

BETWEEN FACTS AND NORMS:  
AGENCY STATUTORY INTERPRETATION  
AS AN AUTONOMOUS ENTERPRISE†

I *Introduction*

John Willis was not just a voice crying in the wilderness. But he was that too. He warned repeatedly about the emptiness of administrative lawyers' taste for 'separation of powers,' 'democracy,' and 'rule-of-law' talk, a discourse he labelled 'theology.'<sup>1</sup> By that epithet Willis meant to signal that much of the conversation had little to do with the practical affairs of governance. And he lamented on numerous occasions the profound failure of administrative lawyers to pay close attention to what administrative agencies actually do, how they do it, and the internal ethics that both motivate and restrain their behaviour. Willis described himself as 'a government man' or 'a legislation man' and 'a what actually happens man,'<sup>2</sup> but he recognized that the profession was much more interested in remedies against government, usually in court, than in how administration could be organized to solve pressing social problems.

Willis and his realist brethren can hardly be said to have had no impact. Yet I would be hard-pressed to describe administrative law scholarship in the 100th year after John Willis's birth, and many decades after much of his writing, as devoted principally to non-theological topics. There is hardly a better illustration of this tendency than the subject that my article begins to address. And, while I will be treating of matters

\* Sterling Professor of Law and Management, Yale University.

† With apologies to Jurgen Habermas, *Between Facts and Norms*, trans. by William Rehg (Cambridge, MA: MIT Press, 1996). I owe an enormous debt of gratitude to Josh Rosenstein, Mike Shumsky, and Steven Wu for research assistance in the preparation of this article. The present text is a revision of an article first published as 'Agency Statutory Interpretation' in Philip Frickey, ed., *Issues in Legal Scholarship: Dynamic Statutory Interpretation* (Berkeley, CA: Berkeley Electronic Press, 2002), online: Berkeley Electronic Press <<http://www.bepress.com/ils/iss3/art9>>.

1 Perhaps the strongest statement of this is John Willis, 'Canadian Administrative Law in Retrospect' (1974) 24 U.T.L.J. 225 ['Retrospect']. In other writings Willis sometimes characterized the usual approach as 'conceptual' – see John Willis, 'Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional' (1935) 1 U.T.L.J. 53 ['Three Approaches'] – or 'ideological,' as in his famous send up of the McRuer Report: John Willis, 'The McRuer Report: Lawyers' Values and Civil Servants' Values' (1968) 18 U.T.L.J. 351 ['Lawyers' Values'].

2 Willis, 'Retrospect,' supra note 1 at 227.

American, I do not detect a substantial shift in the orientation of law talk, at least administrative law talk, in other English-speaking jurisdictions.

As many readers will know, the US Supreme Court shocked many American administrative lawyers two decades ago when, in its *Chevron*<sup>3</sup> decision, it articulated a broad doctrine of deference to agency interpretations of the statutes that define their goals and empower the agencies to achieve them. Emphasizing the vanishingly thin lines between policy making and statutory interpretation and stressing the appropriateness of political rather than legal controls over policy making, the Court declared that federal courts were to uphold agency statutory interpretations unless the agency's interpretation was clearly erroneous or unreasonable. Although there is much reason to believe that *Chevron* merely gave legitimating voice to standard judicial practice, the professional storyline was quite different. On that account, the Supreme Court was flouting the Administrative Procedure Act's injunction that courts 'decide all relevant questions of law' and 'interpret ... statutory provisions.'<sup>4</sup>

Since *Chevron*, forests have been laid waste to accommodate the outpouring of legal commentary on that decision and its progeny. As John Willis might have predicted, many saw the *Chevron* decision's approval of political rather than judicial control as evidence of the collapse of the rule of law. And because political control of administration is often through the executive branch rather than the legislature, the decision suggested to some the decline of democracy as well. Others, however, applauded the Supreme Court's recognition of presidential direction of administration as the true source of democratic legitimacy in the administrative state. Whatever commentators felt about *Chevron*, it was clear that 'democracy' and 'rule-of-law' talk had triumphed again.

Indeed, although all of these commentators seem to have recognized that the *Chevron* decision validated agency statutory interpretation as an autonomous enterprise, virtually no one has even asked, much less answered, some simple questions about agency statutory interpretation:<sup>5</sup>

3 *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984) [*Chevron*].

4 5 U.S.C. § 706.

5 A striking exception is an article by Peter Strauss analysing the case for agency use of legislative history. Peter Strauss, 'When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History' (1990) 66 Chi.-Kent L.Rev. 321 ['When the Judge'].

