

*“Towards a theory of Deference in South Africa; Trans-Atlantic Lessons”*

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# *Towards a theory of Deference in South Africa; Trans-Atlantic Lessons*

*'Let the jury consider their verdict,' the King said, for about the twentieth time that day.*

*'No, no!' said the Queen. 'Sentence first - verdict afterwards.'*

*'Stuff and nonsense!' said Alice loudly. 'The idea of having the sentence first!'*

*'Hold your tongue!' said the Queen, turning purple.*

*'I won't!' said Alice.*

*'Off with her head!' the Queen shouted at the top of her voice'.<sup>1</sup>*

*“The very word deference calls up lowering the eyes, baring the covered head, laughing at jokes that are not funny”<sup>2</sup>*

## **Introduction**

The South African experience with administrative law, prior to the transition of 1994, was typified by executive malignancy that tangled black Africans in a web of permits and licenses. Noxious racial legislation, thinly disguised by a veneer of parliamentary language<sup>3</sup>, riddled the statute book. Judicial control of executive excess was, with a few exceptions<sup>4</sup>, limited by a judicial willingness to defer to

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<sup>1</sup> Lewis Carroll, *“Alice in Wonderland”*, (Picador 1969), Chapter 12.

<sup>2</sup> Joseph Vining, *“Authority and Responsibility: The Jurisprudence of Deference”*, (1991), 43 Admin L. Rev. 135, at 135.

<sup>3</sup> Most notoriously the Bantu (Urban Areas) Consolidation Act 25 of 1945 which imposed impossible conditions on black Africans wishing to live in the designated urban areas.

<sup>4</sup> For example *Oos-Randse Administriraad v Rikhotso* 1983 (3) SA 595 (A) where s10 of the Act above was held to be ultra vires the powers of the Minister.

the state in security matters<sup>5</sup>. Faced by a sovereign parliament with the power, and frequently the inclination, to pass oppressive security measures an administrative law of deferential *ultra vires* was ineffective as a means of exercising meaningful restraint.

The system of constitutional democracy that has replaced apartheid has emphatically turned its back on the Westminster tradition of parliamentary sovereignty, and opted instead for the ‘checks and balances’ proffered by the tripartite division of power into legislative, executive and judicial spheres. However, from the perspective of administrative law, this system complicates rather than clarifies the question as to the appropriate province of judicial review. Although the consequences were tragic, the apartheid system had the benefit of a crisp institutional hierarchy. Liberal democracy, by contrast, cannot deal in such blunt certainties. Thus while it affords the judiciary an institutionally pre-eminent position in declaring what the law requires, it fetters that interpretative monopoly by acknowledging the expertise and functional pre-eminence of the other branches in the actual arena of governance; policy formulation, fact gathering, and regulation promulgation.

The resulting tangle of competing claims of competence is a paradox particularly apposite in the South African context. Liberal democracy requires that the public periodically elect representatives to govern in the name of the common good. Trust is reposed in public representatives, a trust easily (in theory at least) rescinded at the ballot box. It is reasonable to pre-suppose that this core notion of democratic accountability should function as the primary restraint on legislative action. People elect other people to act for them and dispose of them if they don’t act accordingly.

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<sup>5</sup> See *infra*, E Cameron, “*Legal Chauvinism, Executive Mindedness and Justice – LC Steyn’s Impact on South African Law*”, (1982) 99 SALJ 38, where Cameron argues that Steyn’s deference to the “intention” of the legislator functioned as a convenient legal proxy to give effect to the judges sympathy for the goals of the regime.

The Constitutional Court, by contrast, lacks the democratic legitimacy or the institutional capacity to supplant the legislatures interpretation of the public interest with its own. The South African Constitution requires however, that all spheres of state be bound by the Constitution<sup>6</sup>, and reposes power in the judiciary to vet legislative enactments for their consonance with the fundamental rights provisions. At first blush the system posits a contradictory institutional structure; it impels intervention where constitutional rights are threatened yet counsels at the same time that there is little epistemological justification for the resultant reckoning.

Review, in a constitutional system, posits the necessity to rein in agency excess that threatens the fundamental normative values, from which all the bodies receive their legitimacy as Jaffe observed, “An agency is not an island entire of itself. It is one of the many rooms in the magnificent mansion of the law. The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law”<sup>7</sup>. Judicial review can thus be construed as the physical manifestation of distrust in the ability of public servants to stay within the terms of that tacit bargain, as Lenta construes it, “expresses distrust of elected representatives and acts as a precaution against abuses of the original investment of trust”<sup>8</sup>.

The delicate task of balancing the twin imperatives of democratic restraint and rights-driven intervention is complicated by two factors. Firstly the courts in South Africa are sensitive to the fact that the executive and legislature face an impossibly large burden in revitalizing a country rendered somnolent by years of repression, isolation and economic malaise. The massive disparities in wealth and consequent desperate position of many South Africans require that government be allowed a wide freedom of manoeuvre in determining ameliorative measures, yet

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<sup>6</sup> Section 8(1) of the Republic of South Africa Act 108 of 1996. reads “The Bill of Rights applies to all laws, and binds the legislature , the executive , the judiciary and all organs of state”

<sup>7</sup> Louis Jaffe, “*Judicial Control of Administrative Action*” (1965) at 590. Cited by Daniel B. Rodriguez. “*Jaffe’s Law: An Essay on the Intellectual underpinnings of Modern Administrative Law Theory*”, (1996-1997). 72 Chi-Kent Law Rev 1159 at p1182,

it is precisely that deprivation which is so inimical to the thrust of the new Bill of Rights, “brings into sharp focus the dichotomy in which a changing society finds itself and in particular the problems attendant upon distributing scarce resources on the one hand, and satisfying the designs of the Constitution...on the other”<sup>9</sup>.

While the burdens imposed by apartheid provides a resource context to which any discussion of judicial review in South Africa must be sensitive, it also complicates the simple picture of judiciary and legislature restricted to questions of law and policy respectively. The sheer volume of work to be completed necessitates that wide areas of discretion are left to government officials to perform wide-ranging and perhaps loosely defined public functions. The simple bright-line model of the separation of powers sketched above dissolves under the pressure of such immediacy. As observed by Yacoob J, the executive itself becomes a locus for policy formulation rather than an instrumental body implementing legislative programmes, “The contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable”<sup>10</sup>.

The key question facing the post-apartheid regime of administrative law is to reconcile their obligation to the rule of law whilst avoiding immersion in complex matters of national policy lest the Courts become the battleground for competing visions of the common good<sup>11</sup>. In order to secure a jurisprudence of respect it is incumbent on the South African courts to generate criteria around which the appropriate province of judicial intervention and agency expertise can lock together in a coherent picture of common enterprise. The consistent theme of this paper will be to argue that any attempt by the Court to interfere in primary

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<sup>9</sup> *Soobramoney v Minister for Health KwaZulu Natal*, 1997 (12) BCLR 1696, at para 39. (Madala J)

<sup>10</sup> *Grootboom v Minister for Housing, KwaZulu Natal*, 2000 (11) BCLR 1169 (CC) at para 41 (Yacoob J)

<sup>11</sup> TRS Allan, amongst others, argues that any involvement in prioritising certain claimants or certain claims to the expense of others involves courts in precisely the same questions as those of the administrator. The investigation incumbent upon the Court to reach its conclusion thereby turns it into simply a rival for a in which policy can be tested, “In what sense can judicial intervention, whether to command the performance of an administrative duty or to restrict or stifle its current manner of implementation, be distinguished from another species of administration, albeit at one remove?” “*Doctrine and Theory in Administrative Law: An Elusive Quest for the Limits of Jurisdiction*”, (2003) P.L. 429, at p433.

public policy under the auspices of judicial review will result in a jurisprudence of chaos. Jacques De Ville, in particular, presses a vision of “administrative justice” shorn of formal criteria, but rather taking its inspiration from the overtly normative command of the Constitution. In contrast to De Ville, it will be contested that the American jurisprudence offers a more fruitful judicial review model, the genesis of which can be observed in both *Bato Star* and *New Clicks*. Similarly the Constitutional Court jurisprudence on socio-economic rights, which bears closest resemblance to De Ville’s contextual approach can, it will be argued, be reconceptualised as a version of the “hard look” doctrine.

This paper will offer a ‘snapshot’ designed to demonstrate the analytical poverty of a bare constitutional approach shorn of intellectually comprehensible criteria. It will be argued that this approach fails to offer a coherent corpus of law, oscillating alternatively between formalistic bows to deference and judicial interventions of extraordinary ambition. The thrust of the analysis with the normative model will not be to quibble with the impact of the Constitution, but rather to argue for a return to a conceptual analysis where the doctrine of deference is not determined haphazardly by reference to the Court’s solicitude for a particular constitutional right. It will be briefly argued that the courts in South Africa have been waylaid by the interpretative millstone of determining whether a contested decision is “administrative action”, often encapsulating their entire deference analysis within a perfunctory nod to separation of powers principles<sup>12</sup>. It will be argued that the South African judiciary has refused to grasp the nettle of an overtly conceptual justification for judicial review. Their current approach, of stressing the requirement of ‘reasonableness’, it will be argued begs rather than answers the demand for substantive criteria that subsist beyond the particular circumstances of each case.

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<sup>12</sup> See for example Sachs J in *Soobramoney* where he opined that the personal and resource decisions involved in determining who should, and should not receive treatment was not the appropriate location for judicial interference, “Important though our review functions are, there are areas where institutional incapacity and appropriate constitutional modesty require us to be especially cautious”, supra at para 58.

In lieu of such conceptual poverty it will be argued that there are important lessons to be gleaned from the deference jurisprudence of the United States Supreme Court. Revolving around the twin pivots of *Chevron USA Inc v Natural Resources Defense Council*<sup>13</sup> and *Skidmore v Swift Co.*<sup>14</sup>, the justifications for deference underpinning this dual standard will be examined. In order to advance the debate from the unhelpful totems of ‘rationality’ and ‘reasonableness’ review, the American experience with the concrete justifications of legislative intent and agency expertise will be sketched. The South African material will be prevented through the prism of Jacques De Ville’s theory. It will be argued that there is no warrant for the conceptual excess’s of his programme. Rather the few post-1994 cases that have dealt expressly with deference will be adverted to, and an attempt made to elicit a skeletal model from the rather sparse dicta. The paper will conclude with a modest proposal for a process rationale for deference, broadly based on a *Skidmore*-hard look paradigm to reconcile the two emerging streams of the jurisprudence. It will be argued that it promises the genesis of a deference jurisprudence which offers the prospect of incorporating agency expertise into the judicial calculus yet preserves the hallowed admonition that those “who are limited by the law ought not to be entrusted with the power to define the limitation”<sup>15</sup>.

## Part 1

In the American canon, Justice John Marshall posited a view of checks and balances that offered no immediate indication of why a court should ever accept administrative resolutions over their own. The legislature declared what the law is, its content decided, per *Marbury v Madison*<sup>16</sup>, by the courts. To argue that the administration should alter that understanding of what the law is, instinctively jars with our conception of constitutional legitimacy. Antonin Scalia

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<sup>13</sup> 467 US 837 (1987)

<sup>14</sup> 323 US 134 (1944)

<sup>15</sup> Cass Sunstein, “*Law and Administration after Chevron*”, (1990), 90 Colum. L. R. 2071 at p2077

<sup>16</sup> *Marbury v Madison* 5 U.S. (1 Cranch) 137, 177 (1803)

writes that to talk of deference is all very well in the context of factoring expert views into judicial determinations, but the stronger form “to say that those views...will ever be *binding*- that is, seemingly a striking abdication of judicial responsibility”<sup>17</sup>. In *Lochner v New York*<sup>18</sup> the majority struck down a New York attempt to regulate the ability of employers to demand long hours from bakers. The Supreme Court adopted an extraordinary reading of the word “liberty” in the Fourteenth Amendment. Peckham J held that, “an employee may desire to earn the extra money which would arise from his working more than the prescribed time, but this statute forbids the employer from allowing the employee from earning it”<sup>19</sup>. The *Lochner* majority, despite elaborate bows to the Constitution, were engaged in a naked grab for power, enforcing their own extreme *laissez faire* economic views for the putative good of the country. The collapse of the Court’s resistance to the New Deal in *West Coast Hotel Co. v Parrish*<sup>20</sup>, marks the rise of the “administrative era”, an era indelibly marked by the painful lessons learned from *Lochner*’s abortive vision of judicial statesmanship. American review jurisprudence from that time forth, has revolved around the twin lodestars of accountability and legitimacy.

Stung by Roosevelt’s reaction to their interference, for much of the 20<sup>th</sup> century the Court clung to the idea of a bifurcation of Constitutional labour, “that administrators and judges alike would implement Congress’s policy decisions, but that administrators might do so more effectively in some instances”<sup>21</sup>. This distrust of the judiciary sprang from a post-Depression sentiment that the judiciary, with their traditional concern for the sanctity of both property and private law rights, were institutionally incapable of construing the statutory regime so as foster the great programmes of social redistribution. In other words

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<sup>17</sup> Antonin Scalia, “*Judicial Deference to Administrative Interpretations of Law*”, (1989), 36 Duke Law Journal, 511 at p513. (emphasis in original)

<sup>18</sup> 198 U.S. 45 (1905)

<sup>19</sup> Ibid, at 52.

<sup>20</sup> 300 US 379 (1937)

<sup>21</sup> Johnathan T. Molot, “*Re-examining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*”, (2002), 96 N. Western Uni. Law. Rev, p1239, at 1241-42.



the rise of the administrative state questioned the certitudes of the judiciary's *Marbury*-esque right to say, "what the law is". On this post New-Deal conception, the Democratic progenitors of the welfare state questioned the automatic right of the court's to interpret statutes where the economic expertise of the agency might be the more effective tool of social engineering.

This tension between constitutional legalism and administrative expediency gave rise to an initial *ad hoc* arrangement where the Courts perpetrated the fiction of "faithful agent"<sup>22</sup>. This approach squeezed the administration and the courts into an equally uncomfortable institutional position where both were portrayed as agents of Congress, the dispositive question being which body was institutionally better placed to determine a particular interpretative question. The key consideration of the interwar jurisprudence was not a general policy prohibition but rather that judges lacked the political legitimacy to engage in certain *kinds* of policy making. However with an argument of important resonance in the South African context, Molot notes that judicial proclamations of restraint on institutional grounds were manifestly incapable of offering the burgeoning administrative state clear guidance as to how the relationship between the competing interpretative communities, judiciary and administration should be constructed<sup>23</sup>.

Stepping into this conceptual lacuna, *Chevron v National Resources Defence Council*<sup>24</sup> offered precisely such criteria. In *Chevron* the Environmental Protection Agency had altered its interpretation of the words, "stationary source" in the Clean Air Act<sup>25</sup>, in terms of controlling pollution emissions. Previously they had interpreted it to mean each individual smokestack but in 1986 had altered that understanding to a "bubble" approach where excessive total factory emissions could be offset by reductions elsewhere in a plant. The Court, led by Justice Stevens, reasoned that where neither the statutory context nor the

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<sup>22</sup> See *infra* *United States v American Trucking Association*, 310 U.S. 534 (1940).

<sup>23</sup> *Ibid*, at 1258.

<sup>24</sup> 467 US 837 (1987)

<sup>25</sup> 42 USC§ 7401 (1988)

legislative history illuminated the word “source”, then it would be judicial presumption of the most odious kind to prefer the courts interpretation to that of the agency. The question then was, “whether the agency’s answer is based on a permissible construction of the statute”<sup>26</sup>. For present purposes there are two noteworthy aspects to the *Chevron* rationale, rooted in two competing conceptions of administrative law.

In its determination to repatriate all questions of substantive public interest to the politically accountable branches, *Chevron* positively *obliges* courts to accept reasonable agency interpretations of ambiguous statutory commands. *Chevron* thus substantially abridged the judiciary’s *Marbury* monopoly on determining what the law is, as Molot puts it, “restricted courts to deciding what statutes reasonably could mean and left it to agencies to decide within those bounds what statutes actually do mean”<sup>27</sup>. Justice Stevens reasoned that where an ambiguity was found in a statute, it was reasonable to presume that Congress had intended, either explicitly or implicitly, that it was for the agency to resolve, “it is entirely appropriate for this political branch of the Government to make such policy choices- resolving competing interests which Congress itself either inadvertently did not resolve or intentionally left to the agency charged with the administration of the statute in light of everyday realities”<sup>28</sup>.

Contained within the above paragraph is however, the nub of the confusion over the rationale for *Chevron*. The Court encourages judges to find an ambiguity based on a fictional presumption of Congressional intent; that legislative will, no matter how strained, should decide who resolves an ambiguity. On the original *Chevron* account, once that had been decided *it was irrelevant* how that agency decision had been arrived at. Justice Stevens, although not advertent to the point appeared to presume that expertise would be brought to bear. Whether it was or not however, it is the implied delegation that attracts

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<sup>26</sup> *Chevron*, *ibid*, at 842.

<sup>27</sup> Molot, *ibid*, at p1242 (footnote omitted)

<sup>28</sup> *Ibid*, at 865-66.

judicial deference, not a superior capacity for policy formulation. The fundamental weakness of *Chevron*, from the position of Supreme Court jurisprudence is that it fails to make a procedural trade-off in exchange for deference. The point, crisply put is that the implied delegation rationale exhausts the judiciary's evaluative tools with a finding of ambiguity such that interpretations which happen to fall within the "reasonable" scope, no matter how haphazardly arrived at will attract *Chevron* deference. The conceptual luminaries of the administrative firmament, namely expertise and rigour of rule-making process are absent from the equation<sup>29</sup>.

As captured in the quote above however, the analytical premise behind the delegation rationale has no independent intellectual existence. While Congress may delegate resolution of an ambiguity to an agency, such delegation is only comprehensible in light of an appreciation that the agency is best placed to make that determination. Justice Stevens's entirely reasonable opinion is that the Supreme Court is not qualified to interpret the phrase "stationary source"- but casting the question as a search for often opaque legislative intent does not provide any answer as to *why* an agency should, in this instance, be allowed to usurp the law interpreting prerogative of the courts. Surely once included in legislation, "stationary source" speaks as much to the court as it does to the EPA? Such a cession is only explicable, then, if the resolution of the ambiguity goes beyond what the classic legal canons of interpretation can resolve and into the terrain of expertise. The point is that the judges could have preferred one of the many conceptions of "stationary source" yet the agency has at its disposal an institutional expertise to make it the obvious body to resolve the decision.

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<sup>29</sup> See *Auer v Robbins* 519 U.S. 452, 454, where the secretary of Labour was entitled to afford a certain exemption to public employees if their rate of pay was linked to the quality of work done. Two police officers argued that they were so entitled on the theoretically possible, but practically impossible, scenario that they be docked pay if found guilty of disciplinary infractions. Scalia J held that irrespective of how the Secretary had arrived at his conclusion, and irrespective of the likelihood of the scenario postulated by the officers the salutary question was "whether the Secretary of Labour's "salary-basis" test for determining an employee's exempt status reflects a permissible reading of the statute". The likelihood or not of an infraction from police officers was a matter to be factored in at the rule making stage, Scalia J opined, arguing that the Court's task was the ascetic one of determining the congruence between the Secretary's construction and the facial demands of the statute.

Contrary to the delegation understanding of *Chevron*, the expertise under-current ignores institutional position, instead standing as, “a salutary understanding that these judgements of policy and principle should be made by administrators rather than judges”<sup>30</sup>.

Indeed the point can be made even stronger, that by acknowledging a broad swathe of permissible disagreement the Court condones agency resolutions independent of what Congress intended. By deploying its expertise to select one option, an agency cannot logically be merely implementing Congressional intent. It uses its interpretative faculties and its understanding of the public interest to reach that conclusion from amongst many possible resolutions, a level of policy autonomy irreconcilable with the fundamental tenet of the delegation doctrine.

