 472 F.2d 659 (6th Cir. 1972).

20. J. MASHAW & D. HARFST, *supra* note 13, at 89-103.

acter and political composition of the Congress fluctuate, civil servants pass in and out the revolving door, however slowly—and with this flux the statutes acquire meanings they never previously had, and lose others that once were obvious. And they do so not only in the particular decisions of the agency heads, but also in the daily humdrum of the civil servants who do its work.

The differences between the statute the judge interprets (under our unarticulated assumptions about occasion, interpreter, and text) and the statute the agency interprets seem like those between “discrete” and “relational” contracts, as presented in current disputes about interpreting contracts.²¹ In the classic model, contracts are best viewed as consent-centered transactions between parties to an episodic transaction; a contract is imagined as attempting at the moment of agreeing to capture all possible future consequences of the parties’ behavior in relation to each other concerning the agreed-on transaction. In criticism of that model, some scholars point out that many contracts are centered not on discrete transactions whose consequences could even imaginably be captured at a given point in time, but on relationships that continue over time, that are “heavily relational and intertwined, and not discrete at all.”²² The parties to such contracts “cannot plan for every contingency and must continue to plan and adjust their duties throughout the relationship; trouble is expected as a normal part of the relationship; unlike the parties in a discrete bargaining process, the parties in an intertwined relationship have an incentive to share both benefits and burdens, and anticipate future cooperation.”²³ Changing the underlying assumptions about contracting in this way requires a thoroughgoing change in approach; so, also, as one moves from the discrete statute and its judicial interpreter to intransitive statutes administered by agencies. This essay takes no more than initial steps in that direction.²⁴

21. The analogy is offered hesitantly by one who has had little exposure to the world of contracts scholarship, but with some encouragement from colleagues who have, and with significant help from a synthesis essay they commended to me as highly reliable, Linzer, *Uncontracts: Context, Contorts, and the Relational Approach*, 1988 ANN. SURV. AM. L. 139. That essay contains a wealth of references to the relevant contracts scholarship. Goldberg, *Regulation and Administered Contracts*, 7 BELL J. ECON. 426 (1976), draws a similar analogy, in the service of offering a justification for much regulation by comparison with long term (“administered” or “relational”) contracts.

22. Linzer, *supra* note 21, at 156, relying especially on the work of Ian MacNeil.

23. *Id.* at 157.

24. See Rubin, *supra* note 1, which generated for me the possible significance for interpretation of the element of intransitivity. The ideas presented here have parallels to, but are not quite the same as, those Philip Frickey and William Eskridge are pursuing under the label “dynamic statutory interpretation”—Professor Eskridge in the pages of this symposium—or that Professors Aleinikoff and Dworkin articulate in their respective writings about statutory interpretation. See Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989); Aleinikoff, *Petersen v. Mc-*

The organic nature of agency relationships with their statutes, that agencies essentially *live* the process of statutory interpretation, makes it of special importance to see how that occurs. The character of the agency as interpreter, that it acts in the world of politics as well as that of law, further emphasizes the inquiry. In some senses, of course, we know that judges, too, are political—that they may be merely the longest lived of our politicians; assuring that they do not “exercise WILL instead of JUDGMENT, . . . [substituting] their pleasure to that of the legislative body”²⁵ is the continuing challenge, and one expects always to find Realists who can persuasively show that it has not been fully met. Yet agency officials are concededly political. Unlike judges, they serve limited terms, from which they may be dismissed; their wages in theory and their resources in reality are hostage to the appropriations process; they spend much of their time testifying to congressional committees, responding to inquiries or demands from the President, members of Congress, or assorted presidential or congressional offices; they may be called to account for the decisions they take in ways a judge could never conceive for her function.

II. LEGISLATIVE HISTORY IN AGENCY PRACTICE

Legislative history has a centrality and importance for agency lawyers that might not readily be conceived by persons who are outside government and are accustomed to considering its relevance only to actual or prospective judicial resolution of discrete disputes. Imagine the law library of a government agency—the Securities and Exchange Commission or the Department of Agriculture. In addition to the reporters and the computer terminals, you will find there an unusually extensive collection of legislative materials. Alongside the statutes for which the agency is responsible, you will find shelf after shelf of their legislative history—collections that embrace not only printed materials such as might make their way to a depository library, but also transcripts of relevant hearings, correspondence, and other informal traces of the continuing interactions that go on between an agency and Capitol Hill as a statute is being shaped in the legislative process, and perhaps afterwards in course of implementation. You may also find there files of correspondence with the Office of Management and Budget and with the White House, gener-

Lean: Updating Statutory Interpretation, 87 MICH. L. REV. 20 (1988); R. DWORKIN, *LAW'S EMPIRE* (1986) and, perhaps especially, Eskridge, *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990). Intransitivity and agency administration are not *universal* characteristics of statutes, and the inquiry here is limited to such statutes.

25. THE FEDERALIST NO. 78 (A. Hamilton) (J. Cooke ed. 1961).

ated while statutory proposals pend or in response to the question whether the President should sign enacted legislation. No part of legislative history as courts normally regard it, nonetheless these files mark and in significant respects may contribute to the agency's stance toward emerging legislation—as records of “where we have been,” they suggest what it expects will be entailed for its programs by the matters under consideration.

Imagine now the work of that library. These materials do not languish. Consciously or unconsciously, the question of statutory meaning is at the core of virtually all the agency does. “Authority” lurks in each rule, each proposal for action. If it must be demonstrated, the responsible attorney will make that demonstration not only in terms of statutory language but also—with effort in proportion to importance—after thorough attention to these materials. Through them she acquires a sense of political history and possibility that will both suggest and constrain. Choice between alternative readings of statutory text, explicit or implicit, recurs for each attorney many times in any significant piece of legal work. Sometimes, of course, that choice appears hardly if at all to the busy attorney: a particular view is already well established within institutional ethos, has been ingested by the attorney as part of her own analytic equipment, is little challenged by the particular circumstances that animate the present piece of work. But if the view isn't well established, or if it isn't yet hers, or if the circumstances carry with them the impulse for change, we expect her to pore through those materials, as she does, seeking help in understanding and/or justification.

As we have already noted, the agency is almost wholly the creature of its statutes, and its daily grist of business produces constant and dynamic change. In this process, prior as well as present political forces play a continuing role. They do so perhaps most obviously through the words of the statute; language rarely if ever changes so quickly that even current intuitive readings are free of the deposit of understandings the statute's writers would have shared. Prior political forces continue to act, as well, through the agency's institutional memory, the set of understandings, vivid in the minds of its civil servants, what the statute has “always” been understood to mean. And, for the newest of the agency's personnel especially, those forces continue to act through the concrete deposits of those forces—the legislative history and the agency's subsequent actions in relation to it.

