JUDICIAL REVIEW OF AGENCY ACTION: THE PROBLEMS OF COMMITMENT, NON-CONTRACTIBILITY, AND THE PROPER INCENTIVES

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As befits any important case, *Chevron*[1] has produced what might be considered several generations of commentary. In the first, commentators debated the importance of *Chevron* for the balance of power in the administrative state. In this context, some viewed the decision as a troubling shift of power away from the judiciary to the President.[2] Others turned their attention to explaining why the Court announced the so-called *Chevron* doctrine. The puzzle here was to explain the apparently selfless act of the Court giving up its own power to overturn agency decisions.[3] Finally, when both the ramifications of and reasons for *Chevron* began to be understood, academic commentators began speculating whether the decision was still viable or whether it had proven to have had little impact in the field of administrative law.[4]

It is against this dense background that Professors Shapiro and Levy address *Chevron* and related problems of scope of review.[5] Despite the already extensive treatment of *Chevron*, they

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

2. *See* William N. Eskridge, Jr. & John Ferejohn, *Playing the Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Richard J. Pierce, Jr., Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071 (1990).

3. *See* Linda R. Cohen & Matthew L. Spitzer, *Solving the* Chevron *Puzzle*, 57 LAW & CONTEMP. PROBS., Spring 1994, at 65; Peter L. 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).

4. *See* Cohen & Spitzer, *supra* note 3; Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984.

5. Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in*

manage to add significantly to the understanding and discussion of scope of review. Indeed, they go well beyond that to offer more general insights and understandings about the behavior of the judicial branch. Drawing on the rational choice literature, Shapiro and Levy develop a model that identifies the interests that judges seek to maximize and how those interests are implicated in the field of administrative law.[6] They then describe the ways in which *Chevron* and its aftermath are related to the judiciary's efforts to maximize its ideological interests. Ultimately criticizing what they perceive as the demise of *Chevron*, they prescribe an ambitious agenda for reforming not only the problem to which *Chevron* was addressed—review of agency interpretation of a statute—but the whole area of scope of review.[7] It is an ambitious and creative project indeed, and in doing so, Shapiro and Levy have advanced the debate substantially.

My misgivings about their project stem almost entirely from three central points. First, I believe that Shapiro and Levy move too quickly in asserting the determinacy of the *Chevron* two-step. As I argue below, a belief in the determinacy of that test must arise primarily from the more general institutional realignment identified with *Chevron* and not particularly from the test itself. The move away from *Chevron* is explained by Shapiro and Levy as a judicial effort to maximize ideological returns by shaping indeterminate doctrine to replace the two-step test. I argue that the dissembling of *Chevron* involved a more complex process in which the inability of the Justices to secure and observe true commitments to the *Chevron* framework *ex post* doomed the Court's project. This, in turn, is related to my second objection. Shapiro and Levy seem to argue that determinacy of doctrine and deference are directly related. In fact, however, the relationship they posit is not inevitable. Indeed, the current Supreme Court is developing what it believes to be a highly determinate doctrine of statutory interpretation that gives little deference to administrative agencies. In this respect, Shapiro and Levy fail to see that judges will seek to develop determinate doctrines that—unlike *Chevron*—call for highly developed judicial craft skills. When this occurs, determinate doctrine will be used to curb agency action.

Substantive Review of Administrative Decisions, 44 DUKE L.J. 1049 (1995).

6. *Id.* at 1053–45, 1060–62.

7. *Id.* at 1071–74.

Finally, although usefully broadening our understanding of *Chevron* to include judicial incentives, Shapiro and Levy ignore other incentives and institutional arrangements. *Chevron* can be understood as affecting not only judicial incentives, but also significantly altering the incentives for agencies. This change in the incentive structure may have proven to be undesirable for the differing proponents of deference to agencies—both those who believe that agencies are due deference because of their reasoned exercise of expert judgment and those who believe that agencies are more politically accountable. Against this background, the post-*Chevron* law that Shapiro and Levy seem to lament is in fact more stable and better designed to serve the goals they articulate for themselves than the legislative amendments they offer.

I. THE *CHEVRON* CONTRACT AND THE PROBLEMS OF COMMITMENT, OBSERVATION, AND VERIFICATION

Shapiro and Levy start their paper with a central but controversial proposition. They argue that *Chevron* put in place a new and more determinate standard for judicial review of agency interpretations of statutory law. This more determinate craft norm limited judges in their efforts to maximize their ideological interests on questions of agency policy.[8] I say "controversial" because it is not readily apparent that the *Chevron* two-step itself is determinate. The Court stated that if Congress had addressed the issue, the agency interpretation was irrelevant because the will of the legislature is supreme.[9] Earlier cases had set forth a similar formulation for review of agency action.[10] Left unresolved by *Chevron* were a number of important issues: How much ambiguity was required before the case became a *Chevron* step-two case? What materials were legitimately included among the traditional tools of statutory construction to be used at step one? More specifically and fundamentally, at the time *Chevron* was decided there was no stable foundational doctrine of statutory interpretation to which the Court could easily refer for resolution of step-one cases. In-

8. *Id.* at 1069.

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

10. *See* Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 31–32 (1981); SEC v. Sloan, 436 U.S. 103, 118 (1978); NLRB v. Brown, 380 U.S. 278, 291 (1965).

deed, it is no accident that the instability of *Chevron* coincided with an enormous outburst of scholarly literature debating theories of statutory interpretation.[11] Moreover, the textualist revival was being advanced in the lower courts by then-Judge Scalia.[12] And certainly with his arrival at the Supreme Court, the entire *Chevron* step-one landscape became a major intellectual battlefield over theories of statutory interpretation.