A number of articles have titles suggesting an analysis of administrative interpretation, but on examination they turn out to be about other topics. For example, Edward Rubin, 'Law and Legislation in the Administrative State' (1989) 89 Colum.L.Rev. 369 ['Law and Legislation'], is an argument for abandoning the philosophical conception of laws as rules of conduct in a world where much of the legislative landscape is populated with statutes that merely confer authority on agencies. Colin Diver, 'Statutory Interpretation in the Administrative State' (1985) 133 U.Pa.L.Rev. 549, like many other articles with similar titles, is about where and how courts should defer to agency interpretation, not

As a factual matter, how do agencies interpret statutes? Are there distinctive interpretive methodologies that appeal to administrators? In what contexts? With what effects? And, on the normative side, How should administrative agencies approach their interpretive task? As John Willis recognized, the fact that administration operates autonomously much of the time need not mean – indeed, should not mean – that it has no internal normative direction.<sup>6</sup> Surely, in a legal world where agencies are of necessity the primary official interpreters of federal statutes and where that role has been judicially legitimated as presumptively controlling, attention to agencies' interpretive methodology seems more than warranted.

I should add that the question of the appropriate scope of judicial review of agency interpretation of their governing statutes is not a uniquely American problem. Indeed, it is hard to imagine a legal system that uses general courts for the review of administrative action in which

how agencies do or should interpret. Mark Burge, 'Regulatory Reform in the *Chevron* Doctrine: Can Congress Force Better Decisionmaking by Courts and Agencies?' Note (1997) 75 Tex.L.Rev. 1095 ['Regulatory Reform'], comes close to discussing the topic, but it ends up being an interesting proposal for 'proceduralizing' agency interpretation in the context of the issuance of rules of general applicability.

In 1989 the Administrative Conference of the United States (ACUS), the body once charged with recommending best practices to federal administrative agencies, issued a recommendation concerning agency interpretation. The ACUS, once again analysing *Chevron*, provided the following startling advice: 'In developing an interpretation of a statute that is intended to be definitive, an agency should use procedures such as rulemaking, formal adjudication, or other procedures authorized by Congress for, and otherwise appropriate to, the development of definitive agency statutory interpretations.' Recommendation 89-5, 54 Fed. Reg. 29,964 (1989). The ACUS did much important work, but one could sympathize with a representative who read Recommendation 89-5 and voted to 'zero out' the ACUS appropriation line.

Cass Sunstein, 'Is Tobacco a Drug: Administrative Agencies as Common Law Courts' (1998) 47 Duke L.J. 1013, argues that administrative agencies are the principal interpreters of statutes and that, as a matter of practice, they have taken on the role of 'updating' the law – a responsibility that was long the province of common law courts. He argues further that *Chevron* legitimated this role. (Michael W. Spicer and Larry D. Terry take a similar view in 'Administrative Interpretation of Statutes: A Constitutional View on the "New World Order" of Public Administration' (1996) 56 Pub.Admin.Rev. 38.) This article, in a sense, takes up where Sunstein's leaves off. Assuming that Sunstein is correct, which I believe he is, what does this new administrative role look like, and what normative principles should guide it?

Executive branch interpretation has received more attention in the literature, but most commentary is devoted to the interpretation of the Constitution and to separation of powers issues that swirl around the notion of the 'Unitary Executive' (see generally Symposium, 'Executive Branch Interpretation of the Law' (1993) 15 Cardozo L.Rev. 21) or the role of the Justice Department as 'legal advisor' to the President and to executive branch agencies. See, e.g., Randolph Moss, 'Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel' (2000) 52 Admin.L.Rev. 1303.

6 See particularly, Willis, 'Lawyers' Values,' supra note 1.

this would not be a vexing, and perhaps vexed, problem. While I have neither the space nor the competence to review the doctrinal position in all the major Commonwealth jurisdictions,<sup>7</sup> conflict about the level of deference to be given to agency statutory interpretation is not difficult to find in Canada,<sup>8</sup> Australia,<sup>9</sup> and the United Kingdom.<sup>10</sup>

This article begins a discussion of administrative interpretation as an autonomous enterprise. It will approach administrative interpretation as a legal practice in its own right, having its own customs and normative constraints. While comparisons will be made with judicial practice, my interest is not in the relationship of courts and agencies. The attempt, instead, is to begin to understand both the normative and the positive dimensions of administrative agency interpretation of statutory language. The normative analysis asks what norms a responsible administrator *should* observe when engaging in statutory interpretation. The positive inquiry, by contrast, seeks to *describe* agency interpretive practice. These approaches are obviously isomorphic to the way the judiciocentric legal literature tends to talk about judicial interpretation of statutes.

7 See Michael Taggart: The Contribution of Lord Cooke to Scope of Review Doctrine in Administrative Law: A Comparative Common Law Perspective in Paul Rishworth, ed., *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Wellington, NZ: Butterworths, 1997) 189. Michael C. Tolley, 'Judicial Review of Agency Interpretation of Statutes: Deference Doctrines and Comparative Perspective' (2003) 31 *Pol.Stud.J.* 421, surveys the position in Canada, the United Kingdom, Australia, and South Africa in addition to the United States.