Unfortunately, while *Chevron* offers a powerful vision of how judicial and agency resources are to be harnessed, its application has been confounded by confusion over the twin rationales. By stressing the restraint inherent in its institutional position the Court achieves flexibility by refusing to clothe statutory language with judicially formulated interpretations, which would, under *stare decisis*, bind agencies in the future<sup>31</sup>. However by referencing its deference rationale to Congressional intent the Court has, on one interpretation, neglected its primary judicial duty to promulgate usable standards of judicial review that will flag to administrators when deference will be granted, and more importantly the malleability inherent in the term “reasonableness”. Reflecting the criticism of the Constitutional Court’s jurisprudence on the issue, the United States Supreme Court has been heavily criticised for showing great deference to favoured interpretations while at other times ignoring agency input as Murphy observes after a review of the jurisprudence, “Nearly twenty years after the *Chevron* decision courts are still struggling at times to resolve the tension between the *Marbury* norm that they control legal meaning and the *Chevron* norm that

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<sup>30</sup> Sunstein, *ibid*, at p2088 (citation omitted)

<sup>31</sup> “The basic legal error of the Court of Appeal was to adopt a static judicial definition of the term “stationary source”, when it had decided that Congress itself had not commanded that definition”, *Chevron*, *ibid*, 467 US at 842.

agencies control policymaking, which in turn sometimes controls legal meaning”<sup>32</sup>.

Conceptual confusion notwithstanding, *Chevron* does offer two clear doctrinal pillars to ameliorate the perceived problem of judicial statesmanship. Firstly it circumscribed the ability of courts to aggrandize their own interpretative province by reference to intent. It changed the question to be asked, such that the courts were obliged to accept ambiguity as an imputation of intent to delegate. Courts under *Chevron* would not be able to construe ambiguity to ennoble their own domain, as Healey puts it, “*Chevron* was accordingly not self-serving in its understanding of Congressional intent”<sup>33</sup>. Second the legal actor to whom lawmaking authority and hence primary policy formulation, is attributed is the politically accountable decision maker, rather than the non-politically responsive courts. Thus Rossi argues that *Chevron* brought real benefits to the administration, savings in costs, efficiency and guidance that cannot be lightly discounted. He reviewed the post-*Chevron* jurisprudence of the D.C. Circuit and discovered a forty per cent drop in remands and reversals from agency interpretation, “By setting the tone for application of standards of review for lower courts, the Supreme Courts decisions regarding standards of review for agency action have had very real consequences for appeals of agency decisions”<sup>34</sup>.

It is important to recognise that the doctrinal difference between pre- and post-*Chevron* jurisprudence is not a relinquishment by the Court but the more modest position that the judiciary should decide less. *Chevron* imposes two hurdles in order for an agency determination to attract judicial deference. Firstly the statute must be ambiguous (*Chevron* Step 1) and secondly the interpretation must be reasonable (Step 2), both of which are susceptible to judicial determination. It is entirely appropriate, and constitutionally required that judges

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<sup>32</sup> Richard Murphy, "A 'New' Counter-Marbury: Reconciling Skidmore Deference and Agency Interpretive Freedom.", (2004), 56 *Administrative Law Review* 1 at p37.

<sup>33</sup> Healey, *ibid*, at 681.

<sup>34</sup> *Ibid*, at 1115

retain the final say over statutory construction to ensure that administrators remain within the realm of what is permissible<sup>35</sup>, yet *Chevron* offers a framework to lend a meaningful role to the intellectual capital built up by the administration, “An appreciation of agency expertise, the limits of specialized knowledge of judges, and political accountability are at the normative core of Justice Stevens rationale for deference”<sup>36</sup>. The converse of that proposition is however, that *Chevron* does not offer any model of how judicial supervision can interact with agency expertise. From legislative intent, deference is inferred, irrespective of what the agency actually does. *Chevron* manifestly does not demand formality of procedure, notice- and-comment, consultation or any other guarantee that expertise has in fact been applied. In fact it provides no guarantees whatsoever that the decision will in fact be ‘better’ and opens up the danger that as deference is not related to process, unscrupulous agencies might skimp on procedure and receive full deference notwithstanding. *Brown and Williamson* and *Mead* represent the two most significant attempts to reconcile deference (the agency imperative) with adequate process (the judicial imperative).

Although *Chevron* marked a paradigm doctrinal shift in recognising the propriety of administrative power, in practise both steps of the *Chevron* doctrine controlled by the courts, proved open to distortion on judicial policy preference grounds. Thus in *FDA v Brown and Williamson Tobacco*<sup>37</sup>, the Court refused to defer to a seemingly logical classification of nicotine as a drug, “intended to affect the structure or any function of the body”<sup>38</sup>. O’Conner J for the majority held that regardless of the impact<sup>39</sup> of a proposed measure an agency must not exercise its

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<sup>35</sup> The converse of this principle, to allow agency’s to determine either “ambiguity” or “reasonableness” would substantially subvert the separation of powers as Scalia J bitterly noted, “I know of no case, in the entire history of the federal courts, in which we have allowed a judicial interpretation to be set aside by an agency- or have allowed a lower court to render an interpretation of a statute subject to correction by an agency”, *United States v Mead Corporation*, *ibid* (Scalia J dissenting).

<sup>36</sup> Jim Rossi, “*Respecting Deference; Conceptualizing Skidmore within the architecture of Chevron*”, 2001, 42 William and Mary Law Review, p1105, at 1114

<sup>37</sup> 529 US 120 (2000)

<sup>38</sup> FDCA 21 U.S.C.8321(g)(1)(C)(2000)

<sup>39</sup> Although the Court decried any investigation into the effect they opined that once the FDA had declared nicotine as “dangerous”, the statutory scheme which empowered them would oblige them to make nicotine illegal with enormous political and economic consequences which seemed to weigh on the Court, “were the

authority, “in a manner that is inconsistent with the administrative structure that Congress enacted into law”<sup>40</sup>. Instead of adhering to a seemingly plausible agency construction of the provision, the Court erected its own version of legislative intent. Relying heavily on the record of the House in subsequent years, the majority noted that Congress had enacted several tobacco-specific statutes, the salient factor being that “Congress has considered and rejected several bills that would have given the agency such authority”<sup>41</sup>. O’Conner J was certainly correct in querying the sinuous approach adopted by the FDA in arguing that a halfway house approach was permissible under the Act<sup>42</sup>

However for all O’Conner J’s solemn declarations to stay faithful to the word of the statute<sup>43</sup>, the majority could not disguise the fact that their search for meaning at Step 1 was much more thorough than *Chevron* seemed to require. Thus they concluded after a long, explicit and exhaustive search through the legislative history that the statute was not ambiguous. In effect they concluded that Congress had positively excluded tobacco from the FDA’s remit in dicta suffused with ‘faithful agent’ rhetoric, “in our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated where it would stop”<sup>44</sup>.

By self-consciously dressing itself in the garb of a Congressional agent the Court complicated the clean lines of *Chevron* deference, by allowing reasonable agency readings of ambiguity to be struck down by distilling lessons from the

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FDA to regulate cigarettes and smokeless tobacco, the Act would require the agency to ban them”.(O’Conner J, *ibid*, at p137)

<sup>40</sup> *Ibid*, at 125

<sup>41</sup> *Ibid*, at p131 (citations omitted)

<sup>42</sup> Somewhat incredibly, the FDA argued that the “danger” from nicotine-addled smokers to public order entailed an approach where nicotine would gradually be circumscribed by limiting advertising, raising prices and greater warnings thus avoiding the repercussions of an outright ban. Justice O’Conner however, argued that such an approach was a wilful misinterpretation of the Act, that “dangerous...was a therapeutic assessment of benefits of the device to consumer against the probable risk of injury”. *Ibid*, at p 139, 141

<sup>43</sup> “It is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed”, *Ibid* at p147.

<sup>44</sup> *Ibid*, at p161 citing *US v Article of Drug, Bacto-Unidisk*, 394 US 784, 800.

broad statutory (and economic?<sup>45</sup>) context. As Sunstein notes, although *Chevron* formally bowed to legislative intent, the presumption of intention from the mere fact of ambiguity meant that, “it matters not” whether Congress actually intended it. Once the agency’s interpretation was reasonable it would pass constitutional muster<sup>46</sup>. Adding an endlessly disputable contextual search for legislative meaning may achieve a Pyhhric conceptual victory by exposing the fiction at the heart of *Chevron* deference, a fiction long recognised even by the Court. Scalia J, writing extra-judicially candidly observed that, “to tell the truth, the quest for the “genuine legislative” intent is probably a wild-goose chase anyway. In the vast majority of cases I suspect Congress neither (1) intended a single result, nor (2) meant to confer discretion upon the agency, but rather (3) didn’t think about the matter at all. If I am correct in that, then any rule adopted in this field represents merely a fictional, presumed intent”<sup>47</sup>. The enlistment of context to find the ‘actual’ legislative intent, it is submitted, has the deleterious effect of reducing the predictability of judicial review and rowing back on the self-sacrificing bent of the interpretative question. It opens the door to judicial policy-making by allowing the Courts to select the salient strands of a multi-faceted legislative history and press them into service as evidence of what Congress “really meant”.

This ill-advised foray to awaken the slumbering, but nonetheless useful *Chevron* fiction is amply demonstrated by the *Brown and Williamson* dissent. Breyer J held that the key statutory phrase was “intended to affect the structure or any function of the body”. Thus the FDA’s interpretation, on the statutory record alone was eminently plausible as, “Both cigarette manufacturers and smokers alike know of, and desire, that chemically induced result. Hence cigarettes are “intended to affect” the body’s “structure” and “function”, in the literal sense of

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<sup>45</sup> “Owing to its unique place in American history and society, tobacco has its own unique political history...Given this history and the breadth of the authority the agency has asserted, we are obliged to defer not to the agency’s expansive construction of the statute, but to Congress’ consistent judgement to deny the FDA this power”, *ibid* at p159-60 (citations omitted)

<sup>46</sup> Sunstein, *ibid* at 1324.

<sup>47</sup> Antonin Scalia, *ibid*, p517.



the word”<sup>48</sup>. Breyer J was consequently entitled to note the hollowness of the majority’s reliance on statutory context when both Congress<sup>49</sup> and the Court<sup>50</sup> had consistently held that the ameliorative mandate of the FDA was to be broadly construed. The minority then cited a plethora of background material; in particular the Surgeon General’s annual reports to show the growing scientific consensus as to the devastation wreaked by tobacco on both smokers and the general public<sup>51</sup>. The force of Breyer J’s dissent is two-fold. Firstly by analysing the FDA’s interpretation of the legislation against the ascetic “reasonableness” standard he demonstrates the conceptual clarity of *Chevron* in operation. The question is not whether what the FDA did is a ‘good’ or ‘bad’ idea, nor rooted in fear of the consequences<sup>52</sup>, but a crisp assessment of permissibility against the statutory text.

Secondly it demonstrates the magnitude of the majority’s departure from that analytical anchor by demonstrating the endless malleability of extrinsic materials. Breyer J’s approach is useful on this point not because his construction of the background materials is a ‘better’ or ‘truer’ picture but rather that such materials can give several plausible versions of what Congress “intended”. As the two competing versions in *Brown and Williamson* show, the result of this investigation will be by no means predictable. The *Brown and Williamson* stress on statutory context, so as to overthrow a facially reasonable agency interpretation, thus substantially rows back on the idea of *Chevron* as the crisp

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<sup>48</sup> Ibid, at p161 (Breyer J dissenting, joined by Ginsburg, Souter and Stevens JJ). To counter the majority’s contention that “intended” in the statute could only be gleaned from the companies literature, Breyer J counselled against such judicial fastidiousness citing advertisements such as, “It takes Nerves to fly the Mail at Night...that’s why I smoke Camels. And I smoke plenty!”, as a tenuous basis for statutory interpretation, at p172.

<sup>49</sup> “The statutes language, then permits the agency to choose remedies consistent with its basic purpose- the overall protection of public health”, (ibid, at 178)

<sup>50</sup> Citing *Bacto-Unidisk*, supra, at 798, where the Court had held that the FDCA, “is to be given a liberal construction consistent with [its] overriding purpose to protect the public health”, ibid at 162 (Breyer J’s emphasis)

<sup>51</sup> Ibid, at p188.

<sup>52</sup> “One might claim that courts when interpreting statutes, should assume in close cases that a decision with enormous social consequences, should be made by the democratically elected Members of Congress rather than by unelected agency administrators. If there is such a background canon of interpretation, however, I do not believe it controls the outcome here”, ibid at 190.

antidote to the infinitely malleable, factor-and-context dependant scheme of judicial review that beleaguered pre-*Chevron* jurisprudence<sup>53</sup>.

In order to ameliorate the perceived deleterious effects of bright-line, all or nothing *Chevron* deference, the Supreme Court has tensed a second strut in the institutional wheel. In *United States v Mead Corporation*<sup>54</sup> the Court was required to consider whether the United States Customs Service decision that Mead's ringbound day-planner should not be included within the tariff classification accorded to "diary", should be entitled to deference. The majority, led by Souter J held that the tariff classification was not owed *Chevron* deference, "there being no indication that Congress intended such a ruling to have the force of law"<sup>55</sup>.

After reviewing the 10-15,000 tariff designations reached every year and finding it inconceivable that Congress had intended legal consequences to have attached to proclamations often reached with a minimum of transparency, Souter J held that nonetheless the agency was due so-called 'Skidmore deference'. Invoking the archaic *Skidmore v Swift Co.*<sup>56</sup>, the majority cited Justice Jackson's dicta with approval, "The weight [accorded to an administrative judgement] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it *power to persuade*, if lacking power to control"<sup>57</sup>. Thus using the formality touchstone Souter J held that while *Chevron* obliged courts to accept reasonable agency resolution of statutory ambiguity, this *Skidmore* deference would allow courts to accord weight to policy-statements, memoranda and the plethora of lesser materials<sup>58</sup>.

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<sup>53</sup> The political affiliations of the judges on split has provoked wry comment. Jennifer Costelloe observes that since the Republicans came to power not a single Congressional hearing has occurred on the dangers of tobacco, an interstitial factor under-pinning the majority's reluctance to submit tobacco to the zeal of FDA regulation, See generally, Costelloe, "*The FDA's Struggle to regulate Tobacco*". (1997), 49 Admin. L. Rev. 671.

<sup>54</sup> 523 US 218 (2001)

<sup>55</sup> Ibid, p221

<sup>56</sup> 323 U.S. 134 (1944)

<sup>57</sup> Ibid at 140, cited in *Mead* at 228 (emphasis added)

<sup>58</sup> Ibid, at 234

This purported grafting of a search for Congressional intent to bequeath “force of law” powers onto the *Chevron* framework elicited a stinging dissent from Scalia J. He held that “*Chevron*, the case that the opinion purportedly explicates makes no mention of the “relatively formal administrative procedures” that the Court today finds the best indication of an affirmative intent by Congress to have ambiguities resolved by the administering agency. Which is not so remarkable, since *Chevron* made no mention of any *need* to find such affirmative intent. It said that in the event of a statutory ambiguity agency authority to clarify was to be *presumed*”<sup>59</sup>. As Scalia J points out, by the Court delving into the formality of procedure in order to find an implicit delegation to agencies to promulgate rules, the already strained justification of giving effect to legislative intent is pushed beyond the point of coherence, “If the relevant question really relates to Congressional intent, the quality of the process associated with establishing the classification rulings should not be outcome determinative...In fact Congress itself makes rules all the time with no process whatsoever”<sup>60</sup>.

While concurring in the thrust of Scalia J’s dissent, Howarth argues that the real difficulty in the majority opinion is found in its refusal to break free from the *Chevron* conception of legislative intent<sup>61</sup>. Howarth instead proffers an explanation that uses the distinction between ‘lawmaking’ and mere ‘interpretation’ as a more comprehensible guide to explaining the *Chevron/Skidmore* puzzle. At base he argues that it is appropriate to defer to the latter but not to an agency’s statutory interpretation<sup>62</sup>. It is eminently sensible to

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<sup>59</sup> Ibid, p252

<sup>60</sup> Ronald J. Krotvsky, “*Why Deference? Implied Delegations, Agency Expertise and the Misplaced Legacy of Skidmore*”, (2002), 54 Admin. L. Rev, p735 at 748.

<sup>61</sup> Thus Souter J added a third strand to the express/implied search for legislative intent to delegate, arguing that the Court could look to statutory context to find the requisite cession of power, “Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency’s generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute”, at p229. There is however no necessary logical correlation between Congress prescribing formal procedures and imputing an intention to that body to cede law making powers to an agency. If they actually intended such, the obvious way to transmit that would be to simply say so, rather than opaquely allow their intent to be divined via the procedures laid down.

<sup>62</sup> Cooley R. Howarth, “*United States v Mead Corp.: More Pieces for the Chevron/Skidmore Deference Puzzle*”, (2001), 54 Admin L Rev., p699 at 700

defer to agency interpretations of ambiguous statutory terms where Congress has granted such power, or where a statutory gap gives rise to an implied power to fill the lacuna<sup>63</sup>. However operating on a lower plane of deference *Skidmore* would repatriate interpretative authority to the Courts, allowing them to reach their own conclusions but mindful that in the interpretative joust between agency and court the former is often best placed to promulgate policy.

However even Howarth's gloss does not take away, it is submitted, from the compelling nature of Scalia's dissent. He argued that to resurrect the anachronism of *Skidmore* as a complementary but lesser companion to *Chevron* would retard the progress towards a coherent deference scheme. He argued that so-called *Skidmore* deference was nothing more than "trifling statement of the obvious: A judge should take into account the well-considered views of expert observers"<sup>64</sup>. His primary objections are two fold. Firstly, the dilution of the certainty provided by *Chevron*. At least formally *Chevron* provided a clear indicia of whether agency or court should be charged with resolving an interpretative question, as Healey notes, "regardless of whether the delegation to the agency as express or implied, intended or unintended; the delegation is a consequence of the statutes ambiguity"<sup>65</sup>. After the *Mead* gloss, the Courts will be charged with determining Congressional intent against a long list of non-decisive factors which may not be ultimately dispositive, "we have sometimes found reasons for *Chevron* deference even when [these factors are not present]"<sup>66</sup>.

For present purposes Scalia's despair is well founded. Before *Mead* any ambiguity was presumed by the Courts to give rise to deference for an agency interpretation. After *Mead* the courts will sift through a mulch of elaborate factors

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<sup>63</sup> Howarth, supra at 711. Howarth is mindful of the difficulty of deciding whether an action is interpretation or lawmaking but argues that the *Chevron* court itself was cognisant of its importance and implicitly accepted that a line twixt the two could be maintained. Although the question will be returned to below it might be observed that this is precisely the same investigation as engaged in by O'Regan J in *Department of Education, Eastern Cape v Ed-U-College (PE)*, 2001 (2) SA 1 (CC). As recognised by Howarth the line is muddy but the investigation is one the courts have competently conducted in the past.

<sup>64</sup> Ibid, at p250.

<sup>65</sup> Micheal P. Healy, "Spurious Interpretation Redux: *Mead* and the Shrinking Domain of Statutory Ambiguity", (2002), 54 Admin. L. Rev, p673 at 675-76.

<sup>66</sup> *Mead*, ibid at 229

including the formality of procedure, applicability to future transactions and expertise to divine whether the legislature ‘actually’ decided that the agency should power to make “force of law” pronouncements. If such an investigation concludes that Congress had no such intention then the residue of less formal agency proclamations will be entitled to deference on the *Skidmore* ‘persuasion’ scale. Justice Scalia witheringly decried the courts *Mead* gloss on *Chevron*, describing it as “the ‘ol ‘totality of the circumstances test’ may be beloved by a court unwilling to be held to rules”, but it is, “feared by litigants who want to know what to expect and provides virtually no guidance to Congress on whom it can expect to interpret its statutory instructions”<sup>67</sup>.

Twinned to what Scalia J perceived as an inevitable loss of certainty on a practical level is *Meads* failure to resolve the conceptual confusion at the heart of the Supreme Court’s deference jurisprudence. Running throughout the decision is the same ‘faithful agent’ rhetoric as found in the post New Deal decisions, albeit on a more elaborate scale. The *Mead* Court held that their construction of judicial review principles was an exercise rooted in what the legislative branch would have done had it contemplated the issue<sup>68</sup> - that ultimately *Chevron* deference should attach where Congress wished it to be attached, a reconstruction achieved by some creative judicial sleuthing.

