

**EXPANDING *CHEVRON*'S DOMAIN: A COMPARATIVE  
INSTITUTIONAL ANALYSIS OF THE RELATIVE  
COMPETENCE OF COURTS AND AGENCIES TO  
INTERPRET STATUTES**

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Applying Professor Neil Komesar's comparative institutional analysis, this Article sets out the case for according agencies primacy over courts in statutory interpretation; under the Article's analysis, courts would retain an important, albeit secondary role. The implications of this analysis are significant. The Supreme Court's *Chevron* doctrine says that federal judges should defer to agency interpretations of statutes when Congress has delegated those agencies lawmaking authority. The comparative institutional analysis here suggests that *Chevron*'s "domain" should be expanded to include all interpretations promulgated by an agency's governing board or director.

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## INTRODUCTION

Professor Neil K. Komesar has championed the notion that the creation and application of legal rules should generally consider the comparative institutional competence of different rule makers. To be sure, earlier judges (like Louis Brandeis and Felix Frankfurter) and scholars (like Willard Hurst and Henry Hart) anticipated the broad contours of Komesar's comparative institutional analysis,<sup>1</sup> but none engaged in this kind of analysis with the analytical rigor that Komesar has accomplished.<sup>2</sup>

In a series of legal classics, Professor Komesar makes the following claim: judges ought to be reluctant to develop aggressive doctrines to solve problems that other institutions (especially the market and legislatures) are handling satisfactorily, and should be particularly loathe to trump market or legislative rules when the judiciary is not competent to administer such doctrine effectively and with acceptable costs.<sup>3</sup> As an economist would put it, the first prong of this analysis involves the "demand" function for judicial doctrine, and the second prong involves the "supply" function.

On the demand side, the Komesarian question is whether another institution (such as the market) can provide a sufficient structure of rules or, stated another way, whether there are defects in the rules provided by these other institutions.<sup>4</sup> Thus, most commercial law can easily and (according to most scholars) fairly be generated by parties to written contracts, and so Komesar's analysis suggests that there is no need for many substantive court-generated rules of contract. Where the parties are not negotiating under conditions of equal knowledge and roughly equal

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1. See CARL A. AUERBACH ET AL., *THE LEGAL PROCESS: AN INTRODUCTION TO DECISION-MAKING BY LEGISLATIVE, JUDICIAL, EXECUTIVE, AND ADMINISTRATIVE AGENCIES* (1961) (published version of the Hurst and Garrison materials, considering workplace injury law from the perspective of comparative institutional competence); see also HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (parallel effort, but one that did not focus on a single legal problem).

2. For a splendid intellectual history, situating Komesar's comparative institutional analysis within a broader "post legal process" framework, see Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996). See also Edward L. Rubin, *Institutional Analysis and the New Legal Process*, 1995 WIS. L. REV. 463 (reviewing NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994)).

3. See KOMESAR, *supra* note 2; see also Andrew Coan, *Toward a Reality-Based Constitutional Theory*, 89 WASH. U. L. REV. 273 (2011).

4. Neil K. Komesar, *The Logic of the Law and the Essence of Economics: Reflections on Forty Years in the Wilderness*, 2013 WIS. L. REV. 265.

bargaining power, however, there is need for judicial doctrines such as unconscionability.<sup>5</sup>

On the supply side, the question is whether courts are institutionally competent to create useful rules that are better than those that would govern under market conditions. Specifically, Professor Komesar considers the limitations of courts: judicial decision making is limited by the structure of adjudication, the kinds of parties who will litigate, and the constrained resources and limited personnel of the court system.<sup>6</sup> Given these limitations, Komesar is concerned that judge-made rules will not be satisfactory substitutes for rules or practices generated by the market, however defective. For example, he is skeptical that judges can create and administer a useful regime of unconscionability doctrine, and so he supports the reluctance of judges to substitute their fairness judgments for those in written contracts.<sup>7</sup>

No one has rigorously applied Professor Komesar's comparative institutional analysis to generate insights about statutory interpretation doctrine. Many scholars and judges have engaged in single institution analysis,<sup>8</sup> and a handful have offered hypotheses grounded upon comparative institutional analysis,<sup>9</sup> but none has engaged in a successful effort to apply the latter to matters of statutory interpretation. Nor has Komesar himself explored the implications of his theory and methodology for statutory interpretation doctrine and theory. This gap is

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5. *Id.* at 283–85.

6. KOMESAR, *supra* note 2, at ch. 5; *see also* NEIL K. KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001) (providing a more detailed statement of Komesar's supply-and-demand analysis); Andrew B. Coan, *Judicial Capacity and the Substance of Constitutional Law*, 122 *YALE L.J.* 422 (2012) (providing further reasons, grounded upon norms of judicial practice, that constrain the capacity of courts to handle great quantities of cases).

7. Komesar, *supra* note 4, at 283–86.

8. For some outstanding examples of useful single institutional analysis, *see*, for example, JAMES WILLARD HURST, *DEALING WITH STATUTES* (1982); and Louis L. Jaffe, *Judicial Review: Question of Law*, 69 *HARV. L. REV.* 239 (1955).

9. A number of statutory interpretation works follow a kind of comparative institutional analysis, though not one that is as rigorous as Komesar's. The substantial consensus among such works is that administrative agencies have many comparative advantages vis-à-vis courts and that most statutory interpretation *should* be carried out by agencies with limited judicial review or revision. *E.g.*, WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* ch. 5 (1994); JERRY L. MASHAW & DAVID HARFST, *THE STRUGGLE FOR AUTO SAFETY* ch. 11 (1990); ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006); Jerry Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 *J.L. ECON. & ORG.* 81, 91–99 (1985); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 *GEO. L.J.* 97, 134–41 (2000); Jerry L. Mashaw, *Agency Statutory Interpretation*, 2 *ISSUES LEGAL SCHOLARSHIP* (2002), <http://www.degruyter.com/view/j/ils> (follow “Read Content” hyperlink, select Volume 2, Issue 2, then select article name).

astounding, because comparative institutional analysis is, without question, a highly productive way of addressing these issues. I shall lay out a tentative Komesarian framework in this Article.

I start with the proposition that comparative institutional analysis ought to be conducted by reference to the three purposes of a system of legal rules (namely, predictability, legitimacy, and efficacy). On the whole, such a Komesarian calculus supports an interpretive regime dominated by purposive agency interpretations, with courts playing a residual and deferential role. Doctrinally, comparative institutional analysis lends normative support to the strong deference to agency interpretations announced by the United States Supreme Court and most state courts. Specifically, Komesarian analysis provides a way to read the Court's much-cited *Chevron* doctrine<sup>10</sup> much more liberally than the Court itself has done and suggests the contours of a unified deference doctrine that is consistent with the Court's actual behavior in the hundreds of statutory interpretation cases where the Justices have had an agency interpretation before them.<sup>11</sup>

The comparative institutional analysis that follows departs from, or suggests several friendly amendments to, Professor Komesar's theory and method. To begin with, I want to emphasize a cautionary point that such an analysis generally understates and often ignores: most of the generalizations needed to advance a comparative institutional analysis rest upon factual beliefs that are not supported by empirical data or even a representative array of case studies. Not only has precious little empirical work even been attempted, but many of the judgments required by comparative institutional analysis would require causal explanations that are not possible for many cross-institutional generalizations.<sup>12</sup> Given the dearth of solid empirical work, it is disturbing that comparative institutional analysis of public law often rests upon confident, even dogmatic, factual assertions that are completely unsupported.<sup>13</sup> Armchair analysis has a longstanding place in legal scholarship, but even that tradition ought to be cautious before relying on comparative institutional

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10. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 866 (1984). For the best doctrinal survey, see Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001).

11. For an empirical analysis of the Court's actual behavior in the 1014 agency interpretation cases it decided between 1984 and 2006, see William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008).

12. See William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671 (1999) (expressing skepticism that empirical work will be able to resolve the deeply debated doctrinal and theoretical issues of statutory interpretation).

13. William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041 (2006) (book review).

analysis by scholars whose only experiences in government service have been judicial clerkships.<sup>14</sup>

Additionally, I want to make explicit the central importance of including, and in fact focusing on, administrative agencies as the critical rule-making institution in our polity.<sup>15</sup> This point has not been prominent in this field of inquiry, partly because of Professor Komesar's own interests. For contract, tort, and property law, he treats the market as the default rule-making institution, and the question for his analysis is whether courts should trump market rules with judge-generated rules.<sup>16</sup> For constitutional law, legislatures are treated as the default rule-making institution, and the question for his analysis is whether courts should trump legislated rules with judge-generated constitutional rules.<sup>17</sup> For statutory interpretation, in contrast, there are three potential default rule-making institutions that might compete with courts: the legislature itself, administrative agencies, and private institutions (including but not limited to the market).<sup>18</sup> The first and third potential defaults are potentially significant, but I shall focus on agencies, which are easily the most significant.<sup>19</sup> Hence, a critical issue for comparative institutional analysis is whether or under what circumstances court-generated rules should trump agency-generated rules.

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14. Contrast the careers of institutionalist pioneers like Louis Brandeis, who was a brilliant lobbyist and statutory drafter as well as litigator, *see generally* AUERBACH ET AL., *supra* note 1, at 359–60, 812–14, and Henry Hart, who was counsel to the Office of Price Administration during World War II, *see id.* at 213 n.†, with the careers of recent scholars who engage in this analysis, most of whom have had no government service beyond a few years of clerking for federal judges. This lack of experience with nonjudicial institutions can cut in different directions: for some scholars, the lack of experience allows a romantic view of agencies while dismissing courts, *e.g.*, VERMEULE, *supra* note 9 (urging a minimalist role for judges), while for others it fosters a romantic view of courts and a neglect of agencies, *e.g.*, JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (dedicated to Earl Warren and advancing an influential theory of representation-reinforcing judicial review).

15. The Symposium celebrating Professor Komesar's work featured a panel (consisting of Professors Wendy Wagner, David Skeel, and me) devoted to this proposition, which Komesar, in remarks responding to the panel, treated as fully consistent with his theory. *Cf.*, *e.g.*, KOMESAR, *supra* note 2, at 90–97 (providing an intelligent discussion of different economic theories of “bureaucracy”); *id.* at 138–41 (providing a comparative analysis of agencies versus courts with juries).

16. *Id.* at ch. 6 (tort law); Komesar, *supra* note 4, at 282–89 (contract and property law). *But see* KOMESAR, *supra* note 2, at 171–77 (comparing administrative management of tort reform with judicial management).

17. KOMESAR, *supra* note 2, at ch. 8.

18. *See* HURST, *supra* note 8, at 31–65; Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369 (1989).

19. Rubin, *supra* note 18; *cf.* Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341 (2010).

A final revision is the most important. In conducting such a comparative institutional analysis, I should like to reflect upon something that is less deeply discussed in Professor Komesar's work, namely, the importance of normative goals. Comparative institutional analysis is normative: which institution, or cluster of institutions, will make the best rules, given the criteria for successful rules in our society or legal system?<sup>20</sup> Thus, I shall frame my analysis in terms of the three best-accepted goals for rules in our legal system; those goals, in turn, generate criteria for comparing institutional capacities and performances. One goal of a legal system is predictability and objectivity in the application of rules (these are the *rule of law* criteria). A second is legitimacy. Are the rules generated by a democratic or other process that inspires people to follow those rules with some enthusiasm? (These are *democracy* criteria.) Third, rules have a function. Do they serve public-regarding functions well? (These are *efficacy* criteria.)

With these goals in mind, I shall first suggest reasons why agencies are generally superior to courts in creating regulatory rules. Second, I shall apply the Komesarian calculus to suggest circumstances where courts might usefully trump agency rules with judge-imposed rules. Third, I shall consider the doctrinal ramifications of this analysis. The ramifications are multifarious, but I shall focus on the most obvious one, namely, the implications of comparative institutional analysis for doctrines of judicial deference to agency constructions of the statutes they are implementing.

#### I. AGENCIES AS THE PRIMARY INSTITUTION FOR (MOST) STATUTORY INTERPRETATION

Statutory interpretation is the application of statutory texts and rules to particular issues or fact situations. In our polity, Congress and other legislatures create statutes—but many institutions interpret statutes. Private attorneys, corporate counsel, and associations of all kinds apply statutes to problems they face. Administrators and agencies interpret statutes all the time, as do judges and courts. Legislatures, in fact, engage in a fair amount of statutory interpretation: as they predict how different bill language will be applied in practice, as they call agencies to task for questionable applications, as they study the effects of statutes they have enacted, and as they deliberate about whether to revisit a regulatory arena. In short, statutory interpretation is a pervasive activity in our country, and many institutions make it a focal point of their energies.