8 Frank Iacobucci, 'Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis' (2002) 27 *Queen's L.J.* 859.

9 Administrative Review Council, *The Scope of Judicial Review: Discussion Paper* (2003), online: Government of Australia <<http://www.law.gov.au/agd/www/archome.nsf/Page/RWPD6CCAD0EEC1FCFFECA256CF400040EF8?OpenDocument>>; *Enfield City Corp. v. Development Assessment Commission* (2000), 199 C.L.R. 135 (H.C.A.) (containing an explicit reference to and rejection of *Chevron*). See Margaret Allars, 'Chevron in Australia: A Duplicious Rejection?' (2002) 54 *Admin.L.R.* 569; and see generally Mark Aronson, Bruce Dyer, & Matthew Groves, *Judicial Review of Administrative Action*, 3d ed (Sydney: Thomson Lawbook, 2004) at 181–4.

10 See, e.g., T.R.S. Allen, 'Constitutional Dialogue and the Justification of Judicial Review' (2003) 23 *Oxford J.Legal Stud.* 563; Janet McLean, 'The Crown and Contract in Administrative Law' (2004) 24 *Oxford J.Legal Stud.* 129. Compare *Anisimic Ltd. v. Foreign Compensation Commission* (1968), [1969] 2 A.C. 147 (H.L.); *Page v. Hull University Visitor* (1992), [1993] A.C. 682 (H.L.); and *Southern Yorkshire Transport Ltd. v. Monopolies and Mergers Commissioner* (1992), [1993] 1 W.L.R. 23 (H.L.).

New Zealand follows British doctrine. The leading case seems to be *Bulk Gas Users Group v. Attorney General*, [1983] N.Z.L.R. 129 (C.A.). If anything, the language of the New Zealand cases is even stronger than that of their British counterparts in asserting the final authority of the courts to decide questions of law, including questions of statutory interpretation. See, e.g., *Hawkins v. Minister of Justice*, [1991] 2 N.Z.L.R. 530 (C.A.); *Fulcher v. Parole Board*, [1997] 15 C.R.N.Z. 222 (C.A.); and *Chiu v. Minister of Immigration*, [1994] 2 N.Z.L.R. 541 (C.A.).

This discussion is highly tentative, often conclusory, perhaps sometimes even question-begging. The topic is vast, and this article cannot hope to provide an exhaustive analysis. Moreover, the discussion operates in an awkward space, as its title suggests, between facts and norms. For I will be positing normative propositions about how agencies should interpret statutes based largely on what I take to be the position of administrative agencies in the scheme of American governance. I will be proposing what John Willis might have called 'civil servants' values' as they relate to the project of statutory interpretation, but I will be arguing for those propositions, not from the empirical facts of the matter, but from what my late colleague Charles Black might have called the 'structure and function'<sup>11</sup> of administrators within the American constitutional system. To put it slightly differently, I will be hypothesizing what I believe to be the position that responsible administrators should take towards statutory interpretation given their position in the American constitutional order (norms) and the practical necessities of administration (facts).

The concrete reason for this 'hypothetical' stance will become clear when the article turns to the description of agency practice. I have not at this stage been able to recover or explore administrators' internal normative perspective on these matters, only something about some of their practices.

But this inquiry also operates between facts and norms in a more profound sense recognized by Jürgen Habermas's book and by some of John Willis's writings. For we have yet to construct an ideal of administrative legitimacy that accommodates the generalized discourse of law in courts to the profoundly different discourse of law in action, particularly where most of that action is in the form of public administration.

## II *Interpretive norms*

Lawyers and legal academics argue endlessly and inconclusively about the norms that should guide judicial interpretation of federal statutes. Much of this conversation has a constitutional or structural flavour.<sup>12</sup> It focuses on the separation of powers and the appropriate role for courts in the

11 Charles L. Black, *Structure and Relationship in Constitutional Law* (Baton Rouge: Louisiana State University Press, 1985).

12 Indeed, I have argued elsewhere that all such arguments must be at base arguments about constitutional appropriateness. Jerry L. Mashaw, 'Textualism, Constitutionalism, and the Interpretation of Federal Statutes' (1991) 32 *Wm. & Mary L.Rev.* 827 ['Textualism']. See also Jerry L. Mashaw, 'As If Republican Interpretation' (1988) 97 *Yale L.J.* 1685. Cass Sunstein seems to agree. See Cass Sunstein, 'Interpreting Statutes in the Regulatory State' (1989) 103 *Harv.L.Rev.* 405. So does Nick Rosenkranz, although he takes both Sunstein and me to task for the vagueness of our approaches. See Nick Quinn Rosenkranz, 'Federal Rules of Statutory Interpretation' (2002) 115 *Harv.L.Rev.* 2085 ['Federal Rules'].

elaboration of the legal order. We grapple continually with the studied ambiguity of the judicial role in a constitutional system that seems to presume legislative supremacy in law-making but then subjects that supreme role to both authoritative interpretation and constitutional control by reviewing courts.