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<sup>67</sup> *Mead*, *ibid* at 241. While agreeing with Scalia’s suspicion of the circumstantial test added by the *Mead* majority, it is felt that Scalia errs in charging *Mead* with providing no guidance to legislators. Whereas under *Chevron* the inevitability of ambiguity and the ambiguity inherent in ‘ambiguity’ arising from legislation, even amongst the most skilled and prescient legislators, meant that Congress often had no choice over whether agency or court received interpretative power over any given piece of legislation. Under *Mead* however, while a mixed bag of factors was mentioned, the primary concern of the majority was the formality of the rule-making procedure, “it is fair to assume that Congress contemplates administrative action with the force of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force” (*ibid* at 231). It would seem, at first blush, to be open to Congress to all but guarantee judicial deference to agency determinations by prescribing a series of formal notice-and-comment and publication procedures to be fulfilled by the agency prior to the determination (although in *Barnhart v Walton*, 122 S Ct. 1265 (2002) the Supreme Court held that deference was far more textured a question than simply an investigation into the formality of procedure). This ‘formal’ criterion for deference would also substantially guard against the administration haphazardly arriving at a reasonable interpretation of an ambiguity. Formal procedures would, almost as of course, require the application of agency expertise and intellectual capital to the question at hand.

<sup>68</sup> *Mead*, *ibid*, p229

This kneeling at the altar of intent rings hollow when reconciled with the methodology advocated by the Court. As pointed out above, *Chevron* bluntly construed all ambiguity as *necessitating* deference to agency interpretations, subject to the “reasonableness” parameter. *Mead* excessively qualifies that simplicity, with Souter J arguing that implied intent has to be constructed from an analysis of the listed factors such as formality of procedure, applicability to the future etc. Put simply the factors used by the *Mead* court to divine legislative intent are in fact procedures used to ensure that agency expertise is harnessed<sup>69</sup>. Thus it is submitted that there is a fundamental contradiction at the heart of *Mead*. If the ostensible purpose of deference jurisprudence is to harness agency expertise, the Supreme Court uses a fantastic version of legislative intent to ground the opposite conclusion from that in *Chevron*. By construing legislative silence as granting interpretative primacy to courts, rather than agencies as in *Chevron*, the *Mead* gloss will “mean that statutory law will be more often decided by courts than by democratically responsive decision makers”<sup>70</sup>.

This *Mead* gloss, it is submitted highlights the weakness of the legislative intent approach. Beyond producing the ludicrous result in the case of replacing a tariff designation of the United States Customs Service with one of the United States Supreme Court, the Court twists the doctrine to give itself interpretative primacy over statutory ambiguity, subject to a broad determination that that primacy can be repatriated to the agency by reference to equally broad, and even less determinative factors. Thus *Mead* Step 1 calls for an investigation of express delegation by Congress. In the absence of express delegation *Mead* 2 argues that implied delegation, instead of being presumed should be constructed by the court from a broad range of non-determinative factors such as the formality of procedure and the statutory circumstances (whatever that might mean). If the Court finds no such implied intent then *Mead* 3 will invoke *Skidmore* whereby the

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<sup>69</sup> “It can still be apparent from the agency’s generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute...even one which “Congress did not actually have an intent” as to a particular result”, *ibid* at 227.

<sup>70</sup> Healey, *ibid*, at p680.

level of deference will be determined by another cluster of factors designed to gauge the persuasiveness of the agency position, but leaving the Court free to either adopt or reject it. By refusing to drop the conceptual millstone of legislative intent, it is submitted that the Court leads administrators into a thicket of confusion, purporting to ground a complex administrative hierarchy in the (silent) intention of Congress, as Healey acidly notes, “Can we reasonably believe Congress intended varied levels of deference should be accorded to administrative decisions on the basis of indeterminate, inconsistent, and ambiguous factors weighed by the Court”<sup>71</sup>. Not only does the Court’s approach ring false, it militates against four fundamental values of post New Deal jurisprudence- that agencies should construe their own statutes and that, as far as possible the judiciary should not be given scope for their own values to infuse judicial review principles, and that there be an appreciable degree of certainty to aid administrators to determine which of their pronouncements will attract judicial deference<sup>72</sup>.

The final reason why *Mead* provides an unwelcome gloss on *Chevron* is that it will result in the fossilisation of agency resolutions brought before the courts. While relative competence to make a decision does not answer the constitutional conundrum raised by courts preferring agency interpretation in apparent contradiction of the *Marbury* principle<sup>73</sup>, the *Mead* gloss does deprive the *Chevron* command to defer of its main practical advantage. While courts, and their determinations are bound by *stare decisis*, agencies are free to change their

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<sup>71</sup> Healey, *ibid*, at p679.

<sup>72</sup> Cynthia Reid succinctly demonstrates the point by reference to two pre- and post- *Mead* decisions of the Federal Circuit. Prior to the *Mead* gloss in *American Wildlands v Browner*, 260 F3d 1192 (10<sup>th</sup> Cir 2001) the Circuit were willing to defer to an EPA interpretation of an ambiguous term on the basis of *Chevron* presumption to delegate. After *Mead* in an analogous case, *Hall v EPA*, 273 F. 3d 1146 (9<sup>th</sup> Circuit 2001) the EPA had approved a county plan for air emissions on the sole basis that it had not relaxed any of the controls imposed when approval had been granted the previous year. The Ninth Circuit held that as delegation was no explicit, and could not be constructed or inferred from the statutory context the EPA’s plan was not due any deference under *Skidmore* as it was not persuasive. Reid argues that the difference between the two is not explicable on any doctrinal ground, and that Scalia J’s prediction of disparate and fundamentally incomprehensible deference standards after *Mead* has in fact, come to pass. Cynthia Reid, “*United States v Mead Corp.: The Supreme Court’s Failed Attempt to clarify the law of Agency Deference*”, (2001-02), 8 *Envtl. Law* 407, particularly 416-19.

<sup>73</sup> Cf, Scalia, *ibid*, pp513-514

interpretations of statutory language in light of prevailing circumstances. Thus the Supreme Court's determination that a ring-bound day planner is not a diary will forever prevent the Customs Service from saying that they are, even if (although it does seem unlikely) some compelling new understanding dawns on the Service which encourages them to revisit the question again. Although the example is anodyne, the point is not.

Surely administrative agencies should be allowed to change their approach in light of what their expertise and policy priorities indicate as the most efficient way to proceed. Thus there does not, to use the much more serious issue in question in *Brown and Williamson*, seem to be any coherent reason why the FDA's change in interpretation of nicotine as a "drug" should be any less valuable than the contrary position which preceded it. The expertise unquestionably brought to bear, particularly in light of a growing consensus as to the narcotic properties of tobacco, would intuitively suggest this as an ideal candidate for judicial deference. In *Chevron* for example if the court had decided that 'stationary source' meant "single-stack" rather than factory-wide "bubble" in 1986 it would still mean single stack today irrespective of whether this was an anachronistic means of regulating the environment. Or contrarily if the court had decided that "stationary source" did entail the "bubble" approach but it subsequently failed in practice, the EPA would have no choice but to stick with it. Thus the unfortunate consequence of *Mead* is that because it decides more, it subjects far more agency decisions to the ossification imposed by *stare decisis*, "Skidmore deference gives the agency's current position some vague and uncertain amount of respect, but it does not, like *Chevron*, leave the matter within the control of the Executive Branch for the future. Once the court has spoken, it becomes *unlawful* for the agency to take a contradictory position; the statute now says what the court has prescribed"<sup>74</sup>.

Thus "so-called" *Skidmore* deference eviscerates the quickening spirit of *Chevron*. Granting deference to agency resolution of ambiguity once they were

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<sup>74</sup> *Mead*, *ibid*, Scalia J dissenting (emphasis in original, citations omitted)



not arbitrary or capricious is deliberately set as low standard to satisfy<sup>75</sup>. Once the agency has acted within the broad scope of its legislative mandate and has reached a considered opinion, *Chevron* ring-fenced an interpretative space that was protected from definitive judicial pronouncements. While fossilising determinations over, for example what “diary” encompasses, would provide certainty as to statutory meaning, it would effectively silence any role for agency expertise. The institutional legitimacy of courts is based on their adherence to precedent, formality and transparency of process and an oft-proclaimed distance above partisan disputes. By contrast, Murphy observes, deference to agencies is built on precisely opposite considerations<sup>76</sup>. We positively expect them to change their position, by reference to expert analysis and shifting ideological policy priorities. If that paradigm breaks down as an unintended side-effect of *stare decisis* then the deference project has indeed drifted into the shoals.

To demonstrate his point Scalia referred to *Neal v United States*<sup>77</sup> where the Court refused to defer to an agency interpretation contrary to the court’s own of five years previously. The decision was silent on the issue of expertise or appropriate deference, satisfying itself that once the agency interpretation could not be reconciled with the court’s, “we need not decide what, if any, deference is owed the Commission in order to reject its alleged contrary interpretation. Once we have determined a statute’s meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency’s later interpretation of the statute against that settled law”<sup>78</sup>. While *Skidmore* affords agency determinations a deferential weight proportionate to its persuasiveness, which in many instances will substantially sculpt the courts eventual resolution of the issue, the primary problem with *Skidmore* on this analysis is the form in which that resolution is cast. By granting final interpretative primacy to the courts rather than the agency,

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<sup>75</sup> Thus in *Heckler v Campbell*, 461 U.S. 458, at 466 (1983) where Justice Powell held that, “Where, as here, the statute expressly entrusts the Secretary with the responsibility for implementing a provision by regulation, our review is limited to determining whether the regulations promulgated exceeded the Secretary’s statutory authority and whether they are arbitrary and capricious”,

<sup>76</sup> Richard Murphy, *ibid*, p42.

<sup>77</sup> 516 U.S. 284 (1996)

<sup>78</sup> *Supra* at 294-95.

*Skidmore* enmeshes the whole machinery of legal stasis. Both lower courts and the agency will be bound by that resolution until such time as the agency returns to court and attempts to alter the courts interpretative outlook. While the courts are obliged to take account of agency views this *Skidmore* approach is thin gruel indeed for yoking expertise to the constitutional wagon after the heady vista promised by *Chevron*.

Having outlined the two inter-locking levels of deference jurisprudence formulated by the United States Supreme Court, the second section will analyse the possibility of employing this jurisprudence to overcome the procedural lacuna, identified in the abstract, between constitutional provision and the judicial review dicta of the Constitutional Court. The analyses will start with the incommensurability of legislative intent, to which *Chevron* is formally beholden, and the post 1994 accommodation in South Africa. It will be briefly demonstrated that, although the Constitutional Court has yet to fully engage with the resolution of statutory ambiguity, such an approach has never enjoyed much support in South Africa. From that position it will be argued that two distinct streams of deference jurisprudence can be identified with the invocation of constitutional rights being the critical factor in demarcating two radically different approaches to judicial restraint. Finally the bare bones of a deference model for South Africa will be suggested.

## **Part 2**

The treatment of legislative intent in the United States requires a something of a suspension of ones critical faculties. Clearly when the House has actually spoken on a particular subject there exists a constitutional imperative to be cognisant of that position. However the *Mead* Court found itself between the Scylla of Congressional immutability and the Charybidis of bowing formally to that self-same legislature. Its solution was to move further and further away from explicit declarations of intent such that what Congress ‘meant’ was inferred from the ‘statutory circumstances’. It is submitted that the *Mead* courts unwillingness

to depart from the legislative intent model of judicial review has stymied the American jurisprudence from focusing on other more readily ascertainable factors. Indeed it is the fundamental thrust of this section that once intent is stripped away, the residue of factors left behind can be moulded into a comprehensible model of judicial review. The unsuitability of the legislative intent model of review can be conveniently divided into four parts.

Firstly the primary analytical attraction of legislative intent from a judicial point of view is that when the courts use legislative intent as the dispositive factor they are enforcing a legislative rather than judicial boundary to agency interpretation. It is the legislature, (albeit in the guise, *ex officio* of the courts) which actually decides the requisite boundaries of agency interpretations. Thus the political bargains implicit in the separation of powers are left intact, the court a faithful, if autonomous, agent of the legislature. On this neat conception courts merely enforce restrictions pre-ordained by the legislature, thus avoiding any tincture of employing a political assessment of the agency's actions. The fundamental constitutional justification underpinning this analysis is a well-rehearsed assessment of institutional competence. Unelected and politically unaccountable courts, with little expertise, are ill placed to judge the policy boundaries of what is or is not reasonable. Such questions are best left to the democratically legitimate legislature for promulgation and expert agencies for implementation, with the courts acting as a silent sentry over the limits. The guiding principle is that decisions of policy are kept in the appropriate, democratically legitimate sphere.

However while faithful agent theory is theoretically easy to defend it does not bear up under the intense practical scrutiny required of courts in the administrative state. On the contrary courts are obliged to make policy assessments all the time, even if that investigation is veiled. The *Wednesbury* principle of "absurdity" is only coherent when the courts investigate the effects of that policy, and weigh up the competing interpretative claims. The Courts in Canada have candidly admitted that the question of reasonableness is not to be a

purely legal investigation; that it only makes sense when related to factual reality. In *Caimaw v Paccar of Canada Ltd* it was held that, “I cannot agree that it is always necessary for the reviewing court to ignore its own view of the merits of the decision under review. Any adjudication upon the reasonableness of a decision must involve an evaluation of the merits. Reasonableness is not a quality that exists in isolation. When a court says that a decision under review is “reasonable” or “patently unreasonable” it is making a statement about the logical relationship between the grounds of the decision and the premises thought by the court to be true. Without the reference point of an opinion (if not a conclusion) on the merits, such a relative statement cannot be made”<sup>79</sup>. The House of Lords, while not quite so candid, have enunciated similar principles<sup>80</sup>.

On a more fundamental level even the *Chevron* relinquishment scotches the simplicity of a simple dichotomy of law and policy. By retaining judicial primacy over both questions asked in Step 1 and 2, the court sets the “reasonableness” level at a judicially mandated requirement of justification that has nothing to do with Congressional intent. This selection of process by the judges, and the fact they disagree so vociferously over its appropriate scope<sup>81</sup>, involves precisely the same brand of investigation as that candidly admitted by the Canadian court. If discretion is construed as the residue of powers left when all legal hurdles have been vaulted, then the setting of that bar is necessarily a creative undertaking. Thus legislative intent, qua *Chevron*, is forced into an anomalous position whereby standards set by a judicial understanding of the appropriate place for deference is shoe-horned into a model of Congressional intent.

*Skidmore* deference is even less coherent on a legislative intent analysis, as the court is invested with interpretative authority, free to enunciate a policy position that has no putative relationship with Congress. In *Christansen v Harris*

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<sup>79</sup> [1989] 2 S.C.R. 983, (La Forest J)

<sup>80</sup> See generally, *R(P) v Secretary of State for the Home Department*, [2004] EWHC 91.

<sup>81</sup> See Souter J’s thinly veiled criticism of Scalia J’s *judicial philosophy*, “Justice Scalia’s first priority over the years has been to limit and simplify”, *Mead*, at p263.

*County*, for example, the Court conducted an investigation into the effects of the agency resolution, found them unconvincing and proffered instead what they regarded as a more efficient mechanism. Thus the provision of the FLSA in dispute was construed against the courts understanding of the appropriate scheme for public employees, “ At bottom we think that a *better reading*...is that it imposes a restriction upon an employer’s efforts to prohibit the use of compensatory time”<sup>82</sup>. In South Africa, although the point will be returned to below, the courts regularly interfere in order to avoid absurdity. In *New Clicks*<sup>83</sup> Chaskalson CJ felt no compunction in reading into a regulation words that he felt would otherwise produce an anachronism. In doing so he made no attempt to paint it as filling in an unfortunate legislative over-sight but rather in order to satisfy a judicially mandated ‘transparency’ benchmark<sup>84</sup>. Indeed in this instance absurdity was an evaluation of the policy impact of the pre- and post- alteration regulation, with the court opining that the latter will be more efficacious. The point is, it submitted, is that the legislative intent model of review cannot be offered as a necessary *sine qua non* of a prohibition on judicial policy evaluations, as even Antonin Scalia observed, “Policy evaluation is, in other words, part of the traditional judicial tool-kit”<sup>85</sup>.

The second objection to legislative intent is captured in that the phrase itself is something of an oxymoron. It is conceptually and practically difficult to talk of a disparate body whose factions often define themselves by opposition to the others having a specific ‘intent’ as to a piece of legislation. When the courts peruse a piece of legislation for the limits imposed on agency discretion, any intent that the legislature might have had is frequently opaque, disguised, absent or contradictory. Even more likely is that the legislature never considered who was to have interpretative primacy over particular questions, or if they did, were

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<sup>82</sup> 529 U.S. 576, (2000), at 585 (emphasis added)

<sup>83</sup> *Minister for Health and Another v New Clicks South Africa (Pty) Ltd and Others*, CCT 59/04, Decided 30<sup>th</sup> September 2005. (Hereafter *New Clicks*)

<sup>84</sup> At para 303-04. Chaskalson CJ was blunt about his right to depart from the clear meaning of the words if that would have ludicrous factual implications, at para 232.

<sup>85</sup> Antonin Scalia, *Duke L J*, *ibid*, p515.

unable to translate that into the draft<sup>86</sup>. The search for intent, once it departs from actual expressions, frequently involves no more than the marshalling of a paper trail supportive of the judges preferred statutory construction. The leeway inherent in constructing intent, and the ambiguous nature of language<sup>87</sup>, means that it offers little in the way of certainty and even less in terms of interpretative coherency.

In *MCI Telecommunications Corp v AT and T*<sup>88</sup>, for example, Scalia J held that the word “modify” was not sufficiently ambiguous to encompass the radical changes to the tariff regime proposed by the FCC, “Petitioners contend that this establishes sufficient ambiguity to entitle the Commission to deference in its acceptance the broader meaning, which in turn requires approval of its permissive detariffing policy”<sup>89</sup>. Scalia J then looked at the legislative history, prior decisions of the Court and canvassed the veracity of various dictionaries in order to conclude that it was highly unlikely that a major shift in telecommunications policy could be achieved under the auspices of the word “modify”<sup>90</sup>. On the other hand a three-judge dissent adhered to the Spartan vision of the judicial function laid down in *Chevron*, “The Commission’s reading cannot in my view be termed unreasonable. It is informed (as ours is not) by a practical understanding of the role (or lack thereof) that filed tariffs play in the modern regulatory climate”<sup>91</sup>.

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<sup>86</sup> Molot points out that occasionally Congress does achieve “true statutory clarity” but points out that that is very much the exception rather than the rule, *ibid*, p1245.

<sup>87</sup> Cf the eloquent decision of O’Conner J in *Young v Community Nutrition Institute*, 476 U.S. 974 (1986) where the word “shall” in a statute could equally plausibly have two different meanings. O’Conner J held that “As enemies of the dangling participle well know, the English language does not always force a writer to specify which of the two possible objects is the one to which a modifying phrase relates”, at p980. Justice Stevens held that the meaning of the provision was obvious to all but the most semantic, and chided that statutory interpretation, “requires more than merely inventing an ambiguity and involving administrative deference”, (at p988).

<sup>88</sup> 512 U.S. 218 (1994)

<sup>89</sup> *Ibid*, at p226

<sup>90</sup> *Ibid*, at p230.