One wants not to romanticize the impact of this history and its use, and at the same time to observe its possible uses in the arena of contemporary *political* oversight that so distinguishes the contexts of agency and

judicial interpretation. There is always the chance that it will be overwhelmed—at least for a time—by the contemporary politics of an Ann Gorsuch or James Watt supported by the President in battles with the Congress. When received, obviously enough, the history need be no more definitive than the statute it accompanies; where the history of the RSAA gives fairly clear signals on the issue of compatibility, that of the NTMVSA only confirms that Congress papered over its failure to come to closure on the question just how costs should be taken into account in making judgments about safety. Even so, the staff of an agency enduring over time and pursuing its mission will form understandings grounded in its history, as it unfolds, that political leaders may find they have to respect if they do not wish to destroy morale or an internal sense of the agency's legitimacy. The agency once charged with the generation of safety standards is obliged to find a path within the range of disagreements it knows that formula to have concealed—to do so in a manner likely to survive the political oversight to which it is immediately subject as well as eventually to satisfy a reviewing court. That oversight will likely occur before the same committee as produced the papered-over formula; in the immediate wake of the legislation, one may find a high degree of awareness just what the elements of disagreement were, how much room and on what issues the agency has to exercise its own discretion. The path then taken will itself generate expectations and patterns of action that acquire force with time.

III. LEGISLATIVE HISTORY AND "RULE-OF-LAW CULTURE"

We are accustomed to giving these expectations and patterns the name "law," and to holding agencies to them, in a limited way, through the medium of judicial review. Of course, courts finding that statutes are indeterminate in important respects *could* respond by invoking the delegation doctrine but, as already noted,²⁶ they do not. Instead, they seek other means of assuring themselves that agencies can be kept within law's control and have acted within the law. Very occasionally, that may be by a judicial supplying of constraints through "interpretation" of the statute to supply the decision Congress omitted.²⁷ More often, they in-

26. See *supra* note 17.

27. The obvious contemporary example of this move is the plurality opinion in *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980), which imposed a threshold requirement for assessing health hazards under the Occupational Safety and Health Act in the face of demonstrable Congressional indecision on the issue of assessing costs in relation to safety and few if any indications that it had even considered the requirement the Court found in the statutory text. See Shapiro & McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1, 46 n.259 (1989). The plurality indicated that it thought its only alternative to

quire into agency procedures, reasoning processes, and the building and honoring of internal constraints that conduce to regularity.²⁸ Agencies actively solicit these results by regularly acting as if authority had always to be justified and legality demonstrated; the courts' nonrecourse to the delegation doctrine is purchased, as it were, by these demonstrations of adherence to rule-of-law culture.²⁹

The political pressures operating on agency action at any given point may be overt, as when a member of Congress submits an inquiry, an oversight hearing looms, the Office of Management and Budget raises questions based on economic impact analysis, or a high administration official seeks a certain outcome; or they may be implicit—the product of political appointments made with an eye to the appointee's program or likely approach, or of a successful bureaucrat's intuitive knowledge what course of action will avoid political reprisal or earn political credit. Any resistance these pressures encounter may be the product, simply, of the agency actor's own will, exercised within whatever room a variety of contending and often contradictory external forces afford. Yet one imagines also that resistance derives from the play of past political force captured in the legislative histories and decisions already taken. Every so often the impulse to act or interpret in a given fashion will be met by refusal: "The statutes don't permit that." "We've built up a set of expectations that will unravel if we go that way." "Even if the words might be taken that way in isolation, that's just inconsistent with what's been understood since the statute was enacted; it would require an amendment to get us there." "I don't see a fair reading of the legislative history that would permit that interpretation." Such refusals are not lightly made, particularly if the current political forces are large ones; even if one didn't want to agree with political superiors (often one wants to agree with them), credibility and professional reputation if not job security are on the line.

finding this meaning in the statute was to hold it invalid for excessive delegation. 488 U.S. at 646. That is a high level of provocation, and I do not intend to suggest that a Court persuaded that a statute must be found invalid for excessive delegation (*i.e.*, that it will be found to authorize an agency to act outside law's necessary control) is unjustified in adopting an available interpretation that establishes the necessary confidence in control—whether or not Congress could reasonably be thought to have enacted the resulting regime. Note, however, that prior formulations about delegation, even permissive ones, do not admit to congressional indeterminacy. See *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the . . . body . . . is directed to conform . . .") (emphasis added); *Yakus v. United States*, 321 U.S. 414, 425 (1944) ("[W]hether the definition sufficiently marks the field within which the administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.") (emphasis added).

28. See *Motor Vehicles Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *supra* note 17.

29. See *Strauss*, *supra* note 4, at 442-43.

If such refusals nonetheless occur they are, at least in contemplation, one way in which agency personnel mark the elusive boundary between politics and law.

If this picture is well painted, we may find in it a number of recognizable elements. One is a basis for the judicial judgment, variously expressed and never more strongly than in *Chevron, Inc., USA v. Natural Resources Defense Council*,³⁰ that agency judgments about statutory meaning are entitled with substantial frequency to acceptance. Except for the rare case in which a statute's indeterminacy provokes so much judicial concern about the possibilities of control as to provoke the judges themselves to read the statute to cabin the indeterminacy,³¹ one confidently expects the reaction will be that of the *Chevron* Court:

In these cases, the administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies. Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by this case. Perhaps that body consciously desired the administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes it matters not which of these things occurred.³²

Note that the agency is not acting beyond judicial control; the opening sentences suggest that agency judgment may be reviewed for abuse of discretion in the accustomed mode—one that permits inquiry into consistency, reasoning and judgment.³³ Nonetheless, the Court has acknowledged three propositions, striking yet appropriate in the context of a statute committed to an agency reader: that the statute *is* indeterminate; that primary responsibility for giving it shape over time lies elsewhere; and (as the discussion in *Chevron* following the quoted paragraph particularly emphasizes) that that responsibility will *appropriately* be exercised under the oversight of the political as well as the judicial branches.

Judicial acceptance of such agency responsibility seems a corollary of the choices Congress makes in committing a statute to administrative

30. 467 U.S. 837 (1984).

31. See *supra* note 27 and accompanying text.

32. 467 U.S. at 865 (footnotes omitted).

33. *Motor Vehicles Mfrs. Ass'n. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983); see also *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

reading in the first instance. The processes by which agencies generate statutory readings permit, yet tend to smooth, understanding complex, interdependent, and intricate statutory schemes and adapting them to the changing circumstances of society and of the legal order as a whole. Congress finds it hard enough to act initially; courts are brought to statutory puzzles episodically and piecemeal, neither bearing responsibility for the whole nor having the resources and incentive for comprehensive understanding. The agency's constant exposure to its statutes, its continuing immersion in their political histories and interdependent possibilities, and its responsibilities for program make it a particularly capable reader; its continuing interactions with the many communities affected by the statutes—and with their political representatives in Congress and the White House—give its readings, in any event, a real-world influence courts would be hard put, and foolishly advised, to deny. And the connection to the past provided by personnel and the attachment to language-in-history, together with an effective obligation of explanation to earn respect and judicial review for reasonableness and procedural sufficiency provide some basis for connecting those readings to law.