So the promise of determinacy and the stability of *Chevron* were never really serious possibilities given the intellectual and political climate in which the case was to be applied. If there was any possibility that *Chevron* could make the law more determinate, that may have had less to do with the two-part test than with the attitude or mood reflected in the general rhetoric of the opinion.[13] The Court cautioned that judges are not elected and have no political constituencies.[14] On the other hand, administrative agencies are controlled by the President, who is directly accountable to the people. In other words, *Chevron*'s potential for certainty or determinacy was not in the two-part test, but in its operation as a kind of super-strong default rule. Unless the party challenging agency action could show a contrary intent by the most compelling evidence, the agency's interpretation of the statute had to be upheld. Like the other canons being developed by the Court,[15] the *Chevron* case shifted the burden to the challeng-

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11. *See, e.g.*, T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369 (1989).

12. *See* FAIC Sec., Inc. v. United States, 768 F.2d 352, 361–64 (D.C. Cir. 1985); Hirschey v. Federal Energy Regulatory Comm'n, 777 F.2d 1, 7–8 (D.C. Cir. 1985) (Scalia, J., concurring).

13. It is not unusual to have the Court send signals about scope of review to the lower courts in the form of mood and atmosphere. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 487–91 (1951).

14. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865 (1984).

15. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 611–29 (1992); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 454–60

er to show by a clear statement that the agency's decision was contrary to legislative intent.[16]

Thus, the commitment to certainty that Shapiro and Levy find in *Chevron* probably did not come from the adopted two-part test. Rather, the strong deference signals can be found in the more general discussion and rhetoric of the opinion. The distinction is significant for two reasons. First, it is relevant to whether reforms that rewrite the standards of review to restate the *Chevron* test will be worthwhile or successful. Second, it may offer another explanation for why *Chevron* was so quickly eroded by the Court.

On Shapiro and Levy's account, we are still nonetheless left to wonder why all of the participating Justices joined in the *Chevron* opinion. In fact, the puzzle becomes even more striking in light of Shapiro and Levy's account of what judges choose to maximize. They posit that judges like to achieve their ideological outcomes and that this impulse is particularly strong in administrative law cases. Curbing the desire for ideological utility is the craft norm that limits judicial discretion by putting the judge's reputation at stake for gross departures from doctrine. Thus, judges should adopt vague craft norms to maximize ideological utility. If this is so, then why was *Chevron* decided or written as it was in the first place? On Shapiro and Levy's account, the *Chevron* two-step severely constrained judges yet it was unanimously adopted contrary to their ideological self-interest.

As Shapiro and Levy note, others have offered hypotheses for why the Court abdicated its own power in *Chevron*. Most of the arguments advanced are institutional in character. Peter Strauss argues that *Chevron* was a response to the Court's docket problems.[17] He suggests that the Court in *Chevron* opted for the national uniformity secured by the affirmance of the agency's views because of the Court's limited ability to correct the errors that could occur in the lower courts and could severely disrupt national, uniform programs if they were not reviewed.[18] Linda Cohen and Matt Spitzer argue that *Chevron* was a necessary correction by a conservative Supreme Court to signal to the more liberal

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(1989).

16. *See Chevron*, 467 U.S. at 860–62.

17. *See* Strauss, *supra* note 3, at 1117–22.

18. *Id.* at 1121.

appellate court judges that the actions of the Republican agencies should be given great deference.[19]

Shapiro and Levy do not dispute either of these explanations and indeed seem to agree or assume that for the Court in 1984 *Chevron* represented a clear policy choice in favor of more deference and possibly an atypical judicial abdication of the power to maximize ideological utility. Unless we explain *Chevron* as a simply overwritten and overstated blunder by the Court, it is hard to offer a nonstrategic reason for the opinion. Many commentators and lower court judges read the opinion as an important shift in doctrine and as the definitive statement on deference.[20] Thus, it seems sensible to credit some of the institutional arguments advanced in support of *Chevron*. Also, consistent with Shapiro and Levy's rational-choice focus, we can assume that in giving up ideological utility the Court believed that it was getting some other benefit: more leisure time, fewer agency costs in administering the courts of appeals, or an increase in the craft quality of other cases as a result of a lighter docket.

Chevron then can be understood as a kind of contractual commitment by the Justices to forego ideological utility for other goals. In this respect, all of the Justices are better off because they all get the benefit of the *Chevron* rule. And because all of them adhere to the rule, there is no danger of opportunistic behavior by a Justice to defect: the majority of adherents to *Chevron* can outvote any Justice seeking to return to maximizing ideological utility. This last point is essential to the stability of the *Chevron* contract. If all of the Justices cooperate, they are all better off. But if some of them forge a majority and cheat, then they will be maximizing the ideological utility that their colleagues have foregone, prompting others to defect as well. The chances of cooperation are enhanced when the Justices play the *Chevron* game repeatedly. The liberal Justices know that if they defect and fail to defer under *Chevron*, the conservative Justices will retaliate in kind, which keeps the Justices cooperating.

Therefore, essential to the maintenance of the *Chevron* rule is the ability of the Justices to cooperate in complying with that

19. *See* Cohen & Spitzer, *supra* note 3, at 68.