<sup>91</sup> *Ibid*, at p2444-45, (Justice Stevens joined by Blackmun and Souter JJ, O’ Conner J took no part in the courts determinations)

The indeterminacy of the victor, in any particular circumstance, between text and context in the search for ‘intent’ can be even more dramatically demonstrated. In *Japan Whaling Association v American Cetacean Society*<sup>92</sup>, Japan had flouted an international prohibition on whaling. The original American scheme to punish violations had flopped due to the granting of discretion to the President to impose quota cuts on offending nations. The President had however little will to do so. To counter this the Packwood Amendment had altered the relevant legislation to read that, upon certification of a violation, the Secretary of State, “must reduce, by at least 50% the offending nations fishery allocation within the U.S. fishery conservation zone”<sup>93</sup>. The Secretary however did not cede to this imperative and argued that he would, in effect, save more whales by negotiating a total scrapping of the Japanese fleet over three years in exchange for no quota reduction being immediately imposed. The majority considered the efficacy of the compromise scheme and chose to read the statute as not, in fact, entailing any obligation at all, “If Congress has directly spoken to the precise issue in question, if the precise intent of Congress is clear, that is the end of the matter [citing *Chevron*]...But as the courts below and respondents concede, the statutory language itself contains no direction to the Secretary automatically and regardless of circumstances to certify a nation”. Justice White then, with grave solemnity declared that the courts were powerless to interfere “unless the legislative history of the enactment shows with sufficient clarity that the agency construction is contrary to the will of Congress”<sup>94</sup>.

A powerful four judge dissent lambasted the majority’s pretence of fidelity to the legislature, “This court now renders illusory the mandatory language of the statutory scheme, and finds permissible exactly the result that Congress sought to prevent in the Packwood Amendment: executive compromise of a national policy of whale conservation”<sup>95</sup>. To support the rival interpretation they cited letters from the Secretary himself where he had accepted that should any whaling be

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<sup>92</sup> 478 U.S. 221 (1982)

<sup>93</sup> 16 U.S.C. § 1821(e)(2)(A)(i)

<sup>94</sup> Ibid at p233

<sup>95</sup> Ibid at p242 (Justice Marshall joined by Brennan, Blackmun and Rehnquist JJ)

conducted this would automatically constitute a breach of the relevant treaty and thus trigger the punitive mechanism<sup>96</sup>. The Court noted, “Significantly the Secretary argues here that the agreement he negotiated with Japan will- in the future- protect the whaling ban more effectively than imposing sanctions now. But the regulation of future conduct is irrelevant to the certification scheme... The Secretary would rewrite the law. Congress removed from the Executive Branch any power over penalties when it passed the Packwood Amendment”<sup>97</sup>. While the Secretary’s motives might have been flawless, the minority bridled at the contention that this was consistent with legislative intent, citing every single speech in Congress as contrary to the majority conclusion, as a furious Parthian shot<sup>98</sup>.

The attraction of ‘intent’ is that it purports to offer the judiciary a firm criterion from which the limits of agency discretion can be extrapolated from legislative materials. Thus the separation of powers concern over judges establishing boundaries by reference to a judicial appraisal of the public interest is avoided. In reality however it is submitted that ‘intent’ is a judicial construction from amongst uncertain materials, a selection from amongst a variety of contextual materials modifying, qualifying and abrogating the legislative text<sup>99</sup>. In

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<sup>96</sup> Letter from Sec Baldrige to Sen Packwood, July 24, 1984, cited at p245

<sup>97</sup> Ibid, at p245.

<sup>98</sup> Ibid, at p247-48 memorably concluding, “I am troubled that this Court is empowering an officer of the Executive Branch, sworn to uphold and defend the laws of the United States, to ignore Congress' pointed response to a question long pondered: "whether Leviathan can long endure so wide a chase, and so remorseless a havoc; whether he must not at last be exterminated from the waters, and the last whale, like the last man, smoke his last pipe, and then himself evaporate in the final puff." H. Melville, “*Moby Dick*” 436 (Signet ed. 1961)”

<sup>99</sup> See *infra* the decision in *Addison v Holly Hill Fruit Products Inc*, 322 U.S. 607 (1944) where an Administrator had established conditions for an agricultural tax exemption well within the mandate granted by Congress. However Frankfurter J held that he had been insufficiently sensitive as to the reason discretion was granted, “Representative Biermann, while explaining his amendment in somewhat Delphic terms, did indicate plainly enough that he had in mind not differences between establishments within the same territory but between rural communities and urban centres” (at p615). Mr Justice Roberts (joined by Black and Murphy JJ) devoted numerous pages to the myriad crops grown in the United States and opined that it was eminently sensible for Congress to delegate the promulgation of definite criteria to the Administrator. To continue it as the majority did would, “nullify the delegation, making of the Administrator merely a surveyor in the wrong place”. Opining that the real Congressional intent was to maintain rural infrastructure the dissent thought that the majority opinion frustrated that intent by foreclosing the chosen option of the Administrator (at p635). Even from the limited sample highlighted here it should be apparent, it is submitted, that the search for intent is at best replete with analytical



other words it involves precisely the same interpretative questions that are supposedly anathema to this construction of judicial review, albeit papered over by formal genuflecting at the legislative altar.

Even if ‘legislative intent’ was not riddled with a significant margin for analytical manoeuvre, it is submitted this option is foreclosed by the structure of the post-1994 constitutional accommodation. For the Westminster system any abandonment of *ultra vires* in order to ground judicial review in a legal matrix extrinsic to the legislature would be a constitutionally impermissible challenge to the supremacy of Parliament. In South Africa however the Constitution is at the apex of the legal hierarchy. Thus, although powers are distributed between the three branches, and to a certain extent between the provinces and the centre, none of the bodies can over-ride the Constitution itself. The Court in the *Certification* judgement held that the new Constitution marked a decisive shift away from a legislative towards a constitutional vision of institutional demarcation, “the principles of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another”<sup>100</sup>. This description is bulwarked by Article 2 that submits all ‘conduct’ to constitutional control, “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed on it must be fulfilled”<sup>101</sup>. The South African constitution impacts significantly on the exercise of judicial review. Firstly there can be no area of legal terrain where deference to the legislature is structurally *obligated* by the document. Rather the Constitution inverts the Westminster presumption and affords interpretative primacy to the Constitutional Court, whose determinations are binding on all others.

Thus deference to the legislature is not structurally required but rather a product of voluntary self-restraint, as the Court phrased it, “Parliament is no

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difficulties and at worst merely a constitutionally acceptable means of casting judicial determinations on preferable policy into an institutionally appropriate semantics

<sup>100</sup> *First Certification Judgement*, 1996 (4) SA 744, at para 109.

<sup>101</sup> Article 2, Constitution of the Republic of South Africa 1996.

longer supreme. Its legislation, and the legislation of all organs of state, is now subject to constitutional control". The Constitutional Court has, since its inception, denied the power of an agency interpretation to supplant its own construction of a statute. The Court is charged with final authority to say what the law is, so for example in *New Clicks*, Chaskaslon CJ attached no weight to a functionary interpretation, "It is the Courts duty and not that of the former or present Director-General, to interpret the statute"<sup>102</sup>. The result of the ultimate interpretative monopoly of the Constitutional Court over constitutional matters<sup>103</sup> has reduced the concept of 'legislative intent' to little more than a minor interpretative aid<sup>104</sup>. In *New Clicks* Chaskaslon CJ considered the weight to be given to an explanatory memorandum which accompanied the primary legislation in issue<sup>105</sup> and cited his own prior dicta to the effect that "where the background material is clear, is not in dispute, and is relevant to showing why particular provisions were or were not included in the Constitution, it can be taken into account by a court in interpreting the Constitution"<sup>106</sup>. However the Chief Justice held that such material would only go towards "ascertaining the mischief that the statute is aimed at where that would be relevant to its interpretation"<sup>107</sup>. Again legislative intent, where used, is referenced by the Court as merely an

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<sup>102</sup> Ibid, at para 205. Cf *President of the Republic of South Africa v Hugo*, 1997 (6) BCLR 708, at para 17. (CC) where Goldstone J held that the supremacy clause had trumped the residue of prerogative powers, "The President, as an executive organ of state, by reason of the supremacy clause, is subject to the provisions of the interim Constitution".

<sup>103</sup> Article 167 (3)(a)

<sup>104</sup> Thus for example in *Ed-U-College*, *ibid*, O'Regan J referred to estimates contained in the parliamentary 'White Book' as fettering the apparently wide discretion conferred on the administrator. However O'Regan deployed this analysis not as a means of discovering Parliamentary intent but rather to assess the freedom of manoeuvre conferred, in real terms, to decide whether the subsidy formula was "policy" or "administration" (*ibid*, at p21). The same judge in *Premier, Mpumalanga v Executive Committee of the Association of State Aided Schools, Eastern Transvaal* held that the Premier could rely on his budget speech as an explanatory tool (at para 18). The judge referred to the same speech to inform her eventual holding (at para 28) but emphasised that it was no more than an element of the factual backdrop against which the court made its decision. Its status as displaying 'legislative intent' or conferring deference to it on that basis are entirely absent from the decision. The strongest dicta which could be construed as support for 'legislative intent' is to be found in *Paolo v Jeeva NO and Others*, 2002 (2) SA 391 at para 23 (D), where Farlam JA held that, "The proposed exclusion for planning purposes of value flowing from a property is not one which can be based on the words used by the Legislature". However this seems to have been merely an observation made in passing and exerted no appreciable influence over the eventual decision.

<sup>105</sup> Ibid, para 199

<sup>106</sup> Citing *S v Makwanyane*, 1995 (3) SA 391 (CC), at para 19

<sup>107</sup> Ibid, at para 201.

illuminatory material. No special significance is to be attached to it by virtue of its legislative origin. The interpretative question then is altered from a jurisdictional one, to a joined jurisdictional and normative enquiry as succinctly captured in *Fedsure Life Assurance* where the Court held that the ascetic doctrine of *ultra vires* had been superseded, “This is not the case under our constitutional order where all legislation has to comply with the Constitution and the standards set by the bill of rights”<sup>108</sup>.

The final indicator of the unsuitability of *the Chevron* model of a deference jurisprudence built around legislative intent was indicated in *Minister for Justice v Van Heerden*<sup>109</sup>, where the Constitutional Court indicated fundamental differences in constitutional design between the United States and South Africa. Pointing to the ostensible similarity in phraseology<sup>110</sup> the majority opinion nonetheless held that the American jurisprudence of subjecting facially discriminatory provisions to strict scrutiny could not be imported into South Africa. Rather they held that the history, context and social design of the 1996 Constitution compelled the opposite conclusion; that the achievement of equality was a pervasive, positive obligation on the government, “Thus our understanding of equality includes...remedial or restitutionary equality”<sup>111</sup>. Mokgoro J in a separate concurring opinion, put it thus, “The use of the phrase “achievement of equality” therefore recognises that the creation of democracy and the equal treatment before the law are not enough to foster substantive equality. Unless the disparity which exists is consciously and systematically obliterated, it can easily be overlooked and will as a result continue to define our society for a long time to come”<sup>112</sup>. The result of these radically different approaches from a judicial review stance is that while the United

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<sup>108</sup> *Fedsure Life Assurance v Greater Johannesburg Transitional Council*, 1999 (1) SA 374 (CC), Chaskalson P, Goldstone and O’Regan JJ at para 25, See also *Minister for Finance v Jacobus Van Heerden*, where Moseneke J held that, “Thus, the achievement of equality is not only a guaranteed and justiciable right in the Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance”, 2004 (3) All SA 63 (CC) Para 22 (citation omitted).

<sup>109</sup> 2004 (6) SA 121 (CC)

<sup>110</sup> For example “equal protection of the law” occurs in both s9 of the South African Constitution and the 14<sup>th</sup> Amendment, Moseneke J at para 29.

<sup>111</sup> Moseneke J citing, Sachs J in *National Coalition for Gay and Lesbian Equality v Minister for Justice and Another*, 1999 (1) SA 6 (CC), at para 61 (internal quotation marks omitted)

<sup>112</sup> *Ibid*, at para 74

States Constitution is designed to mediate the institutional relationship between the branches, the South African Constitution acts as something of a “grand normative narrative”, which underpins all legal pronouncements<sup>113</sup>.

This then opens up the twin paradigms underpinning South African deference jurisprudence. As will be seen below the Constitutional Court has constructed a judicial review jurisprudence that draws a line directly from constitutional provision to a high degree of judicial intervention. The model of legislative intent is both structurally and normatively excluded from the post-1994 dispensation. Where constitutional rights are threatened the Court is obliged to intervene, irrespective of the origin of the deprivation. As will be argued below, it is the consonance with constitutional principle which governs review proceedings in South Africa, rather than sensitivity to legislative prerogatives or the judicial policy circumspection that underpins the area in the United States. Conversely where constitutional principles are not at stake then the Constitutional Court will display a high degree of deference. This brand of review uses the clunking concept of “administrative action” as its lodestar, a determination which, it will be argued, obscures rather than clarifies the project of enunciating a doctrinal basis for review.

### Part 3

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<sup>113</sup> The difference in function can be captured in the uses which constitutional history are put in the respective jurisdictions. Thus in *Marsh v Chambers*, 463 U.S. 783, 791. (1983) Chief Justice Burger held that a Nebraska regulation requiring all sessions of the state parliament to be opened with a prayer did not breach the non-establishment clause, on the grounds largely that the Founding Fathers had done precisely the same before opening sessions, “Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns...It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable”<sup>113</sup>. The American approach is to use the understanding’s of the Founding Fathers as a guide to determining how the institutional arrangement was intended to work (note in this regard the frequent reliance on the Federalist Papers of James Madison and in particular No. 48 with its warning against the concentration of power in one body as the very essence of tyranny). On the other hand in South Africa recent history is used as the primary contextual factor for giving meaning to the constitutional guarantees. Thus in *Van Heerden* the conceptual fork in the road is Moseneke J’s reference to centuries of disadvantage for black South Africans as justifying a species of affirmative action. Without such a background, it is submitted that, the courts finding of a substantive need for restitution would intuitively jar with a provision mandating absolute equality for all.

On the traditional description of the Parliamentary state the judge is presented with the unenviable choice of using the crude tool of absurdity to resolve the unfortunate question of whether a contested decision is entirely outside the realm of possible resolutions. This approach is exhausted by the jurisdictional question and is thus of little assistance in providing a constitutionally explicable way of harnessing agency expertise *within certain limits*. Indeed the jurisdictional approach instinctively jars with the Constitutional Court's conception of the Constitution as providing a linked normative matrix that extends beyond the remit of any particular article<sup>114</sup>. While the Westminster system logically requires such fictions in order to justify meaningful judicial review of an otherwise unimpeachable Parliament, in a constitutional system such a formal approach leads to a species of judicial review that depends almost entirely on the idea of jurisdiction<sup>115</sup>. Using manifest absurdity as the trigger for judicial review, however, brings us no closer to a doctrinal justification. Once the policy background, over-arching constitutional values or the political purpose under-pinning a statutory enactment are invoked as justificatory or explanatory canons, the jurisdictional approach is scuppered. Factors out-with a simple exercise of reconciling administrative action and statutory authorisation<sup>116</sup> cannot be accommodated by this conception.

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<sup>114</sup> Yacoob J in *Grootboom*, supra, at para 23.

<sup>115</sup> See the decision of Lord Browne-Wilkinson in *R(ex parte Page) v University of Hull*, (1993) 1 All E.R. 97, where His Lordship held that, "In all cases, save possibly one, this intervention by way of prohibition or certiorari is based on the proposition that such powers have been conferred on the decision maker on the underlying assumption that the powers are to be exercised within the jurisdiction conferred, in accordance with fair procedures, and in a *Wednesbury* sense, reasonably", at p111 (citation omitted)

<sup>116</sup> This has been implicitly recognised by the House of Lords in the post Human Rights Act 1998 era. In *R (P) v Secretary of State for the Home Office and Another*, (2001) 1 WLR 2002, Lord Philips MR a Home Office policy of separating prison mothers from their babies after 18 months without reference to any extrinsic factors was potentially reviewable on a basis other than that of *Wednesbury* unreasonableness, "Before the introduction of a rights based culture into English public law these applications for judicial review would have been quite unarguable" (at 2020). Lord Philips MR went on to argue that the Human Rights Act obliged the courts to look far more searchingly at administrative schemes than they would previously have done. The Master of the Rolls acknowledged that the Prison Service was the expert body and thus entitled to deference, but was cognisant that it was for the Court to be the ultimate protector of, in this instance, family life. In a decision that was conspicuously non-deferential, Lord Philips concluded that the possibility of inconvenience and expense incurred by the Prison Service, "...would not be such as to outweigh the clear harm to the child resulting from separation, combine to satisfy us that this is a case in which the Prison Service should be required to think again" (at 2036).

If the pillars of legislative intent and *Wednesbury*-era descriptions of the law are insufficient, it remains incumbent upon the South African Constitutional Court to promulgate a model that *is* cognisant with the new dispensation. This section will use the approach of Jacques De Ville as an analytical pivot around which to make a modest contribution. Echoing the poverty of the two models sketched above, De Ville argues for an abandonment of formal criteria and a move toward a context and justice driven scheme that takes seriously the idea of the Constitution as a trans-institutional normative command. It will be argued that while De Ville offers several valuable esoteric insights into the mechanics of Constitutional Court decision-making, the project of supplanting formality with principle as the mainstay of review jurisprudence will purchase individual justice at the cost of a Byzantine system for the administration. Deference, on De Ville's approach, will be earned not in terms of expertise or procedure but through a perceived congruence with a judicial vision of the new South Africa. This section will argue that De Ville's fervour leads too readily to abandon formality and procedure but that his point as to the pervasiveness of constitutional principle must be taken seriously. The concluding section will argue that instead of arrogating the judiciary jurisdiction over questions of policy under the cover of principle, the American doctrine of hard-look offers a conception where allegations of interference with constitutional rights leads to a process burden on the agency while leaving their resource allocation prerogatives largely untouched.

The South African Constitution in its provision of an administrative action clause. S33 reads, *inter alia*, "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair". The Constitutional Court has however split this provision into two distinct enquiries. Firstly the question is posed whether the action is administrative or not, followed by an analysis of its consonance with the three factors in the constitutional provision. However much of the analytical capability of the Court has been exhausted on the vexed, but ultimately unhelpful question of whether an impugned action is administrative, leaving uncertain the appropriate place of deference once that threshold question has been answered.

In *Ed-U-College*<sup>117</sup>, O'Regan J was called upon to consider whether the setting and subsequent altering of a subsidy formula was entitled to deference. The case would appear ideally positioned for an exercise of restraint. The finance available was the result of legislation passed by the provincial legislature, with the exact subsidy formula committed to the discretion of the MEC<sup>118</sup>. O'Regan J held that the nub of the issue was whether the action qualified as legislative or administrative, citing with approval a passage from *Fedsure* where the Johannesburg Council was deemed, "a legislative body whose members are elected. The legislative decisions taken by them are influenced by political considerations for which they are politically accountable to the electorate"<sup>119</sup>. Whereas *Fedsure* had decided that *any* emanation of such a democratically elected body was legislative, O'Regan J reached a contrary conclusion with reference to the promulgation of the subsidy formula. She noted the formula was neither debated, mandated nor constrained by the provincial legislature<sup>120</sup> but then deployed this observation as fodder for a remarkably simple institutional picture of the constitutional state. Observing that as the determination of the precise subsidy formula was not legislative it *must* be administrative action under s33 of the Constitution. The key question then, was whether the agency action was 'original' policy formulation or mere 'implementation', "For example, the executive may determine a policy on road or rail transportation, or on tertiary education. The formulation of such a policy involves a political decision and will generally not constitute administrative action. However, policy, may also be formulated in a narrower sense where a member of the executive is implementing legislation...[this] may often constitute administrative action"<sup>121</sup>.

In other words O'Regan J opined that if the power were not legislative *ergo* it *must* be administrative action. This conception, it is submitted, exposes two aspects of an uncomfortable conceptual conundrum at the heart of an emerging deference

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<sup>117</sup> *Permanent Secretary for Education, Eastern Cape v Ed-U-College (PE) Inc*, 2001 (2) SA 1 (CC).

<sup>118</sup> S48(2) of the Schools Act, 84 of 1996, holds that, "The Member of the Executive Council, may, out of funds appropriated by the provincial legislature for that purpose, grant a subsidy to an independent school"

<sup>119</sup> *Fedsure*, *ibid*, at para 41, cited by O'Regan J at para 11.

<sup>120</sup> *Ibid* at para 15.