Endorsing political as well as judicial oversight gives the character of the connection to the past particular importance. Let us accept the Supreme Court's concession in *Chevron* that statutes are often (if not always) indeterminate—not in the sense that they mean nothing, that “oranges” could be substituted for “rice” in a statute providing price supports and acreage restrictions for the latter, but in the sense that they often mean no one fixed thing, that they leave open an envelope of possible understandings among which a definitive choice of intended or necessary or correct meaning cannot be made. We are then very near, if not precisely at, the insight that critical legal scholars reduce to “power,” positivists to “chaos,” public choice theorists to “rational self-interest maximization,” and pragmatic legal scholars want to call “law.” The way the pragmatists want to do that, as Robin West points out in her contribution to this symposium³⁴ is by asserting the constraining character of that tradition or context within which judgments are made. However a member of the public or a member of Congress might understand the possibilities opened by, say, the NTMVSA, a person who is a lawyer for the Department of Transportation—and who acts within the enveloping history and traditions of the DOT, and who acts in relation to the political history as well as the text of the statutes applicable to the

34. West, *The Meaning of Equality and the Interpretive Turn*, 66 CHI-KENT L. REV. 451 (1990).

DOT—that person will come to a more bounded judgment, a judgment outside the wholly personal, a judgment that (even if not wholly determined) may therefore be described as one of law.

One needs to pay close attention to the importance for that argument of the legislative history component. From the perspective of pragmatic interpretation, it is not only important to observe that traditions count; it is also central to see what those traditions are, to have some sense of how they contribute to the formation of judgment and to its articulation in the swirling world of current politics. Because part of what distinguishes agencies from courts in the business of statute-reading is that we accept a legitimate role for current politics in the work of agencies, the question then becomes, in important respects, titrating just how much politics and just how much law there is in the mixture.³⁵ It is just this fact of accepted current political influence or oversight of agency work-product that lends importance to the continued use of past political history in agency statute-reading.

IV. SEPARATION OF POWERS IMPLICATIONS

Imagine two contexts for an interchange between an administrative official and a political overseer. The administrator has to resolve in some specific setting a question of statutory meaning in a framework formally set by prior legislation. As language, the relevant passage is problematic; but the politician would say that current politics calls for a particular one of the available readings and is prepared to demand that reading. In case one, our official repairs to the library we have described and investigates the political history of the provisions in question—that is to say, their legislative history and subsequent development; she concludes that today's politically desired reading is not a fair one in light of that context and thus causes the agency to frustrate the current political demand.³⁶ In case two, the library is closed—use of legislative history is impermissi-

35. See Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123 (1989) and Farber, *Democracy and Disgust: Reflections on Public Choice*, 65 CHI.-KENT L. REV. 161 (1989).

36. The case in which the bureaucrat finds ("is able to find," for the more cynically inclined) history to support what current politics demands presents other possible issues. When she reaches the outcomes current politics has demanded, law has served as less of a constraint on their influence. We might imagine, however, that dressing her conclusion up in the language of history and what its materials command may to some extent have obscured the influence of current politics, and in this way secured an unearned legitimacy for that conclusion. One thus has issues of candor about the basis for an exercise of public authority that will in any event occur, rather than constraints over the exercise of that authority. A person or society might prefer to have more candid exercises of less constrained authority, rather than the combination of constraints and camouflage; my preference is for the possibility of constraint.

ble—and the traditions of statute-reading emphasize text-based approaches. Agency history—“the way we have always read the statute”—and arguments grounded in reconciling elaborate and complex schemes remain available; yet it seems to me evident that closing the legislative history library would impair the agency’s defenses against current politics. Text-based approaches don’t pay much attention to agency traditions, and (for all the occasional references to Nineteenth Century dictionaries) invite contemporary readings;³⁷ thus, the relative force of contemporary politics is much increased in case two as against case one. The responses available to a contemporary politician’s commanding “Why don’t you read the statute my way”? have been sharply diminished.

This observation does not in itself establish that case two is the less desirable outcome. One account of our transaction would find in case two a distinct normative improvement. This would be the account of those who conceptualize the relationships between administrative agencies and elected politicians (usually representatives in the Congress but sometimes also Senators or even, occasionally, the President) as principal-agent relationships in the game-theoretic or economic sense.³⁸ The problem to be solved, on this view, consists of finding ways to monitor the agent to assure that it adheres to the wishes of its principal. Formally, those wishes are expressed in legislation, but the literature addresses the problem in current time, as an issue of oversight. Just as a rational judge will think that honoring a system of precedent will tend to give her own judgments force in the future, one might suppose that a rational legislator might wish to encourage respect for past legislative judgments as a means of assuring the future force of his own legislative acts; nonetheless, the oversight issue is presented as one of securing satisfactory results for today’s constituents today.³⁹

On this view of matters, then, the administrative agency behaves ideally when it responds fully and intuitively to current political inputs. Whatever impedes this outcome—conflicting contemporary political signals (such as may be received from various congressional committees, the

37. See, e.g., *Sullivan v. Zebley*, 493 U.S. 521 (1990); Schauer, *Formalism*, 97 *YALE L.J.* 509 (1988); compare Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 *DUKE L.J.* 511, 521.

38. The literature is invoked, and an ambitious effort at such an analysis is made, in Revesz, *Specialized Courts and the Administrative Law-Making System*, 138 *U. PA. L. REV.* 1111, 1139-47 (1990). Revesz, for his purposes, assumes that current and past political pressures from Congress will not differ. *Id.* at 1145 n.145, and appears to assume that those pressures will be congruent with the law bearing on agency action. *Id.*

39. See, e.g., McCubbins & Sullivan, *Congress: Structure and Policy*.

White House, etc.) that permit playing one off against another, or internalized bureaucratic resistance—frees the agency agent to ignore its politically representative principal. Because those principals are themselves regarded as agents operating in a highly disciplined interaction with their principals, the public—a relationship that justifies their power—whatever thus frees the agency agent to ignore current political signals would be said to place its acts outside political legitimacy. For these observers, the substitute determiner of administrative action is merely the personal self-interest of the concerned bureaucrats, a self-interest that will find expression in agency “capture” by regulated interests or other undesirable results.

A. Delegation

Seeing that the case two rules would diminish an agency’s capacity to resist current political oversight serves to underscore that what is at stake is the normative claim that agency action *should* be mediated by influences other than, or at least in addition to, those politics. That claim is readily identified with separation of powers reasoning. Separation of powers reasoning focuses on legislature, executive and court as agents, rather than as principals, and—with the possible exception of the executive—denies binding force to the mere politics of these agents. Legislative action is to occur through the passage of statutes; courts are authorized to act only according to law, not policy; such discretion as the executive may have in the ordinary affairs of government must be cabined by law.⁴⁰ These limitations reflect the agency of these institutions; they are the mechanism by which their principal, the people, is to be protected against the loss of its power to the tyranny that would result if any of the three were to acquire monopoly over government power.

40. While what we know as the delegation doctrine is ordinarily articulated in terms of what Congress cannot do (“Congress cannot delegate legislative authority”), it is often more helpful to consider it as expressing limits on permissible executive discretion. “Discretion,” any administrative lawyer knows, is a problematic concept. As antonym to “ministerial,” the Supreme Court pronounced in the magisterial *Marbury v. Madison*, 5 U.S. 137, 166 (1803), it is an authority beyond the control of law. “[T]here exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.” *Id.* at 166.