This Part consists of a series of thought experiments relating to the operation of a legal system in a society such as ours, specifically, a

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20. KOMESAR, *supra* note 2, at 4–5.

complicated democratic society. What does such a society need in terms of rules and practices for interpreting statutes? I shall argue that it needs three things: predictability, expertise, and democratic legitimacy. I shall also argue that, for most rules in the modern state, it makes sense for agencies and not courts to create the rules applying statutes to particular problems and issues. In the process of justifying agency primacy, I shall derive guidelines for agencies when they interpret statutes.

*A. The Rule of Law: Predictability and Reliance*

As statutes are applied to new circumstances, not only do they require interpretation, but people and organizations need an “authoritative” interpreter, that is, a focal person or institution providing interpretations that all citizens and corporations know they are supposed to follow.<sup>21</sup> It is, of course, possible for a society to follow a more pluralist system, as our society does for religion: each of us can choose which institution (denomination) to join and, hence, which dynamic system of rules and relationships to embrace. So on matters of morals, an authoritative interpreter, whose views are binding on all of us, is neither necessary nor desirable. But on a host of other matters, we want and need an authoritative interpreter.

Consider this example. There are several public parks, where children play and where adults read, visit with one another, and walk their dogs. After several accidents involving motorcycles and motorscooters, the city council enacts a statute: “no vehicles are allowed in public parks.” Does that statute prohibit bicycles? Users of the park will have many different views about whether the statute bars bicycles: kids and some parents will think it obviously does not; many older park users and parents of toddlers will think that it obviously does; and other park users will have a variety of views, including the view that the law is completely ambiguous on this matter. There is a public need for an interpretation that binds everyone; if you do not like that interpretation, you can petition the city council to amend or even repeal the statute.

Consider some traditional rule of law virtues that should accompany the process of statutory interpretation (whatever the ultimate application to bicycles).<sup>22</sup> The process ought to be neutral and objective: the

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21. There might be more than one authoritative interpreter. In a family, for example, Mom and Dad might both be authoritative interpreters of family rules; in most cases, the first parent to lay down a rule is the primary decision maker, to which the other parent defers. Decision-making cycles (where Mom lays down one rule, Dad trumps it or provides a slightly different rule, Mom creates an exception, etc.) are widely considered nonproductive in our society.

22. See generally LON L. FULLER, *THE MORALITY OF LAW* (1964) (classically advancing the desiderata for procedural justice).

interpreter comes up with a rule applicable to everyone (no exceptions for special interests) that is derived from the statutory command through a rational process that even someone harmed by the interpretation (i.e., bike riders) can appreciate. From a rule of law perspective, it would be useful if the process involved public deliberation, where different perspectives are argued and reasons given for the interpretation. It would be terrific if the result were reasonably predictable, that is, different decision makers following the relevant criteria will usually reach the same result. And it would be good if the interpretation were stable; parents and older park users can rely on the bicycle ban when they make plans to arrange a play date or a meeting in the park.

The no-vehicles-in-the-park hypothetical originated in the published version of H.L.A. Hart's Holmes Lectures, and Professor Hart assumed that courts would provide the interpretations called for by the variations in possible "vehicles."<sup>23</sup> Under a single-institution analysis, courts would seem well-suited to provide objective, neutral, reasoned, and predictable interpretations of that statute. If the local courts follow the federal model, trial judges are expected to listen carefully to arguments on all sides and to provide reasons for their statutory constructions. If the judge has life tenure, she is likely to be independent of the political process and more attentive to objective considerations in her opinion, which is reviewable on appeal. If an appeals court construed the statute to be inapplicable to bicycles, park users could rely on that construction, for trial judges would be absolutely bound by it and even a differently constituted appeals court would follow the precedent as a matter of stare decisis.

These are powerful rule of law advantages for making an independent judiciary the primary organ for statutory interpretation. Yet under a Komesarian *comparative* institutional analysis, one can readily understand how even this classic "judges know best" statute is (and should be) primarily interpreted by administrators and not by judges. Indeed, the police and prosecutors are, in practice, the dominant interpreters, because they make the initial decisions as to the statute's application. If the police or the prosecutor interprets the law to allow bicycles in the park, then there will be no case for a judge to offer her interpretation. Even if the police interpret the law to exclude bicycles, they might enforce their understanding through signs, friendly persuasion, and warnings that, likewise, are not likely to generate court cases (and, with such cases, judicial constructions of the statute). The result is that courts may have no opportunity even to interpret the statute

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23. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607–11 (1958). See also Lon L. Fuller, *Positivism and the Fidelity to Law—A Response to Professor Hart*, 71 HARV. L. REV. 630, 661–69 (1958) (responding to Hart and also focusing on application of the no-vehicles hypothetical).



and, if they do get a case now and then, may not develop a systematic array of rules. This feature of judicial decision making is an important limitation on the ability of judges to deliver a comprehensive regulatory regime.<sup>24</sup>

This thought experiment can be generalized at the national level. From a rule of law perspective, the big advantage of federal agencies is that they have the capacity, and often the legislative mandate, to generate a lot of detailed rules expeditiously and to publicize those rules as binding upon the entire nation.<sup>25</sup> Case-by-case adjudication, which is the characteristic mode for courts, takes longer to generate rules, especially national rules binding on everyone. In contrast, agencies have a variety of mechanisms that allow them to generate national rules relatively quickly: administrative rulemaking, published guidances, handbooks, and even online websites.<sup>26</sup> These are more accessible to the general public than judicial precedents are, they have immediate national application, and they are more detailed (sometimes much more detailed) than precedents usually are or can aspire to be.

Potential drawbacks of police and prosecutor interpretation are that it might not be transparent to the community and might vacillate, as different officers could bring different viewpoints to the enforcement process. In that event, however, the best solution, from a Komesarian point of view, would be for the police department and the prosecutor's office to cooperate in publishing guidelines for use of the parks; such guidelines could be posted at various points in the park and could advise park users that they can ride tricycles but not bicycles in the park, and they can roller-skate if they choose. Indeed, the best rule of law solution would be for the City Council to authorize the Parks Commission to promulgate rules, after public notice and a hearing open to all, setting forth the rules for park use (including the no-vehicles command).<sup>27</sup>

To be sure, any police-prosecutor guideline or commission rule might be subject to potential judicial review in those cases where someone was fined for a violation. As before, however, there would likely be no judicial review of administrative decisions to allow

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24. Cf. KOMESAR, *supra* note 2, at 136–38 (considering the lawmaking effects of skewed participation by citizens in the adjudicative process).

25. This argument originates with Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1124 (1987).

26. On the variety of mechanisms available to agencies, see M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1386–90 (2004); Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1468–73 (1992).

27. See Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996) (arguing that the rule of lenity should be replaced by public rulemaking by prosecutors, with judicial review of rules interpreting criminal statutes).

mechanisms like tricycles into the park. Nor would any but a handful of accused vehicle-riders press their arguments in court, because of the expense and bother.<sup>28</sup> And if a litigious cyclist did press her case before a judge, it is probable that the judge will “go along” with the police and prosecutor in most cases—for reasons that I shall explain below.

The foregoing thought experiment (the “Case of the Vehicles in the Park”) also suggests important guidelines for agencies to follow when interpreting statutes. The most obvious guideline is procedural: agencies can be most helpful if they promulgate a coherent set of rules in a format easily available to the public affected by the rules. For our no-vehicles statute, for example, the police department or the parks commission could generate a list of “allowed” and “not allowed” mechanisms and post the list on park landmarks, the park website, and in a little handbook or plastic card people could carry home. Complicated federal statutes might be interpreted through postings in the Federal Register.

Substantively, agencies, like any other interpreters, must interpret statutes with close attention to the statutory language, declining to give the words a meaning they will not bear. Thus, the agency might choose to apply the no-vehicles law to include bicycles in the statutory bar; bicycles are frequently deemed to be vehicles, and so this is a permissible application (though the opposite reading, excluding bicycles from the law, may also be permissible). I am more dubious that an agency could, consistent with the rule of law, apply the statute to cover roller skates, toy cars, or pogo sticks. All of these mechanisms might meet the dictionary definition of “vehicle,” but the average person would probably not consider a no-vehicles ban to cover toys of this sort.<sup>29</sup>

### *B. Public Good: Agency Expertise*

As a general matter, statutes are adopted for a public purpose, and we usually assume that legitimate public purposes are instrumental and not purely expressive or moralistic. The no-vehicles law may have been adopted in part for moralistic reasons (to disapprove of vehicle-operating persons), but such a statute would surely also have been publicly justified by an instrumental goal, such as improving the safety of parks and preventing harm to vulnerable persons in the parks (i.e., children and older persons). Federal super-statutes carry out the greatest goals of our legal system, such as outlawing irrational and prejudice-based workplace

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28. How many of the tens of millions of speeding tickets are challenged in court? Speeding tickets in many jurisdictions carry a higher penalty (hundreds of dollars) than would the no-vehicles law.

29. *Cf. McBoyle v. United States*, 283 U.S. 25 (1931) (finding that an airplane is not a “motorized vehicle” as used in a federal statute barring the use of such vehicles).

discrimination, preventing environmental degradation, preserving a healthy and integrated system of public and private finance, and responding to international terrorism.<sup>30</sup>

Because statutes are purposive, and society potentially benefits from purposive laws, interpreters of all sorts are urged to apply statutes so as to advance rather than detract from the public-regarding statutory purpose.<sup>31</sup> In addition to following statutory texts, agencies, like judges, ought to apply statutory text in light of legislative purpose(s). An interpretation that undermines the statute's efficacy is one that should be avoided, if possible. The question for the comparative institutional analyst is this: Do agencies have an advantage over courts in interpreting statutes to carry out their purposes?

The conventional wisdom is that agencies have greater "expertise" than courts in figuring out instrumental applications.<sup>32</sup> One source of agency expertise comes from specialization: agency officials spend their time focusing on a particular set of problems, they are better at solving those problems than judges would be because they have thought about them more, they have seen what works and what does not work, and they are sharply aware of the practical trade-offs that are needed given scarce resources for implementation. Interpreting our no-vehicles law, many judges would find that bicycles are included in the plain meaning of the statute—but the police and prosecutors are likely to write such an application out of the law entirely if their experience reveals that bicycles do not contribute to accidents harming park users. Contrariwise, if the police perceive bicycles to be the *main* cause of injury to park users, they will apply the statute, even though many judges would not. If it is true, as Justice Antonin Scalia has recently argued, that the comparative advantage of courts is rigorous textual analysis, then judicial interpretation of something like the no-vehicles law will often miss the right purpose-based analysis, such as the application of the statute to bicycles if the police observe them to cause accidents or pose other dangers to park users.<sup>33</sup>

Not only do agency personnel develop expertise by gaining experience from their focus on particular problems, as in our no-vehicles

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30. See WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010) (providing a theory of super-statutes and examples such as those described in text).

31. *E.g.*, HART & SACKS, *supra* note 1, at 1377–80; ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 63–65 (2012).

32. Like most "conventional wisdom," that in the text is not supported by empirical evidence, and so it must be taken with a grain of salt.

33. *E.g.*, SCALIA & GARNER, *supra* note 31, at 36–39 (providing a rigorous application of judicial reasoning, ending with the confident but hard-to-defend assertion that a no-vehicles law could never apply to bicycles).

example, but agencies today usually include staff who have special training in economic analysis, often critically important for a reliable means-end analysis. For example, the Securities and Exchange Commission (SEC) is charged with enforcing antifraud rules against persons and companies engaged in the purchase and sale of corporate securities. To carry out its mission, the SEC has assembled a staff of economists and lawyers with training in economics to figure out what kinds of rules work best to head off as well as detect securities fraud.<sup>34</sup> Many a single-institution analysis takes the SEC to task for not doing a better job at detecting such fraud, such as the notorious Madoff Ponzi scheme,<sup>35</sup> but almost no one has argued that judges would do a better job interpreting the statutes than the SEC has done. Indeed, the main criticism of the SEC has been that it remains too much dominated by lawyers and ought to rely more than it does on the advice of economists, a lesson the agency has already taken to heart.<sup>36</sup>

The SEC is an independent agency, outside the formal control of the President.<sup>37</sup> Executive branch agencies, such as the Environmental Protection Agency (EPA), are staffed with experts in their fields of regulation (such as scientists in the EPA), but have an added layer of expertise imposed upon them by the President, namely, the cost-benefit analysis of their significant rulemaking by the Office of Information and Regulatory Affairs (OIRA).<sup>38</sup> Staffed with economists and other experts, OIRA requires agencies to justify their instrumental regulations through a rigorous cost-benefit analysis, which OIRA's experts then review to determine whether the regulatory rules are needed to generate benefits consistent with the statutory goals.<sup>39</sup> By all accounts, OIRA requires agencies to adjust their rules to respond to cost-benefit concerns.