<sup>121</sup> *Ibid*, at para 18

jurisprudence. Firstly by neglecting to engage in a quixotic attempt to reconstruct legislative intent, the Constitutional Court has broadly committed itself to an expertise approach. However, as adverted to by the Supreme Court, even after the *Mead* gloss, where the legislature expressly commands an agency to strike a balance or determine a policy there are powerful constitutional reasons to respect that delegation of policy determination. If deference is due to the Schools Act itself on the grounds of manifesting a political choice, then there would seem no obvious reason why the same respect not be shown to s48(2). In *Premier, Mpumalanga and Another v Executive Committee, Association of State Aided Schools, Eastern Transvaal* it was held that a, “Court should generally be reluctant to assume the responsibility of exercising a discretion conferred expressly upon an elected member of the executive branch of government”<sup>122</sup>. Although O’Regan J is correct that this passage is dictum and not technically binding as precedent, she offers no explanation to justify departing from its analytical force. Indeed while the Constitutional Court is clear that it *could* subject all decisions to constitutional adjudication, such an imprimatur does not offer any valid reason why they *should* do so in a particular instance. Where, as here, the legislature has spoken and there is no constitutional question or defect of process, it is incumbent upon the Court to explain their decision to supplant an agency action on other than *ex officio* grounds.<sup>123</sup>

There is one other area of concern in *Ed-U-College*. O’Regan J references institutional position as her guiding factor, not institutional expertise arguing that the inherent “democratic” legitimacy of the legislature forecloses any interference. No such reservations attach to the executive however. By recognising that implementation is ‘policy’ but at the same time classifying it as mere ‘implementation’, O’Regan J is, it is submitted, insufficiently cognisant of the original considerations and ramifications affecting a decision to adopt an, “across the board subsidy per learner...or a means test for the parents of learners in which of which learners from wealthy families would not have been afforded subsidies”<sup>124</sup>. In other words executive policy making under legislative auspices will *always* be classified as ‘implementation’, the statutory origins of

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<sup>122</sup> 1999 (2) SA 91 (CC) at para 51.

<sup>123</sup> Although in *Ed-U-College*, O’Regan J found that the respondents had, in fact, successfully resisted the educational institutes claims for a remittal.

<sup>124</sup> *Ibid*, at para 15.



the power perversely rendering impossible any finding that this is original ‘policy formulation’. At the risk of triteness while a *Chevron* court decided what a statute could mean, it vacated the question of what it did mean to the administration<sup>125</sup>, on the grounds that a policy determination should be left to a politically accountable administration. One of the seminal doctrinal advances of the case was its debunking of the accountability dichotomy between legislature and executive.

Thus while O’Regan J limits her restraint analysis to the legislature, there seems to be no reason why the same respect should not be shown to the executive when promulgating the regulatory instruments which actually govern peoples lives and are as much a product of political processes as primary legislative instruments. *Chevron* ceded power to agencies precisely because they are accountable, as recognised in the South African context by Ziyad Motala. He argued that, particularly in the separation of powers model chosen at the Constitutional Assembly where there is a significant overlap in personnel between the two, it is otiose to talk of executive insulation from popular accountability, “the members of the Cabinet originate from the legislature, and the entire executive branch is dependant on the support of a majority in the legislature”<sup>126</sup>. Thus, although somewhat idealised, the bedrock of the constitutional design requires that the executive remain responsive to public needs or risk being voted out of power or to put it another way, are subject to precisely the same forces, which justifies judicial restraint over legislative action. It would seem that O’Regan J’s approach would automatically classify the executive as implementers, rather than formulators of policy with a consequentially reduced claim for judicial deference.

Although not addressing the issue of deference directly, in *New National Party*<sup>127</sup> Yacoob J, refused to engage, with the strong allegations of injustice made against the statute demanding that voters present a new form of ID. Instead Yacoob J decided the case by reference to institutional position alone, betrays the poverty of placing an institutional bias to the “administrative action” problem. Raising the spectre of “millions

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<sup>125</sup> Cf, Molot, *ibid*, at p1242.

<sup>126</sup> Motala, “*Towards an Appropriate Understanding of the Separation of Powers, and Accountability of the Executive and Public Service in the new South African Order*”, 1995, 112 S. African L. J. 503, at 512

<sup>127</sup> 1999, (3) SA 191 (CC)

of South Africans arriving at registration points or voting stations armed with all manner of evidence that they are entitled to vote”<sup>128</sup>, Yacoob J held that some means of regulation of the voting process was inevitable and that the evidential threshold that the applicants had to satisfy was to prove that “a legislative measure designed to enable people to vote in fact results in a denial of that right?”<sup>129</sup>. Not only did he not engage with the practical reality that this would lead to a disenfranchisement amongst the African poor<sup>130</sup>, the learned judge seemed to accept the legislature’s solution to an pressing social problem, *simply because it was the legislature*. Again Yacoob J reiterated the archaic notion of a deference dichotomy between legislature and executive, “Decisions as to the reasonableness of statutory provisions are ordinarily matters within the exclusive competence of Parliament. This is fundamental to the doctrine of separation of powers and the role of the courts in a democratic society”<sup>131</sup>. The rationality principle enunciated by could be equally implicated in the ratification of iniquitous, quixotic, and beneficial statutory pronouncements, as Bickel observed in an American context “it may not signify a great deal to conclude that such an accommodation is rational. The real question may be whether it is good...it has not always been possible to be satisfied that what is rational is constitutional”<sup>132</sup>.

However unsatisfactory the Constitutional Court’s approach to restraint in *Ed-U-College* and *New National Party* it did establish two bright-line principles. Firstly if the action were legislative, the democratic accountability of that body would lead to a strong presumption of deference. If on the other-hand the Court decided that what appeared to be legislative was actually ‘administrative’, then the appropriate level of deference would have to be construed as part of the s33 analysis. In *New Clicks*, Chaskalson CJ substantially reiterated this approach. Although the breadth of the case encompasses

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<sup>128</sup> Ibid, at para 16.

<sup>129</sup> Ibid, at para 21.

<sup>130</sup> Somewhat unrealistically Yacoob J held that “any person who seriously intended to vote could reasonably be expected to make the necessary enquiries”, at para 40. By shifting the burden onto putative complainants, it would seem on this conception that the legislature could concoct entirely fantastic schemes with virtually no administrative capacity to execute them yet be insulated from primary judicial review if there exists even the possibility for the applicant to receive the administrative action petitioned, no matter how theoretical that possibility.

<sup>131</sup> Ibid at para 24.

<sup>132</sup> A. Bickel, “*The Least Dangerous Branch: The Supreme Court at the Bar of Politics*” (1962) at p39. Cited by Lenta, *ibid*, at p552.

many issues the one that most clearly engages with deference is the Constitutional Courts handling of “appropriate”. Section 22(g) required that a Pricing Committee, inter alia, determine an appropriate exit price to which all medicines would be subject. This price would then be converted into a binding regulation upon promulgation by the Minister. Using the *Ed-U-College* dictum of deciding which side of the administrative/legislative ‘line’ a particular power fell, Chaskaslon CJ opined that the totality of the circumstances indicated that this was an example of the former. This conclusion was, however certainly not compelled by the circumstances, and the materials marshalled by the Chief Justice only supported his case in the loosest sense, “The Constitution calls for open and transparent government and requires public participation in the making of laws by Parliament and deliberative legislative assemblies. To hold that the making of delegated legislation is not part of the right to just administrative action would be contrary to the Constitution’s commitment to open and transparent government”<sup>133</sup>.

While the Court’s adherence to the normative command of the Constitution is laudable, such an opaque approach to determining the question implicitly posed by s33 offers the legislature little guidance as to when its enactments will be deemed ‘truly’ legislative or merely a gloss on an ‘administrative’ determination. It would seem that even where, as here, the casting of a determination in legislative form will not be enough to come under the rubric of legislative, with its consequential deferential review. At most it can be speculated that the Courts will be reluctant to classify any act as legislative if it has its genesis in executive determinations, “If, then, administrative action in section 33 of the Constitution *must* be construed as including legislative administrative action, how should PAJA be construed?”<sup>134</sup>.

It is submitted that the Court has not always handled its ‘line’ jurisprudence with conspicuous success. Above all, particularly in the three cases mentioned above, they

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<sup>133</sup> Ibid, at para 113

<sup>134</sup> Ibid, at para 119. (emphasis added) It is not clear what Chaskaslon CJ was referring to when he stated s33 must be construed to include legislative administrative action. If it is a reference to the Medicine Act then the paragraph is unremarkable. If however the Chief Justice is stating that all legislative administrative acts are subject to s33 and the Promotion of Administrative Justice Act 2000 then that compel a broad range of regulations which have their origin in technical reports, advice or official commissions within the less deferential standard, irrespective of their final legislative format.

seem insufficiently cognisant of the original policy input of the executive even when charged with implementation. It is submitted that the twin nomenclatures should be abandoned in favour of an approach that looks at the original policy discretion for a particular decision, rather than outdated deference to the legislature while pigeon-holing the executive as mere automatons for implementation.

#### **Part 4**

Although the Constitutional Court self-consciously promulgated a broad model of deference jurisprudence in *Bato Star*<sup>135</sup>, it is interesting to trace the construction placed on the legislation at issue in *Bato Star*, the Marine and Living Resources Act<sup>136</sup>, by the lower courts. An analysis of the High and SCA decision's, when grafted to the approach eventually adopted by O'Regan J, succinctly demonstrates the perils of an *ad-hoc* approach, shorn of the conceptual anchors which typify the iconic American cases. In *Food-Corp*<sup>137</sup>, the fishing company was a start-up fishing business that complained that their quota allocation of pilchards and anchovies had been unfairly altered by the adoption of a new mathematical model. They produced evidence that some applicants had had their quota increased by 84,000% and others by 430%, while theirs, without apparent justification, had remained static. In the Cape High Court, the approach of Van Zyl J uncannily echoed that of *Chevron*. As happened with the EPA in the American case, he noted that the pelagic fish quota had changed from a "multiple" model to a "unitary" one, after seventeen years of the former. Noting the complex mathematical formulae advanced to justify the change, Van Zyl J held that the altered approach was broadly consistent with the legislation, "Within the boundaries of optimal utilisation of the pelagic resource, bearing in mind the need for its conservation and precautionary approaches to its management and development, a general policy objective has been set to maximise the catches of pelagic species"<sup>138</sup>.

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<sup>135</sup> *Bato Star v Minister for Environmental Affairs*, 2004 (4) 490 (CC)

<sup>136</sup> 18 of 1998.

<sup>137</sup> *Foodcorp (Pty) Ltd v The Deputy Director General, Department of Environmental Affairs*, 2004 (5) SA 91 (C)

<sup>138</sup> At para 12.

Bearing this over-riding objective in mind, Van Zyl J opined that this was essentially an appeal disguised as a review, the selfish priorities of the applicants directed to securing bigger quotas for themselves rather than rectifying a systemic weakness for all. He held that the Chief Director's decision was a polycentric one, "And in deciding whether this decision is reviewable it should be remembered that even if the respondents had succeeded in proposing what to my mind would be a better solution than that adopted by him...it would not be open for us to adopt it"<sup>139</sup>. In other-words the High Court, unlike O'Regan in *Ed-U-College*, drew a direct line from policy formulation to executive deference, arguing that the thrust of PAJA was substantially abrogated by the context, "These [accusing the Director of breaching s6(2)(e)(vi), (f)(ii) and(h) of the PAJA] are serious allegations to make against any decision-maker burdened with the responsibility of implementing the policy-laden and policy centric objectives and principles of the Act"<sup>140</sup>. Van Zyl J thus satisfied himself as to the coherence of the new formula to the legislation in the broadest terms, found it a reasonable interpretation of an ambiguous statute and deferred to the agency. Shorn of the formal legislative intent investigation, this substantially replicates the concern of the United States Supreme Court to allow expert agencies to decide what a statute means subject to the laconic judicial standard of reasonableness.

Harms JA in the Supreme Court of Appeal was scathing of the mathematical consequences of this deferential approach and argued that the High Court had erred in its construction of the statute<sup>141</sup>. Turning his face against the approach of Van Zyl J, Harms JA held that the true purpose of the statute was ecological sustainability with a variety of supporting considerations such as transformation<sup>142</sup>. Against this statutory canvas he held that the Director's decision was void on the grounds of gross unreasonableness, citing the example of the company that received the windfall quota grinding up valuable pilchards because it had neither the infrastructure nor the expertise to deal with the fish. Harms JA specifically repudiated the impossibility of review on technical matters arguing that "One does not need to understand the complex processes, mathematical or otherwise to realise

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<sup>139</sup> Ibid, para 51.

<sup>140</sup> Ibid, at para 59

<sup>141</sup> Unreported, 87/04, 19<sup>th</sup> November 2004.

<sup>142</sup> Ibid, at para 4.

that at least some of the results produced by the simple application of the formula were irrational and inexplicable and consequently unreasonable”<sup>143</sup>. In contrast to Van Zyl J who interpreted the appropriate role of the judicial function through the prism of legality, Harms JA held that this was precisely the form of incompetence that the separation of powers subjected to judicial control. Deference, on the SCA’s conception, was an empty vessel if executive did not earn it<sup>144</sup>.

In the decision which gave rise to the *Bato Star* decision Schutz JA offered yet another construction of the same legislation. In *Minister for Environmental Affairs v Phambili Fisheries (Pty) Ltd*<sup>145</sup>, the Supreme Court of Appeal again divined an appeal rather than a review application in terms similar to those of Van Zyl J, “The tone of the attack is that the respondents know far better than the Chief Director does how he should do his job, but little appreciation is manifested of the complexity of his task or of the competing interests involved”<sup>146</sup>. Whereas in *Foodcorp* the review ultimately succeeded on grounds of absurdity the nub of the issue in *Phambili* was that the Director was insufficiently cognisant of the Act’s solicitude for transformation. The fishing companies argued that allocating 5% to an equity pool was unreasonable judged against a statute that twice reiterated the necessity for diversification. Furthermore they argued that the Director’s choice could not be defended on grounds of stability or the need for a renewal of the fleet, as both of these concerns were either merely re-iterated from past legislation or not mentioned at all. They argued that the new text of the Act had specifically layered the diversification priority over the ‘old’ environmental concerns.

Schutz JA rebutted this interpretation, relying as it did on a conception of legislative intent with little purchase in South Africa, by arguing that, “No doubt s2(j) was intended to remedy the “mischief” of past discrimination, but that does not mean that it overmasters the other subsections merely because they lack novelty”. The logical conclusion of the applicants approach would be to read transformation as a positive imperative to the detriment of all the other contextual factors, as Schutz JA opined, “It

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<sup>143</sup> Ibid, at para18

<sup>144</sup> Ibid, at para12.

<sup>145</sup> 2003 2 All SA 616 (SCA)

<sup>146</sup> Ibid, at para 13.

would be absurd to suggest, for instance, that transformation should be hastened by increasing the TAC [Total Allowable Catch] drastically, as this would subvert the injunction to conserve marine living resources”<sup>147</sup>. Rather Schutz JA read the legislative scheme as entailing a two-stage task to determine first whether the decision fell within the broad range of what was reasonable, in the circumstances where all the factors were simply flagged by the legislation and the balance to be struck between them “left to the discretion of the Chief Director”. However in order to guarantee an actual, rather than accidental congruence with the legislative scheme Schutz JA cited Hoexter to the effect that, “They [agencies] must explain *why* action was taken or not taken; otherwise they are better described as findings or other information”<sup>148</sup>. Thus the agency must satisfy the court that all the relevant factors were adopted, consultations made and findings made available- that the agency had applied its expertise to the decision and that all the mechanics indicative of a reasoned decision were present.

The conception sketched by Schutz JA is appealing. He explicitly stated that the polycentric first strand was not an onerous standard. This leg of the test closely meshed with both the Chief Director’s discretion and his expertise in determining the appropriate balance. On the other hand, the process emphasis of the second leg was designed to ensure the quality and transparency of the decision taken, and echoes the emerging consensus that deference cannot be a product of the separation of powers, but must be earned on an case-by-case basis, “My conclusion is that reasons were given that they were reasonably clear and that they were adequate”<sup>149</sup>. From Schutz JA’s judgement it was clear that the interpretative focus of the investigation would be on the second stage, with the first being satisfied by a demure rationality standard.

In the Constitutional Court, O’Regan J, it is submitted, substantially echoed that approach. Noting with approval, the rigour of the grading process by which quota applicants were rated, it was apparent that the applicant was a reasonably poor candidate<sup>150</sup>, and *prima facie* their receipt of a small quota seemed both consistent and

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<sup>147</sup> Ibid, at para28

<sup>148</sup> Ibid at para 40, citing Cora Hoexter, “*The New Constitutional and Administrative Law*”, Vol 2, p244.

<sup>149</sup> Ibid, at para 44.

<sup>150</sup> Ibid, at para 13, *Bato Star* was out-scored by 77 other companies.

reasonable<sup>151</sup>. Thus despite O'Regan's determination to read the attempted *Wednesbury* formulation in s6(2)(H) of the PAJA as consistent with s33(1) of the Constitution<sup>152</sup>, she stressed that this was not a warrant to look at the correctness of the decision. The Courts job, she opined in a formulation similar to *Chevron* Step 2, was merely to determine whether an agency's decision fell within the "bounds of reasonableness"<sup>153</sup>. This reasonableness was to be construed from a variety of factors, with a strongly deferential flavour, "the nature of the decision, the identity and expertise of the decision-maker...the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected"<sup>154</sup>.

While Schutz JA had all but washed his hands of the substantive aspects of the decision, O'Regan was uncomfortable with this abdication, arguing that deference should be construed as "respect" for the Director's expertise and his conclusions on the facts. However, implicit in her judgement is the idea that deference cannot, unlike on the *Chevron* conception, exist in a contextual vacuum. Thus it was within the Court's province to further structure the reasonableness requirement with the basic, and it might be added bluntly polycentric, assessment of whether the decision might reasonably be said to achieve the declared goal<sup>155</sup>. In the event they held that the Chief Director had struck a reasonable balance and supplied justificatory reasons and the quota allocation consequently passed administrative muster.

Jacque De Ville criticises the Constitutional Court for what he characterises as an anaemic standard of review, pointing out that the factors mentioned by O'Regan J as guiding the reasonableness criterion are largely absent from the decision. De Ville posits the Courts approach thus, "The impact of the decision on the lives and well-being of those affected, a factor identified by O'Regan J as relevant to determining the

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<sup>151</sup> The result of the impugned allocations was that a cut of the quota's accorded to the "pioneer" companies were redistributed to smaller concerns, while no new entrants to the industry were permitted. It was the declared policy of the Chief Director to encourage internal restructuring in preference to allowing new entrants to a capital-intensive and already over-subscribed industry. Ibid, at para 11.

<sup>152</sup> "Even if it may be thought that the language of section 6(2)(h), if taken literally might set a standard such that a decision would rarely if ever be found unreasonable that is not the proper constitutional meaning to be attached to the section" Ibid, at para 44.

<sup>153</sup> Ibid, at para 45.

<sup>154</sup> Ibid, at para 45.

<sup>155</sup> Ibid, at para 48.



reasonableness of the decision, does not feature in the analysis. There is also no overt attempt by the Court to assess whether the weight attached to stability was appropriate in the circumstances vis-à-vis the obligations to restructure the industry. In effect, the Court simply asked, in accordance with the minimum rationality standard, whether there was a rational basis for the decision in relation to its purposes”<sup>156</sup>. Underpinning De Ville’s criticism are two serious analytical disparities between the Court’s rhetoric and its substantive approach, between what it does and what it says it does.