But separation of powers issues hardly exhaust our normative interests. Much of the literature on statutory interpretation in courts is also directed to what I will call 'prudential' normative concerns. Because 'ought' implies 'can,' we argue incessantly about the competence of courts when they approach the task of interpreting legislative utterances. And this leads us into further disputes about the appropriate evidentiary base for statutory interpretation as well as the most effective means for carrying out the judiciary's self-proclaimed constitutional responsibility 'to say what the law is.'<sup>13</sup>

Indeed, most methodological disputes have both constitutional and prudential dimensions. Many arguments about judicial competence are vague about their normative foundations because 'competence' can convey a concern for either 'authority' or 'capacity.' Because 'capacity' is also a functionalist argument for allocating 'authority,' this conceptual confusion seems almost inherent in the interpretive debate.

Analysis of the normative dimensions of administrative interpretation can usefully be organized around these same themes of constitutional demand and prudential concern. I might even have said that agency statutory interpretation *must* be analysed along these two dimensions. *United States v. Mead Corporation*,<sup>14</sup> the Supreme Court's most recent, extended attempt to explain its *Chevron* doctrine, informs us that we must cope with two types of deference to agency statutory interpretation – *Chevron*<sup>15</sup> deference and *Skidmore*<sup>16</sup> deference. But these iconic cases have strikingly different rationales. *Chevron* relies on constitutional structure, namely Congress's legitimate authority to delegate law-making power to administrative agencies and the political accountability of those agencies to the president and to Congress. *Skidmore*, by contrast, sounds in 'capacity' or 'expertise,' the potential for accurate understanding by agencies immersed in both the politics of congressional enactment and the day-to-day administration of statutory texts.

#### A CONSTITUTIONAL DEMANDS

In some sense the position of agencies as 'faithful agents' of the legislature has a constitutional clarity that exceeds that of the judiciary. While

13 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 at 177 (1803).

14 *United States v. Mead Corp.*, 533 U.S. 218 (2001) [*Mead Corp.*].

15 *Chevron*, *supra* note 3.

16 *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

American courts must somehow balance their position as faithful agents of the Constitution and the Congress, agencies seem to enjoy a less conflicted constitutional role. However moribund in practice, the non-delegation doctrine<sup>17</sup> – the requirement that agencies must be given a legislative mandate that contains intelligible guiding principles – makes agencies, first and foremost, agents of the Congress. That agencies are a part of the executive branch does not significantly alter this structural position. Agencies are the means by which the executive carries out its constitutional responsibility to ‘take Care that the Laws be faithfully executed.’<sup>18</sup> Continual competition between presidents and congresses for control of administration is both a structural feature of the American Constitution and a stark fact of American political life. But, as a normative constitutional matter, it is generally not a good interpretive argument for an agency to say simply, ‘The president told me to interpret the statute that way.’ By contrast, ‘The statute made me do it,’ however empirically contestable in any particular instance, has the hallowed ring of constitutional legitimacy.

Yet the meaning of ‘faithful agency’ is never uncomplicated, and agencies operate in a political milieu that raises a number of additional issues – questions that look quite different from an agency’s perspective than from the bench’s. Think again about agencies’ relationship to the president. The president issues executive orders, which, if constitutional, are binding on administrative agencies. Executive orders are of many types, but in recent years orders attempting to structure agencies’ deliberative processes have been a prominent means of presidential control over a far-flung federal bureaucracy.<sup>19</sup> Executive orders demanding that agencies engage in regulatory cost–benefit analyses, consider the effects of their actions on small public and private entities, or consult with affected state and local authorities are intended to shape the way agencies interpret their mandates and carry out their statutory duties. To put it another way, they are meant to shape agency interpretation by nudging discretionary judgements in one direction or another. Agency recalcitrance in the face of a valid executive order is neither politically prudent nor constitutionally appropriate. And presidential delegations of authority to monitor agency compliance with these demands – to the

17 For a general discussion see Jerry L. Mashaw, Richard A. Merrill, & Peter M. Shane., *Administrative Law: The American Public Law System*, 4th ed. (St. Paul, MN: Thomson/West, 1998) at 56–84 [*Administrative Law*]. For a recent treatment of the doctrine as essentially an interpretive canon, see John F. Manning, ‘The Non-Delegation Doctrine as a Canon of Avoidance’ [2000] *Sup.Ct.Rev.* 223.

18 U.S. Const. art. II, § 3.

19 For a recent analysis of both the practice and the normative appropriateness of presidential direction of administration, see generally Elena Kagan, ‘Presidential Administration’ (2001) 114 *Harv.L.Rev.* 2245.