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34. E.g., Bruce R. Kraus & Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis*, 30 YALE J. ON REG. (forthcoming 2013) (detailed description and defense of SEC's economic analysis, and responding to judicial critics of that analysis).

35. Jonathan R. Macey, *The Distorting Incentives Facing the U.S. Securities and Exchange Commission*, 33 HARV. J.L. & PUB. POL'Y 639 (2010).

36. Compare *id.* (criticizing the SEC as too lawyer-driven and urging more reliance on economic analysis), with Kraus & Raso, *supra* note 34 (reporting more staffing and greater reliance on economists by the SEC).

37. Or so the Supreme Court has assumed. See *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3148 (2010) (making this assumption, based upon the parties' stipulation).

38. For an overview of OIRA review, see, for example, Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006); Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821 (2003); Thomas O. McGarity, *A Cost-Benefit State*, 50 ADMIN. L. REV. 7 (1998).

39. Croley, *supra* note 38, at 841–43.

Again, one can criticize OIRA's instrumental analysis, both generally and in particular cases, but a *comparative* institutional analysis asks whether courts could accomplish this means-end analysis as well or better than OIRA and the relevant agencies. Everyone has her own list of federal agencies that underperform—but virtually no one advocates abolition of the agency and transfer of its duties to courts.<sup>40</sup> In the modern regulatory state, courts are just not up to the task of instrumental, purposive analysis. Courts' decision makers (judges) are lawyers, typically with little training in economics or science; the supporting staff (law clerks) are smart and somewhat better trained in economics and science but are short-term employees whose time is swallowed up with the minutiae of legal research and fact-checking; and the case-by-case mode of decision making is not well-suited to the kind of systematic rulemaking that the regulatory state needs to accomplish.

### *C. Legitimacy: Democratic Accountability*

A third important criterion for a system of legal rules is that the directives governing the citizenry are *legitimate*: they are adopted through a process that the society recognizes as the valid mechanism for generating rules applicable to all its members. At the national level, our primary rule of recognition is Article I, Section 7: when both chambers of Congress agree on particular language and the President signs on (or is overridden), a statute is created that is binding on judges and, by implication, on citizens and anyone within the nation's jurisdiction as well.<sup>41</sup> The most notable thing about Article I, Section 7 is the electoral connection; each institution (the House of Representatives, the Senate, and the Presidency) is elected by a different kind of constituency, and each is accountable to that constituency when its members make important policy choices.<sup>42</sup> Stated another way, when Congress enacts statutes, often after an intensely divisive political debate, those statutes create new settled rules that even the losers accept as legitimate, even if unwise.<sup>43</sup>

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40. Professor Jerry Mashaw, for example, is a critic of the regulatory efforts of the National Highway Traffic Safety Administration (NHTSA), but his classic analysis of auto safety concludes that judicial review only made regulatory dysfunction worse. See MASHAW & HARFST, *supra* note 9, at 225.

41. U.S. CONST. art. I, § 7 (process for creating federal statutes); *id.* at art. VI (the Supremacy Clause, requiring state judges to follow federal statutes).

42. Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749 (1999); V.F. Nourse, *Toward a New Constitutional Anatomy*, 56 STAN. L. REV. 835 (2004).

43. JEREMY WALDRON, *LAW AND DISAGREEMENT* 10 (1999).

Under these foundational principles of democratic accountability, it stands to reason that the statutory interpreter ought to be responsive to the legislative process that created the statute. An interpretation that is consistent with legislative expectations is to be preferred to one that is not, all else being equal. Admittedly, this proposition has generated some controversy, but almost all the objectors are Justice Scalia and his former law clerks, the advocates of the new textualism. The new textualists object that legislative “intent” is a worthless fiction and that, even if not fictive, such intent cannot be discovered by courts.<sup>44</sup> The first objection seems to be erroneous; political scientists and linguists are largely in agreement that collective legislative intent is both conceivable and frequently achieved in the process of enacting statutes.<sup>45</sup>

As a matter of comparative institutional analysis, the new textualists’ second argument suggests the possibility that agencies might have access to the insights of legislative history and, hence, serve as more legitimate interpreters of statutes than courts. As to this question, there is virtually no empirical evidence one way or the other, but there is good reason to believe that agencies have a comparative advantage in this respect as well. Return to our no-vehicles thought experiment.

When the (hypothetical) City Council was considering bills to bar vehicles from municipal parks, it is quite likely that police and prosecutors were an active part of the process. If the police department had told the Council that there was no problem with any kind of vehicles, there would likely have been no legislation. Conversely, if the police had reported a lot of accidents resulting from motorcycles zipping through the park, the Council would probably have taken their recommendations very seriously. The point is that agencies are, relatively speaking, more knowledgeable about the legislative debates, deals, and understandings behind an enacted statute. If the judge is appointed for life (the federal model for the judiciary), she will probably be much more of a stranger to the statute than the administrators are.

Moreover, the administrators are probably more knowledgeable about the ongoing legislative history of the statute than judges are. For

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44. E.g., SCALIA & GARNER, *supra* note 31, at 375–87 (arguing that legislative “intent” is a worthless fiction, that legislative materials are unreliable evidence of any conceivable intent, and that treating materials generated by legislative subgroups as “authoritative” raises separation of powers concerns); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997).

45. LAWRENCE M. SOLAN, *THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION* 82–119 (2010); James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 41–56 (1994); Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119 (2011) (responding to separation of powers arguments for excluding legislative history and, indeed, turning those arguments around to favor legislative history).

example, the police and the councilmembers might have originally focused on *motor* vehicles, rather than bicycles and the like, but in the wake of the statute the police do notice accidents involving bicycles. Knowing that the statute does not include bicycles, the police might petition the Council to amend the law to add bicycles. Because many parents and kids want the park to be bicycle-accessible and parent groups suggest regulatory alternatives such as special bicycle paths, the Council might decline the police proposal but adopt, instead, a law requiring bicycles to be ridden in parks only on designated paths. The police know not to enforce the no-vehicles law against bicycles under such circumstances.

The conclusions inspired by this thought experiment can probably be generalized to the federal level. Although there is no empirical evidence, I have read all the briefs filed by the Solicitor General supporting an agency statutory interpretation in hundreds of Supreme Court cases between 1984 and 2006. Upon reading these cases, my judgment is that the agency briefs were, virtually without exception, most useful discussions of legislative history, and that executive department lawyers were skilled and relatively scrupulous in discovering and analyzing legislative history.<sup>46</sup> To be sure, agency briefs are advocacy documents in cases where the United States is a party, but scholars have been impressed that the Solicitor General subjects agency interpretations to stringent review and presents an unusually good analysis.<sup>47</sup> Moreover, contrary to the new textualists, I find Supreme Court analysis of legislative materials to be highly sophisticated and useful treatments of legislative history.<sup>48</sup>

Aside from their typical advantage in access to legislative materials, there is a deeper reason why agencies will be more responsive to legislative expectations than courts will be: legislators communicate constantly with agencies and sometimes send them signals when their significant interpretations are off track.<sup>49</sup> While communications from the current Congress do not necessarily establish the intent of the enacting Congress (especially if the statute was enacted long ago), an interpretation consistent with current congressional preferences is,

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46. See Eskridge & Baer, *supra* note 11, at 1196–98.

47. See generally Margaret H. Lemos, *The Solicitor General as Mediator between Court and Agency*, 2009 MICH. ST. L. REV. 185.

48. Eskridge, *supra* note 13, at 2065–70 (responding to the argument that judges are experts at textual interpretation and incompetent or sneaky in using legislative history).

49. E.g., Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984); Bradley Lipton, Note, *Accountability, Deference, and the Skidmore Doctrine*, 119 YALE L.J. 2096, 2105 (2010).

relatively speaking, more democratically legitimate than an interpretation that is not.

Likewise, federal agencies are more responsive than courts to the policy preferences of the President, who along with the Vice President is our only nationally elected official. Executive branch agencies are potentially more responsive; their heads are appointed and can be removed by the President, and much of their interpretive work is reviewable by OIRA.<sup>50</sup> Even “independent” agencies are subject to presidential preferences, though to a lesser extent: their heads are appointed by the President, their budgets are prepared by the Office of Management and Budget, and the United States Department of Justice (an executive agency) controls their litigation decisions on appeal.<sup>51</sup> The comparative institutional point is this: compared with courts, one reason agencies are more competent to make big “political” decisions (legally debatable decisions with important policy consequences) is that agencies are accountable to democratic institutions and popular participation in ways that unelected, life-tenured federal judges are not.<sup>52</sup>

The foregoing analysis has important consequences for the process an agency should follow when interpreting federal statutes. Recall my earlier point, that agencies should be attentive to the statutory text, read in light of the statutory purpose (the agency’s mission). In conducting this analysis, the agency should also consider the ongoing legislative history of the statute. Moreover, when the agency is making a “big move” addressing an important, unresolved issue, it is incumbent upon the agency to engage in an open, deliberative, and democratically accountable process, including but not limited to notice-and-comment rulemaking.<sup>53</sup>

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50. Mashaw, *supra* note 9; see also Croley, *supra* note 38, at 827–28; Lipton, *supra* note 49, at 2105–06.

51. See Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 *CARDOZO L. REV.* 273, 287–92 (1993) (describing the ways in which the Department of Justice has dominated legal decision making by the EEOC, ostensibly an “independent” agency).

52. Cf. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (offering accountability to the President as an important reason for deferring to agency decisions where Congress has not directly addressed an issue in the statute).

53. Compare HENRY S. RICHARDSON, *DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY* 219–20, 251 (2002) (notice-and-comment rulemaking is the best solution to the administrative state’s possible democracy deficit), with Lipton, *supra* note 49, at 2114–15 (quoting E. Donald Elliott, *Re-Inventing Rulemaking*, 41 *DUKE L.J.* 1490, 1492–93 (1992)) (arguing that agency responsiveness owes more to informal interactions with We the People than to the Kabuki-like dance of rulemaking).



## II. THE (POTENTIAL) UMPIREAL ROLE FOR COURTS

Under a Komesarian comparative institutional analysis, tied to the goals of our legal system, statutory interpretation is better carried out by agencies than by courts—which is pretty much the system we have in this country. The conclusions reached in the previous Part support the status quo and suggest, moreover, the best interpretive approach agencies should generally follow in light of the normative commitments underlying our legal system: read statutes broadly, in light of their purposes, and follow a quasi-legislative political process for interpretations addressing big policy questions or arenas not resolved by the statute.<sup>54</sup>

To be sure, some federal statutes seem to delegate the primary responsibility for statutory interpretation to courts, with agencies allotted a secondary role. Surprisingly, Komesarian analysis may often trump this form of legislative choice among institutions. Like state and local legislatures, Congress has vested the interpretation of criminal laws with the judiciary, but as we have seen in the Case of the Vehicles in the Park even those statutes are dominated by administrative interpretation, as a practical matter. An even more dramatic example is the Sherman Act of 1890, the antitrust super-statute that vests prosecutorial authority in the Department of Justice but also authorizes private lawsuits and renders federal courts the primary decision makers for policy issues presented by the broadly worded law.<sup>55</sup> In practice, however, the Supreme Court has faithfully (almost slavishly) followed the Department of Justice's advice in prioritizing the disparate purposes of the original law, setting forth both *per se* and flexible prohibitions of specified anticompetitive conduct, and jettisoning judicial precedents right and left.<sup>56</sup> This example illustrates the power of Komesarian comparative institutional analysis: even when Congress sets the court-agency balance in favor of judicial primacy in statutory interpretation, the agency may still acquire primacy where its expertise dominates that of the Court and its interpretations strike the Court as not in conflict with the democratic expectations of the political branches.

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54. This is roughly the process most agencies follow when interpreting statutes. *E.g.*, Lipton, *supra* note 49, at 2112–13; Mashaw, *supra* note 9.

55. Sherman Anti-Trust Act of 1890, Pub. L. No. 190, ch. 647, §§ 1–8, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1–7 (2006)).

56. See ESKRIDGE & FEREJOHN, *supra* note 30, at 120–64 (presenting an institutional history of the Sherman Act and demonstrating the dominance of the Department of Justice in setting antitrust policy, followed by the judiciary); Leah Brannon & Douglas H. Ginsburg, *Antitrust Decisions of the U.S. Supreme Court, 1967 to 2007*, COMPETITION POL'Y INT'L, Autumn 2007, at 3, 17–20 (empirical evidence demonstrating the complete dominance of the Department of Justice in setting antitrust policy and persuading the judiciary, 1967–2006).