The Court was cognisant that the post-1994 dispensation had impacted on the fishing industry most heavily in terms of altering the ownership profile of the fleet. Thus, while the legislation bore in mind the environmental concerns of its predecessors its most radical change was that, “This commitment to transformation of the industry was affirmed and reinforced in the Act...the preamble to the Act declares as one of its goals: “to provide for the exercise of control over marine living resources in a fair and equitable manner to the benefit of *all the citizens* of South Africa”<sup>157</sup>. However, De Ville argues that the Constitutional Court was so determined to clear a line between law and policy that they failed to realise that the obligation to transform is simultaneously a legal imperative and a political undertaking. By reading “transformation” as a policy-command to the executive the stringency of the Court’s approach, De Ville argues, effectively resulted in a judicial abdication<sup>158</sup>. Thus, he argues the Court was not only entitled, but positively obliged to match the Director’s scheme against its own conception of “transformation”. The Director’s decision to use the old quota’s as the basis for the 2002-05 allocation thereby largely preserving the status quo, along with the decision to opt for internal re-structuring rather than new entrants, would on this conception come within the legitimate scope of the court’s investigation. De Ville clearly regards the Court’s circumspection on these issues as an unnecessary sacrifice to O’Regan’s equally unnecessary poly-centricity concern<sup>159</sup>. Rather the actuality of how transformation is to be effected is legitimately within the province of the Constitutional Court, and any

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<sup>156</sup>JR De Ville, “*Deference as Respect and Deference as Sacrifice: A Reading of Bato Star Fishing v Minister for Environmental Affairs*”, 2004 SAJHR 577, at p585.

<sup>157</sup> Ibid, para 79 (Ncgobo J’s emphasis)

<sup>158</sup> Ibid, at p591

<sup>159</sup> Ibid, at p591.

agency conception, which does not adhere to that actuality, should be struck down, irrespective of policy content.

Secondly he criticises the Court on a fundamental axiom of its approach to judicial review. The Court in *Bato Star*, in both the decisions of O'Regan and Ncgobo JJ, reiterated the unique South African Constitutional concept of a transformative document<sup>160</sup>. Influenced by this hierarchical imperative to strive for equality, the ordinary meaning of words were to be interpreted and tempered by reference to this over-arching common goal, or as De Ville puts it, "context is now believed to determine meaning"<sup>161</sup>. Distilling this contextual lesson De Ville argues that the legislative wording of "have regard to" and have "particular regard to"<sup>162</sup>, positively prohibit the Court from resorting to the formal approach to the separation of powers which heavily influenced O'Regan J's decision, as she observed, "Parliament has identified the relevant policy considerations and has left the implementation to the Executive"<sup>163</sup>. The net result of De Ville's twin observations would be a constitutional order where context would render the Constitutional Court as an instrument rather than an observer of the transformative labour. He argues that it rings false for the Court to solemnly invoke a past history of discrimination and, in virtually the same judicial breath, invoke a policy circumspection which results in a perpetuation of the *status quo*. In fact he goes further and accuses the Court of, in effect hiding behind the law/policy distinction, when the effect of their decision is to bulwark the inherited inequality, "In spite of pretending not to choose sides in the policy issues involved, the Court actively chooses in favour of the current distribution of economic power"<sup>164</sup>.

Although impossible to do justice to his erudition, De Ville's criticism can be simply stated. Legislative phraseology and institutional parsing cannot be the dispositive factors under the new dispensation, he argues, as this allows the Court to shuffle off its transformative obligations by pretending that reasonableness, *qua* s33, can be constructed

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<sup>160</sup> See particularly, Ncgobo J at para 74.

<sup>161</sup> Ibid at p596

<sup>162</sup> Contained, in relation to transformation, in s2(j) and 18(5) of the Act.

<sup>163</sup> Ibid, at para 52.

<sup>164</sup> De Ville, *ibid*, at p597 (footnote omitted)

from an artificial medley of formal factors. The constitutionally truer model, De Ville argues, is to (a) recognise the reality that adopting a formal vision of judicial review in the name of reining in judicial control over policy amounts itself to a policy choice for stasis, (b) bluntly recognise the inherent instability of meaning in both legislative pronouncements and the notion of reasonableness itself<sup>165</sup>; (c) take seriously the constitutional command on the court to heft a transformative burden, and ferment a realisation that formal conceptions may frustrate fundamental constitutional objectives on utterly artificial institutional grounds, (d) to adopt the contextual approach which O'Regan J mentioned but did not pursue<sup>166</sup>, and thus use a 'real-world' approach to these complex questions considering inter alia "critical pragmatism...historical uses and abuses of socio-economic power...There is as a consequence also frequently attention given to patterns of exclusion, to power dynamics and to the broader socio-political context"<sup>167</sup>. De Ville's fundamental discomfort with the Court's decision is that the formal criteria are lamentably incapable of service in a constitutional system whose normative command obliges all interpretative communities, including the courts, to actively participate in relation to the policy issues that require adjudication<sup>168</sup>.

It is submitted that De Ville's enthusiasm for the "contextual" project leads him into error. It is submitted that if the Constitutional Court begins to construe its review jurisprudence in the purely contextual fashion, which he advocates, then the emerging deference jurisprudence will be still-born, with justice in the individual case purchased at the cost of a chaotic institutional order. The first objection is that De Ville would squander the limited resources of the Constitutional Court in pursuit of individual justice, spurning the responsibilities for promulgating an understandable model of review that is of use to litigants, lower courts and the executive alike. At root it is felt that De Ville's enthusiasm for the ameliorative potential of contextualism, treats the Constitutional Court as a species of judicial fire brigade, extinguishing the fires of bureaucratic tardiness by

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<sup>165</sup> Ibid, at p598

<sup>166</sup> Thus one of her factors from which reasonableness was to be construed was "...the impact of the decision on the lives and well-being of those effected", *Bato Star*, ibid, at para45.

<sup>167</sup> Ibid, p588-89 (footnotes omitted).

<sup>168</sup> Ibid, at p590.

blunt analysis of what will most efficiently achieve the constitutional goal in ‘real-world’ terms.

The United States Supreme Court has always been aware that its institutional role is not to do justice in an individual case but rather to “secure harmony of decision and the appropriate settlement of questions of general importance”<sup>169</sup>. The infrequency which that Court, can visit any particular question means that the primary responsibility of a superior court is to act as a guarantor of the coherence of the legal system. Strauss describes the system as a “managerial” one, where agency interaction with the courts will be, at best sporadic, noting agencies fielding millions of enquires about particular programmes of which a few might mature into legal disputes. Of those, most will be winnowed out by successful resolution, lower courts and tribunals, with a very slim possibility of the case proceeding to the Federal Circuit and the even more remote possibility of it being amongst the three percent of applications the Supreme Court agrees to hear every year<sup>170</sup>. Although the percentage of cases heard by the Constitutional Court is, it is presumed, higher it still represents a tiny snapshot in which available resources and luck play as great a part in securing access to Constitution Hill as the necessity to rectify overweening injustice.

This institutional handicap under which the Court labours, places a priority on the clarification of doctrine rather than the rectification of individual dispute. Thus the Constitutional Court and the individual litigant will rarely, if ever, come face to face. The ‘players’ in a dispute will be the litigant and the agency, with the latter fettered by its obligation to obey the law and any judicial precedent’s that have percolated down the legal hierarchy. Despite the attractive verbiage of De Ville’s approach, at base his conception offers little more than an imperative to do substantive justice masquerading as a usable and useful model of judicial review. Utterly malleable factors such as socio-economic factors, historical usage and their ilk speak exclusively to substance- did a

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<sup>169</sup> Hellman, “*Caseload, Conflicts and Decisional Capacity; Does the Supreme Court need some Help?*”, 1983, 67 *Judicature*, p28 at 31.

<sup>170</sup> Peter L. Strauss, “*One Hundred and Fifty Cases per Year: Some implications for the Supreme Courts limited Resources for Judicial Review of Agency Action*”, 1987, 87 *Colum. Law Rev.*, 1093 at p1099. Strauss gives the example of 760 administrative judges facing a caseload of 363,533 hearings as an example.

proposed measure by the Director General trench on the applicants *individual* rights?...or does that assessment change when history is factored in?...or does that assessment change when ownership diversification is assessed?...or does that change by judging the quota against the court's vision of transformation as opposed to that of the Agency?. The point is that the intellectual and analytical capital built up by each individual decision falls away with the delivery of judgement. By plunging each individual court into a factual melee of uncertain scope on each new application, the "contextual" approach divined by De Ville offers no guidance to the lower courts or the administration as to when certain decisions will be opportunities for, "appropriate constitutional modesty".

The deleterious consequences of De Ville's conception can be easily speculated upon. He urges Courts to approach judicial review applications from the starting point of context, constructing the fairness of a decision by analysing the practical effects on the individual, the community, the nation, the history of a particular dispute and the resonance with the inheritance from apartheid, if any. Yet the agency in the case is called on to consider an entirely different set of concerns. Stability, conservation, environmental practise, transformation of the industry and utility of the end product, life-cycle of anchovies and pilchards, balancing the means of netting them and international fishery obligations, all speak to substantial practical concerns. The point here is that a particular year's quota will be determined by reference to these criteria in the Act. Upon appeal to a court, or ultimately the Constitutional Court they will be subject to an equally comprehensive, but substantially different set of judicial criteria with a very different emphasis. In other-words instead of the American conception of a broad-based reasonableness, drawn from what the statute could mean, a South African agency will be faced with promulgating a set of regulations which has to fall within the over-lap of two substantive circles, one sketched by the legislature and the other by the courts. De Ville's spurning of process then forces the agency into the thankless position of drawing a substantive allocation of pelagic fish that somehow satisfies the indeterminate message of a reformatory Constitution. How this approach aids in the harnessing of agency expertise in the conservation of deep-sea fishing is, necessarily, not entirely clear

The point can be put stronger yet. The contextual approach counselled by De Ville is notable for ignoring any question of process. One peruses his argument in vain for any equation of formality of process with judicial restraint in the manner of the *Mead* gloss. Logically of course he could not. If individual justice is the lodestar of De Ville's approach to judicial review then formality and diligence of process demonstrably cannot be an effective guarantor. In essence De Vile argues that the law/fact or process/substance distinction is illusory if the basis of that distinction is a policy circumspection, "But the notion of institutional competence is controversial and not in the least neutral or objective...As Singer rightly argues (and as *Bato Star* illustrates), there is no reason to believe that *means* is any less controversial than the ends that are pursued"<sup>171</sup>. In *Bato Star* itself the process used by the Director was rigorous and fair, on its own terms, and still led to what De Ville construes as a staid distribution in contravention of the perceived transformative thrust of the legislation. Abandoning the interpretative millstone of the distinction, De Ville divines an obligation on the Constitutional Court to engage directly with the justice of the Director's decision.

Thus the second fundamental objection is that De Ville elides the *right* to intervene with the *reason* for intervention, entailing the unsatisfactory position of Constitutional Court intervention on an *ex officio* basis, but without any other discernible justification. De Ville relies implicitly on the power of the Court to impose a binding solution on the executive. By advocating a turn to the substantive effect of the Director's decision De Ville posits a straight intellectual duel between Court and Agency in which the former will always be able to implement its resolution, on an *ex officio* basis. There is, on the "contextual" approach, no room for consideration of agency expertise or the institutional legitimacy of un-elected courts imposing a policy decision for which they are responsible to no constituency. Blinded by the vision of individual justice, De Ville offers no *reason* why the decision of the Constitutional Court should replace that of the Director. Certainly not on grounds of institutional legitimacy, nor legislative intent which clearly envisaged the question to be resolved by the Executive, nor deficiency of procedure, nor superiority of appreciation for the facts of the maritime industry or the

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<sup>171</sup> De Ville, *ibid* at 594, citing JW Singer, "Legal Realism Now", (1988) 76 California LR 465 at p536. (emphasis in original).

complex mathematics governing quotas<sup>172</sup>. It is submitted that De Ville's conception amounts to an obligation on the Constitutional Court to intervene simply because they can, an intervention to be repeated on an *ad-hoc* basis when the Constitutional Court's vision of a equitable society is implicated.

The third fundamental reason to object to De Ville's model is contained in the contested meaning of his conceptual anchor, the Constitution itself. Constitutional principle suffers from precisely the same indeterminacy of language as bedevils the attempt to fasten legislation with one particular meaning. Lenta cites John Rawls to the effect that the content of rights will be endlessly disputable, the extent to which the degree to which the state has been variously obliged to lift people out of poverty on the back of socio-economic rights as a paradigm example of contestable meaning.<sup>173</sup>, concluding that "On the merits of these issues, we are fated for repeat, intense, obdurate and reasonable disagreement". In *New National Party* we noted the phlegmatic stringency of Yacoob J's majority decision. O'Regan J on the otherhand, penned a more expansive decision, with a strong hierarchy of rights flavour. Although her

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<sup>172</sup> Indeed De Ville seems to enmesh all questions of interpretation in his *ex officio* approach. Thus because the word "transformation" is contained in a statute De Ville reads as an obligation on the Court to construct a model of what it regards as the proper role of transformation in society, against which the prior agency vision (in this case internal rather than external restructuring). However the converse of the Constitution's binding of all organs of state to its redistributive goals is equally to give the other branches interpretative rights over constitutional provisions, albeit without the power to insulate them from judicial review. The Namibian Supreme Court were called on, in a roughly analogous fashion, to consider the interpretation of a ministerial functionary of the environmental provisions of the Namibian Constitution in *Waterberg Big Game Hunting Lodge v Minister for Environment and Tourism*, 2005 NASC 2 (23<sup>rd</sup> November 2005) (SCN). They held that they were insufficiently expert to assess the consonance between s95(1) of the Constitution and the impugned importation orders for non-native buck and held that on this specific part of the Constitution they were in an inferior institutional position to judge what the Constitution commanded. However they did not preclude any investigation as to the propriety of the procedure followed, "It is accepted that the biodiversity of Namibian wildlife must be protected but whether or not, accepting that principle, the sudden adoption of a policy behind the scenes and arbitrarily choosing the applicant as the first victim, is justified in the case before us, is a completely different issue. On this issue the Court is surely in as good a position as the Minister to decide, if not in a better position" (O'Linn J at para 9). The point highlighted by the Namibian Court is that there is no reason whatever to suppose that a generalist superior court will ever reach a better conclusion as to the meaning of a particular constitutional provision. Indeed the complexity and inter-connectedness of factors typical of, but not unique to the environmental spheres is a powerful indication that a courts decision will have little appreciation for the technical expertise which in both *Waterberg* and *Bato Star*, govern the whole question of sustainability. Once again De Ville impermissibly elides a right to intervene with a reason to intervene.

<sup>173</sup> John Rawls, "*Political Meaning*", (1993) 54, cited in Patrick Lenta, "*Democracy, Rights Disagreements and Judicial Review*", 20 SAJHR 2004, 1 at p6.

opinion did not require her to go beyond the issue of voting and ID's, O'Regan J was emphatic that any infringement with the rights constitutive of liberal democracy would incur a level of heightened scrutiny. Thus while the impugned measure might have appeared eminently sensible on the papers, O'Regan J referred somewhat opaquely to a cluster of rights which contain, "broad equitable defining characteristics, such as the right to free and fair elections, the right to a fair trial, the right not to be discriminated against"<sup>174</sup>, to which heightened scrutiny would attach.

For present purposes the insufficiency of De Ville's conception of normative reference is, it is submitted, demonstrated by a comparison of O'Regan J's decision in *New National Party* with Chaskalson P's decision in *Ferreria v Levin*<sup>175</sup>. Section s305 of the Criminal Procedure Act limited the right of appeal from magistrates courts, uniquely requiring such persons to secure a certificate from a Supreme Court judge that grounds offering reasonable prospects for appeal existed. The question before the Court was whether such a limitation, exercised in the name of expediency, was a justifiable limitation on the right to both a fair trial<sup>176</sup> and equality<sup>177</sup>. While the court had little trouble in finding the offending sections unconstitutional the case is of interest in Chaskalson P's disagreement from Ackermann J's assertion that "freedom" should be defined as broadly as possible<sup>178</sup>.

Chaskalson P held that, as all regulation limited freedom in varying degrees, such an approach would involve the Court in subjecting all laws to the 'necessary' test prescribed by s11(1) of the interim Constitution. He argued that, "Implicit in the idea of the social welfare state is the acceptance of regulation and redistribution in the public interest. If in the context of our Constitution freedom is to be given the wide meaning that Ackermann J suggest[s] it should have, the

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<sup>174</sup> Ibid, para 123

<sup>175</sup> 1996 (1) SA 984 (CC) (decided under the interim Constitution).

<sup>176</sup> Section 25(3)h of the Interim Constitution 1993

<sup>177</sup> Section 8(1) of the Interim Constitution 1993.

<sup>178</sup> Ackermann J, *ibid*, at para 54.



result might be to impede such policies. Whether or not there should be regulation and redistribution is essentially a political question which falls within the domain of the legislature and not the court”<sup>179</sup>. The learned President then quoted with approval the dissent of Holmes J in *Lochner v New York*<sup>180</sup>, to the effect that the meaning of liberty would be “perverted when it is held to prevent the natural outcome of the dominant opinion”<sup>181</sup>, and urged the Constitutional Court to heed the “fundamental principle” that it was incumbent for the Court to bow to the dominant opinion of the legislature in cases which implicated competing visions of the public good. The salient point to extract is that even though discussing one of O’Regan J’s putative threshold rights, a guaranteed fair trial<sup>182</sup>, Chaskaslon P drew a radically different normative conclusion. Briefly put, while O’Regan J opined that the threshold rights required a higher degree of judicial scrutiny in order to guarantee the liberty proffered by the Constitution, Chaskaslon P drew precisely the opposite conclusion on the same materials<sup>183</sup>. He opined that the Constitution was a redistributive one, a process of transformation charged to the executive. For the Court to expand its reading of “liberty” beyond that strictly prescribed by the Constitution would undue the careful demarcation of competence between executive and judiciary and imperil the fundamental goal of broad societal change.

This branch of the objection to De Ville can be shortly stated. Firstly enthrone the Constitution’s normative message at the hierarchy of the Court’s analytical armoury offers little in terms of a workable model of judicial review. Not only can the Court not decide what the Constitution requires, it is not obvious how that message is to work in terms of agency supervision. Indeterminate principle, without more, is a demonstrably insufficient basis for judicial review.

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<sup>179</sup> *ibid*, at para 181.

<sup>180</sup> 198 US 45 (1905)

<sup>181</sup> *Supra*, at 76

<sup>182</sup> *New National Party*, *ibid* at p123

<sup>183</sup> Indeed Chaskaslon P explicitly rejected both the idea of variable levels of scrutiny and the approach of using fundamental constitutional principle as a meaningful restraint, arguing that, “We cannot regulate this power by mechanisms of different levels of scrutiny as the courts of the United States do, nor can we control it through the application of the principle that freedom is subject to laws that are consistent with the principles of “fundamental justice” as the Canadian courts do”, *ibid* at 181.

Neither executive competence, expertise nor accountability receives a mention in either of the above cases yet it is these attributes that are the engine in “translating rights from constitutional text into reality”<sup>184</sup>. The inevitable result of a failure to promulgate a set of definite criteria has led the Constitutional Court to use the “reasonableness” criterion as the base of its review jurisprudence a “superficially formal”<sup>185</sup> criteria permitting varying levels of judicial scrutiny depending on the proposed measures congruence with a particular judges elastic understanding of an indeterminate document The point here is, it is submitted, that the Constitution is a document of indeterminate meaning subject to the vagaries of its interpretative community. It is submitted that the Constitutional Court cannot decide what the Constitution means in any appreciably concrete sense, thus bequeathing an endlessly shifting normative matrix as the sole criteria for judicial review.

Furthermore there is a serious counter-majoritarian difficulty with De Ville’s approach. To attribute to the judiciary a special insight into the normative message of the Constitution unavailable to the administrators, legislature or indeed the average citizen again returns to the absence of a *reason* for judicial interference in De Ville’s approach that goes beyond the mere employment of institutional power. Judges, as Dworkin points out, while familiar with what the Constitution says, have no claim to a better understanding of what the Constitution entails<sup>186</sup>. There is therefore no reason why judges should be able to impose their vision, in this instance of the redistributive balance entailed of how “transformation” should proceed, on the administration. Where there has been no infringement of constitutional rights there are powerful majoritarian reasons for respecting the reasonably constructed resource distribution models of the executive. Although De Ville forcefully argues why review of administrative action should become more exacting under the auspices of the Constitution, he

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<sup>184</sup> Marius Peitser, “*Coming to terms with Judicial Enforcement of Socio-Economic Rights*”, 2004, (20) SAJHR 383, at 388.