When we use “discretion” in describing the ordinary domestic affairs of government, however, we are far from the conclusion that “there is no law to apply,” indeed we work hard to assure that courts do have a role in checking its exercise in a wide variety of ways. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); *Monaghan, Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983). While the delegation doctrine is a well-known fraud in its conventional garb, since these days Congress enacts few laws that do not delegate legislative authority (Rubin, *supra* note 1), it remains the price of such delegations that the discretion they confer be subject to the control of law. See *supra* note 29.

In their most stringent form, as expressed by John Locke, separation of power limitations forbid subdelegation; “[t]he power of the legislative being derived from the people by a positive voluntary grant and institution, can be no other, than what the positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer the authority of making laws, and place it in other hands.”⁴¹ If observation of the limitations in this form is no longer conceivable, as most would agree it is not, their remaining force lies in the proposition that the authority relationship between legislature and agency is to be one characterized by law rather than, simply, politics; in particular, that aspect of law that embodies the constraints of separation of powers suggests the particular importance for the agency/legislative relationship of statutory enactment—in separation of powers theory, that is, statutes are the characteristic means by which the legislature requires an agency to act, and that requirement persists until replacement statutes are enacted. To put this argument in a somewhat different way—what separation of powers theory suggests, so far as legislative politics is concerned, is that the political history that attends the legislature’s characteristic act of political legitimacy (the enactment of a statute) is the only political history that has a claim to command agency action. An approach favoring political action by Congress or its members that is not attached to statutory action, at the expense of political action that results in enactment of a statute, disservices the separation of powers.

B. *The President*

Before pursuing the possible implications of locking the agency out of its library for congressional relationships with agencies, we might pause to note that there could be other implications as well. Locking the agency out of its library also increases the effective political authority of the current President and may shift the balance of authority, as between them, toward him.⁴² Empowerment of the President could occur in two ways. Most directly, the general counsel and her agency will have lost some of their weapons to resist policy guidance in dealings with the President if she can’t say, “given the legislative history, we can’t read the statute that way.” The agency is the repository of expert knowledge

41. J. LOCKE, *SECOND TREATISE OF GOVERNMENT* 87 (R. Cox. ed. 1982).

42. As may be apparent, the model implicit in the textual discussion distinguishes “agencies” from the President, supposing that the President may have characteristic relationships with administrative agencies but that their authority is nonetheless theirs and not his—whether they are “independent” or “executive” agencies. See Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

about the legislative process that generated or failed to generate statutory change. That knowledge provides a means for resisting the President on the sleeve of Congress, a means associated at least fictionally with law. It provides an anchor for the "Duties" the Constitution indicates may properly be assigned to the agency, not the President.⁴³

The second way in which the President might be empowered would be if the abandonment of legislative history served, overall, to weaken Congress' controls. It may well work this way. One comparing the capacities of the President and Congress (more precisely, committees and members of Congress) to exercise contemporary oversight controls could well conclude—even considering the contributions of such leveling institutions as the General Accounting Office and the Congressional Budget Office—that the President is likely to be more adept. One could believe, too, that judicial disregard of legislative history, paired with *Chevron's* counsel of deference to agency readings, creates pressure to enact definitive (discrete, transitive) legislation Congress is unlikely to be able to meet. The Presidential gains from such moves seem not unconnected to the phenomenon of an increasingly Republican judiciary and a near-permanent Republican presidency.⁴⁴ These impacts appear especially dramatic if the government is *equated* with the presidency, as the Justices who are most consistently formalist about statutory interpretation might like to do.⁴⁵

C. Congress

The implications for Congress are the more striking if we focus on its own operation. From this perspective, one sees that a retreat from legislative history would weaken the controls over agency action that could be thought to continue to work on behalf of the *enacting* Congress. From *that* Congress, only the words of the statute then would remain, while the current Congress's political authority might have been enhanced. The President has gained political authority over the agencies; for Congress, the picture is more complex—the authority of the legislating Congress is diminished while the political authority of contemporary members of Congress may be enhanced.

This more complex outcome is one that also ought to be troubling from a separation of powers perspective. At any given moment, we can imagine that the two Congresses just described co-exist, the Congress

43. U.S. CONST. art. II, § 2, cl. 1; compare the Necessary and Proper Clause's reference to powers vested "in any Department or Officer." U.S. CONST. art. I, § 8, cl. 18.

44. See Ross, *Reagan Realism Comes to Detroit*, 1989 U. ILL. L. REV. 399.

45. Compare *Morrison v. Olson*, 487 U.S. 654, 659 (1988) (Scalia, J., dissenting).

that legislates for the future and the Congress that exercises current political oversight authority. In constitutional contemplation Congress legislates. The legislating Congress is the one that generates statutes and legislative history. The oversight Congress is the one that stresses constituent-service, attempting to influence agency action in the here and now, without passing statutes—acting, as has been fashionable to accuse it recently, as a counter-executive. What we need to consider is that letting go of legislative history may have the effect of putting a premium on oversight. It may make it more profitable to a member of Congress, torn between one role as a member of the legislating Congress and another as a member of the oversight Congress, to pay attention to being a member of the oversight Congress. What is done in making legislation doesn't count as much any more. Moreover, since on this hypothesis the agency is not going to be paying nearly as much attention to what went on during the process of legislating as it used to, our hypothetical member is going to have to put that much more energy into oversight to see to it that it toes the line, that it stays on track in the here-and-now. Moving away from legislative history, then, may well exacerbate the tendency of Congress to act as counter-executive.⁴⁶

V. LEGISLATIVE HISTORY AND THE CHANGING CHARACTER OF CONGRESS

The debate raging over the value of legislative history, addressed at length elsewhere in this Symposium, is a debate that focuses on its use by *courts* in interpreting statutes. Since early in this century, and over the past fifty years in particular, American courts have made significant use of the political history of legislation in their efforts to interpret it. The growth in that practice strikingly parallels the emergence of the statute as, at first, the common-law's competitor and, more recently, as the foundational instrument of the legal order. The availability of presidential messages, printed committee reports, transcripts of debate, and other accompaniments of the legislative process permitted courts closer under-

46. Compare Revesz *supra* note 38 (analysis of the impact of changing review mechanisms on congressional-agency relations.) Any such influence, admittedly, would be hard to quantify. Many other factors point Congress toward the counter-executive mode—for example, our recent penchant for electing our President and the dominant congressional factions from separate parties. Congress's habit of creating agencies to identify the particulars of measures to be taken has been ascribed, not only to the complexity of contemporary regulatory problems, but also to the general political advantages of getting the credit for addressing a problem generally while simultaneously avoiding the blame for detailed implementation and creating opportunities for future constituent service. Enacting legislation inescapably requires more resources to achieve, and promises less immediate reward at the polls, than constituent service. See Rubin, *supra* note 1 and Strauss, *supra* note 4.