20. *See* sources cited *supra* note 2; Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. REG. 283, 306–07 (1986); INS v. Cardoza-Fonseca, 480 U.S. 421, 453 (1987) (Scalia, J., concurring).

agreement and to discover and retaliate for any breaches that might occur. Although the repeat plays give the Justices ample opportunity to monitor each other, the problem is that the amorphousness of the *Chevron* test makes accurate *ex post* monitoring by the Justices almost impossible to undertake. *Chevron* seemed to say "defer unless Congress's intent is clear." With this vague contract, there are severe problems in auditing and monitoring compliance. The Justices must be able to observe the behavior of their colleagues. The Justices must also be able to verify breaches of the agreement. I would suggest that these problems—particularly those of verification—are so acute as to make the *Chevron* contract an impossible one to enter.[21]

All of the Justices post-*Chevron* have had ample opportunity to observe the actions of each other. In the most public of judicial actions, the Justices' votes to uphold or reject agency decisions reveal their respective views on *Chevron*. Along with voting, the Justices must also write opinions justifying results. When an agency decision is overturned, the opinion must explain whether or not the *Chevron* framework is being followed. In their private discussions and deliberations as well, the Justices also observe each other's behavior and commitment to *Chevron*.[22]

Despite these opportunities to observe *Chevron* compliance or behavior, the Justices lacked any mechanism for accurately verifying whether in fact all were following the *Chevron* bargain.[23] In the first major post-*Chevron* case, *INS v. Cardoza-Fonseca*,[24] the liberal Justices seemed to breach the *Chevron* deal and did not defer. Using traditional tools of statutory interpretation, the major-

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21. For application and development of these concepts in contract law, see Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271, 279–80 (1992). *See generally* Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994) (describing difficulty of monitoring cooperative behavior between opposing counsel). The general concepts are explained in David M. Kreps, *Corporate Culture and Economic Theory*, *in* PERSPECTIVES ON POSITIVE POLITICAL ECONOMY 90 (James E. Alt & Kenneth A. Shepsle eds., 1990).

22. *See* Bernard Schwartz, *"Shooting the Piano Player"? Justice Scalia and Administrative Law*, 47 ADMIN. L. REV. 1, 46–48 (1995) (reviewing internal deliberations reflected in transmittals between Justices Scalia and Stevens on whether the majority opinion in *Cardoza-Fonseca* was consistent with *Chevron*).

23. Here the problems of observability and verifiability overlap since the Justices could not actually observe each other's state of mind through votes and opinions.

24. 480 U.S. 421 (1987).

ity concluded that the intent of Congress was clear and contrary to the agency's construction.[25] This rhetoric of the majority opinion—written by Justice Stevens, the author of *Chevron*—directly rejected any claim that *Cardoza-Fonseca* was a departure from *Chevron*.[26] Despite this effort to claim fidelity to *Chevron*, the more conservative dissenters would view the majority liberals as defecting from the *Chevron* commitment. When three Justices dissent and invoke the deference principle of *Chevron*, they will find it difficult to take seriously the majority's assertion that the statute was so clear that no deference could be granted.[27]

The problem, therefore, was that even if the Justices' behavior was observable in many ways, there remained no mechanism for accurately verifying whether a breach of the agreement occurred. Perhaps the solution to this verification problem was to be found in the ideological lineup of Justices in a case like *Cardoza-Fonseca*. But that was not a viable solution because of two complications. First, in a Court with three wings—liberal, conservative, and moderate (or "crafters" to use the Shapiro and Levy language)—the ideological flanks may occasionally pick up votes from the moderate or craft wing. When this occurs—particularly when the moderate or craft wing oscillates in results—the ideological breachers can claim fidelity to *Chevron* since the nonideological Justices were essential to a majority. Second, when some of the Justices refuse to defer by casting what might be considered contra-ideological votes, joining with their usual ideological opponents—i.e., conservative Justice joins liberal Justices to invalidate conservative agency policy—the verification problems become difficult. The odd coalition provides a plausible basis for the claim that there has actually been compliance with *Chevron* rather than deference because the agency loses at step one. Here, ironically, Justice Scalia—once a *Chevron* proponent—has proven to be instrumental in the unraveling of *Chevron*.[28] His adoption of an

25. *See id.* at 446.

26. *Id.* at 446–48.

27. This phenomenon is graphically illustrated by the cases in which the Court splits 5–4 with either the majority or a substantial minority insisting that no ambiguity exists to trigger *Chevron* step two. *See* Lampf v. Gilbertson, 501 U.S. 350, 362 (1991); NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 796 (1990). Consider also the remarkable situation in Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 706 (1991), in which all seven of the Justices in the majority found the statute ambiguous and upheld the agency's views under *Chevron* step two. Justice Scalia insisted in a lone dissent that the statute was clear and required the agency to lose at step one of *Chevron*. *Id.*

28. *See* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72

interpretive theory that presumes textual determinacy has shifted him into an anti-deference position, sometimes casting "liberal" votes to form odd coalitions to invalidate agency decisions.[29] Verifying who the *Chevron* cheaters are has proven to be extremely difficult, even when most of the judicial behavior has been readily observed.

Against this background, the rational strategy for the dissenters in *Cardoza-Fonseca* should have been to defect from *Chevron*, hoping to persuade some of the moderate or craft Justices that the agency should lose at step one in the next liberal agency case. They cannot allow the liberal Justices to follow *Chevron* selectively while they forego ideological utility for the good of the Court. Of course, after that the liberal Justices may choose to cooperate by again deferring and attempting to restore the *Chevron* equilibrium. The problem is that they may not have seen *Cardoza-Fonseca* as a defection, but as a sincere application of *Chevron* responding to a conservative defection with one of their own.

Thus, if we assume that *Chevron* was indeed designed as a shift and that the strong language of the opinion reflected a general commitment by the Justices for more political control than judicial control, there simply was no easy way for the Justices to monitor and audit each other's behavior. What some Justices might have viewed as an agency reversal under an application of *Chevron*, another group might have perceived as a defection to maximize ideological utility. When the latter group retaliates by not deferring and the former believes that the retaliation was unwarranted, the result may be a return to the pre-*Chevron* uncertainty. The *Chevron* agreement was not only short-lived but doomed from the beginning.