<sup>185</sup> TRS Allan, *Ibid*, at 437

<sup>186</sup> See generally, Ronald Dworkin, “*Sovereign Virtue*”, 2000 (OUP), Chapter 4

does not explain why *judges*, rather than Parliament or some other entity, should perform this exacting review.

We have argued above that the “contextual” approach counsels a misapplication of the Constitutional Courts limited judicial resources. We have argued that it offers only the indeterminacy of principle that would introduce defensive administrative behaviour in a bid to remain within the broad swathes of the Constitutional Court’s tour of historical and socio-economic factors. We have further argued that De Ville’s conception does not advance the project of harnessing agency expertise under judicial supervision, deference accorded to resolutions which happen to accord with the judiciary’s vision of South Africa rather than any particular expertise or institutional advantages they might enjoy. What we do accept however is the call De Ville makes to press into service the Constitution as a fulcrum for judicial review. The primary task, it is submitted, is to erect an intellectually coherent bridge by which constitutional principle can be translated into a scheme of judicial review where agency and judiciary are partners rather than antagonists in allocating interpretative responsibility. We will argue that the beginnings of a process rationale, analogous to the American jurisprudence, can be divined from amongst the few available deference decisions. Finally we will argue that the Court’s socio-economic rights jurisprudence, which appears to have taken De Ville’s imprecations as to principle most seriously, can be, without undue conceptual strain, interpreted through the prism of process rather than the substantive spin placed on them hithertofore.

Instead of traversing the American path of utilising formality of procedure as a proxy for legislative intent it is submitted that the South African Courts could, and in O’Regan’s *Bato Star* decision did, begin to use procedure as an effective proxy for the application of expertise. The primary weakness of the *Chevron* approach, as sketched above was that it relinquished judicial control over statutory interpretation without any *quid pro quo* that expertise would actually be applied in individual cases. Through inadvertence, fluke, necessity or improper motives an agency could land their resolution of a statutory conundrum within the realm of the reasonable. The force of the American courts solution has been substantially tarnished by their refusal to surrender the idea of

Congressional intent as the quickening force behind judicial review. However the *Mead* gloss does offer the South African courts a conceptually forceful model of deference review. Given that the Constitutional Court will have no truck with *Chevron's* obligation to relinquish control of what the law says, the idea of constructing deference around process offers the courts the means of standing guard over constitutional values whilst affording the Executive the space to govern according to popular and constitutional mandate.

In *Logbro v Bedderson*<sup>187</sup>, Cameron JA considered whether a tendering procedure, which the High Court had ordered to be reconsidered, could extend to scrapping the original proposal and asking for new tenders. The administrator argued that such a move was permissible, arguing *inter alia* that a rise in value of the land in the intervening two years justified a call for new tender applications<sup>188</sup>, in pursuance of its legitimate interest in securing the best price for state land. The case offers a direct factual comparison with the *Chevron* dicta as it turned on the agency interpretation of the word “reconsider”<sup>189</sup>, Cameron J construing it in familiar terms, “The fact is that the committee’s performance of its duty in 1997 was a prime instance of what commentators have dubbed ‘polycentric decision-making’<sup>190</sup>, involving the balancing of the appellants’ right to fair procedures and the burden on the agency of its public responsibility. Cameron J then cited the work of Cora Hoexter which referenced the level of deference to be applied directly to the complexity of the question to be addressed, “to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate”<sup>191</sup>. Cameron JA however did not develop his analysis on the point, concluding shortly that the tendering committee had acted unimpeachably in fulfilling its public law obligations however found for the appellants on the ground that

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<sup>187</sup> 2003 (2) SA 460 (SCA)

<sup>188</sup> *Ibid*, at para 3.

<sup>189</sup> *Ibid*, at para 15

<sup>190</sup> *Ibid*, at para 20.

<sup>191</sup> *Ibid* at para 21, citing C Hoexter, “*The Future of Judicial Review in South African Administrative Law*” (2000) 117 SALJ 484 at 501 (citations omitted)

they were not given a chance to canvas their submissions thus violating the *audi alterem partem* principle.

Given the somewhat disjunctive nature of the concluding paragraphs of the learned judges decision it is difficult to assess, beyond a somewhat trite observation linking complexity with judicial restraint, what role deference played in the resultant order. Two tentative observations can be made however. The first is the notable absence of any reference to legislative intent, the Hoexter piece revolving around the place of appropriate judicial respect. Secondly the propriety of absorbing deference into s33 of the Constitution was affirmed by the Supreme Court of Appeal. Although left implicit by virtue of the brevity of the decision, the Court gave the first exposition of what shall be termed the ‘process rationale’ for deference. In what will become a consistent theme Cameron JA construed deference as relative to the degree to which both the question required expertise and to a lesser extent whether that expertise was actually applied.

Heher JA echoed a similar concern in *Gauteng Gambling Board v Silverstar Development Ltd*<sup>192</sup>. The Gambling Board responsible for Gauteng was given a statutory mandate to award licenses up to a maximum of six. In pursuance of this the Board decided to split the applications into geographic regions according to a hypothetical subdivision, and then ranked the applications in terms of certain criteria. The winner in each area was then awarded a casino license. Again the Supreme Court of Appeal noted the relative institutional incompetence of courts, noting that an agency is “generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision...That is why remittal is almost always the prudent and proper course”<sup>193</sup>.

However as with *Logbro*, Heher J was at pains to point out that this ‘due deference’ would have to be earned, and could not be assumed to flow as a matter of course from relative institutional positions, “Applications, like trials, depend on evidence not conjecture. The Board, despite ample opportunity, has laid no basis in fact or expert

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<sup>192</sup> 80/04 25 February 2005 (SCA)

<sup>193</sup> *Ibid*, at para29

opinion, to suggest that a reasonable possibility exists [that it will change its mind]”<sup>194</sup>. Rather the Court opined that as Board had “brought to bear the information and expertise at its disposal in its evaluation of the applications in 1997”, and that as the information was in front of the court, the latter’s institutional weakness was substantively purged. On that basis the Supreme Court felt entitled to make an order contrary to that reached by the Board. Addressing what was the primary motivation for the development of the *Mead* doctrine, the Supreme Court of Appeal decried any bright-line rule of judicial restraint, arguing that a procedural lapse by the agency could remove a case from the “limitations imposed by the general principles”.

Extrapolating from Heher J’s dicta it can be tentatively presumed that deference will function as a background judicial rule. However that presumption is dependant both upon expertise and secondly that that superior knowledge is actually brought to bear. Interestingly the formality of procedure bestowed on the agency (such as notice-and-comment), used by the United States Supreme Court as a “proxy” for a legislative preference for agency resolution is absent from either of the above cases. Instead the dispositive factor was the failure of the expert body to place the fruits, as it were, of their expertise, in front of the Court. While the *ratio* of Cameron J in *Logbro* is opaque in *Gauteng Gambling* the Supreme Court ruled that no deference could attach short of a convincing agency explanation for their interpretation. This, at first blush appears to be along the lines of *Skidmore* deference, in terms of deference being linked to the persuasiveness of the agency conclusion

O’Regan J in *Bato Star* offered a vision of judicial review close to that of the Supreme Court in *Mead*. The Court was not to consider what was the best quota distribution but to construct a model of what was reasonable and determine if the Director had struck a reasonable equilibrium to fall within those bounds. This echoes, at broad strokes, the American Courts concern to concentrate their judicial energies on the procedure used coupled with a laconic reasonableness assessment. In *New Clicks* the Court substantially replicated this approach. In *New Clicks* the Court substantially dwelt on the procedure used by the Pricing Committee, holding ultimately that it was precisely the

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<sup>194</sup> Ibid, at para 38.

failure of the agency to properly explicate its conclusions which was outcome determinative, elevating this criteria to a pivotal role in an emerging deference jurisprudence. Echoing the American concern for notice-and-comment procedures as a strong indication of an appropriate opportunity for deference, Chaskaslon CJ noted that draft regulations had been published for comment prior to promulgation<sup>195</sup>, noting that the pharmaceutical sector had “a fair opportunity of making their views known”<sup>196</sup>. Furthermore the Committee actually responded to those submissions, altering the exit price in response to their concerns, “The proposal as to the manner in which the single exit price should be calculated was materially changed. Other material changes were made to the regulations”<sup>197</sup>.

However an unimpeachable process did not exhaust the Courts investigation, as they adhered to the specific investigative pattern laid down by the PAJA. This pattern decisively rejects the holistic contextual concerns raised by De Ville but rather reflects a concern for the propriety of decision-making rather than its correctness, “PAJA addresses the four requirements of the Constitution relating to just administrative action: lawfulness, reasonableness, procedural fairness and the provision of reasons”<sup>198</sup>. Thus the Pricing Committee must hold notice-and-comment procedures<sup>199</sup> such that concerns are communicated to the law-maker and factored into the eventual equation, while lawfulness relates to the inclusion of the exercised power within the statutory authority, “The question, however, is not whether the regulations are consistent with policy statements, but whether they are sanctioned by the empowering legislation”<sup>200</sup>. Chaskaslon CJ clearly thought that a serious question had been raised on a prima facie level that the price struck would have serious economic consequences. On De Ville’s conception then he would merely have to conclude that the price was “unreasonable” under s6(2)(h) of PAJA as revocable on the grounds that “it is one that a reasonable decision-maker could

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<sup>195</sup> Para 176

<sup>196</sup> Para 179

<sup>197</sup> Para 180

<sup>198</sup> Chaskaslon CJ, *ibid*, at para 143

<sup>199</sup> Para 150

<sup>200</sup> Paragraph 204.

not reach”<sup>201</sup>. However the Constitutional Court did not do so and instead advanced a comprehensive process rationale.

Once the transaction was classified as ‘administrative’, the Court devoted significant passages to the appropriate construction of deference in the Executive context. The Chief Justice began his analysis with a perusal of the Medicine Act, and its accompanying memorandum from which he concluded that, “The mischief, therefore, to which section 22G is directed is the lowering of the high cost of drugs”<sup>202</sup>. Holding that price regulation was a policy decision within the province of the legislature, the Chief Justice concluded that there were no constitutional or statutory violations with the regulations but concluded with the curious assessment that the “devil, however, lies in the detail”<sup>203</sup>. The fundamental point is that the Chief Justice took seriously the Pharmacies allegation that the price would “destroy the viability of pharmacies” and that this raised not a question as to *reasonableness* but rather an implication as to the *process* pursued. In the circumstances “the applicants were under an obligation to explain how they satisfied themselves that this would not be the result of the dispensing fee prescribed in the regulations. They were the only people who could provide this information. They did not, however, do so. Absent such explanation, there is sufficient evidence on record to show that the dispensing fee is not appropriate”<sup>204</sup>.

In other-words unusual or erroneous statutory interpretations, (which necessarily involve policy assessments), give rise not to a finding of substantive unreasonableness but rather act as an indication that the agency has not in fact applied its expertise to the impugned resolution and consequently a more onerous burden of explanation. In a case tailor-made for De Ville’s cacophonous claims to abandon the formal anchors the Constitutional Court used substantive considerations only insofar as they indicated the appropriate level of process/explication, which would be required of an agency.

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<sup>201</sup> Citing O’Regan J’s gloss on the section at para 44 of *Bato Star*.

<sup>202</sup> Paragraph 203.

<sup>203</sup> Paragraph, 236.

<sup>204</sup> *Ibid*, para 404



It is interesting to view this approach through the prism of Supreme Court jurisprudence. When presented, as here, with a statutory ambiguity the United States Supreme Court would have taken the delegation to the Pricing Committee as explicit legislative intent that the Medicine Act was for executive resolution and, presumably, decided that the price struck was within the permissible range of reasonableness. Both superior courts utilise a similar conception of “reasonableness” as constituting a judicial rubric for what is the permissible terrain over which an agency may travel in its interpretation. Thus Moseneke J held that “appropriate” was not an absolute or immutable standard and thus the courts role should be restricted to determining if the price struck fell within “the enabling legislation and the lawful boundaries for the exercise of the public power conferred”<sup>205</sup>. This assessment, the judge hastened to add, was one about which people could plausibly disagree, and thus the Court was restricted to deciding not what the statute says, but rather what it permits “The ultimate question must be whether the determination of appropriateness falls within a range of what may be reasonably regarded as proper, well-suited and fair”<sup>206</sup>. The substantial difference is the far stronger flavour of judicial power that infuses the jurisprudence of the Constitutional Court as compared to their trans-Atlantic brethren.

Chaskalson CJ in *New Clicks*, as O’Regan J in *Bato Star*, felt no compunction with invoking context. He offered a complex list of factors, distilled presumably from his appreciation of the evidence in relation to back/front shop logistics, courier pharmacies, the percentages accorded to dispensary fees and the impact of retail chains on competition in urban areas, to hold that an onerous explanatory burden has been raised. For the Chief Justice to hold solemnly that he is deciding the “appropriateness” question by reference to what the legislation permits rings hollow in the circumstances. Rather the Chief Justice rides roughshod over his own acknowledgement<sup>207</sup> that Parliament had enacted the primary legislation with the sole intention of reducing medicine prices. In fact the Chief Justice positively ignored such guidance, and posited that it was for the Court, not the Legislature or the Executive to decide what the Medicine Act actually required.

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<sup>205</sup> Ibid, para 712.

<sup>206</sup> Ibid, para 713.

<sup>207</sup> Para 203.

He then uses the broad economic considerations, distilled from a judicial vision of what the “appropriate” price should be, to argue that the burden of explication has not been discharged.

The legislation held that a price which lowered the cost of medicines would be ‘appropriate’, and left it to the Pricing Committee to determine exactly how. On the contrary the Court held that ‘appropriate’ would consist of a balance of factors, none of which are mentioned in the Committee’s founding articles. Although this approach jars with his earlier assertion that the only salient question is if the regulations come within the empowering legislation the key point to extract is that these considerations fed into an increased burden of explication on the agency. In passing it should be noted that this contrasts sharply with the Supreme Court position in *Whitman v American Trucking Association*<sup>208</sup> where Scalia J barred the EPA from considering costs in determining air quality standards, “The text of §109(b), interpreted in its statutory and historical context..., unambiguously bars cost considerations from the NAAQS-setting process, and thus ends the matter for us as well as the EPA”<sup>209</sup>.

While the Chief Justice’s approach appears broadly similar to the ‘persuasiveness’ approach of *Skidmore* it diverges in one critical aspect. The Chief Justice, armed with the policy priorities he believed the price control should have been aimed at, felt entitled to pit the probative value of the evidence raised in intellectual competition and declare a clear winner, in an approach reminiscent of *Skidmore*’s apportionment of deference in accordance with persuasiveness. However the Chief Justice traversed a level playing field, pitting the Pharmacies evidence against that provided by the Pricing Committee<sup>210</sup>, and finding the latter under whelming after highlighting some obvious gaps in their economics. *Skidmore* operates however, not as a weighing vehicle, but as a means for the agency to guide the courts decision-making process. In other words the multi-factored analysis provides an opportunity for a structured deference investigation when *Chevron* is

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<sup>208</sup> 531 U.S. 457 (2001)

<sup>209</sup> At 471.

<sup>210</sup> See *infra*, para 391-97

not available<sup>211</sup>. Where the legislature has been inscrutable it provides an interpretative space for the agency to influence a precedent that will ultimately bind them, the so-called “one clear-shot”. In other words *Skidmore* promotes a species of deference precisely because it imbalances the playing field between an agency and aggrieved plaintiff because of its heavy emphasis on respect for executive expertise. Once again the Constitutional Court paid heed to the idea of executive expertise, “that courts must be sensitive to the special role of the executive in making regulations. This, and the special expertise of the Pricing Committee, are factors to which due regard must be paid in the present case”<sup>212</sup>. Precisely what role this recognition played in the eventual decision is however, difficult to quantify as the Chief Justice struck down the Pricing Committee’s determination on the basis that the evidence tendered was ‘flimsy’<sup>213</sup>. Whereas *Skidmore* suggests that where a court has to make a policy decision, the agency’s analysis should be *the* integral factor in the process. Courts, handicapped by their generalist remit, should be reluctant to supplant agency determinations on any but the most compelling ground. To demand that the agency be pitted in an equal intellectual battle with an aggrieved plaintiff on each visit to a court seems to spurn the lesson of learning from agency expertise in favour of a more just, but far less certain jurisprudence.

That the emerging South African model is less deferential than its American counter-part should not blind us to the fact that a jurisprudence of process has been firmly established. Distilling the lessons from *Logbro*, *Gauteng Gambling* and *New Clicks* and *Phambili* it is apparent that the courts are sensitive to the remit as guardians of agency discretion rather than a surrogate policy-arbitration forum. From the case law a rudimentary model emerges. It can be presumed that a range of determinations will be construed as reasonable, thus in the *Phambili* case (and this is pure speculation) the equity pool might be approximately from 5 to 30%. On Schutz JA’s approach the agency must satisfy two hurdles. Firstly, the agency resolution must be objectively plotted within the range of the broadly drawn reasonableness factum, akin to *Chevron* Step 2. Secondly the agency must provide materials to justify why they chose that particular

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<sup>211</sup> Molot, *ibid*, at 1335

<sup>212</sup> Paragraph 390.

<sup>213</sup> *Ibid*, para 403

option from amongst the reasonable range. The more unusual or erratic the agency resolution, or if extrinsic evidence has been tendered to cast aspersions on the agency decision, the greater that burden of explanation will be. As per *New Clicks* these questionable agency resolutions will flag not substantive unreasonableness but rather a frailty of decision-making, with a consequently increased burden of explanation on the agency. The rigour of the procedure followed will be a key criterium, with process functioning as a proxy for the application of expertise.

#### **Part 4**

De Ville's conception of the court as an active participant in the goal of achieving equality is more closely reflected in the Constitutional Courts socio-economic review jurisprudence. In the three seminal cases discussed below the policy circumspection which typify both *New Clicks* and *Bato Star* are entirely absent. Equally absent is the expertise acknowledged by the Constitutional Court as the founding rationale for deference in the administrative sphere. Indeed at fist blush the Court appears to have adopted De Ville's suggestion to break from administrative review, and use the opportunity to formulate a benign model of substantive administrative justice. In *Grootboom*<sup>214</sup>, the Constitutional Court was faced with a claim from desperate squatters that the government was not fulfilling its obligation to provide access to adequate housing. The provincial government argued that they were doing all in their power to construct dwellings, a programme the Court found to be laudatory, "what has been done in execution of this programme is a major achievement. Large sums of money have been spent and a significant number of houses had been built"<sup>215</sup>. The High Court reached the conclusion that the Western Cape had satisfied the test laid down in s25, "it could not be said that [appellants] had not taken reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right to have access to adequate housing"<sup>216</sup>.

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<sup>214</sup> *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC)

<sup>215</sup> *Grootboom*, supra, para 53.

<sup>216</sup> Quoted in *Grootboom* at para 14.

If this were an administrative enquiry, it would seem that the governmental policy would easily satisfy the reasonableness criterion laid down by O'Regan J in *Bato Star v Minister for the Environment*<sup>217</sup>. Even a severe casting of the housing policy would not, it is submitted, lead to a conclusion that the policy was one a “reasonable decision-maker could not reach”. However, Yacoob J held that the diligence of the Western Cape did not exhaust the enquiry. He began by noting, “Reasonableness must be understood in the context of the Bill of Rights as a whole...a society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality”<sup>218</sup>. He opined that this solicitude for dignity required that the enquiry must not be framed within the restrictive embrace of scouring the administrators actions for a rational connection to the administrators view of what the Constitution required, “It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right...[if they] fail to respond to the needs of the most desperate, they may not pass the test”<sup>219</sup>. Crucially, for present purposes, this was a reasonableness enquiry framed within the prism of historic denial of access to housing<sup>220</sup>.