The foregoing analysis, and especially the dramatic example of agency dominance in the construction of national antitrust policy, raise these Komesarian questions: Ought courts, as a matter of institutional capability, be considered obsolete institutions in the modern regulatory state? Do they have *any* role to play in the modern legal system?

For some statutory schemes, courts do approach irrelevance, as for those statutes where Congress has delegated all effective interpretation to various agencies and nothing to judges.<sup>57</sup> A surprisingly large number of statutes are what Edward Rubin calls “intransitive” laws, where congressional directives are addressed to agencies and administrators, and not to the citizenry and judges.<sup>58</sup> David Skeel’s contribution to this Symposium illustrates the importance of intransitive statutes during the financial crisis of 2008–09: the overwhelming majority of the statutory directives were addressed to regulatory agencies, and the federal courts were, by design as well as by their own abstention, virtually irrelevant to the construction of the statutes that formed the foundation of the nation’s regulatory response to the crisis.<sup>59</sup>

But a central lesson of comparative institutional analysis is that, however superior one institution may appear to another, the “superior” institution has its Achilles heels and the “inferior” institution has some formidable strengths that might correct for the weaknesses of the superior institution. So it appears to be with agencies and courts. Even if, in the general run of statutory issues, agencies seem like the best institution to make rules, there may be particular issues where courts are the best institution to make certain judgments. More important, the undemocratic, unexpert but predictable (even plodding) judiciary might be the best institution of all to monitor certain kinds of agency dysfunctions, including those reflecting an agency’s “minoritarian bias” in favor of its specialized perspective or that of its client groups, as well as poor decisions flowing from an agency’s “majoritarian biases” that impose unfair costs upon minorities.<sup>60</sup>

In short, a proper comparative institutional analysis would not read federal courts out of the business of statutory interpretation. Indeed, the Komesarian perspective helps us appreciate the richness of the

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57. Even in such statutes, of course, courts remain open for lawsuits challenging the constitutionality of statutory provisions or their implementation, *see Webster v. Doe*, 486 U.S. 592 (1988), but such lawsuits rarely have much traction.

58. Rubin, *supra* note 18, at 381–83.

59. David A. Skeel, Jr., *Institutional Choice in an Economic Crisis*, 2013 Wis. L. REV. 629.

60. These terms are taken from *Imperfect Alternatives*. KOMESAR, *supra* note 2, at 54, 75–81; *see also id.* at 216–31 (detailed examination of the Framers’ approach to minoritarian and, especially, majoritarian biases as well as the relevance of this analysis to recent theories of judicial review by Bruce Ackerman and John Hart Ely).

sometimes-denigrated “umpireal” role<sup>61</sup> of judges. Their independence from politics and the slenderness of their resources render the judiciary not only the “least dangerous” branch,<sup>62</sup> but the only branch of government that can be trusted to maintain boundaries needed for the rule of law, and perhaps also democracy, to flourish. Although Professor Komesar himself has emphasized the judiciary’s comparative advantage in monitoring majoritarian biases,<sup>63</sup> this Part will argue that courts have other comparative advantages as well. Specifically, judicial review is institutionally defensible when (1) agencies are in potential conflict with state regulations, (2) agencies shirk their rule of law duties revealed by clear statutory texts upon which private and public institutions have relied, and (3) agencies contravene important public values. Consistent with Komesar’s approach in the constitutional arena, my analysis envisions a more aggressive role of courts to counteract the majoritarian biases of agencies and accepts that courts cannot as a practical matter play a very effective direct role in monitoring minoritarian biases such as capture by special interests.

#### A. Intergovernmental Disputes

Perhaps the least-appreciated role of federal judges is *boundary maintenance*, namely, enforcing prescribed boundaries or limits on officials.<sup>64</sup> The Komesarian reasons for preferring agencies as rule-making institutions do not completely apply when agencies (or agencies and other political institutions) are in conflict, which is typical in boundary maintenance disputes.

For the best example, consider cases where the issue is whether a federal statute preempts a state or local rule. Much of the Supreme Court’s docket is occupied by such cases, and almost all of them call forth a federal agency brief, as well as briefs from state and local agencies or their litigation surrogates.<sup>65</sup> In more than two-thirds of the Supreme Court cases, federal agencies take the position that state or local

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61. For a discussion of the umpireal role of judges, see Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).

62. See THE FEDERALIST NO. 78, at 392–94 (Alexander Hamilton) (Gary Wills ed., 1982) (describing the judicial branch as the “least dangerous to the political rights of the constitution”).

63. See KOMESAR, *supra* note 2, at 134–38, 213–31.

64. Cf. Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006 (1987) (sophisticated analysis of the role of judicial review in policing the “boundary” between the public and private spheres).

65. See William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441 (2008) (reporting and analyzing 131 Supreme Court cases involving preemption claims with federal agency inputs through amicus briefs, 1984 to 2006).

rules are preempted by national statutes.<sup>66</sup> Although such agencies do consider concerns raised by state and local governments, they do not appear to be perfectly constrained by such pressures, which are counterbalanced by agency tendencies to consider their own missions superior to state and local projects.<sup>67</sup> The leading scholars have cautioned that federal agencies tend to seek expanded jurisdiction and authority, which motivates them to grab turf from state and local authorities.<sup>68</sup>

On the demand side, therefore, one can see a strong need for institutional mediation of such important disputes. On the supply side, the Komesarian question is whether these preemption issues are ones that the Supreme Court is well equipped to handle. This is a question worth extended discussion and requiring more evidence, but the existing evidence supports a judicial role in these cases. That the Court is largely independent of politics renders it the best national institution to handle such disputes, for the Justices' independence gives some assurance to state and local governments that their arguments will be taken seriously. To be sure, any national institution is likely to favor national interests much of the time, but the Supreme Court has an impressively neutral track record in preemption cases, from the perspective of state and local governments. The Court protects state and local rules against preemption in 47.3% of the cases that it hears, finds preemption in 45.8% of the cases, and rules both for and against state law in 6.9% of the cases.<sup>69</sup>

Consider a recent and highly controversial preemption case, *Arizona v. United States*.<sup>70</sup> Arizona enacted the Support Our Law Enforcement and Safe Neighborhoods Act, the purpose of which was to “discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.”<sup>71</sup> To carry out this purpose, Arizona made it a crime for a noncitizen to be noncompliant with federal alien-registration requirements (section 3)<sup>72</sup> or

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66. *Id.* at 1479 tbl.2 (reporting that in the Court's preemption cases where a federal agency took a position, the agency in 70.2% of the cases favored preemption of state law).

67. Nina Mendelsohn, *Chevron and Preemption*, 102 MICH. L. REV. 737 (2004).

68. Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 209–11 (2004); Mendelsohn, *supra* note 67, at 794–97.

69. Eskridge, *supra* note 65, at 1484, app. (reporting the results in the 131 preemption cases decided by the Court, 1984–2006, and having agency inputs).

70. 132 S. Ct. 2492 (2012).

71. Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, § 1, 2010 Ariz. Sess. Laws 450, 450 (codified as amended at ARIZ. REV. STAT. ANN. § 11-1051 (2012)).

72. § 3.

to seek or engage in work in Arizona (section 5).<sup>73</sup> Section 6 authorized state and local officers to arrest without a warrant a person “the officer has probable cause to believe . . . has committed any public offense that makes the person removable from the United States.”<sup>74</sup> Section 2(B) required officers conducting a stop, detention, or arrest to make efforts, in some circumstances, to verify the person’s immigration status with the federal government.<sup>75</sup>

Few issues are as divisive as state efforts to buttress federal immigration enforcement. States like Arizona believed the federal executive department was not enforcing immigration laws in any meaningful sense and sought to add their incentives and officials to strengthen enforcement. The Obama administration took the position that such state laws unhinge the careful balance set in recent immigration statutes. The Supreme Court ruled that sections 3, 5, and 6 of the Arizona law were preempted by federal immigration statutes, but that section 2(B) was not, on its face, preempted but might be vulnerable to challenges as it is applied by the state and local authorities.<sup>76</sup> Authored by Justice Anthony Kennedy, a Reagan appointee, and joined by Chief Justice John Roberts (appointed by President George W. Bush) and Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor (appointed by Democrats),<sup>77</sup> the opinion for the Court represented a bipartisan consensus judgment that seemed impossible for any of the political branches to achieve in 2012.<sup>78</sup>

Also important, the dissenting opinions were of high quality. Justices Clarence Thomas and Samuel Alito reflected different but impressively judicious judgments about the balance between federal and state law in the field of immigration.<sup>79</sup> Although Justice Scalia’s dissenting opinion contained a fair amount of intemperate rhetoric, the bulk of it was sophisticated legal analysis supporting a broad role for the states to police their own borders and to discourage illegal aliens from remaining within their jurisdictions.<sup>80</sup> All eight participating Justices, in

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73. § 5(C).

74. § 6(A).

75. § 2(B).

76. *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012).

77. *Id.* at 2497; LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM* 295 tbl.4-1 (5th ed. 2012).

78. See, e.g., Ross Douthat, Op-Ed., *Boehner, American Hero*, N.Y. TIMES, Jan. 6, 2013, at SR6; Editorial, *Provisional Government*, WASH. POST, Jan. 4, 2013, at A14; Janet Hook & Carol E. Lee, *Cliff Talks Down to the Wire—Both Sides to Meet at White House Today; Any Deal Is Likely to Be Limited*, WALL ST. J., Dec. 28, 2012, at A1.

79. *Arizona*, 132 S. Ct. at 2522–24 (Thomas, J., concurring in part and dissenting in part); *id.* at 2524 (Alito, J., concurring in part and dissenting in part).

80. *Id.* at 2511–21 (Scalia, J., concurring in part and dissenting in part) (offering hard-hitting and high-quality legal and constitutional analysis supporting

my opinion, engaged in a judicious debate about the legality of state action on a politicized issue pitting federal agencies against state and local legislatures, governors, and law enforcement agencies. Justice Kennedy's opinion for the Court settled the matter about as well as any judgment could have done—and this is significant evidence of the utility of the federal courts in resolving intergovernmental disputes between national agencies and state or local governments.

To be sure, most intergovernmental disputes at the national level will not be settled by the federal courts; more efficient mechanisms for dispute resolution outside the preemption context exist within the executive branch of the federal government. For example, disputes among federal agencies (surprisingly common) are generally settled by OIRA, by the Solicitor General, or even by the White House, rather than by the judiciary.<sup>81</sup> Not as common as national-state disputes, but potentially even more important, are disputes between the political branches of the federal government, namely, the President (or agencies under the President) versus Congress. Perhaps surprisingly, most of those disputes involve matters of statutory as well as constitutional interpretation, and the Supreme Court has proven to be an honest arbiter of such disputes.<sup>82</sup>

### *B. Agency Shirking*

One of the most important Komesarian insights is that comparative institutional analysis must avoid the tendency to romanticize institutions. Even if I am right that agencies have many advantages over courts in making rules, we still need to think hard about what dysfunctions might afflict agency rulemaking before concluding that courts should play a

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Arizona's position). *But cf. id.* at 2521–22 (injudicious rhetoric assailing the Obama administration for its amnesty program for children of illegal aliens, a program not strictly relevant to the legal issues in the appeal).

81. See Bagley & Revesz, *supra* note 38 (OIRA); Lemos, *supra* note 47 (Solicitor General).

82. The Steel Seizure Case, *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952), initiated this *pas de deux* between constitutional and statutory limits, as most such disputes fall within the “zone of twilight,” where the dispute rests upon presidential claims that Congress has authorized presidential initiatives. *See id.* at 634–38 (Jackson, J., concurring). For recent examples, see *Medellin v. Texas*, 552 U.S. 491 (2008); and *Morrison v. Olson*, 487 U.S. 654 (1988). Even *Morrison*, which most scholars believe to have been poorly reasoned, represented the effective operation of the Court as a neutral decision maker; the author of the pro-Congress opinion was Chief Justice William Rehnquist, a former executive branch official and never a Justice to go out of his way to undermine presidential authority. *See id.* at 659; Philip P. Frickey, *Transcending the Routine: Methodology and Constitutional Values in Chief Justice Rehnquist's Statutory Cases*, in *THE REHNQUIST LEGACY* 266, 276–77 (Craig M. Bradley ed., 2006).

secondary (or even tertiary) role in statutory interpretation. A generation ago, many law professors took as axiomatic the idea that most agencies were “captured” by the interest groups they were charged with regulating, and that agency capture justified a highly skeptical judicial review of agency rules.<sup>83</sup> In Komesarian terminology, captured agencies reflected minoritarian biases, where administrators or an interest group pressed statutory policy away from the public interest favored by the majority. Today, agency capture theory has lost most of its bite,<sup>84</sup> but virtually anyone who has had experience in actual administration agrees that even well-motivated agencies engage in what economists would call “shirking,” namely, departing from the (majoritarian) agenda set for the agency by Congress.