The agreement and auditing problems outlined above might have been even more severe than initially suggested, particularly for the more liberal Justices. After *Chevron*, with a Republican

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WASH. U. L.Q. 351, 366 (1994) (describing how Justice Scalia's commitment to textualism permits him to find a statute's "plain meaning" more frequently and thus requires less deference to agency interpretations).

29. *See* City of Chicago v. Environmental Defense Fund, 114 S. Ct. 1588, 1594 (1994); INS v. Cardoza-Fonseca, 480 U.S. 421, 423–54 (1987) (Scalia, J., concurring); *see also* Nicholas S. Zeppos, *Chief Justice Rehnquist, the Two Faces of Ultra-Pluralism, and the Originalist Fallacy*, 25 RUTGERS L.J. 679, 688–97 (1994) (arguing that Justice Scalia's quest for methodological consistency will lead him to cast votes contrary to his ideological preferences in the individual case).

President, we would expect that the policies of the administrative agencies would be more conservative. For the conservative Justices, the *Chevron* commitment may be relatively costless. Rarely, if ever, will there be a case that reviews a liberal agency action. Thus, the conservative Justices can commit themselves to cooperate and play by the *Chevron* rules and still maximize their ideological utility. Under *Chevron*, mostly conservative agency actions will be upheld under the deference rule. The conservative justices can consistently pledge their commitment to *Chevron* without ever sacrificing ideological utility. The danger for the liberal Justices is obvious. The liberal Justices may legitimately fear that the conservative Justices will abandon *Chevron* when the White House shifts to the other party. Fearing this bait and switch tactic by the conservatives, the liberal Justices will rationally begin to defect almost immediately after *Chevron*. True to this prediction, the conservative Justices seemed to abruptly shift their views on *Chevron* without even awaiting the election of a Democratic President, aggressively reviewing some of the positions taken by agencies under President Bush.[30]

In sum, the *ex post* monitoring and auditing problems with the *Chevron* commitment are enormous. The Justices will not be able to separate out sincere agency reversals under *Chevron* from defections to maximize ideological utility. More fundamentally, with agency policies skewed on the political spectrum, the Justices who are truly sacrificing ideological utility in the early aftermath of *Chevron* will rationally fear conservative defections after a change in the White House. Knowing this, the rational strategy becomes almost immediate defection from *Chevron*.

II. DETERMINATE CRAFT NORMS AND THE RELATIONSHIP TO JUDICIAL REVIEW

Shapiro and Levy relate determinate craft norms to *Chevron* and the restoration of the primacy of political accountability as the dominant form of control on agency decisionmaking.[31] But there

30. *See* Lechmere, Inc. v. NLRB, 502 U.S. 527, 539–41 (1992); Presley v. Etowah County Comm'n, 502 U.S. 491, 508–09 (1992); EEOC v. Arabian American Oil Co., 499 U.S. 244, 257 (1991), *overruled by* the Civil Rights Act of 1991, 42 U.S.C. § 2000 (Supp. IV 1994).

31. Shapiro & Levy, *supra* note 5, at 1068 ("[M]ost cases would be resolved in favor of the agency . . . under the determinate version of *Chevron*.").

is no clear relationship between determinate craft norms and deference to agencies. In other words, it is possible to have what appear to be more determinate craft norms for judicial review but have power taken away from administrative agencies. This is most dramatically illustrated by the fiercely determinate textualism of Justice Scalia, but is increasingly apparent in the work of the entire Court.[32] Three developments in particular demonstrate this point.

First, there is an almost fanatical movement in the Court to have dictionary definitions control the meaning of statutes.[33] This trend now includes those cases in which the agency has interpreted a statute as well. The Court has not hesitated to invalidate an agency's action when the agency has read a statute in a way that is contradicted by a consensus of meaning found in the dictionaries.[34] Unfortunately for agencies, the use of dictionaries is a one-way street. That is, even though an agency interpretation that conflicts with the consensus dictionary definition is presumed invalid, evidence of conflicting dictionary definitions does not by itself make a statute ambiguous; this would make it a *Chevron* step-two case.[35] The Court seems to believe that it has made doctrine more determinate by using dictionaries as a predictable source of meaning. But the result has been to exert greater judicial control over administrative agencies.

Second, the Court has increasingly used structural and linguistic canons of interpretation in ways that seem to make doctrine more determinate. Again, however, the effect has been to limit agency discretion. Two of the structural canons in particular illustrate the point. Consider first *expressio unius est exclusio alterius*—the expression of one item implies exclusion of others. The typical case in the agency context is when Congress has authorized the agency to take action X or regulate X, and the agency then proceeds to undertake Y or regulate Y. There are two ways to understand the express reference to X and the absence of reference to Y in the statute. It can be viewed as legislative inad-

32. *See* William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term, Foreword: Law as Equilibrium*, 108 HARV. L. REV. 27, 73 (1994) (describing certainty of textualism and its effects on agencies).

33. *See id.* at 73–74; Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437 (1994).

34. MCI Telecommunications Corp. v. AT&T, 114 S. Ct. 2223, 2229 (1994).

35. *See id.* at 2229–30; Brown v. Gardner, 115 S. Ct. 552, 555 (1994).

vertence or inattention, which suggests ambiguity; or it can be understood as a conscious legislative decision to draw the regulatory boundary at X and not to allow Y. The former, of course, is a *Chevron* step-two case, while the latter would be resolved against the agency at step one. The *expressio unius* canon adopts the latter understanding of structure and therefore operates as a significant restraint upon the agency. The Supreme Court and the courts of appeals have now firmly committed themselves to using this canon to constrain agency power.[36]

Of similar limiting effect is the canon *noscitur a sociis*—a word is known by the meaning of surrounding words. The canon is typically invoked in a case in which the statute gives the agency a list of powers to exercise. The question is whether the terms in the list all share a common meaning or whether more general terms in the list convey broader powers. The situation obviously poses a problem of statutory ambiguity, but the ambiguity is eliminated by use of the canon. The general power claimed by the agency is constrained by the common meaning—again the dictionary—given to the surrounding words.