Office of Management and Budget or the vice president or the President's Council on Environmental Quality – are a common feature of the modern 'managerial' presidency.

Presidents obviously also attempt to shape agency action by a host of less formal actions, including letters, conversations, Rose Garden speeches, legislative proposals, and bill-signing statements. There is some hesitancy about the legal authority of the president to engage in certain types of steering activities with respect to so-called independent agencies. But, with regard to executive branch agencies that are not protected by special appointment or removal provisions, there seems no constitutional difficulty with admitting that these agencies are bound to follow presidential direction to the extent that it is consistent with their statutory authority. Indeed, were this not the case, constitutional ideals would be wildly inconsistent with political reality, and the political accountability of agency personnel would be radically reduced.<sup>20</sup>

Hence, both as a practical political and as a normative constitutional matter, we should expect agencies to interpret statutes in the context of presidential direction. To that degree, of course, the faithful administrative agent confronts a multiple-principals problem that is quite different from that facing Article III courts. Executive orders and executive directives are by and large irrelevant to judicial construction of statutes. Many executive orders state that they are intended to have no effect outside the executive branch, and judicial practice presumes that limitation even in the absence of a formal statement.<sup>21</sup> Save in those rare instances where presidents have been given clear statutory or constitutional authority to guide judicial interpretation by presidential pronouncement, the failure of the court to exercise interpretive judgement independent of presidential preferences would be an abandonment of what we imagine to be the constitutionally appropriate role of the federal judiciary. By contrast, for agencies *of the* executive branch to ignore legitimate presidential instruction would be for them to ignore their appropriate place in the constitutional order. One need not believe in some constitutionally problematic version of 'the unitary executive' to believe that political control over administration by elected chief executives is a critical feature of our demo-

20 Kagan cites and discusses much of the relevant literature; see generally *ibid.* Suffice it to say that the situation is not quite so straightforward and non-controversial as the text suggests. Moreover, in practice, the president's capacity to influence 'line' or 'independent' agency policy, including interpretive practice, may have more to do with situational contingencies than with statutory attempts at insulation. See Neal Devins, 'Political Will and the Unitary Executive: What Makes an Independent Agency Independent?' (1993) 15 *Cardozo L.Rev.* 273 at 282–4.

21 For a discussion see Mashaw *et al.*, *Administrative Law*, *supra* note 17 at 249–52.

cratic constitutional order and one that should shape agency approaches to the interpretation of statutes.<sup>22</sup>

Consider also the position of agencies with respect to the direct implementation of the Constitution. American administrative agencies are obviously bound by the Constitution and must often implement it directly. Agency hearing processes, for example, must satisfy constitutional due process requirements. And federal law enforcement officials make thousands of decisions every day that require an interpretation of the Fourth Amendment's search-and-seizure provisions. But how should the potential for constitutional difficulty influence an agency's construction of some statute that it is charged with implementing? We know that there is a judicial canon of statutory construction, based on principles of constitutional comity, that counsels courts to avoid constructions of statutes that would raise serious constitutional questions about their validity.<sup>23</sup> Are agencies in a similar position?

Arguably not. They have no general responsibility for constitutional review of congressional action whose aggressive or imprudent exercise might threaten the legitimacy of judicial review and thereby weaken the constitutional order. Indeed, intense agency attention to avoiding constitutional questions in interpreting the statutes entrusted to their care would often foreclose authoritative resolution of constitutional questions by the judiciary. To put the point in its strongest form, an administrative apparatus that operated in the shadow of the avoidance canon would effectively set itself up as the sole arbiter of the constitutionality of congressional action. Administrative avoidance would thus settle the constitutional question save in those extremely rare instances where the agency has no discretion to withhold action that would arguably violate constitutional constraints. And, obviously, administrators who fail to pursue implementation any time a constitutional issue looms on their horizon could not possibly carry out their legislative mandates effectively. Constitutionally timid administration both compromises faithful agency

22 For an interesting and provocative case study of presidential direction of agency interpretation, see Michael Herz, 'Imposing Unified Executive Branch Statutory Interpretation' (1993) 15 *Cardozo L.Rev.* 219.

23 This article assumes the validity of the conventional view regarding the effects of this 'constitutional avoidance' canon. But there are reasons to believe that a constitutionally induced 'misconstruction' of a congressional statute may disable the Congress in a more fundamental way than would invalidation through judicial review. See Jerry L. Mashaw, *Greed, Chaos and Governance: Using Public Choice to Improve Public Law* (New Haven, CT: Yale University Press, 1997) at 101-3. Indeed, the origins of this approach to interpretation may lie in the courts' felt need for some means to review and invalidate legislation in an era, or under constitutional systems, where judicial review was or is viewed as constitutionally illegitimate.

and potentially usurps the role of the judiciary in harmonizing congressional power and constitutional command.<sup>24</sup>