In this Part, I consider different ways agencies might shirk—with each kind of shirking behavior tied to the goals of a legal system of rules. Thus, an agency may shirk by ignoring established legal limits on their authority. Such *rule-of-law shirking* is especially problematic when persons and firms have widely relied on those limits. An agency can also engage in *democratic shirking*, where it expands (or constricts) statutes so much that it usurps Congress’s authority and without the accountability felt by legislators. Finally, agencies engage in *policy shirking* when they fail to pursue the congressional goals effectively, perhaps because of interest group capture or simply because of lethargy and inertia.

Each kind of shirking calls upon the comparative institutional analyst to consider institutional checks, such as judicial review of agency interpretations. Under Komesar’s theory, however, such a move requires a belief that the checking institution (i.e., the judiciary) can accurately detect shirking and remedy it without creating excessive costs. For structural reasons, the judiciary is not as clearly capable of monitoring agency decisions to correct for minoritarian biases as for interagency disputes and for majoritarian bias. Because courts are both independent and skilled analysts of the legislative deals encoded in statutory language, I believe they do a good job monitoring rule-of-law shirking, and their role is highly valuable for institutions and persons who have relied on the rule of law the agency has ignored. A comparative institutional analysis is less supportive of judicial capacity to monitor democratic and policy shirking, but not entirely negative, either. In what

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83. E.g., Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 14–15 (1984) (suggesting that many statutes are rent seeking and that courts ought to interpret them narrowly); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1682–90 (1975).

84. See, e.g., Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 260 (1998).

follows, I shall lay out the agency problem and some thoughts as to whether courts would be appropriate monitoring institutions.

#### 1. RULE-OF-LAW SHIRKING: PROTECTING RELIANCE INTERESTS

As suggested by my earlier analysis, agencies interpret statutes purposively, and that is on the whole a good impulse in the modern regulatory state. A consequence of a purposivist approach to statutes is that the interpreter will read the statute dynamically, to reach beyond the original problems that were the basis of congressional deliberation.<sup>85</sup> Again, this is not only natural for agencies, but often or even typically beneficial for the public interest. But what if the agency presses statutory policy beyond the established meaning of the statute, a meaning that has generated reliance interests? This represents the agency shirking its rule of law duties. (If there has been no reliance on the statute, the agency's dynamism might technically violate rule of law norms, but the violation would tend to be harmless error.)

One might expect agencies to engage in this kind of rule-of-law shirking rather frequently, because administrators can get caught up in the normative bounce that comes from aggressively pursuing the agency's mission and because the political process is as likely to encourage as to halt agency dynamism. If agencies shirk their rule of law duties and undermine reliance interests, the Komesarian question is whether the judiciary is an appropriate institution to correct this kind of shirking. I believe the answer to that is "yes," though there is no systematic empirical evidence supporting my judgment. Instead, I shall provide as an example a Supreme Court decision overturning an agency interpretation for which I have tremendous sympathy.

The issue in *FDA v. Brown & Williamson Tobacco Corporation*<sup>86</sup> (the FDA Tobacco Case) was whether the FDA had exceeded its authority to regulate "drugs" and "drug delivery devices" when it promulgated rules bringing nicotine (a drug) and cigarettes and other tobacco products (drug delivery devices) within the ambit of the Food, Drug & Cosmetics Act of 1938.<sup>87</sup> For most of the twentieth century, the

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85. ESKRIDGE, *supra* note 9, at ch. 2 (explaining the inevitability of dynamic statutory interpretations).

86. 529 U.S. 120 (2000). For an excellent account of this landmark decision, see Theodore W. Ruger, *The Story of FDA v. Brown & Williamson: The Norm of Agency Continuity*, in STATUTORY INTERPRETATION STORIES 334 (William N. Eskridge, Jr. et al. eds., 2011).

87. *Brown & Williamson*, 529 U.S. at 125–31; Nicotine in Cigarettes and Smokeless Tobacco Is a Drug and These Products Are Nicotine Delivery Devices under the Federal Food, Drug, and Cosmetic Act: Jurisdictional Determination, 61 Fed. Reg. 44,619, 44,628–33, 44,663 (Aug. 28, 1996).



FDA was not only one of the most aggressive, turf-grabbing agencies, but also one of the most successful, its reputation as the guardian of American health rendering it a powerhouse that remade the country's pharmaceutical industry and the practice of medicine.<sup>88</sup> Who could not have admired the FDA? And when FDA Commissioner David Kessler (1990–97)<sup>89</sup> went after the health-destroying tobacco industry, who could not be sympathetic? Indeed, at first glance, the FDA's regulation of tobacco products was supported by the statute's broad authorization and its health-protective purpose.

As a rule of law matter, however, the FDA's action was open to question.<sup>90</sup> While nicotine was, arguably, a "drug" that tobacco manufacturers intended to alter and affect the body (through its addictive qualities), nicotine was unlike all the drugs previously regulated by the FDA. The 1938 Act contemplated that FDA-authorized drugs could only be prescribed for the beneficial uses allowed by the FDA and branded on the product;<sup>91</sup> tobacco products always harmed the body and had no beneficial use, and under the Food, Drug, and Cosmetic Act (FDCA) the agency was supposed to ban such products from the market entirely.<sup>92</sup> Starting in 1965, however, Congress had repeatedly enacted statutes regulating tobacco products through health warnings rather than through prohibitions and had done so only after the FDA had assured Congress that nicotine was not a drug and tobacco products were not drug delivery devices regulated under the FDCA.<sup>93</sup>

Given the FDCA's regulatory structure and the longstanding agency assurance to Congress and to the industry that nicotine was not a regulable drug, Commissioner Kessler's action was a legal stretch for the agency, and the Supreme Court was on solid ground to enforce the legal structure Congress had created for drug regulation.<sup>94</sup> The Justices would

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88. DANIEL CARPENTER, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA 1–15 (2010).

89. *David A. Kessler, M.D.*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/AboutFDA/CommissionersPage/ucm113239.htm> (last visited Jan. 21, 2013).

90. See Richard A. Merrill, *The FDA May Not Regulate Tobacco Products as "Drugs" or "Medical Devices,"* 47 DUKE L.J. 1071 (1998) (skeptical analysis of Commissioner Kessler's regulatory move by a former FDA general counsel).

91. Federal Food, Drug, and Cosmetic Act, Pub. L. No. 717, ch. 675, §§ 501–05, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. §§ 301 to 360ddd-2).

92. *Brown & Williamson*, 529 U.S. at 135–37, 141 (citing 21 U.S.C. §§ 352(f), (j) (2006)).

93. *Id.* at 133–43; see Merrill, *supra* note 90, at 1074–82 (recounting the statutory and legislative history of these congressional actions).

94. As a personal matter, I have nothing but sympathy for Justice Breyer's excellent dissenting opinion, which scores many good legal points against the majority, but in my (reluctant) view Justice Breyer never successfully responds to the structural

have been acutely aware that their interpretation would be highly unpopular and would bring strong criticism to bear on a Court that was already assailed as excessively friendly to big business. The relative independence of the Supreme Court from political reactions and the Court's relative competence in parsing statutory language and structure made it a potentially useful institution to enforce settled statutory understandings, especially those which had generated reliance interests by both private industry and the public sector (in this case, Congress).

## 2. DEMOCRATIC SHIRKING: PROTECTING ELECTORAL ACCOUNTABILITY

The Supreme Court is best situated to monitor rule-of-law shirking by agencies that pursue statutory purposes beyond the terms of their legal jurisdiction and statutory mandate. The concern with rule-of-law shirking is that it undermines the predictability of law and reverses assumptions upon which private industry and the public sector have reasonably relied. A related kind of shirking involves an agency's usurpation of policy at the expense of the legislative process.

Such usurpation, even for the best of reasons, is inconsistent with the democratic premises of Article I, Section 7: major policy decisions need to pass through both chambers of Congress and, usually, the President before they become the law of the land. The imprimatur of three differently constituted electorates<sup>95</sup> guarantees a variety of democratic inputs into national policy decisions. When an agency such as the FDA makes a major policy move on its own, without sufficient mooring in a congressional authorization, it undercuts the democratic legitimacy of statutes. This was an additional reason advanced by Justice Sandra Day O'Connor for overriding the agency in the FDA Tobacco Case: the Court was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."<sup>96</sup>

The Komesarian question is whether the Supreme Court is an institution that can reliably detect democratic shirking of this sort, without using that as a justification for its own overreaching. I am doubtful. One can certainly read the FDA Tobacco Case as an example of a conservative, business-friendly Court vetoing a popular regulatory

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argument discussed in text. See *Brown & Williamson*, 529 U.S. at 161–92 (Breyer, J., dissenting).

95. Namely, the national electorate that selects the President, the statewide electorates that select Senators, and the smaller district electorates that select Representatives.

96. *Brown & Williamson*, 529 U.S. at 160.

move by the Clinton administration.<sup>97</sup> That the FDA adopted its tobacco regulation only after extensive public feedback and debate in the media and in the notice-and-comment process preceding the regulation demonstrates that a quasi-democratic process undergirded the regulation. Although I consider *Brown & Williamson* a judicious treatment of this difficult issue, I am skeptical that the Court is able consistently to identify instances of harmful democratic shirking and to enforce any such rule without ideological bias.

Nonetheless, I should not close the door on this kind of rule, especially if cautiously and nonideologically applied. Thus, even the conservative, business-loving Rehnquist Court showed its democracy-protecting teeth in cases where conservative Republicans were rebuked.<sup>98</sup> One remarkable case was *Gonzales v. Oregon*,<sup>99</sup> where the Rehnquist Court rebuked the Bush-Cheney administration for interpreting the Controlled Substances Act of 1969 to preempt Oregon's aid-in-dying law.<sup>100</sup> Although the Act delegated extensive rulemaking authority to the Attorney General, Justice Anthony Kennedy's opinion for the Court reasoned that the statute was focused on traditional concerns with drug addiction and abuse, and not with the novel use of drugs for a new state law permitting aid in dying.<sup>101</sup> Like the FDA Tobacco Case, the Oregon Aid-in-Dying Case left fundamental policy changes to the legislative rather than administrative process.

### 3. POLICY SHIRKING: PROTECTING AGAINST BAD RULES

Most scholars agree that agencies often produce bad rules, as a result of tunnel vision, interest group pressure, or simple mistakes in judgment.<sup>102</sup> The Komesarian questions are whether executive branch

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97. And within months after deciding the FDA Tobacco Case, the same five Republican-appointed Justices (Rehnquist, O'Connor, Scalia, Kennedy, and Thomas) closed the door on the Democrats' challenge to an alleged GOP vote-counting coup in the 2000 presidential race. See *Bush v. Gore*, 531 U.S. 98 (2000) (one of the most widely criticized Supreme Court decisions in its history).

98. E.g., *Massachusetts v. EPA*, 549 U.S. 497, 501, 534–35 (2007) (three Republican-appointed Justices joined two Democrat-appointed Justices to strike down the Bush-Cheney administration's refusal to consider carbon dioxide as a possible pollutant, contrary to the apparent congressional mandate); see EPSTEIN ET AL., *supra* note 77, at 295 tbl.4-1.

99. 546 U.S. 243 (2006) (Kennedy, J., for four Republican-appointed Justices and two Democrat-appointed Justices); see also EPSTEIN ET AL., *supra* note 77, at 295 tbl.4-1.

100. *Oregon*, 546 U.S. at 248–49, 253–54, 275.

101. *Id.* at 269–74.

102. See, e.g., Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486 (2002).

review can correct most of the mistakes agencies may make, whether federal courts can differentiate between the good or neutral rules and the bad rules, and whether courts can advance the public good (on balance) when they strike down agency rules. As before, I am aware of no systematic evidence allowing us to make any judgment on any of these important questions, and so I leave them open.<sup>103</sup> Instead, consider three different reasons federal court review of agency rulemaking *might* produce better rules, overall, than agency rulemaking would produce on its own.