These two canons were recently invoked by the D.C. Circuit in *Sweet Home Chapter v. Babbitt*[37] and demonstrate the way in which they impose limits on agencies. The issue in *Sweet Home Chapter* was the legality of the EPA's regulation that makes destruction of animal habitat a violation of the Endangered Species Act.[38] The Act makes it a crime for any person to "take" any endangered species. "Take" is defined to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or to attempt to engage in any such conduct."[39] The D.C. Circuit held that the EPA's interpretation was contrary to the statute.[40] Central to the court's analysis were the two structural canons. The court first noted that all of the terms in the definition "contem-

36. *See* City of Chicago v. Environmental Defense Fund, 114 S. Ct. 1588, 1591–92 (1994); Sweet Home Chapter v. Babbitt, 17 F.3d 1463, 1471–72 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (1995); Kelley v. EPA, 15 F.3d 1100, 1108 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 900 (1995); Railway Labor Executives' Ass'n v. National Mediation Bd., 988 F.2d 133, 139 (D.C. Cir. 1993), *aff'd on reh'g en banc*, 29 F.3d 655, 666 (D.C. Cir. 1994), *cert. denied*, 63 U.S.L.W. 3686 (U.S. Mar. 21, 1995) (No. 94–890); Wachtel v. Office of Thrift Supervision, 982 F.2d 581, 586 (D.C. Cir. 1993).

37. 17 F.3d at 1465.

38. *Id.* at 1464.

39. 16 U.S.C. § 1532(19) (1988).

40. *Sweet Home Chapter*, 17 F.3d at 1464–65.

plate the perpetrator's direct application of force against the animal."[41] Invoking *noscitur a sociis*, the court concluded that the word "harm" could not be read to include habitat modification, but rather, like all of the other terms, applied only to actions directed toward an endangered species itself.[42] The court also relied upon the fact that other provisions of the Act expressly allowed the EPA to take actions for habitat preservation and tellingly allowed for purchase of private property to protect the rights of owners. For the court, these other express references to habitat protection implied that no such authority was granted in the general prohibition section—*expressio unius est exclusio alterius*.[43] Ambiguity is eliminated through the use of these structural canons with doctrine more determinate but agencies worse off.

Finally, the Supreme Court has developed a set of substantive interpretive canons that constrain agency decisionmaking while making doctrine more determinate. Assume that a statute administered by an agency is ambiguous. Presumably under *Chevron*, this case should be resolved under step two. But if the substantive canons are invoked to eliminate the ambiguity or shift the burden of proof to the agency to show that the power to act is explicitly authorized, the case now becomes a loss for the agency at step one of *Chevron*. There is an intersection here between the Court's development of constitutional or quasi-constitutional norms[44] outside of administrative law and the review of agency decisions that transgress these newly invigorated constitutional protections. Thus, *Lechmere, Inc. v. NLRB*,[45] in which the Court invalidated the NLRB's interpretation allowing union organizers access to the private property of the owner, is fully consistent with the Court's recent cases giving greater constitutional protection for property rights.[46] *Presley v. Etowah County Commission*,[47] in which the Court invalidated the Department of Justice's reading of the Voting Rights Act to cover changes in the internal structures of gov-

41. *Id.* at 1465.
42. *Id.* at 1466.
43. *Id.*
44. *See generally* Eskridge & Frickey, *supra* note 15.
45. 502 U.S. 527, 539 (1992).
46. *See* Dolan v. City of Tigard, 114 S. Ct. 2309, 2322 (1994); Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2901 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).
47. 502 U.S. 491, 508–09 (1992).

ernment, involved not only the Court's enhanced protection of federalism interests,[48] but also presaged the Court's increasing sense that an aggressive reading of the Voting Rights Act may collide with equal protection principles.[49]

These three developments—dictionaries, structural canons, and substantive canons—all illustrate that determinacy in administrative law is not directly related to greater deference to agencies. In fact, these trends demonstrate that the opposite might be true—development of craft norms that maximize judicial reputational utility appears to be related to less deference. What Shapiro and Levy are apparently searching for is not necessarily more determinacy, but less judicial adventurism. However, these three developments demonstrate that the Shapiro and Levy argument in favor of a *Chevron*-like regime of review will fail under their own construct. Shapiro and Levy posit that judges can maximize reputation through craft excellence or maximize ideology while sacrificing craft. In either case, giving up ideological utility allows the judge to gain in reputational craft utility. But the broad deference position that was the basis for *Chevron*, as well as for the Shapiro and Levy reform, not only requires the judge to give up ideological utility but craft utility as well. A broad reading of *Chevron* tells the judge to defer if any ambiguity is found. Once the ambiguity is found, the craft task is over. In the typical administrative law case, it is probably true that finding ambiguity is easier than finding clarity.[50] *Chevron* therefore gave judges less opportunity to

48. *See id.* at 510; Eskridge & Frickey, *supra* note 15, at 619-25 (discussing federalism cases); *see also* United States v. Lopez, No. 93-1260, 1995 U.S. LEXIS 3039 (Apr. 26, 1995) (invalidating Gun-Free School Zones Act of 1990 as exceeding Congress's power under Commerce Clause); New York v. United States, 112 S. Ct. 2408, 2434 (1992) ("State governments are neither regional offices nor administrative agencies of the Federal Government.").