The Court in *TAC*<sup>221</sup> examined each of the justifications provided by government for its refusal to provide an anti-HIV drug against the reasonableness standard. The Court rejected each in turn for reasons ranging from a simple lack of evidence to support governments claim, to a lack of proportionality between means and ends, concluding that the Constitution could not countenance a scheme where the indigent poor were denied a “simple, cheap and potentially life-saving medical intervention” on the pleaded grounds of administrative incapacity<sup>222</sup>. Similarly the Court over-rode the rather flimsy pleas of the government that Nevirapine should be limited to test sites due to a dearth of medical

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<sup>217</sup> 2004 (4) SA 490 (CC)

<sup>218</sup> *Grootboom*, supra, at para 44.

<sup>219</sup> Supra, at para 44.

<sup>220</sup> Yacoob J at no point strays into the greener pastures of s33 and confines himself to, “the test of reasonableness established by the section[26]”, supra, at para 64

<sup>221</sup> *Minister of Health v Treatment Action Campaign*, 2002 (5) SA 721.

<sup>222</sup> *Ibid*, at para 73

knowledge. Drawing heavily on a canvas of rights<sup>223</sup> the Court ordered the government to remove barriers on the use of the drug without delay. Similarly in *Khosa v Minister of Social Development*<sup>224</sup>, Mogkoro J began her substantial investigation with the now familiar refrain that; “The socio-economic rights in our Constitution are closely related to the founding values of human dignity, equality and freedom”<sup>225</sup>. In *Khosa*, the applicants contended that denying them social security benefits on the grounds that they were permanent residents rather than citizens was unreasonable in terms of s27 that promises *inter-alia* that, “Everyone has the right to have access to...social security”. From that position the reasonableness factum was triggered by the fact that discrimination on the grounds of citizenship, was implicitly prohibited by s9(3). Mogkoro J cited with approval the *Brown v Board of Education*<sup>226</sup> dictum that that the exclusion of minorities from state welfare programmes reduced their status to that of second-class citizens, and over-rode the executive’s expediency arguments by concluding that the denial was dissonant with constitutional principle<sup>227</sup>.

This trilogy of cases evinces a robust vision of judicial review that goes far beyond formal criteria proffered by the American jurisprudence. Indeed the socio-economic rights cases offer a qualitatively different investigation to that of *Bato Star*. Thus, O’Regan J in *Bato Star* held that, “Parliament has identified the relevant policy considerations and has left the implementation of this task to the executive”<sup>228</sup>. S33 went to the latter and not the former. It would, at first blush, seem to have no evaluative mechanism to assess the choice of objective, and could thus be equally implicated in assessing the procedural fairness of both egalitarian and iniquitous policy choices. In *Grootboom*, by contrast, the Court was not constrained in its interpretation by drawing a connexion between the objective as interpreted by the state and the measures adopted to satisfy it. As Wesson points out, “The point of Yacoob J’s is not, however, that the

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<sup>223</sup> For example, “their inability to have access to Nevirapine profoundly affects their ability to enjoy all rights to which they are entitled”, at para 78.

<sup>224</sup> 2004 (6) BCLR 569 (CC)

<sup>225</sup> *Supra*, at para 40

<sup>226</sup> 347 US 483, 494 (1954)

<sup>227</sup> Imported from *Larbi-Odam and Others v MEC for Education (North-West Province) and Another*, 1998 (1) SA 745 (CC), at para 72

<sup>228</sup> *Ibid* at para 43.

program implemented by the state was disproportionate to the goal. Rather, it is that the state's aim was *itself* flawed to the extent that it unduly prioritised the construction of adequate housing at the expense of short-term needs"<sup>229</sup>. This appears to approximate to De Ville's conception of administrative justice extracted directly from the normative ether of the Constitution.

However we have argued above that, as with *Chevron*, judges retain control of step 1- the determination of reasonableness. As pointed out above, although this has been interpreted laconically, it does involve a basic judicial policy determination as to whether the agency resolution is consistent with statutory goals. So in *Bato-Star* if the Director had granted no equity pool for diversification, such allocation would be flagged as unreasonable. While we argued that judicial resources are concentrated in the process sphere, the reasonableness factor does ensure basic policy congruence between executive implementation and legislative command.

The trilogy of cases were marked as innovative solutions to the justiciability of socio-economic rights, they reflect all the weakness' of a judicial review process constructed around normative principle. There is little material, and no guidance provided to lower courts and administrators by invocations such as that of Mogkoro J in *Khosa*. The learned judge concretised the hitherto tacit postulate that "the rights to life, dignity, and equality" demarcated the normative boundaries of socio-economic enquiries<sup>230</sup>, this is ineffectual in educating the administration as to when, and upon what grounds their pronouncements will attract judicial deference. In the same way that the *Phambili/Logbro* line of cases can be conceptualised within a *Skidmore* framework, it is submitted that the socio-economic cases can be yoked into a comprehensive "process" rationale for deference by glossing the socio-economic cases as a South African version of "hard look" review.

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<sup>229</sup> Murray Wesson, "*Grootboom and Beyond, Reassessing the Socio-Economic Rights Jurisprudence of the South African Constitutional Court*", 2004, 20 SAJHR 283 at p292 (emphasis in original)

<sup>230</sup> *Supra*, at para 44.

## Part 5

Hard-Look review arose in the Federal D.C. Circuit as a reaction against the gradual colonisation of regulatory agencies by the industries they were supposed to be over-seeing<sup>231</sup>. Coupled to this was the loss of confidence in governance after the foreign-policy disasters of the 60' and 70's, as Warren puts it, "A trusting submission to government became less palatable after the failures of the best and the brightest in the Vietnam War"<sup>232</sup>. Whereas previously the courts had been satisfied if there existed "substantial evidence"<sup>233</sup> to support an agency determination or construction, the hard-look doctrine provided, as the name suggests, a more searching species of review. Thus in *Greater Boston Television Corp. v FCC*<sup>234</sup>, the D.C. Circuit was faced with an agency about-face. While materials could be marshalled to justify the change under the "substantial" test, the Circuit felt that such rapid alteration entailed a burden of justification on them to *explain* why they changed position. Justice Leventhal held that a requirement for reasoned explanation, "enables the court to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has undertaken a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent"<sup>235</sup>. This process, the Court opined, necessarily involves judicial involvement in technical questions, "The court does not depart from its proper function when it undertakes a study of the record, hopefully perceptive, even as to the evidence on technical and specialised matters".

Two things are of immediate interest. Firstly the Court is allowed to range outside the boundaries of either the legislation or the evidence proffered by the agency. This approach fits neatly with the Constitutional Court's determination that a "court

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<sup>231</sup> See generally, William S. Jordan III, "Judges, Ideology and Policy in the Administrative State: Lessons from a Decade of Hard Look Remands of EPA Rules", 53 Admin. Law R. 45, 2001

<sup>232</sup> Mathew Warren, "Active Judging, Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit", (2001-2002) 90 Geo. L J. 2599, at p2602.

<sup>233</sup> Mathews at 2602.

<sup>234</sup> 444 F.2d 841, at 850 (D.C. Cir. 1970)

<sup>235</sup> Ibid, at 850.



should not “rubber-stamp” a decision simply because of the identity of the decision-maker”<sup>236</sup>, and Chaskaslon CJ’s reference to the deleterious economic effects of the price agreed upon on several types of pharmacy. Indeed instinctively it would seem fatuous to posit, particularly in a post-legislative intent landscape, that “appropriate” can be construed with any coherence if extrinsic factors are ignored. Hard-Look offers precisely such scope, requiring the courts to be sensitive to context and the resource limitations which structure decisions, as Jaffe noted, “An agency entrusted with grandiosely stated responsibilities and far-reaching powers can only realize a modest measure of its potential,...What problems are most exigent, how they can best be solved-and by implication what problems must be left aside or left to other agencies- are questions the solutions to which peculiarly demands a feeling for the whole situation”<sup>237</sup>. On Leventhal’s conception the Court could range widely so that ignorance of context, wilfulness as to effect, bias or laxity of procedure would flag the absence of a reasoned decision. Appropriate judicial restraint would be required, “If the court becomes aware, especially form a combination of danger signals, that the agency has not really taken a ‘hard look’ at the salient problems”<sup>238</sup>. Effectively, the Circuit argued, the guardianship role of the courts cannot be undertaken effectively unless the court engages in the totality of the circumstances.

Secondly this if such “danger signals” are present this fosters not an intrusion into the policy sphere but rather an increased burden of explication. Thus in *Greater Boston* after maintaining a consistent position for sixteen years, it was incumbent upon the agency to offer reasons as to the change. If the court was satisfied that the agency had, in fact, taken a hard look then the agency was the appropriate crucible for policy determination, and deference should flow.

The practical boon of this approach has been reaped in the America. As explained by Bazelon J in<sup>239</sup>, hard look is not a judicial Trojan horse to engage in contentious

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<sup>236</sup> *New Clicks*, *ibid*, at para 390.

<sup>237</sup> Louis F. Jaffe, “*Judicial Control of Administrative Action*” (1965) at 565-67.

<sup>238</sup> *Greater Boston*, *ibid*, at 851.

<sup>239</sup> *Environmental Defence Fund v Ruckelhaus* 439 F. 2d 584 (D.C Cir 1971)

policy disputes. He argued that while judges may not be qualified to make value-laden policy decision, they could “scrutinize and monitor the decision making process to make sure that it is thorough complete and rational”. Thus the achievement of hard-look is its ventilation of the decision-making process while excluding courts from policy contentions. This ‘ventilation’ fulfils two functions. Firstly it provides a means of structuring agency discretion in a manner useful to the administration, providing formal criteria of what constitutes both ‘danger signals’ and the level of justification required by administrators to pass judicial muster. Thus Mathew’s notes the results of “hard-look” have been drop in the number of review applications, and greater certainty as to evidential burdens when it is required<sup>240</sup>. Furthermore by subjecting the whole corpus of the agency’s materials to judicial investigation, it acts as a guarantee against the manifestation of unsavoury agency predilections in the ultimate result. As Sunstein notes, “The notion is that by requiring consideration of statutorily relevant factors, and by barring reliance on irrelevant factors, persistent biases in the administrative process may be redressed”<sup>241</sup>

From a South African perspective, this conception assumes real jurisprudential resonance when Sunstein’s approach is grafted to the D.C. decisions. Sunstein argues that hard-look should best be construed as the egalitarian branch of two-stream review. He notes the historical bias of courts for individual rights but argues that in the constitutional dispensation such an approach does not satisfy either the counter-majoritarian or societal remit of the courts. He notes, “For Courts to protect private ordering...is all very well, but it must be accompanied by a willingness to protect citizens from public law torts such as racial discrimination, pollution, and the wide range of harms recognised in the affirmative state. That protection usually takes the form of safeguarding not traditional private rights, but a process of decision designed to ensure that the relevant public values will be properly identified and implemented”<sup>242</sup>. Thus he argues that hard look should be implicated when minority rights are threatened, or the politically weak are under-mined

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<sup>240</sup> Ibid at 2607.

<sup>241</sup> Cass R. Sunstein, “*In Defence of the Hard Look: Judicial Activism and Administrative Law*”, (1984), 7 Harv. L.J and Pub. Policy 51, at p54.

<sup>242</sup> Ibid, at p57

by process's in which they have no imput. Sunstein contends that resource allocation decisions, (such as *Bato Star*), would not qualify for hard-look while minority political rights (such as those implicated in *Khosa*), would properly be subjected to the full rigour of "hard look" review. He construes it thus, "But I would not exclude a relatively vigorous judicial role. The very vices of the courts as resource allocators turn out to be virtues in the context of review of agency action (or inaction). Independence and decentralization are, in the latter context, a means of promoting original constitutional goals"<sup>243</sup>.

It is argued that the Constitutional Court's jurisprudence can be, with a slight adjustment, captured within the model briefly sketched above. The *Grootboom/Khosa* approach, to adopt Iles's phraseology, does not look to the weight attached to various considerations, rather "*Grootboom* reasonableness does not involve a choice between things at all"<sup>244</sup>. Rather it requires that the government will have to satisfy the Court that they are pursuing a colourably defensible vision of the public good. If they pass that rationality test then a proportionality test will be invoked, as per *Khosa*, to determine the fairness of any exclusion. In the jurisprudence of the Court the impugned plan will be assessed against the normative requirements of the Bill of Rights; the exclusion of the desperate (*Grootboom*), indigent (*TAC*) or politically weak (*Khosa*) will flag the decision maker's interpretation as failing the egalitarian test. Thus the socio-economic rights cases substantially replicate the Sunstein concern for hard-look as a means of vindicating minority rights in the political process.

The difference as it subsists now is that under the Constitutional Court's approach interference with constitutional principle enmeshes the courts in disputes as to substance- that the government's policy goals were unconstitutional rather than the process used to implement them. While the provision of emergency housing or anti-retroviral drugs at judicial behest may be laudable, it should not blind us to the costs to democracy of judicial management of resources. This, as has been argued above, is riven

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<sup>243</sup> Ibid, at p58.

<sup>244</sup> Iles, supra, at p456.

with difficulties as to the legitimacy of judges making policy distribution choices by reference to vague principle. Further the blinkered perspective imposed by the judicial forum make the Constitutional Court particularly unsuited to interact with the practicalities of governance. On the other hand in America hard look entails a process burden on the agency, requiring greater scrutiny where there is evidence of agency malfeasance. Warren characterises the fruits of the D.C. approach thus, “the court had the power to require necessary procedures to protect vital interests even if statutory authority for such action remained unclear...Bazelon believed that the court owed a duty to the public to ensure that agencies employed an adequate decision-making process”<sup>245</sup>.

Indeed it is submitted that O’Regan J in *New National Party* substantially adhered to this vision of hard look as a mechanism for restraining the excess’s of majoritarianism. By acknowledging the legitimacy of the goal, and the propriety of the statutory casting, but still arguing that it was an unconstitutional using of legislative power O’Regan J flagged these burgeoning administrative principles. O’Regan J formulated the investigation in terms of constitutionality, a constitutionality deduced, in this instance, by reference to the disproportionately discriminatory effect the measure would have on the rural poor<sup>246</sup>. The learned judge held that the Constitutional Court had to ground the question of ‘reasonableness’ in the factual reality, to look behind the statutory language, “South Africa is a diverse society. Some of its citizens are fully literate and live in wealth and comfort; many however are disadvantaged educationally and materially. What is reasonable for one group of citizens, may be quite unreasonable for another. It is not clear to me how the test established by the majority can accommodate sensibly the realities of South African society”. She argued that in light of the votes foundational nature it is incumbent upon the government to prove that measures it adopts in pursuance of the Constitution’s vision of a common vote do not have the opposite effect *in practise*, “That framework should seek to enhance democracy not limit it...Regulation, which falls short of prohibiting voting by a specified class of voters, but which nevertheless has the *effect*

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<sup>245</sup> Warren, bid, at 2624 (citations omitted)

<sup>246</sup> Ibid, at para 126.

of limiting the number of eligible voters needs to be in reasonable pursuance of an appropriate government purpose”<sup>247</sup>.

Secondly she argued that it was open to use the moral principles posited by the Constitution as a sufficient ground for striking down a legislative measure; that the binding of the legislature to the principles of the Constitution impelled rather than forbade a pressing standard of judicial review. To stop the analyses at an institutional level she argued, jarred against the Constitutions command that the legislature, as much as the Courts, are key guarantors of liberal democracy, “Given the constitutional obligations imposed upon Parliament to enhance democracy by providing free and fair elections, it seems incongruous and inappropriate that this Court should be able to determine whether *citizens* have acted reasonably, but not *Parliament*”<sup>248</sup>.

In *New National Party*<sup>249</sup> large numbers of people had been disenfranchised by a new legislative requirement that voters provide a bar-coded ID. Yacoob J brushed over objections of cost and allegations of serious lack of bureaucratic capacity to issue the documents in time for the forthcoming election and declared, “Courts do not review provisions of Acts of Parliament on the grounds that they are unreasonable. They will do so only if they are satisfied that the legislation is not rationally connected to a legitimate government purpose. In such circumstances, review is competent because the legislation is arbitrary”<sup>250</sup>. On the other hand O’Regan J refused to have such shackles placed on the purview of the Constitutional Court. She reasoned that the right to vote was of critical importance. Thus, while the impugned measure might have appeared eminently sensible on the papers, as noted above, O’Regan J referred to a cluster of rights which contain, “broad equitable defining characteristics, such as the right to free and fair elections, the right to a fair trial, the right not to be discriminated

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<sup>247</sup> Ibid, para 122 (emphasis added)

<sup>248</sup> Ibid, at para 126 (emphasis in original)

<sup>249</sup> *New National Party v Government of the Republic of South Africa*, 1999 (3) SA 191 (CC)

<sup>250</sup> Ibid, at para 24.

against”<sup>251</sup>, to which heightened scrutiny would attach. By defending the very core of the constitutional compromise the position of the legislature would be guaranteed rather than eviscerated, “For a court to require such a level of justification, is not to trample on the terrain of Parliament, but to provide protection for a right that is fundamental to democracy”<sup>252</sup>.

These rights accord closely to John Hart Ely’s conception of a two-stream judicial review. Where more than one rational policy is open to the legislature, or where substantive policy has been determined in relation to resource allocation the judiciary should be cognisant of the political procedures which form and ultimately control such determinations. On such questions Sachs J’s approach of “appropriate constitutional modesty” becomes a compelling argument for restraint. However where the essential equilibrium of the political process is threatened then the courts are obliged to intervene on precisely the *values* focused on by O’Regan J; participation, universality, protection of those without voice etc. O’Regan J’s approach offers a broad conception of judicial review where the judges skirt substantive policy disputes, yet are obliged to intervene where they are on the much firmer ground of guaranteeing entry to and plurality of, the political process<sup>253</sup>.

## Conclusion

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<sup>251</sup> Ibid, para 123.

<sup>252</sup> Ibid, at para122.

<sup>253</sup> John Hart Ely, “*Democracy and Distrust: A theory of Judicial Review*” (1980) at 117-125, cited by Lenta *ibid*, at 548. Lenta argues that although O’Regan J offers a conceptual crispness, the blunt fact that her preferred option would result in more eligible voters, and thus “appears more just”, should not obscure the fact that the O’Regan J was proposing a significant rupture in the democratic cloth, “There is no reason to suppose that people, represented by the legislature, should be excluded from interpreting what the right to vote means, about which there is likely to be...a range of reasonable disagreement”, *ibid* at 560-61. Lenta is surely correct in questioning the easy distinction drawn above between entry rights and substantive disputes. It is important to recognise the substantive effect of even these threshold political rights. By trenching on discretion in certain areas but proclaiming restraint in others the O’Regan J approach merely describes the point at which executive determinations will become law. What underpins the difference in judicial approach is not however a substantial ranking of rights in the normal manner that the word ‘hierarchy’ is used. Rather the threshold rights nominated by O’Regan J are noteworthy for their amenability to judicial evaluation, and importance to the structure of the constitutional state. The assessment is emphatically not a normative ranking.

Thus the bare bones of a final conception can be hazarded at. As noted above where an agency interpretation is implicated the first task will be to conclude if the resolution is objectively reasonable. This will be an ascetic standard according to the absurdity rationale of PAJA. At the second stage, the Court will have to decide which of three levels of deference should apply. Hard Look would attach to counter-majoritarian categories noted above. In that case the totality of the context will be opened for ventilation with all aspects of the case brought within the courts remit. Constitutional principle will be the interpretative fulcrum behind this conception, its egalitarian normative message impelling the courts to thoroughly investigate discriminatory practises. The greater the interference with that principle, the greater the burden of justification. Where constitutional principles are not interfered with directly the Court should employ Chaskaslon CJ's *New Clicks* contextual axiom to root out anomalous or unjust agency resolutions. The entirety of the circumstances will feed into a burden of explanation, with deference accorded to the agency proportionate to their power to persuade. Where neither of these is present the Court should copper-fasten its strong *Logbro/Phambili* line of jurisprudence where deference is accorded consequent on the provision of justificatory material before the court. An appreciation for agency expertise and the impropriety of judicial interference with distributive policy questions, must continue to be the guiding lights of this strain of jurisprudence lest judicial zeal weigh to heavily on executive attempts to improve the lot of all South Africans.

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