To begin with, judicial review might produce better rules for an ex ante reason: knowing that their work product will be examined by another institution, agency officials ought to be more careful to include a variety of viewpoints and to ground their rules in defensible facts.<sup>104</sup> In other words, even if judges were incompetent at differentiating between good rules and bad rules, judicial review could perform a useful function if it encouraged agencies to follow deliberative procedures that produced rules that can withstand critical analysis. I am quite keen on this idea, which is illustrated by the Oregon Aid-in-Dying Case: the Department of Justice engaged in a secret deliberative process, limited to a small group of like-minded lawyers, that was inappropriate for the wide-reaching effect the interpretation would have had on terminally ill cancer patients, state experiments for treating the terminally ill, and even the practice of medicine.<sup>105</sup>

On the other hand, judicial review can and often does have negative effects from an ex ante perspective. Knowing that their rules will be subject to judicial review and also knowing that judicial review tends to be oriented toward the status quo (as in both the Oregon Aid-in-Dying and FDA Tobacco Cases, as well as our earlier Case of the Vehicles), agencies may tend to be too cautious and to adopt rules that are not aggressive enough to solve the problems Congress has targeted and has

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103. There is tentative evidence that OIRA review (within the executive branch) is strongly biased against public-regarding but affirmative regulation, at least during GOP administrations. See Alex Acs & Charles Cameron, Regulatory Auditing at the Office of Information and Regulatory Affairs (Sept. 13, 2012) (unpublished manuscript) ([http://www.law.nyu.edu/ecm\\_dlv4/groups/public/@nyu\\_law\\_website\\_academics\\_coll\\_oquia\\_law\\_economics\\_and\\_politics/documents/documents/ecm\\_pro\\_073639.pdf](http://www.law.nyu.edu/ecm_dlv4/groups/public/@nyu_law_website_academics_coll_oquia_law_economics_and_politics/documents/documents/ecm_pro_073639.pdf)).

104. Seidenfeld, *supra* note 102, at 543–47; cf. Eskridge & Baer, *supra* note 11, at 1147–48 (agency success rate at the Supreme Court is positively correlated with deliberative procedures, i.e., notice-and-comment rulemaking).

105. See William N. Eskridge, Jr., *The Story of Gonzales v. Oregon: Death, Deference, Deliberation*, in STATUTORY INTERPRETATION STORIES, *supra* note 86, at 366, 380–82 (reporting the lack of deliberation within the executive branch before the Attorney General issued his directive against the use of controlled substances for aid-in-dying purposes).

empowered the agency to solve.<sup>106</sup> On yet another hand, *ex ante*, the possibility of judicial review might be a precondition for Congress to delegate broad rulemaking authority to agencies.

The foregoing analysis illustrates the ultimate indeterminacy of much Komesarian calculus, especially when there is neither normative consensus nor systematic empirical knowledge upon which to ground institutional comparisons. Along precisely the same lines, consider the *ex post* perspective: on balance, judicial review might produce better rules overall, if judges trumped bad agency rules more often than they trumped good agency rules. How often does each kind of trumping occur?

The answer to that question is completely indeterminate. It is often highly debatable whether an agency rule is “good” or “bad.” I consider the agency rule preempting the Oregon aid-in-dying statute to have been a misguided rule and so applaud the Court for overriding the agency—but thoughtful and highly ethical officials such as Attorney General John Ashcroft and Office of Legal Counsel attorney Robert Delahunty believed it to be an exemplary rule.<sup>107</sup> Assuming I am right about the virtue of the Court’s action in *Oregon*: How often does the Court’s override strike down bad agency rules? How often does the Court strike down good rules?

Although I admire the legal analysis in Justice O’Connor’s opinion for the Court in the FDA Tobacco Case, I believe the Court struck down a very good rule, whereby an aggressive agency crusaded against one of the most tragic drugs in the history of the world. But if one takes a longer perspective, the Court may have struck down a good rule in pursuit of a better one. That is, the FDA’s regulation of tobacco products was, as Justice O’Connor argued, a poor fit with the FDCA’s regulatory regime, and the agency would probably have run into a variety of troubles if it had been allowed to shoehorn tobacco into that statutory scheme.<sup>108</sup>

By striking down the agency rule, the Court stimulated a congressional override, the Family Smoking Prevention & Tobacco

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106. *E.g.*, MASHAW & HARFST, *supra* note 9, at 84–105, 224–54 (making this argument as a critique of judicial review of auto safety rules). *See generally* R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245, 247–49 (1992) (arguing that process-based reversals deter agency rulemaking); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 308–13 (similar).

107. I remain deeply impressed with the thoughtfulness and deep moral conviction of both Ashcroft and Delahunty. *See* Eskridge, *supra* note 105, at 393–94 (reporting the strong reasoning and deep moral conviction that Delahunty, in particular, brought to this issue). For the record, I filed an amicus brief at the Supreme Court level, urging the Court to override the Attorney General’s rule.

108. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 142–43 (2000).

Control Act of 2009.<sup>109</sup> Title I of the Act gave the FDA all the authority it had earlier asserted to regulate tobacco products—and then additional authority to ban sales of tobacco products to persons under the age of eighteen, to set standards for the content of tobacco products (including tar and nicotine levels), to register tobacco companies, and to inspect such companies for compliance with the law; before tobacco companies can introduce new products, they must secure FDA approval.<sup>110</sup> Title II of the statute imposed nine new warnings for tobacco products and authorized the FDA to develop the details of these warnings.<sup>111</sup>

Not only does the 2009 Act rest the FDA's regulation of tobacco products upon a more secure legal and democratic foundation, but it has energized the agency to take even more aggressive action to regulate such products than even Commissioner Kessler imagined in 1996. Again, one might debate this point, on the ground that more than a decade passed before the FDA could regulate tobacco (with thousands of deaths and health sacrifices in the interim) and that if the FDA had prevailed in *Brown & Williamson* it would have secured congressional approval or acquiescence for a similar program.

### C. Public Values

If most agency shirking reflects a Komesarian “minoritarian bias,” where minority insiders distort policy for their own rather than the public interest, some aggressive agency applications or the statute itself reflect a “majoritarian bias,” where majorities unfairly penalize those in the minority without a genuine public-regarding reason. Our system of government is committed to public values that protect minority interests,<sup>112</sup> and the judicial branch has been the repository of this checking function from the beginning of our constitutional history.<sup>113</sup>

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109. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111–31, 123 Stat. 1776 (2009).

110. §§ 101, 901–07, 123 Stat. at 1783–1803. Some of the provisions added by section 101 imposed limitations on the FDA's regulatory authority. New section 906 bars the FDA from banning face-to-face retail sales of tobacco products entirely or from requiring a doctor's prescription to purchase these items. § 906, 123 Stat. at 1795–96.

111. §§ 201–06, 123 Stat. at 1842–50 (codified as amended at 15 U.S.C. § 1333 (Supp. V 2011)).

112. THE FEDERALIST NO. 10 (James Madison) (positing that the limited governance created by the Constitution would protect minority interests against temporary “factions”).

113. See U.S. CONST. amends. I–IX (Bill of Rights, added 1791); see also *id.* at amends. XIII–XV (Reconstruction Amendments, added 1865–70), XIX (Susan B. Anthony Amendment, added 1920); ELY, *supra* note 14, at 101–06, 183 (offering a strong theory of judicial review that corrects for majoritarian bias); KOMESAR, *supra* note 2, at 250–70 (developing the outlines of a cautious theory of judicial review to protect

Thus, the *Federalist Papers* defended not only judicial review but also minority-protective statutory constructions on the ground that the political independence of federal judges would free them to trim back “unjust and partial laws.”<sup>114</sup>

Most law professors think the judicial branch seems reasonably well-suited for the role the Framers imagined: if any branch of government is going to protect minority rights against too-hasty or ill-motivated majority actions, it is presumably the independent judiciary. Not only are federal judges partially insulated from political pressure (and hysteria), but the case-by-case adjudicative process brings judges face-to-face with minority persons and factual inquiries that ought to bring reasons and fairness concerns to bear on contentious issues. Conversely, agencies are less likely to protect individuals and unpopular minorities; dominated by their mission and purpose and responsive to both (majoritarian) legislative pressure, and perhaps also (minoritarian) interest group pressure, agencies are more likely to make rules that run roughshod over individual and small group rights.<sup>115</sup>

Hence, it is probably good for the country that the judiciary enjoys the power of judicial review, invalidating statutes that contravene the Constitution.<sup>116</sup> Most judges and many constitutional scholars urge federal judges to exercise that power sparingly,<sup>117</sup> typically for Komesarian reasons: if judges trump important legislative and

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against majoritarian bias, but without committing the judiciary to a great deal of policy monitoring).

114. THE FEDERALIST NO. 78 (Alexander Hamilton); see William N. Eskridge, Jr., *All about Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 1049–57 (2001) (situating Hamilton’s explanation of the judicial power in statutory cases in the context of the founding era debates over the judicial power).

115. Although a lot of law professors think this way, please notice that the statements in this paragraph of text are supported by no empirical evidence of which I am aware.

116. Again, most law professors think this way, but without a firm empirical foundation. For a counterview, with just as little empirical support, see MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (applying a thoughtful but nonempirical comparative institutional analysis to argue that the political process can enforce the essential Constitution and that the independent judiciary, on the whole, does not contribute positively to that process).

117. A leading statement of this approach to judicial review is JAMES BRADLEY THAYER, *JOHN MARSHALL* 102–07 (1901). For more recent explications, along Komesarian lines, see KOMESAR, *supra* note 2, at 250–70, as well as ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 198–200 (1962); STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* 110–18 (2011); RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 130–34, 302–09 (1990); VERMEULE, *supra* note 9, at 1, 230–31, 233; and Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 635–36 (1994).

administrative rules, they are not only vetoing the product of a difficult democratic process, but they are usually going to leave a regulatory mess that courts have little or no capacity to remedy. One alternative to judicial invalidation of legislation is narrow interpretation of statutes to avoid “serious” constitutional problems, and a Komesarian judge might well construe a questionable statute narrowly, giving the political process an opportunity to address constitutional reservations.<sup>118</sup>

Are there constitutional values that judges ought to be considering when they interpret statutes? As a matter of Supreme Court doctrine, there are dozens of canons of statutory construction that are grounded upon constitutional norms; many of them are rules requiring a clear statement from Congress in order to create a rule that traverses constitutional concerns.<sup>119</sup> A Komesarian comparative institutional analysis would sharply question whether this complicated array of judicial trumps for legislative or administrative rules is justified by the relative capacity of courts to advance America’s public values. Given the dearth of empirical evidence and the sheer number and variety of such canons, one can only guess at their validity.

The most that a comparative institutional analysis might add, tentatively, is the notion that courts are, relatively speaking, better at enforcing libertarian and process values than substantive equality and efficiency values. The nature of the judicial process enables judges to be attentive to the particular effect of broadly written statutes and regulations on individuals, some of whom are litigants who can tell their own stories. More important, judicial capacity enables judges to protect liberty much more easily than to promote anything more than formal equality: courts are pretty effective at stopping or slowing down government action that harms minorities, and not very effective at forcing government action that produces equal treatment of minorities.

The cases I have examined in this Article illustrate these points. Americans enjoy a great deal of personal freedom and, apparently more than people in other cultures, are jealous of their liberties. Most rules generated by legislatures and agencies restrict our freedom to do what we want, and courts serve as a brake upon that regulatory impulse. In my view, such a brake has been most useful and workable in the arena of criminal law. The libertarian brake is useful for criminal law because the political and enforcement processes are dominated by aggressive,

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118. Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 399–411 (2005).

119. The canons are collected in WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* app. (4th ed. Supp. 2012) (reporting more than 100 Constitution-based canons deployed by the Rehnquist or Roberts Courts, 1986–2011).



put-criminals-in-jail attitudes; if any branch of government is going to focus on fair treatment of accused lawbreakers, it will be the judiciary. The libertarian brake is workable because criminal prosecutions must go through the judicial process, at least as a formal matter, and so a judge will have an opportunity to review the application of a statute (such as the no-vehicles law) to a particular case. Note that the libertarian presumption also protects noncitizens, indeed even “illegal aliens,” as demonstrated by the debate in *Arizona v. United States*.

The libertarian presumption is typically paired with a process corollary: before federal courts will go along with an aggressive agency's application of a regulatory statute to restrict important liberties, judges need to be persuaded that Congress has validated this important expansion of governmental authority. Thus, the normative justification for the rule of lenity is not just the due process (libertarian) idea that potential malefactors must be on notice that their contemplated conduct is criminal, but also (and more cogently) the process idea that only the legislature and not the judiciary has the moral authority to declare certain conduct so squalid that it is not only prohibited but is a crime against society.<sup>120</sup>

The Oregon Aid-in-Dying Case illustrates the *best* circumstances, under a Komesarian analysis, for federal courts to veto an agency rule based upon liberty-protecting public values. To begin with, Congress had not targeted the issue of aid-in-dying when it enacted the Controlled Substances Act in 1969.<sup>121</sup> The open-ended statutory language requiring a “legitimate medical purpose” for the limited use of controlled substances frames the debate but does not resolve it. In the last twenty years, Americans have become increasingly concerned about controlling the circumstances under which their lives will end, and aid-in-dying has become an important liberty, as even the cautious Rehnquist Court recognized.<sup>122</sup> Finally, and most importantly, the Court was vetoing an

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120. See Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 345–49 (advocating the retirement of the rule of lenity but also arguing that the nondelegation idea is the best justification for it); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 198–200 (1985) (justifying the rule of lenity along these lines).