49. *See* Shaw v. Reno, 113 S. Ct. 2816, 2827 (1993) ("A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, . . . bears an uncomfortable resemblance to political apartheid."); Holder v. Hall, 114 S. Ct. 2581, 2591, 2592 (1994) (Thomas, J., concurring) (arguing for limited interpretation of the Voting Rights Act in vote dilution cases in order to discourage "racial 'balkaniz[ation]' of the Nation").

50. It may be that in certain cases it takes great craft skills to show ambiguity. But the incentives for the judge to demonstrate them appear absent. Assume that a judge is following the reading of *Chevron* that is in favor of broad deference. She decides that step two is triggered when an ambiguity level of 20% is found. Once the judge gets to that point—or just beyond it for insurance—she has no incentive to demonstrate skills to tease out more ambiguity. There is no payoff for doing so. But if a judge is going to set aside agency action under step one of *Chevron*, when there is a 70% level of confidence

display those craft skills that earn them reputations for greatness. And, as noted above, they did so without getting any ideological utility in return. Craft in statutory interpretation is now being practiced by the Court—particularly in what appears to be a highly sophisticated way by some Justices—but usually in cases that the agency loses at step one of *Chevron*. The trade-off suggested by Shapiro and Levy was never a fair one for the judicial branch and therefore did not occur.

III. *CHEVRON* AND AGENCY INCENTIVES, CONGRESS AS THE MECHANISM FOR COMMITMENT, AND THE NEED FOR MORE DETERMINATE CRAFT NORMS

My third objection to the Shapiro and Levy proposal is that, like much of their paper, it looks only at judicial incentives and ignores the impact of *Chevron* or a *Chevron*-type review statute on both agencies and Congress. This narrow focus causes me to doubt the efficacy of and reasons for their proposal to amend the APA. Moreover, the substitution of legislative action for judicial crafting of standards of review is likely to prove futile, particularly if—as the Shapiro and Levy proposal implies—substantial leeway to develop and implement these new review standards is left to the courts.

Start first with agency incentives. What impact did *Chevron* have on agencies? I would suggest that the *Chevron* rule created bad incentives for the agencies by skewing agency resources in undesirable ways and shifting the power within the agency, as well as altering the power relationship between the agency and the agency's lawyer, the Department of Justice. It soon became clear that the overwhelming significance of *Chevron* focused upon the step-one analysis. Agencies would respond to this with a rational strategy. The significance of *Chevron* step one would lead the agency to devote more resources to the legalistic analysis that was at the core of *Chevron* step one than to policy expertise or political balancing. *Chevron* encouraged the agency to win at step one or at least to demonstrate sufficient ambiguity to make it a step-two case.[51] Therefore, scarce agency resources would be shifted

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that the agency is wrong, the judge will have to demonstrate more skills to get to that point, and indeed may be driven to go past that point to justify substituting the judicial judgment for that of the agency.

51. A rational agency might always prefer to get past step one and win at step two.

away from explanations that a court and the public might find more helpful. Even if the agency's resources are not scarce, the responsibility for explaining and justifying the agency's decision may reside even more exclusively in the hands of the agency's general counsel office. It is the agency lawyers who are expert at the legalistic expressions and justifications that *Chevron* step one accentuates, and therefore we should expect that the agency strategy will adjust accordingly. This may not be bad as long as policy and expertise are expressed in the explanation as well; however, time, space, and expertise limits may lead the agency lawyer to emphasize the law over the policy.[52] Few would suggest that agencies are created to lend their expertise or accountability to doing strictly legal analysis.

But this is only part of the picture. Agencies must do battle not only with the courts to justify their decisions but with their lawyer as well—the Department of Justice.[53] Since most agencies have no independent litigating authority, they have their views presented and defended in court only if the Department—usually through the Solicitor General—finds their views plausible.[54] Again, insofar as *Chevron* step one assumed importance, the Department's role was only strengthened. It is the Department's lawyers—generalists to be sure, but specialists in federal statutory and administrative law—who are the true experts in doing the *Chevron* step-one analysis. *Chevron* then raised the potential for policy disputes within the executive branch to be controlled by the

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If it wins at step one, it cannot later shift its position. This might not be the case when the agency is controlled by a strong President who wants to freeze his reading of the statute to bind successors and who therefore prefers to win the case at step one.

52. Consider the impact of the Supreme Court's highly textual analysis of a banking statute in Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 363 (1986) (discussing Bank Holding Co. Act of 1956 (12 U.S.C. §§ 1841–1850)). In the wake of *Dimension*, a series of administrative opinions by the federal banking agencies took on a textual character and often cited the case. *See* Decision of the Comptroller of the Currency on the Applications of American Security Bank, N.A., Washington, D.C. and Maryland National Bank, Baltimore Maryland, 1994 OCC Ltr. 9 (Feb. 4, 1994); Commercial Paper Activities of Bankers Trust Co. of New York Do Not Constitute Underwriting Securities, Fed. Banking L. Rep. (CCH) ¶¶ 86,270, 90,823, 90,828 (June 4, 1985); Order Approving Applications to Engage in Limited Underwriting and Dealing in Certain Securities, 73 Fed. Res. Bd. Bull. 473, 475 (1987).

53. *See* Michael Herz, Comment, *Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 CARDOZO L. REV. 1663, 1681 (1991).

54. *See* 28 U.S.C. § 516 (1988) (reserving the power to conduct such litigation to the Department of Justice); 28 C.F.R. § 0.20 (1994).