standing of the political impulse behind statutory language—inevitably incomplete—and in this way promoted a more effective partnership between legislative and judicial institutions, one that recognized legislation's political claim to primacy over common law. In their initial appearances, high court references to these materials seemed a means of controlling the resistance of common-law courts to the intrusions of statutes on the elegant uniformity (as it was imagined) of the common-law framework and to their redistributive effect;⁴⁷ later expressions, parallel to the New Deal retreat from judicial activism and fashioned by the same Justices as effected that sweeping change in constitutional approach, sharply subordinated the judicial impulse to create a coherent legal system to the particulars of Congress's will perceived in connection with a given enactment.⁴⁸

While recent criticisms of the use of legislative history could be thought strongly political in character,⁴⁹ at least two continuing changes in the legal context add considerable force to those criticisms. The first is the consequence of the post-modern insight. Just as it is one thing to celebrate "the tenacity of a taught tradition" and another to attempt to evaluate or shape traditions for their capacity to produce bounded results,⁵⁰ it is one matter to draw meaning from debates and reports pro-

47. Chief Justice Fuller's opinion in *Johnson v. Southern Pacific Co.*, 196 U.S. 1 (1904), discussed in *supra* text accompanying note 6, is a familiar early example; the opinion consults presidential messages, legislative reports, amendments, and senate debates as aids in deciding how to interpret the statutory obligation to use "couplers coupling automatically by impact."

48. See especially the Supreme Court's 5-4 decision in *United States v. American Trucking Ass'n*, 310 U.S. 534 (1940), long identified as a watershed decision upholding the use of legislative history. The majority argues strongly for using that history, but it is unlikely that the dissenters—including Chief Justice Hughes and Justice Stone—opposed its use as such. Stone, in particular, was among the strongest proponents of thoughtful statutory interpretation at the time, writing that statutes must be recognized as a source for legal development superior to the common law; also important for Stone, however, was a central judicial role, placing on the judge responsibility for melding common law and statutory law into a unified whole. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 12-16 (1936). The four dissenters in *American Trucking*, with sixty-five years' experience on the Court among them, chose an interpretation that voiced this strong judicial role and fostered general coherence. This was a role that, on the whole, the New Deal Court had repudiated in its flight from judicial activism. The five Justices of the majority had ten years' experience on the Court among them, and chose an interpretation that focused more on understanding the most recently enacted statute than on integrating this statute with the general corpus of federal law.

49. The four Justices of the current Court who have contributed most sharply to these criticisms are President Reagan's four appointees—the Chief Justice, Justice O'Connor, Justice Scalia, and Justice Kennedy. Compare *supra* text accompanying note 44.

50. Pound, *The Economic Interpretation of Law and the Law of Torts*, 53 HARV. L. REV. 365 (1940), is an early and forceful observer of the effect on professional conduct of ingrained habits of thought, "the instinctive tendency of the lawyer to refer every case back to some general principle." *Id.* at 382. Once one understands, however, that these patterns, too, are contingent and might possibly be manipulated in pursuit of some future end—that the heuristic of teaching, like common-law decisions, are not only the present's embodiment of the past but also, and therefore, the means by which the present shapes tomorrow's outcomes—one is consigned, at best, to paradox. Cf. Grey,

duced by legislators principally interested in influencing their colleagues and oblivious to the external effects of what they say, and another to do so if legislators and their staff believe that what they say will have its principal effect after passage. Awareness of the uses to which legislative history is put has contributed to the planned colloquy, the precatory committee report, and other "abuses" with which contemporary lawyers are familiar. The characterization of these devices as abuses is more problematic than is often presented—if Congress in effect delegates decisions on most issues to a few major players, what they do without controversy is in a meaningful sense the action of the whole.⁵¹ And, of course, it continues to be the case that legislation has a political history, and that placing the words enacted in the context of that political history will illuminate them. Yet awareness of these propositions and of courts' consequent efforts to discern that history has contributed to behaviors that seek to exploit the history for effects that might not have been achieved directly through legislation. These behaviors make it increasingly difficult to discern reliably what forces actually contributed to the enactment of a statute, if they do not frustrate the effort entirely.

The second and related change in legal context has been the bureaucraticization of Congress, the emergence of large congressional staffs whose work has largely supplanted open debate, and the concomitant growth of congressional lobbying activity. The legislative reports and debates that underlay the Railway Safety Appliance Act of 1893⁵² were the products of elected officials who had themselves studied the problems and come to conclusions, and who were, transparently, reasoning with and informing one another about the precise shape of a desirable outcome. The Congress of today is a bureaucracy of over 20,000—many in agencies such as the Congressional Budget Office or the General Accounting Office, but thousands also in the offices of individual members or on the staffs of congressional committees. The change reflects a dra-

Langdell's Orthodoxy, 45 U. PITT. L. REV. 1 (1983); West, *supra*, note 34 (especially citing the works of Stanley Fish).

51. Compare Ross, *The Attack on Legislative History as a Tool for Statutory Interpretation* (Testimony to the House Judiciary Committee) (asserting naivety of the view that colloquies and precatory report language are neither considered relevant for legislative action nor controlled against manipulative use) with *National Small Shipments Traffic Conference, Inc. v. Civil Aeronautics Bd.*, 618 F.2d 819, 828 (D.C. Cir. 1980) ("Courts in the past have been able to rely on legislative history for important insights into congressional intent. Without implying that this is no longer the case, we note that interest groups who fail to persuade a majority of the Congress to accept particular statutory language often are able to have inserted in the legislative history of the statute statements favorable to their position, in the hope that they can persuade a court to construe the statutory language in light of these statements. This development underscores the importance of following unambiguous statutory language absent clear contrary evidence of legislative intent.")

52. See *supra* text accompanying note 6.

matic alteration in the nature and possibilities of legislative function. While oversight may be enhanced, the members' participation in legislation is impoverished.

Debate and discussion have lost their central place in the legislative process and that loss has produced serious consequences. The growing importance of staff is but one reflection of the new situation . . . Most of the information reaching members may well be reliable, but it would take an expert to sort out the reliable from the unreliable, and even an expert cannot possibly know about material that has been stifled to serve a staff's or chairman's own interest The second problem with the use of staff . . . is that it has not left the members with more time to concentrate on their legislative work. . . . [W]hile representatives as recently as 1965 spent almost one full day every week on 'legislative research and reading,' by 1977 the time spent on reading was down to an average of eleven minutes per day. In other words, instead of freeing the members to concentrate, the staffs contribute to the frenetic pace of congressional life that pulls members in different directions, reduces the time available for joint deliberation, and makes concentration all but impossible.⁵³

Again, successful legislation continues to be the product of a political history—all this lobbying and staff activity is valued for its contributions to effective shaping as well as for its possible impact on the resolution of subsequent disputes about meaning—yet, also again, telling the two apart is problematic.