Yet this sharp distinction between administrative implementation and judicial review can hardly mean that agencies should be inattentive to constitutional norms. An agency told by statute to provide parties appearing before it with a 'hearing' should surely pay serious attention to the constitutional minima that the Supreme Court has specified for individualized adjudications.<sup>25</sup> It may decide that by 'hearing' Congress meant more than the Constitution might demand, but we would think it odd, absent extraordinary circumstances, for the agency to find that Congress meant less. And, as the *Bob Jones*<sup>26</sup> case reminds us, it is certainly appropriate for an agency such as the Internal Revenue Service (IRS) to interpret seemingly unrelated statutory provisions in the light of constitutional non-discrimination norms and in the context of non-revenue statutes that implement constitutionally grounded non-discrimination commitments. The line between being a constitutionally 'sensitive' faithful agent (interpreting statutes within the overall context of the legal order) and usurping both congressional and judicial authority to interpret the Constitution is obviously a fine one. But that is the peculiar normative constitutional tension within which administrative interpretation must proceed.

The *Bob Jones* case, of course, raises another concern about administrative agencies' interpretive responsibilities. Courts repeatedly suggest that interpretation designed to lend coherence to the general legal order is one of their most important responsibilities as custodians of the rule of law. Guido Calabresi<sup>27</sup> and Ronald Dworkin<sup>28</sup> have suggested, for instance, that fitting statutory language within the overall topography of the law is the principal function of courts as independent interpreters.

Surely agencies have a somewhat similar responsibility. Indeed, the federal statute books are planted thick with statutes that attempt to mitigate agency tunnel vision or mission orientation by requiring that agencies consider a broad range of social goals that are not directly within their charge. Virtually every agency has a manual,<sup>29</sup> outlining the

24 See Larry D. Kramer, 'Foreword: We the Court' (2001) 115 Harv.L.Rev. 4 at 123-8, 165-8.

25 Indeed, the Supreme Court may sometimes do the agency's job for it by finding specific hearing requirements in a statute that entirely fails to mention them. See *Califano v. Yamasaki*, 442 U.S. 682 at 706 (1979).

26 *Bob Jones University v. United States*, 461 U.S. 574 (1983).

27 See generally Guido Calabresi, *A Common Law for the Age of Statutes* (Cambridge, MA: Harvard University Press, 1982).

28 See generally Ronald Dworkin, *Law's Empire* (Cambridge, MA: Belknap Press, 1986).

29 See, e.g., US Department of Agriculture, 'Departmental Manual Number 1260-001,' online: USDA <<http://www.usda.gov/ocio/directives/DM/DM1260-001.htm>>; Internal

procedures for administrative rule making, that requires agency personnel to (for example) consider and implement cross-cutting statutes such as the National Environmental Policy Act, the Regulatory Flexibility Act, and the Paperwork Reduction Act. Indeed, there are so many such requirements that they may be an important contributing cause to the perceived stagnation of federal agency regulatory processes.<sup>30</sup>

But these 'framework' statutes are directed specifically at agency action. Compliance with their requirements is a minimum or core duty of 'faithful agency.' Considering the whole of the legal topography, by contrast, is quite another matter. If we believe with Alexander Hamilton<sup>31</sup> that the executive branch is meant to give energy to governance, we may also believe that an agency interpretive posture that seeks to harmonize its actions with the whole of the legal order risks forgetting that agencies are created precisely to carry out special-purpose missions. Other legal institutions have responsibilities for coherence and balance. Indeed, the sharing of these constitutional responsibilities among Congress, the president, and the courts is part of the justification for assuring that administrators are answerable to all of them. Here, as in our discussion of direct agency implementation of constitutional norms, agencies must balance their more remote responsibilities as contributors to the unity of the legal order – and hence to the operational feasibility of the rule of law – with their more proximate and primary responsibilities to the development of one segment of it.

To put this point in a slightly different way, Jonathan Siegel has argued that courts construe agency statutes against the background of quasi-constitutional administrative law norms.<sup>32</sup> Indeed, the particularities of agency statutes may be all but indistinguishable against an administrative law background that has occupied much of the interpretive foreground as well. But how much attention should the Environmental Protection Agency (EPA) pay to the background norms of administrative law as opposed to the background norms of environmental law? And, as a practical matter, is there any reason to believe that that agency would be expert in the former rather than the latter? The examples can, of

Revenue Service, 'IRS Chief Counsel Advice Training Materials' (Fall 2000), online: IRS <<http://www.irs.gov/pub/irs-utl/cca-trngl.pdf>>; Food and Drug Administration, 'FDA Manual of Regulatory Standard Operating Procedures and Policies' (7 April 2002), online: <<http://www.fda.gov/cber/regsopp/regsopp.htm>>.