121. As Justice Scalia argued in his dissent to *Gonzales v. Oregon*, 546 U.S. 243, 275–85 (2005) (Scalia, J., dissenting), Congress delegated the Department of Justice a great deal of authority to implement the statute. But the dissenters' equally heartfelt argument that the statute itself prohibited the use of controlled substances for aid-in-dying, *see id.* at 285–90, was far from persuasive.

122. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278–79 (1990) (dictum, recognizing a constitutional right to decline medical treatment); *see Washington v. Glucksberg*, 521 U.S. 702, 736–38 (1997) (O'Connor, J., concurring) (concluding that state “assisted suicide” laws are not unconstitutional on their face but that they may be an

agency rule that not only expanded criminal liability to a frontier area of medicine, and did so through a closed process with no public input whatsoever, but sought to close off state experimentation that offered to provide needed evidence regarding the operation of a proper aid-in-dying law.

Contrast the FDA Tobacco Case, where the Court enforced libertarian baselines, but with somewhat less Komesarian justification. As with Ashcroft's directive, the FDA's tobacco regulations did affect liberty interests (tobacco business and individual pleasure from smoking), based upon a medical justification.<sup>123</sup> Like the Department of Justice, the FDA was making an aggressive move to protect the health of the American people through a dynamic interpretation way beyond the expectations of the enacting Congress. So the libertarian presumption has some power in the FDA Tobacco Case, but with this significant difference: unlike the Department of Justice, the FDA adopted its regulation after a more open and deliberative process, with plenty of input from stakeholders.<sup>124</sup> From a Komesarian perspective, this feature renders the FDA Tobacco Case a harder call than the Oregon Aid-in-Dying Case. The perspective also suggests that the *Oregon* dissenters (two of whom were key to the FDA Tobacco majority)<sup>125</sup> were more motivated by their personal revulsion against "assisted suicide" than by analytical or doctrinal consistency.

### III. DOCTRINAL IMPLICATIONS: RETHINKING *CHEVRON*

The foregoing discussion suggests the utility of Professor Komesar's comparative institutional analysis for the proper allocation of statutory interpretation authority and for how each institution ought to carry out its duties to interpret statutes. Thus, the baseline is that administrative agencies will have primary authority not only for implementing federal statutes, but also for interpreting them. Agencies will carry out their duties in classic legal process fashion: they will choose the interpretation that best carries out the statutory purpose, so

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unconstitutional denial of liberty as applied to patients in great pain at the end of their lives, a reservation that four other concurring Justices explicitly joined).

123. In my view, however, the medical justification in the FDA Tobacco Case was stronger than the debatable justification in the Oregon Aid-in-Dying Case.

124. Again, the statement in text represents the conventional wisdom, but it is sobering to read that the FDA's action was largely developed by Commissioner Kessler and the White House, and that the "public" deliberation through notice-and-comment was a largely Potemkin enterprise, according to Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2282-83 (2001).

125. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 123 (2000) (Justices Scalia and Thomas joined in the majority opinion); *Oregon*, 546 U.S. at 275, (Scalia, J., dissenting), 299 (Thomas, J., dissenting).

long as it does not impose upon words a meaning they will not bear. But federal courts ought to remain relevant umpires when agencies are in dispute and ought to be second-order monitors, protecting against the most serious minoritizing examples of agency shirking or majoritizing examples of agency aggrandizement (or both, as in the Oregon Aid-in-Dying Case).

How do we put all this together, doctrinally? In this final Part, I shall argue that a Komesarian comparative institutional analysis justifies a dramatic simplification of the Supreme Court's excessively complicated deference doctrines. Specifically, federal courts should defer to all rules adopted by an agency in a public document representing the agency's considered judgment, unless the agency's rule is clearly contrary to the statute or to settled understandings about the statute. Based upon a comparative institutional analysis, the Court should abandon the formal regimes it has been following and should expand *Chevron* to all areas of statutory law, except criminal law (which should retain the rule of lenity as its baseline).

To be clear, the comparative institutional analysis is explicitly normative (this is how the system *ought* to work) rather than doctrinal (this is the approach supported by the Court's *precedents*). As a doctrinal matter, the standard work is that of Thomas Merrill, who best understands the Court's precedents. His doctrinal understanding is that *Chevron* deference is justified only when an agency is applying a statute pursuant to lawmaking authority delegated to it from Congress.<sup>126</sup> Merrill and his coauthor Kristen Hickman have also provided the classic doctrinal terminology for applying *Chevron*: Step Zero is the threshold inquiry, as to whether the *Chevron* regime kicks in; if Step Zero is satisfied, Step One asks whether Congress has directly addressed the issue; if Congress has not directly addressed the issue, Step Two requires courts to defer unless the agency's interpretation is "[un]reasonable."<sup>127</sup>

Working within Merrill's and the Court's normative framework, my coauthor Lauren Baer and I recommended that the Court assimilate some of its non-*Chevron* deference regimes into *Chevron* and (if not linked to a lawmaking delegation) into *Skidmore*, the default regime.<sup>128</sup> Under a

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126. Merrill & Hickman, *supra* note 10, at 863–73 (justifying *Chevron* as an implied doctrine of congressional intent to delegate lawmaking authority to particular agencies), followed and cited in *United States v. Mead Corp.*, 533 U.S. 218, 230 & n.11 (2001); see also Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2171–75 (2004).

127. Merrill & Hickman, *supra* note 10, at 873 (adding the notion of a *Chevron* “[S]tep [Z]ero”—the “domain” triggering deference, to the Supreme Court’s notion of Step One—whether Congress has directly addressed an issue, and Step Two—whether the agency interpretation is reasonable).

128. Eskridge & Baer, *supra* note 11, at 1184–85.

Komesarian analysis that approaches the deference issue without the constraints of the Court's traditional approach, I would go somewhat further. The short version of my argument is that a comparative institutional analysis would justify an expansion of Step Zero (*Chevron's* domain), would support *Skidmore* deference during Step One, and might support a procedurally more aggressive approach by judges when they engage in Step Two of *Chevron*.

#### A. *Chevron Step Zero: Expanded Domain for Chevron*

Under the Supreme Court's precedents, federal courts are supposed to follow a wide variety of deference regimes where an agency interpretation is in play.<sup>129</sup>

- *Curtiss-Wright* super-deference, when the statutory issue involves foreign affairs or national security;<sup>130</sup>
- *Seminole Rock/Auer* deference to an agency's interpretation of its own regulations;<sup>131</sup>
- *Chevron* deference to an agency's interpretation pursuant to a congressional delegation of lawmaking authority to the agency;<sup>132</sup>
- *Beth Israel* and other statute-specific regimes deferring to agency interpretations of statutes they are charged with implementing;<sup>133</sup>
- *Skidmore* (and uncited *Skidmore Lite*) deference to reasons provided by an agency in support of a statutory interpretation;<sup>134</sup> and
- *Gonzales v. Oregon* antideference, when an agency interpretation raises serious constitutional difficulties or imposes criminal liability.<sup>135</sup>

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129. These are surveyed in Eskridge & Baer, *supra* note 11, at 1099 tbl.1 (summary chart); *see id.* at 1097–1136 (more in-depth explanation and empirical analysis for each regime).

130. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (leading case).

131. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (leading case); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (recent leading case).

132. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); *United States v. Mead Corp.*, 533 U.S. 218, 226–27, 230–33 (2001) (elaborating on *Chevron*, largely along lines set forth in Merrill & Hickman, *supra* note 10, at 835–37).

133. *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500–01 (1978) (deferring to NLRB interpretations that are reasonable applications of the agency's expertise). There are special *Beth Israel*-type deference regimes for a number of other statutory arenas, but the Roberts Court recently overruled the special regime for tax code constructions and replaced it with *Chevron*. *See United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1843–44 (2012).

134. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (leading case); *Mead Corp.*, 533 U.S. at 234–35 (important reaffirmation of *Skidmore* deference).

In an earlier empirical study, my coauthor and I found that the Court applies this complex regime in a haphazard manner: in a large majority of the cases where a formal regime is applicable, the Court does not cite or apply the regime.<sup>136</sup> Indeed, notwithstanding the Court's elaborate continuum of deference, and our own inventive coding of many cases as "Skidmore Lite" (where there was no citation of a regime but we thought deference was palpable), the Court in an absolute majority of cases gave no evidence of deference at all.<sup>137</sup> On the other hand, agency interpretations prevailed in more than two-thirds of the Court's statutory cases between 1984 and 2006,<sup>138</sup> evidence that the Justices find agency submissions persuasive even in the tough cases taken for review.

The normative punch line of the comparative institutional analysis in this Article is that agency interpretations should be the baseline for the modern regulatory state, for rule of law, democracy, and efficacy reasons. This analysis supports Justice Scalia's longstanding campaign to read *Chevron* broadly, to encompass all interpretations officially announced by the agency chair or board/commission.<sup>139</sup> Apply Occam's Razor to the Supreme Court's complicated deference continuum by overruling everything but *Chevron*, thereby creating a new baseline that does not even have to be cited.

To be sure, this bold move would be contrary to the Supreme Court rulings that ground *Chevron* in the principle of congressional delegation of lawmaking authority.<sup>140</sup> But that formal basis for *Chevron* was, as a formal matter, misguided from the beginning. Thomas Merrill and

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135. *Gonzales v. Oregon*, 546 U.S. 243, 263–64 (2006) (expressing reluctance to read the law to vest discretion in the Department of Justice to expand criminal liability); *id.* at 268–69 (expressing reluctance to vest the Department of Justice with discretion to apply the statute in the teeth of constitutional problems with denying any and all aid-in-dying).

136. Eskridge & Baer, *supra* note 11, at 1100–01 (*Curtiss-Wright*); *id.* at 1103–04 (*Seminole Rock/Auer*); *id.* at 1109–15, 1143 (*Skidmore*, usually completely unreferenced and categorized by Eskridge and Baer as *Skidmore-Lite*); *id.* at 1120–23 (*Chevron*).

137. *Id.* at 1117–20.

138. *Id.* at 1100.

139. See *Mead Corp.*, 533 U.S. at 256–59 (2001) (Scalia, J., dissenting); accord, David Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 234–57.

140. See Merrill & Hickman, *supra* note 10, at 863–73 (justifying *Chevron* as an implied doctrine of congressional intent to delegate lawmaking authority to particular agencies), followed and cited in *Mead Corp.*, 533 U.S. at 230 n.11. In earlier work, I had taken this basis for *Chevron* as axiomatic, see Eskridge & Baer, *supra* note 11, at 1185–87, and I remain impressed by Professor Merrill's legal and constitutional arguments in particular. The point of the current Article is that a comparative institutional analysis suggests the wisdom of a simplified approach—a notion that is consistent with Baer and my findings that the Court does not pretend to follow the formal framework constructed by its precedents.

Kathryn Tongue Watts have demonstrated that Congress has not actually delegated lawmaking authority in many of the cases where the Court has applied *Chevron*, including *Chevron* itself!<sup>141</sup> Lauren Baer and I have demonstrated that the Court's own post-*Chevron* precedents do not unwaveringly follow that precept.<sup>142</sup> For example, Justice Breyer sometimes applies *Chevron* with a focus on reliance and the statutory history, with congressional delegation being a "plus" factor.<sup>143</sup>

Thus, *Chevron* can be untethered from congressional delegation of lawmaking authority by recognizing the power of Komesarian analysis: as a practical matter, the rule of law, democratic accountability, and public purposes are best pursued through a regime that gives primacy to agency rulemaking, with federal courts serving important review functions. Moreover, largely consistent with the Court's actual practice, *Chevron* deference should not apply to agency interpretations when (1) there is a clash of different governmental interpretations, as in preemption cases like *Arizona v. United States*, or when the agency interpretation (2) expands a criminal or punitive statute or (3) raises serious constitutional problems, as in cases like *Gonzales v. Oregon*.<sup>144</sup> These three exceptional situations are justified on Komesarian grounds by the likelihood that these are three arenas where the comparative advantage of courts over agencies is strongest.

#### B. *Chevron Step One: Skidmore Deference to Agency's Reading of the Statute*

In earlier work, I urged the Court to simplify its deference continuum to *Chevron* (delegated lawmaking authority) + *Skidmore* (the residual category for other agency interpretations) + *Oregon* (antideference).<sup>145</sup> The Komesarian analysis developed above could support this recommendation, but could also support the broader proposal for a universal *Chevron*, along the lines suggested by Justice Scalia and outlined in the previous Section. As I shall now suggest, the

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141. Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 587–90 (2002).