A. *The Problem of "Democratic Exegesis"*

Surely, care and discretion are warranted; and in some circumstances, the difficulties and risks in using legislative history materials support refusing the undertaking. Omnibus budget reconciliation measures, for example, whose several hundred pages may not even be printed before midnight legislative "debate" and passage, are self-evident minefields whose political history may reflect little more than the tactics of exploitation and exasperation.⁵⁴ Some Justices, most notably Justice Scalia, are advancing arguments that such history ought never be relied

53. M. MALKIN, *UNELECTED REPRESENTATION* 240, 242-44 (1979).

54. Gordon Crovitz told a Symposium in WASH. U.L.Q. of the account given by Rep. Chris Cox, a freshman member of the 101st Congress, of the budget reconciliation bill enacted in the closing moments of that Congress:

[N]ot a single member of the House or Senate was permitted to even read the budget reconciliation bill before the vote on passage. It was not even hauled to the chamber until moments before the vote was conducted in the wee hours Its thousands of pages, which the clerk hadn't even had time to number, had to be tied together with rope like newspapers bundled for recycling. Reading it was out of the question, it's true I was permitted to walk around the box, and to gaze upon it from several angles and even to touch it.

68 WASH. U.L.Q. 614; *Compare* Sorenson v. Secretary of the Treasury, 475 U.S. 851, 866 (1986) (Stevens, J., dissenting).

upon. Thus, when an opinion puts reliance on the approving reference made, in passing, to three district court decisions as part of a single legislative committee's extensive report on proposed legislation, Justice Scalia observed acidly:

that only a small proportion of the members of Congress read either one of the Committee Reports in question, even if (as is not always the case) the Reports happen to have been published before the vote; that very few of those who did read them set off for the nearest law library to check out what was actually said in the . . . cases at issue (or in the more than 50 other cases cited by the House and Senate Reports); and that no member of Congress came to the judgment that the District Court cases would trump [an earlier Supreme Court precedent having some bearing] on the point at issue because the latter was dictum. As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the members of Congress what the bill meant (for [then the passage would have been written differently]), but rather to influence judicial construction.⁵⁵

Perhaps the most striking of the recent Supreme Court discussions came in the concurrence of Justice Kennedy and two others during the 1988 Term, in *Public Citizen v. Department of Justice*.⁵⁶ The case asked whether the ABA's Standing Committee on the Federal Judiciary was an advisory committee under the Federal Advisory Committee Act. The majority answered that question in the negative by reading the statute with the help of its legislative history. A fair-minded reader who considered that history and thought about Congress' probable purposes in enacting the statute could readily have come to that result, but one who only looked at and thought about the text of the statute would be very sure that the Standing Committee indeed *was* an Advisory Committee under the Act, and so had to hold its meetings in public after notice, deliver its advice openly, and in other ways frustrate what we can expect to have been the President's aims in consulting with it. Justice Kennedy took the latter course, strongly suggesting that separation of powers considerations required him to do so:

Where the language of a statute is clear in its application, the normal

55. *Blanchard v. Bergeron*, 489 U.S. 87, 98 (1989) (Scalia, J., concurring). I do not mean to suggest that I accept this line of argument. See Farber & Frickey, *Legislative Intent and Public Choice*, 79 VA. L. REV. 423, 438-50 (1988); and Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 650-56 (1990). See also *infra* text accompanying note 64.

56. 491 U.S. 440 (1989). The Chief Justice and Justice O'Connor joined Justice Kennedy. One might as well count this as the opinion of all four Reagan Justices, as Justice Scalia was not participating yet in many ways has signaled his probable agreement with the views expressed.

rule is that we are bound by it. There is, of course, a legitimate exception to this rule . . . [in] situations where the result of applying the plain language would be, in a genuine sense, absurd, *i.e.*, where it is quite impossible that Congress could have intended the result and where the alleged absurdity is so clear as to be obvious to most anyone I believe the Court's loose invocation of the "absurd result" canon of statutory construction creates too great a risk that the Court is exercising its own "WILL instead of JUDGMENT," with the consequence of "substitut[ing its own] pleasure to that of the legislative body."⁵⁷ . . . Where it is clear that the unambiguous language of a statute embraces certain conduct, and it would not be patently absurd to apply the statute to such conduct, it does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation of the statute with which the Court is more comfortable.⁵⁸

Even if we were concerned with judges alone, these problems need not persuade us to retreat from the use of these materials; that use arose, history teaches us, among judges reacting to a prior generation's stubbornness in the face of legislative change that was itself hard to square with "a democratic exegesis."⁵⁹ The problem, of course, is how the reader, in particular the judicial reader, reliably knows that language is "unambiguous." As Kenneth C. Davis long ago remarked:

Throughout the English-speaking world during the present century, dissatisfaction has often been expressed about inadequate understanding by judges of social purposes behind major enactments Does extensive use of legislative history force the judges to keep in closer touch with democratic desires? Is legislative intent usually so elusive that what the judges find often depends to some extent upon their own social philosophies and if so, are those social philosophies likely to be in better tune with the attitudes of parliamentary majorities if the judges are more familiar with legislative programs and processes?⁶⁰

One sees here alternative visions of the problem—for Justice Kennedy, the headstrong judge who would manipulate the scraps of history for advantage, but may be constrained by language; for Professor Davis, the headstrong judge who cannot see past the language unless acquainted with and constrained by its context. The central word for Kennedy is "rummage"; Davis forcefully reminds of us of times within memory when judges repeatedly defeated "democratic exegesis" precisely by their refusal to acknowledge the purposes and understandings that unauthori-

57. THE FEDERALIST NO. 78, at 469 (A. Hamilton) (C. Rossiter ed. 1961); compare *supra* text accompanying note 25.

58. Public Citizen, 109 S. Ct. at 2574-76.

59. See, e.g., de Sloovere, *Extrinsic Aids in the Interpretation of Statutes*, 88 U. PA. L. REV. 527, 539 (1940); Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 889-91 (1930).

60. Davis, *Legislative History and the Wheat Board Case*, 31 CAN. B. REV. 1, 12 (1953).

tative materials conveyed. The lesson of history is that for judges to restrict themselves to language risks displacing, not defending, a "democratic exegesis."⁶¹

B. *The Problem in Agency Context*

But the concern here is with agency practice, and in that context it is important to note that the focus on the judiciary and its role in relation to legislative history oversimplifies the legislative history debate in at least two ways. First, because we begin with a model of the judicial role in which political oversight of particular decisions has no proper place whatever, we have difficulty imagining that using or excluding legislative history will have systemic consequences for the ways in which the judiciary interacts with the President and Congress. We have no need to consider, for the courts, the difficult calculus required for agencies that do undergo current political oversight as well as the constraints of law. With respect to agencies, we saw, changing the traditions of statute-reading to exclude the use of legislative history might well enhance the relative importance and efficacy of contemporary political oversight—an impact with its own arguable "separation of powers" consequences.⁶²

The second oversimplification inheres in the contrast between discrete and relational analysis in the episodic and inevitably retrospective character of judicial encounters with issues of statutory meaning. Responsible in some sense for all law, a court has infrequent occasion to consider the meaning of any particular part of the law, and no responsibility for continuing, proactive attention to its development.⁶³ If it comes to the legislative history at all, it comes to that history cold, without a developed institutional sense of the state of play. It does not participate in, indeed very likely is utterly unaware of, what occurs in drafting, hearings, debates, or a continuing course of oversight hearings, presidential guidance, and frustrated efforts at securing legislative change; a court is not continually studying issues of statutory meaning and adjusting outcomes—as administrators responsible for a program must. For the agency, of course, the reverse is generally true; its closeness to the legislative process, continued involvement, and responsibility are, as we have seen, precisely the reasons courts have long given its readings of statutory

61. Note in this respect the confidence of Justice Scalia, the most strident current proponent of return to text-based interpretation, that he will usually know what a statute "means." Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521.