30 See Mashaw *et al.*, *Administrative Law*, supra note 17 at 604–10, and authorities there discussed.

31 See Alexander Hamilton, 'The Federalist No. 70' in Clinton Rossiter, ed., *The Federalist Papers* (New York: New American Library, 1961) 423 ('Energy in the executive is a leading character in the definition of good government.')

32 See generally Jonathan R. Siegel, 'Textualism and Contextualism in Administrative Law' (1998) 78 B.U.L.Rev. 1023.

course, be multiplied, and some eminent scholars have wondered in print whether the normative context that Siegel emphasizes actually exists as a distinct field.<sup>33</sup> The difference this can make is obvious to administrative lawyers in those instances where the judiciary seems to switch its background context from general administrative law to field-specific norms. I suspect that most American administrative law professors, for example, explain *Morton v. Ruiz*<sup>34</sup> to their students as an 'Indian Law' case and also bracket the tax cases in the standing jurisprudence<sup>35</sup> as responding to the peculiar hesitancy of American federal courts to permit the litigation of 'other people's tax liability.'

Agencies' special relationship to Congress also affects how they interpret. In recent years, much controversy about statutory interpretation has centred on the evidentiary materials that should be relevant to the judicial task. Textualists are at war with purposivists; plain-language advocates joust with those prepared to seek meaning in legislative history.<sup>36</sup> But whatever one thinks of judicial use of non-statutory legislative material, Peter Strauss has argued persuasively that these materials are critical to the interpretive task of agencies.<sup>37</sup> Although Strauss does not put the argument precisely in 'faithful agent' terms, his basic case is that agencies have a direct relationship with Congress that gives them insights into legislative purposes and meaning that are likely to be much more sure-footed than those available to courts in episodic litigation. For a faithful agent to forget this content, to, in some sense, ignore its institutional memory, would be to divest itself of critical resources in carrying out congressional designs.

Perhaps even more importantly, in Strauss's view, the loss of these resources would be devastating to agency defence of statutory integrity against the pressures of subsequent political coalitions. Statutes persist while presidents and congresses change. In this context, the agency becomes the guardian or custodian of the legislative scheme as enacted. If we believe that agencies are meant to implement the statute, not the preferences of sitting presidents or senators or representatives, then to

33 See, e.g., Ernest Gellhorn & Glen O. Robinson, 'Perspectives on Administrative Law' (1975) 75 Colum.L.Rev. 771.

34 415 U.S. 199 (1974).

35 E.g., *Allen v. Wright*, 468 U.S. 737 (1984); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976).

36 For a comprehensive discussion assessing the propriety of interpreting statutes through their legislative history, see William N. Eskridge, Jr., & Philip P. Frickey, *Legislation: Statutes and the Creation of Public Policy*, 2d ed. (St. Paul, MN: West Group, 1995) at 748-832.

37 See Strauss, 'When the Judge,' supra note 5. The argument is further elaborated in John C. Roberts, 'Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers and the Enactment Process' (2001) 52 Case W.Res.L.Rev. 489 at 561.

denude them of the use of legislative history as a defence against contemporary political importuning is to leave the statutory custodians naked before their enemies.

Hence, even if you think, as I do, that the use of legislative history has no constitutional consequences for courts – that is, that there is no constitutional basis for either restricting or requiring the use of legislative history as a guide to a statutory meaning – one might take a different view with respect to agencies. Not only might they, as a prudential matter, have a better chance of understanding the real political context only partially revealed by legislative history as argued to courts in litigation, they might need to wrap themselves tightly in the blanket of pre-legislative congressional utterances in order to maintain the integrity of the statutory scheme in the face of powerful political controllers intent on wrenching statutory schemes loose from their historical, contextual foundations. In some instances only the skilful deployment of legislative history will permit agencies to fulfil their constitutional role as faithful agents in the statute's implementation.

Yet one wonders how far to push this position. As I have argued elsewhere,<sup>38</sup> legislative history is almost always more specific than statutory language. The concrete and particularized problems memorialized in congressional hearings and reports usually give rise to generalized legislative responses. If legislative history is anecdotal, statutory language may approach the Delphic. The suggestion that the use of legislative history defends statutory integrity begs the question of what integrity means when implementing statutory terms whose breadth allows (and perhaps anticipates) development and reorientation.<sup>39</sup>

Indeed, to the extent that we believe that agencies should be subject to presidential direction in shaping statutory meaning, we commit ourselves to a form of dynamic interpretation that downplays the relevance of the original context of statutory enactments. Nor are presidents the only ones who engage in post-enactment political activity relevant to statutory implementation. Congress also subjects agencies to oversight of their implementing activity. Agencies consult with Congress continually about proposals relevant to their jurisdictions. They appear before congressional appropriations committees that often have strong views about the directions that agency implementation should take. If it is the immersion of agencies in this continuous interaction with both executive

38 See generally Mashaw, 'Textualism,' *supra* note 12.

39 Einer Elhauge argues, for example, that enacting congresses would prefer interpretation that conforms to present 'enactable' political preferences because, given the existing inventory of past enactments, that approach gives maximum authority to sitting congresses in all time periods. Einer Elhauge, 'Preference-Estimating Statutory Default Rules' (2002) 102 *Colum.L.Rev.* 2027. Why those preferences should be constitutionally controlling is left unexplained.

branch offices and sub-parts of Congress that provides us with constitutional security concerning the political accountability of our administrative institutions, should not all of this political context be constitutionally relevant to administrators when they ponder the appropriate interpretation of their statutory mandates?