142. Eskridge & Baer, *supra* note 11, at 1123–29.

143. *Barnhart v. Walton*, 535 U.S. 212, 217–22 (2002) (applying *Chevron*, but in light of the agency's longstanding construction in which Congress had acquiesced).

144. On the consistency of the foregoing "exceptions" with the Court's current practice, see Eskridge & Baer, *supra* note 11, at 1115–17 (lower win rate for agencies when interpretation expanded criminal liability, as it did in the Oregon Aid-in-Dying Case); Eskridge, *supra* note 65, at 1478–79 (lower win rate for agency interpretations in preemption cases).

145. Eskridge & Baer, *supra* note 11, at 1183–90.

much-simplified universal *Chevron* approach is one that ought not render *Skidmore* irrelevant to the work of the judiciary.

At Step One, *Chevron* instructs judges to determine whether the agency interpretation is contrary to the “unambiguously expressed intent of Congress.”<sup>146</sup> An underappreciated feature of this articulation is that, in figuring out whether Congress has provided an “unambiguous” answer to the interpretive question, the Court ought to pay close attention to the agency’s reasoning. In almost all of the cases where an agency offered the Supreme Court its own interpretation of a statute, the Solicitor General filed a brief laying out the agency’s reasoning.<sup>147</sup> As a matter of practice, the Justices pay careful attention to the Solicitor General’s arguments.<sup>148</sup> As Peter Strauss has proposed, consistent with this practice, the Court should announce that federal judges must give *Skidmore* deference to an agency’s reading of the statute for purposes of Step One.<sup>149</sup>

The Straussian proposal makes Komesarian sense. *Skidmore* asks courts to consider whether the agency interpretation is longstanding and consistent and whether it reflects the agency’s expertise.<sup>150</sup> A consistent and longstanding agency interpretation will have generated reliance interests, highly relevant for rule of law purposes. The agency’s reasoned explanation and the application of its expertise are relevant to a court’s determination whether the agency’s construction is supported by the statutory purpose. Although not mentioned in *Skidmore*, an agency’s account of the ongoing legislative history of the statute is also relevant at *Chevron* Step One.<sup>151</sup> Thus, the history of an agency’s interpretation is strongly pertinent to a court’s determination whether Congress has unambiguously addressed a statutory issue.

Undertaking Step One through the lens of *Skidmore* does not mean the agency will always prevail in hard cases, because judges should be attentive to an agency’s history of implementing and interpreting the statute and not just its current position. Recall the FDA Tobacco Case, where the Court ruled that Congress had already decided that health-impairing tobacco products fell outside the FDCA’s regulatory

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146. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

147. Eskridge & Baer, *supra* note 11, at 1143.

148. *Id.* at 1112–14.

149. Peter L. Strauss, “Deference” Is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight,” 112 COLUM. L. REV. 1143, 1145–46 (2012).

150. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (factors for court to consider when it evaluates an agency’s interpretation).

151. The agency’s participation in the legislative history of a statute was emphasized in an important judicial harbinger of *Skidmore*, namely, *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 549 (1940).

regime.<sup>152</sup> While the FDA in this litigation maintained that its interpretation was an excellent fit with the FDCA's health-protective purpose,<sup>153</sup> both Congress and the tobacco industry strongly relied on the agency's previous, and longstanding, view that the FDCA did not cover nicotine and tobacco products.<sup>154</sup> Starting in 1965, Congress enacted legislation specially regulating tobacco products; the legislative history of those statutes demonstrated that Congress had relied on the FDA's hands-off policy to craft a series of compromises.<sup>155</sup> Congress endorsed a policy where regulation was through disclosure of health risks—not the prophylactic measures of the FDCA.<sup>156</sup>

Viewed functionally, through the lens of *Skidmore*, the specific tobacco-regulatory statutes were the kind of fairly settled and “unambiguous” congressional directive that Step One requires courts to enforce. Much as I lament the tobacco industry's triumph, I appreciate Justice O'Connor's opinion for the Court in *Brown & Williamson* as performing an important public function, namely, enforcement of statutory deals that an entire industry had relied upon for decades. To be sure, Justice Breyer's dissenting opinion made an excellent point: the FDA long believed tobacco products not to be drugs because it did not appear that tobacco companies intended their products to affect the human body; once the agency discovered that the companies did actually intend such effects, it might plausibly consider such products to be drug delivery devices.<sup>157</sup> But that discovery came long after Congress had hard-wired the agency's position into the tobacco-regulatory statutes. And, more importantly, Justice O'Connor made a strong case for the proposition that the FDCA's structure does not contemplate agency authorization of a drug or medical device that has no use that is not harmful to the body—and the one inescapable conclusion from the specific tobacco-regulatory statutes is that they barred the FDA from taking tobacco products off the market entirely.<sup>158</sup> That, I fear, was Justice O'Connor's killer argument, as to which the FDA had no persuasive answer.

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152. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126 (2000).

153. *Id.* at 127–31.

154. *Id.* at 129–30, 157.

155. *Id.* at 137–49.

156. *Id.* at 147–48.

157. *Id.* at 172–75 (Breyer, J., dissenting).

158. *Id.* at 133–43 (O'Connor, J., for the Court).



*C. Chevron Step Two: Deference to Agency's Interpretation*

According to *Chevron*, if an agency interpretation qualifies for its deferential regime (Step Zero) and Congress has not directly addressed the issue (Step One), then courts are supposed to follow the interpretation so long as it is “reasonable” (Step Two).<sup>159</sup> Few Supreme Court cases reject an agency interpretation at Step Two, and so almost all cases are resolved at Step One: if Congress has directly addressed the issue, its determination prevails (usually one the agency has correctly anticipated); if Congress has not directly addressed the issue, the agency's interpretation prevails as the default interpretation.<sup>160</sup>

The comparative institutional analysis outlined in this Article suggests functional virtues of the Court's Step Two practice. The judiciary's main comparative advantage is its ability to enforce the rule of law and jurisdictional limits upon agencies that stray from legal constraints, which justifies the Supreme Court's focus on Step One. The agency's main comparative advantage is policy analysis, and a Komesarian analyst would be loath to give judges much leeway to veto an agency's policy balance, the focus of Step Two. When the policy issues are technical matters of economics, science, or human psychology, judges are at an even greater disadvantage. But consider an institutional twist that might enrich a judge's examination at Step Two.

That is, judges sometimes find the agency's analysis unpersuasive or methodologically flawed. Agencies do shirk in a variety of ways, and sometimes judges can detect shoddy analysis of how the agency's interpretation advances the statutory purposes and goals. For example, a zealous Parks Commission opines that tricycles are “vehicles” prohibited in public parks, because these are mechanisms for moving people and things (the dictionary definition of “vehicle”) and because the Commission believes that tricycles are dangerous and have sometimes caused accidents.

Assume a six-year-old child is “arrested” for riding her tricycle in the park. The kid lawyers up and challenges the administrative interpretation underlying her unfortunate encounter with the state. Under the analysis in this Article, the Parks Commission ought to lose at every level of *Chevron*. The Commission ought to lose at Step Zero because the criminal penalty triggers an antideference presumption that the Commission cannot overcome: “vehicle” is, at best, ambiguous as

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159. See Ronald Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1254 (1997) (analyzing Step Two as consistent with, and perhaps no addition to, the APA rule that agency action must not be “arbitrary [or] capricious,” 5 U.S.C. § 706(2)(A) (2006 & Supp. 2012)).

160. E.g., *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

applied to tricycles, and ambiguity in criminal cases ought to be resolved against the prosecutor. Even without the benefit of the rule of lenity, the Commission probably ought to lose at Step One: the Council has addressed the issue through the terminology it has chosen (a conclusion probably supported by the legislative history, if any); most speakers would deem a tricycle to be a *toy* rather than a *vehicle*. Tricycles are for play and are a far cry from the prototypical vehicle (i.e., an automobile); that tricycles are usually operated by persons under the age of eight ought to be decisive even at Step One.

Would the Commission also lose if it somehow got to Step Two, that is, assuming that the rule of lenity were inapplicable *and* the statute were ambiguous *and* the agency concluded that the legislative policy would be advanced by barring tricycles from the parks?<sup>161</sup> Its policy argument would presumably be that the statutory purpose is safety and that tricycles are quite unsafe. The reviewing judge might think: that is ridiculous! In her experience, tricycles are not at all unsafe; kids might fall off of them and scrape their knees, but they do not pose anything like the safety risks of automobiles (the prototypical vehicles) or bicycles (not prototypical but possibly vehicles). Should the judge then reject the Commission's interpretation as "unreasonable," the applicable standard at Step Two?

A Komesarian comparative institutional analysis suggests that the judge should not leap to overturn the agency at Step Two. An evaluation of the safety risks posed by tricycles is a matter where the Commission ought to be better informed than the judge and where the Commission's judgment is more legitimate than a judge's views. So the judge should think twice—and should invoke *process* (a judicial specialty) to resolve her tentative disagreement. A trial judge, of course, can set the matter down for a hearing and ask the Commission what evidence it has for the surprising notion that tricycles are dangerous.<sup>162</sup> Have there been any serious accidents in any municipal park because of tricycles? Does the Commission know of any incident where a child suffered anything more than scrapes and bruises from operating a tricycle? If the Commission has neither evidence nor argument supporting the safety purpose, the reviewing court might well reject its interpretation, even under Step Two.

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161. Many states have abolished the rule of lenity by statute, so that might leapfrog Step Zero. See Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 *FORD. L. REV.* 885, 886 & n.9 (2004). And the Council might have provided a definition of "vehicle" as "any mechanism for transporting persons or things from one place to another." That might create enough ambiguity to survive Step One. In such a case, the Commission might triumphantly claim victory at Step Two.

162. For video evidence of the dangers posed by tricycle riding, see Striderbikes, *The PREbike vs. Tricycle/Training Wheels Experience*, YOUTUBE (Feb. 24, 2010), <http://www.youtube.com/watch?v=JhHjyC-AXIE>.

At the appellate level, judges can ask the same kinds of questions, but the record from the Commission and from the trial court proceedings might be incomplete. For issues such as this one, appeals courts might take judicial notice of safety evaluations of tricycles and of specific incidents, but if the record on appeal is unhelpful and the judges harbor doubts about the agency's analysis, the court ought to consider additional briefing for this precise issue or a remand to the agency for fact gathering before it decides to reverse the agency outright.

#### CONCLUSION

The relative dearth of legal scholarship applying Professor Neil Komesar's comparative institutional analysis to the allocation of responsibility for interpreting statutes and for statutory interpretation methodology is unfortunate. Equally unfortunate is the shortage of empirical scholarship bearing on issues of institutional behavior, competence, and comparative competence. Notwithstanding the shortage of hard data, I believe the Komesarian methodology does ask the right questions relevant to most normative theories of statutory interpretation. And the methodology yields some cogent proposals for the Supreme Court's *Chevron* jurisprudence.

Specifically, a comparative institutional analysis not only supports the central *Chevron* idea, that courts ought to defer to agencies acting under delegated lawmaking authority, but also supports the expansion of *Chevron* to all official and publicly available agency interpretations of statutes they are charged with enforcing. In other words, Komesarian analysis supports a dramatically expanded *Chevron* Step Zero, as a matter of proposed doctrine. Note, however, that even if the Supreme Court does not reconceptualize *Chevron*, my earlier empirical examination demonstrates that Komesar's calculus *better* explains the Court's practice than the *Chevron* doctrine does. The Court's practice also demonstrates that the Justices are not deferential in criminal cases and in cases where some of them find a serious constitutional difficulty with the agency position.

Additionally, comparative institutional analysis suggests that courts should be highly attentive to agency readings of the statute under *Chevron* Step One. If a court is certain that statutory language and legislative history reveal that the agency is shirking its rule of law duties, then the court should correct the agency. But before a court pronounces itself "certain" the agency is wrong, it needs to consider the agency's evidence and arguments through the lens of *Skidmore*: Do these materials, and reliance interests they demonstrate, have some persuasive force? Do they suggest plausible readings of the statute that I had not considered and that better fit the statutory goals?

Finally, and least firmly, a Komesarian analysis suggests a residual role for courts even when the agency has officially interpreted an ambiguous statute. In other words, *Chevron* Step Two needs to have some teeth, if for no other reason than to keep agencies aware that their work is being monitored and, sometimes, to require further deliberation from the agency.

In my view, Neil Komesar's comparative institutional analysis is tailor-made for thinking about issues of agency deference—and *Chevron* reveals the importance of his kind of thinking for academic theories of the modern regulatory state.