62. See *supra* text accompanying note 44.

63. See Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987); Diver, *supra* note 1 at 574-78 nn.163-82.

meaning special weight. Delegitimizing reference to legislative history for the agency, then, not only reduces its defenses to contemporary political oversight; it encourages it to ignore, in acting, what in an important sense it already knows.

The arguments about the use of legislative history are transformed when we come to see them in the context of continuing and rich relationships between an agency and its political overseers, in which issues of statutory meaning are constantly on center stage. The enduring and multifaceted character of the agency's relationship with Congress contributes to the agency's capacity to distinguish reliably those considerations that served to shape the legislation, the legislative history wheat, from the more manipulative chaff. An agency's participation in the debates, for example, may well permit it to say, as a court never could, whether the reference to three district court opinions in a report fairly reflects the resolution of argument about what will be in the language of a bill, or an adventitious midnight insertion.⁶⁴ While it is formally correct to state that Congress enacts language, not legislative history, the committee system in Congress gives major (but not exclusive) responsibility for oversight to the same group of politicians as has the principal function of shaping statutory language in the legislative process. Having such a system gives rise to commitments well understood on both sides—in the agency and in the Congress as a whole—to the importance of what is worked out in committee context. Moreover, that history, however troubled, is connected with what for Congress is both the unusual and the desirable outcome—the passage of legislation. Permitting the agency to anchor its conduct there becomes in effect a statement to Congress (which may well prefer the easier and more immediately rewarding paths of oversight) about its need to legislate to achieve its ends should contemporary political forces take another turn. The continuing interactions thus suggest structural reasons for supporting the agency practice of attending to the history.

Consider the possible analogy to the worlds of discrete and relational contracts.⁶⁵ The classic view of contracts as discrete, consent-centered transactions leads swiftly to the parole evidence rule—that courts will interpret a written agreement on the basis of its words, without reference to external context. Accommodating the existence of contracts having a relational character put unsustainable pressure on the parole evidence rule. What was initially a straight-forward proposition emerged

64. See *supra* note 55.

65. See *supra* text accompanying note 21.

in the Second Restatement of Contracts as requiring "eight sections and twenty-seven pages of commentary to create a complex set of rules that seem to have the effect of letting in almost everything, often in direct contradiction of express written terms;"⁶⁶ the effect is "to allow in evidence of business context, relationship, oral assurances and implicit understandings,"⁶⁷ leading the author from whom the foregoing quotations have been taken to characterize the operative rule as "Tell the jury that people don't usually write words into contracts for no reason, but that it is free to read the document in light of common sense and all the outside evidence."⁶⁸ Seeing contracts as relational simply won't permit treating their meaning as fully encompassed by the outward words initially used to express them. Context—both at the time of drafting and as revealed in subsequent life under the contract—are essential both to accommodate the legal order to the realities of the setting in which contracting is going on, and to understand how the parties reasonably viewed the parameters of their relationship.

The analogy to the problem of legislative history in the agency context ought to be obvious. Perhaps, given a statute that purports directly to resolve the issues with which it deals, a court can afford to read it using parole evidence rules, on the basis only of its outward-appearing language.⁶⁹ Denying force to the political history of intransitive legislation is inconsistent with the reality of the setting within which legislation occurs, and with the way in which agency and legislature reasonably view the parameters of their relationship.

One possible problem with the analogy lies in its focus on the agency-legislature context. Disputes before the courts are not disputes between agency and legislature, but disputes between an agency and members of the public whose interests its actions affect. These members of the public may be interested in having the courts resolve questions of meaning just on the basis of the language Congress has employed. This possible interest has at least two aspects worth examination. Outsiders to the relational process might fear that reliance upon it will lessen effective controls on agency action by permitting the assertion of authority based upon secret considerations. And they might believe that text-based interpretation will enhance judicial controls over administrative action by

66. Linzer, *supra* note 21, at 167.

67. *Id.* at 168.

68. *Id.* at 168 n.150.

69. The "perhaps" is important. On the whole, the public might be thought far less concerned about the success or not of private parties in creating the "law" that will govern their litigative disputes than about securing readings of statutes that are informed by their political history.

sharply reducing if not eliminating the judicial inclination to defer to agency judgment.

Thus, it may be protested, arguments for permitting agency reliance on political history that rely on agency participation in politics serve to elevate the arcane of the legislative process—celebrate precisely those elements of the process that are least likely to be captured in print, even the print of committee reports, debates or hearings. Judicial interpretation, even at the height of reliance on legislative history, has restricted itself to the public record in recognition of the publicity values of a democratic society.⁷⁰ In valuing the agency's participatory sense of the enterprise, we risk losing sight of the private citizen whose interests may be affected by the agency's reading of the statutes; to the citizen these elements are, if anything, even less accessible than they are to the courts. Rather than enhancing the influence of law as against politics, the argument would run, building an argument on the agency's expert knowledge of legislative history reduces the citizen's protections against willful government; she will simply be unable to mount persuasive contrary arguments.

This line of argument found classic expression in the opinions of Justice Jackson, a man whose lawyering experience in government and out had persuaded him that the imbalance was fatal:

The practice of the Federal Government relying on inaccessible law has heretofore been condemned Today's decision [relying on legislative history materials that Justice Jackson represented to have been inaccessible to the public⁷¹] marks a regression from this modern tendency. It pulls federal law . . . into a fog in which little can be seen if found. Legislative history here as usual is more vague than the statute we are called upon to interpret.⁷²

Note, however, that Justice Jackson's argument focuses on the occasional contacts between agencies and courts, and not on the workings of

70. Diver, *supra* note 1, at 557 n.51.

71. In the particular case, the charge of inaccessibility appears to have been misplaced. Finley, *Crystal Gazing: The Problem of Legislative History*, 45 A.B.A. J. 1281 (1959). The text argument, however, depends on propositions about special knowledge that frustrate so easy a refutation. While some private lawyers—for example, those hired as lobbyists during the debates—may have knowledge of the political history of legislation approximating the agency's, the general public will not. That is the whole point about expertise. Nor can one properly respond about this kind of knowledge, as H. Hart and A. Sacks did about the publishable materials of legislative history, that "[a]s soon as the Supreme Court has definitively answered *its* question about the utility of legislative materials in the interpretation of federal statutes, . . . private ordering [can] be counted upon to solve *its* problem of making the materials available[.]" H. HART & A. SACKS, *THE LEGAL PROCESS* 1279-83 (10th ed. 1958). For an argument that such difficulties are simply part of the apparatus of the administrative state, with which we must learn to live in uneasy tension, see Rabin, *The Administrative State and Its Excesses: Reflections on The New Property*, 24 U.S.F. L. REV. 273, 282-89 (1990).