Department, with disagreements expressed in *Chevron* step-one terms and the *Chevron* step-one threat always available for use by the Department (often at the behest of other agencies or OMB) to block agency initiatives. There is much to be said in favor of stronger presidential control over agency decisionmaking.[55] It remains to be demonstrated that it was ideal or rational for this oversight to occur by the Department of Justice wielding the cudgel of *Chevron* step one.

These secondary effects of *Chevron* or a *Chevron*-like rule are not part of the Shapiro and Levy equation. Yet it surely seems odd to be proposing changes in judicial review of agency decisions without asking what incentives are created for agencies under the proposal. Shapiro and Levy do propose significant and extensive amendments to the scope of review section of the Administrative Procedure Act,[56] but agency behavior and institutional incentives are not targeted by their amendment. They claim that the suggested changes will restore the determinacy to scope of review that began with *Chevron* and *State Farm*[57] but did not endure. In making their suggestions, they do not directly enter into the debate about what standard of review is most consistent with separation of powers principles. They propose what they claim to be an "intermediate" view that preserves the judiciary's ability to enforce the rule of law, but without allowing courts to intrude into the sphere of legitimate agency policy choice.[58] In setting forth their amendments, they readily concede that no statutory standard can resolve every case or always constrain judicial choice. They do predict that more precise standards will channel judicial inquiry in a way that makes departures from craft norms more costly, and therefore will serve as a deterrent to judicial ideological adventurism.

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55. *See* Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C.A. § 601 (Supp. 1995); Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 (1988); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 85–86, 93–108 (1994); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1080–82 (1986).

56. 5 U.S.C. § 706 (1988); Shapiro & Levy, *supra* note 5, at 1072.

57. Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

58. Shapiro & Levy, *supra* note 5, at 1070–71.

Their proposal is comprehensive, yet their narrow focus on restoring a *Chevron*-type review standard leaves me pessimistic that the reform will occur. Moreover, by proposing general and vague standards for review, they have ignored various craft norms that might be better in changing agency and judicial incentives in ways that Shapiro and Levy may find desirable. Shapiro and Levy may be correct that the Justices were quite unwilling to give up their power post-*Chevron*. Yet the prospects for legislative relief remain uncertain even if the legislature rather than the Court acts as the third-party enforcer to secure a commitment to a new set of more determinate craft norms. The scope of review standard outlined by Shapiro and Levy for guiding review of agency interpretations of statutory law may be as subjective and open-ended as those articulated in *Chevron*. Moreover, we saw that the determinacy of *Chevron* came not so much from the two-part test as the general signal sent by the Court. Thus, the proposed APA amendments may suffer from the same infirmities that we saw in *Chevron*: the actual test is unlikely to provide serious constraint and the general exhortation to defer unless the law is clear will leave judges with substantial discretion. In this respect, the judiciary will again prove to be pivotal in implementing, defining, and monitoring the new statute. And the same problems of discerning real defections and auditing will arise.

The ambitious but (I fear) largely hortatory effort made by Shapiro and Levy fails to take account of the broad variation in statutory questions and contexts that arise across the many different types of administrative agencies. Statutory questions in administrative law are unlikely to be captured under one simple formulation. This all suggests that to seriously inject the idea of craft norms into administrative law doctrine requires formulation beyond the simple and general *Chevron* two-step, whether it be found in caselaw or statutory law. Statutory cases are too idiosyncratic or unique to achieve consistency in generally stated craft norms across a wide spectrum of cases. The process of comparing clarity or unmistakable intent from case to case will produce few true examples in which craft can be readily observed. Indeed, post-*Chevron* law quickly disintegrated into a sequence of charges and countercharges about who did or did not defer in the last case. The solution must be to seek out craft norms that transcend the particular statutory analysis, that can then be applied across all

agencies despite the diversity of text, legislative history, or statutory purposes.

Here I would urge them to look both at pre- and post-*Chevron* law. As others have observed, the pre-*Chevron* approach was contextual and practical, focusing on a number of factors and not simply on the narrow *Chevron* step-one inquiry.[59] The whole of the agency decisionmaking process and its placement in statutory law was critical in deciding the deference question. These factors included the consistency of the agency's position over time, the amount of time that the policy has been in place, the form of the agency action, and whether the agencies involved have all spoken with a single voice on the issue.[60] Under both the traditional[61] as well as the more modern defense[62] of this approach, these factors were deemed relevant to the ultimate persuasiveness of the agency's decision. The advantage of these factors for Shapiro and Levy's proposed reform is that they provide clearer craft norms that transcend the individual statutory setting. There certainly will be instances when the courts do not consider these factors or apply them inconsistently. But the more precise and portable character of these factors across statutes and agencies assures that the reputational sanctions that Shapiro and Levy seek will in fact be felt by those who do not play the game by the rules. Judges who ignore them will be seen as ideological maximizers whose reputations should decline accordingly.

Another major advantage of this approach is that it has the possibility of producing a relatively stable judicial consensus across the spectrum of ideological judges. With different ideologies, judges will obviously disagree in individual cases whether the agency should prevail or not. But the differing judges may agree that the review standards should be created in a way to promote fair, unbiased, rational, and politically accountable decisionmaking. Some of the contextual factors outlined above are directly related to these more universal goals of administrative government. Con-

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59. *See* Merrill, *supra* note 28, at 352 (contrasting *Chevron* with "the older pragmatic tradition that emphasized a variety of contextual factors"); Merrill, *supra* note 4, at 972 (calling pre-*Chevron* test "pragmatic and contextual").

60. *See* Merrill, *supra* note 4, at 1016–22.

61. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

62. *See* Mayburg v. Secretary of Health & Human Servs., 740 F.2d 100, 105–07 (1st Cir. 1984) (Breyer, J.); Merrill, *supra* note 4, at 1016–22; *see also* Sunstein, *supra* note 15, at 443–46 (arguing against a general rule of deference to agency interpretations).

sider the problem of a conflict in views among administrative agencies. A judge believing that political accountability is a bedrock principle of scope of review law will be keenly interested in whether the agencies are in conflict. The problem most frequently arises when an independent agency, not subject to direct Presidential control,[63] disagrees with the views of a purely executive agency. In the 1980s, the politically independent Federal Reserve Board opposed the deregulatory measures of the more politically accountable Department of the Treasury and Comptroller of the Currency. The Board's actions to halt deregulation were consistently invalidated by the courts.[64] No deference to the Board was granted because of the schism among the banking agencies.[65] This is desirable for judges who want politically accountable agencies. The unaccountable Board is due less deference when the President and his subordinates set forth a different policy view. The conflict among agencies will also be relevant for those judges who seek to further deliberation and rationality in agency decisionmaking. It may suggest haste by the Board in taking action or an absence of persuasiveness to its rationale.[66]

Acting in the shadow of these contextual factors is not without cost to the agency. Under the view set forth by Shapiro and Levy, there would be a freeing up of agency resources since the apparent decline in scrutiny would lessen the burdens on agency decisionmaking. But these factors are quite different from the unpredictable and vacillating judicial attitudes of either strict or deferential review. These contextual factors tend to place the agency in the position of controlling the amount of deference it receives. They are designed not simply to operate as *ex post* justifications for a result but to alter the incentives for agency action.[67] An agency that is aware *ex ante* that a conflict in agency

63. *See* Humphrey's Executor v. United States, 295 U.S. 602, 624–26 (1935) (describing independence of Federal Trade Commission from executive control); *see also id.* at 610–11 (same, in oral argument of William J. Donovan).

64. *See* Board of Governors v. Dimension Fin. Corp., 474 U.S. 361, 374 (1986); Citicorp v. Board of Governors, 936 F.2d 66, 73 (2d Cir. 1991), *cert. denied*, 502 U.S. 1031 (1992); Synovus Fin. Corp. v. Board of Governors, 952 F.2d 426, 436 (D.C. Cir. 1991); *cf.* FAIC Sec., Inc. v. United States, 768 F.2d 352, 361–62 (D.C. Cir. 1985) (invalidating FDIC regulation opposed by the Department of Treasury and Antitrust Division of the Department of Justice).

65. *See* Citicorp v. Board of Governors, 936 F.2d 66, 75–76 (2d Cir. 1991).

66. For a good example of this view, see Judge Newman's discussion in *Citicorp*, *id.* at 75.

67. *See* Merrill, *supra* note 4, at 1029 (arguing that the *Chevron* focus on judicial

views or a shift in agency position will tend to lower the amount of deference can plan accordingly and make up for the loss by articulating its position more carefully or with more support from practical experience. As noted above, *Chevron* created no such incentives and indeed skewed them in particularly perverse ways. In suggesting that so much was at stake in step one of the analysis, the message sent to agencies was to make sure that they devote their time to explaining why either they win at step one, or why the statute is ambiguous and warrants only the minimal scrutiny under step two. With limited resources and staff, the agencies were forced not to do what they are supposed to do best—apply their expertise or resolve political or policy disagreements rationally—but to channel these scarce resources into legalistic formulations.

Therefore, Shapiro and Levy would be better off to insert into their reform package the factors that can indeed be identified as craft norms.[68] By doing so, they will at least allow for the enforcement of the reputational sanctions that simply could not be administered under *Chevron* and likely would prove to be ephemeral under their proposal as well. Moreover, in making the agency "earn" deference, the traditional factors create the proper incentives for agency action as well as halting the diversion of agency resources from explaining and justifying expert policy judgments to legalistic explanations. In this last respect, this incentive-based

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behavior creates no incentives for agencies). This incentive theory of earning deference can be seen in a variety of contexts. One is that in which the Court alters its level of deference and the aggressiveness of its *Chevron* step-one posture depending on how the agency expressed its views. *See* Massachusetts v. FDIC, 47 F.3d 456, 459 (1st Cir. 1995) (noting that choice of whether to adopt formal adjudication up to agency but further stating that doing so would consume agency resources and earn agency greater deference); New York City Employees' Retirement Sys. v. SEC, 45 F.3d 7, 14 (2d Cir. 1995) (agency may adopt interpretive rules without notice and comment or even more informal "no-action" letters but these are entitled to less deference than formally adopted legislative rules); John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 114 S. Ct. 517, 531 (1993) (leaving open whether agency position adopted in brief was entitled to deference, but finding such a position first articulated in the Solicitor General's amicus brief unpersuasive); Callejo v. Resolution Trust Corp., 17 F.3d 1497, 1499 (D.C. Cir. 1994) (tying standard of review of agency decision to whether agency proceeded by informal adjudication or formal adjudication controlled by promulgated regulations). In a recent decision, the Court has also suggested that the agency's views are due less weight when the agency has sought to preclude judicial review of its decisions. *See* Brown v. Gardner, 115 S. Ct. 552, 557 (1994).

68. For an earlier effort to do so, see generally Ronald M. Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239 (1986).

approach at least allows the agency to play some role in determining the reception it will receive when judicial review is sought, and makes the deference analysis less likely to appear as conclusory judicial whim. Given that it is the fear of the latter that dominates not only the Shapiro and Levy paper but the more general discourse on *Chevron* and scope of review, the former may be viewed at least as a small step forward in working out the relationship between courts and agencies.