72. *United States v. Public Util. Comm'n of Cal.*, 345 U.S. 295, 319 (1953) (Jackson, J. concurring). Chief Justice Rehnquist was Justice Jackson's law clerk at the time of this decision.

agency process overall, or the agency's interactions with all the external forces that may impinge on it. The citizen's disadvantage in individual litigation—that is to say, the agency's claim to judicial respect for its legislative history expertise—had long been assured by such rules as the command to give “great weight” to the “contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new [or to interpretations made by those who] suggested the provision's enactment to Congress.”⁷³ These approaches reflect assessments of the systemic advantages *for law* of valuing that expertise.

One such advantage, already suggested, lies in using the agency's knowledge of legislative history as an anchor against the tugs of current politics. Recall the possible consequences for *judicial* process of approaches that do or do not value the agency's uses of legislative history—Justice Kennedy's concern about rummaging, and Professor Davis' about headstrong judges.⁷⁴ When we turn to the agency and *its* use of legislative history to constrain current politics, the change in context sharply diminishes the force of the Kennedy argument, and heightens that of Davis. Courts and private lawyers may not be subject to discipline in their “rummaging,” but agencies are. When the agency resists political direction, it does so in the context of its continuing relationships with actors—the White House, Congress and its committees—who know the “unauthoritative” materials well, and are in some position to assist a “democratic exegesis.” To be successful in resisting current political force, the agency will have to be credible; indeed, its credibility in vulnerable and continuing relationships will likely have an importance to it quite transcending any advantage to be gained from momentary manipulation of the record.

Two related difficulties might be acknowledged here. The discussion is cast in terms of agency *resistance* to current political force; where the agency disposition is to follow that force, that could be characterized as problematic in “democratic exegesis” terms if the force being followed were properly characterizable in “public choice” terms of private dealing and self-interest.⁷⁵ Further, the possibility of an extended, institutionalized skew between Republican President and Democrat Congress may

73. *United States v. American Trucking Ass'ns*, 310 U.S. 534, 549 (1940) (quoting *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933)); *see also* *SEC v. Collier*, 76 F.2d 939 (2d Cir. 1935) (L. Hand, J.)

74. *See supra* text accompanying note 58.

75. *See* Diver, *supra* note 1, at 558 nn.63-7

diminish the disciplinary force of the relationship with Congress; as long as the President can be pleased, his veto power may protect the agency against effective reprisal. These are difficulties—the latter chosen with some regularity (if little conscious comprehension) by the people, it may be noted—but it is hard to see how agency textualism would ease them. Releasing the anchor of past political force gives current winds the greater impact; it denies the general relational characteristic of the agency's existence and functioning; and thus it also denies the bases for claiming deference to agency judgment. Would it have been harder for Ann Gorsuch to change EPA as she did, if neither the bureaucrats whose direction she sought to change nor courts reviewing the results could appropriately refer to the political history of what had gone before? Judicial insistence on agency explanation of statutory reasoning in terms of past experience and, in particular, judicial attention to unexplained departures from prior readings—conventional elements of abuse-of-discretion review—might do more to meet these difficulties and complement political oversight than returning to idiosyncratic readings on an impoverished informational base.⁷⁶

VI. CONCLUSION: THE *CHEVRON* PROBLEM

The foregoing line of argument presupposes that agency statute-reading will be respected by subsequent—particularly judicial—readers. That is, it presupposes an approach like that of *Chevron USA v. NRDC*⁷⁷ that requires (or at least counsels) courts to accept reasonable, even if disputable, readings that agencies have given their statutes. In the absence of such an approach, the need of the subsequent, authoritative statute-reader for manageable interpretive conventions would dominate the agencies' interests. If courts *would* remain at sea about what meanings are sound to ascribe to past political histories, or would not be subject to effective discipline—would tend to “rummage”—in selecting among the possibilities opened up by those histories, a system that stresses judicial readings might appropriately discard those histories. Perilous as ac-

76. The effect of “hard look” review, wrote an unusually perceptive bureaucrat, is to “give those who care about well-documented and well-reasoned decisionmaking a lever with which to move those who do not.” Pedersen, *Formal Records and Informal Rulemaking*, 85 *YALE L.J.* 38, 60 (1975). That result is not inevitably desirable; agency defensiveness in anticipation of intensive review is credited in well-regarded analyses with slowing rulemaking at three important safety agencies to a crawl. R. MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT* (1983); J. MASHAW & D. HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990); J. MENDELOFF, *THE DILEMMA OF TOXIC SUBSTANCE REGULATION* (1988). It seems unlikely, however, that the burden of explaining statutory readings would often match that of rationalizing the choice of one rather than another standard for exposure to, say, airborne lead.

77. 467 U. S. 837 (1984); see also *supra* note 17.

cepting simple judicial text-readings of complex relational arrangements might be, it would not arm additional current political controls over the agencies' work; agency attorneys would then work within the constraints of "what we could reasonably expect to convince a court our statute means," a frame of reference that is not overtly political.

But the *Chevron* approach is, in fact, much more closely aligned with current patterns of legislation, creating ongoing relationships rather than point-in-time resolutions; it is not realistic to expect those patterns to change. Moreover, *Chevron*-type rules express now-inevitable characteristics of the agency/court relationship: that opportunities for statute-reading in the agency dominate those that arise in court; that agencies read their particular statutes with a far richer understanding of context, interrelationship, and impact than courts could hope to achieve; and that agencies have the superior potential for securing national uniformity in the interpretation and application of complex statutes.⁷⁸ Indeed, to some degree we *want* an element of current politics in statutory interpretation, and agencies provide a means for securing that.⁷⁹

If we *are* going to have *Chevron*-type rules, so that current politics plays an acknowledged role in the ascription of meaning, then it is madness also to adopt rules for statute-reading that foreclose attention to past politics—that is, to legislative history and the subsequent course of the agency/legislative relationship. The harm to be expected is precisely the freeing up of current politics—legislative, executive, *and* judicial—in relation to law, as the agencies thus made responsible for the articulation of meaning experience the inevitable tensions between them. It is not only that our hypothetical agency lawyer will have fewer weapons with which to resist today's expediency; as important, the traditions within which she performs her own function will have changed—she will have been persuaded of the foolishness or inappropriateness of making the inquiries that might even to lead her to question whether she ought to resist.

Perhaps what we describe as law is all shadow and fetish; perhaps, as Learned Hand once darkly remarked (in another context), "in the end this may seem merely a fiat, but that is always true, whatever the dis-

78. Strauss, *supra* note 63.

79. Judges are not experts in the field, and not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibility may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments.

Chevron, 467 U.S. at 865.

guise.”⁸⁰ Yet one’s conviction is that the disguises, the traditions, also serve to structure and constrain—that the ceremonies of a rule of law culture make the performance of a body that observes them different, less dangerous and more acceptable, than would otherwise obtain.

80. *Sinram v. Pennsylvania R. Co.*, 61 F.2d 767, 771 (2d. Cir. 1932).