To put the matter slightly differently, one can understand the judiciary's constitutional qualms about using non-enacted legislative materials – particularly post-enactment congressional activities not leading to subsequent legislation – as a basis for interpretation.<sup>40</sup> If courts are to maintain their independent status as both defenders and declarers of 'the law,' they risk at least the appearance of illegitimacy when they immerse themselves in the politics of legislative enactment and, particularly, in the politics of post-enactment implementation. Therein lies, I take it, one strategic constitutional underpinning for the *Chevron* doctrine. If courts are to act as faithful agents and yet avoid immersing themselves in contemporary political processes, one way to go about it is to give discretion to those who cannot avoid it.

But these considerations suggest that whatever constitutional scruples there may be about judicial use of evidence bearing on political struggles and political context, agencies' use of this 'political' material is a part of maintaining their democratic legitimacy. It is precisely their job as agents of past congresses and sitting politicians to synthesize the past with the present.<sup>41</sup>

Other structural aspects of agencies' constitutional position point in the same direction. Agencies are not passive interpreters dependent upon discrete occasions of adversarial contest to present them with interpretive choices. They are, instead, active implementers who are expected to pick and choose their occasions for interpretation and the forms those interpretive utterances will take. Agency control of what might be called its 'interpretive agenda' argues for an interpretive approach that engages a wider-ranging set of policy considerations and a more straightforward attention to political context than would be constitutionally appropriate for the judiciary.

Moreover, in many situations agencies have clear law-making authority. They are the implementers of non-self-executing legislation, laws that are not capable of application as rules of conduct until the agency gives them meaning by adopting binding interpretations. Here again the

40 In situations where these materials are unusually persuasive, those qualms may be overcome. See, e.g., *FDA v. Brown & Williamson Tobacco*, 529 U.S. 120 (2000).

41 Edward L. Rubin, 'Dynamic Statutory Interpretation in the Administrative State' in Philip Frickey, ed., *Issues in Legal Scholarship: Dynamic Statutory Interpretation* (Berkeley, CA: Berkeley Electronic Press, 2002), online: Berkeley Electronic Press <<http://www.bepress.com/ils/iss3/art2/>>.

*Chevron* doctrine recognizes a convergence of interpretation and policy making that both counsels judicial caution and establishes administrative responsibility. As a part of the Court's *Chevron* opinion put it, the combination of law-making and interpretive responsibility in administrative institutions is constitutionally appropriate because it can be directed, checked, and controlled by the political branches.

Consider finally the matter of the constitutional status of judicial precedent. A judicial interpretation ignoring prior authoritative interpretations of higher courts would be considered constitutionally illegitimate and deeply inappropriate almost anywhere. Yet there are numerous instances where non-acquiescence in judicial constructions may be necessary for the proper exercise of an agency's constitutional mandate. Federal agencies administer national programs but are reviewed by federal courts whose jurisdictions are limited to particular districts or circuits. Only the Supreme Court has a national jurisdiction matching that of most federal agencies. Agencies such as the Social Security Administration, the EPA, the National Labor Relations Board (NLRB), and the IRS routinely confront conflicting interpretations of their statutes by district and circuit judges in different parts of the country. In these situations there is no consistent judicial precedent to follow.

But the situation is more subtle and more interesting than conflicts among district or circuit courts that make following judicial precedent impossible in a national program.<sup>42</sup> In the United States, the constitutional legitimacy of judicial construction of federal statute arises from the court's constitutional mandate to decide cases or controversies. While federal courts 'declare what the law is,' they do so only in concrete cases. These interpretations become 'the law of the case.' They are binding on the litigants in that case and on inferior courts subject to the reviewing jurisdiction of the court rendering the interpretive opinion.

But agencies are not inferior courts. They are a part of the executive branch. Hence, a court ruling is binding on the agency in the litigated case but, as a technical legal matter, not otherwise. The agency is legally free to maintain its prior position and litigate the matter further. American administrative agencies have often refused to acquiesce in reviewing court determinations and have adopted varying positions on how to manage their conflict with the courts pending a final resolution of the matter.

Most lawyers would probably subscribe to the notion that a Supreme Court determination would provide such a final resolution. But even that

42 See Samuel Estreicher & Richard Revesz, 'Nonacquiescence by Federal Administrative Agencies' (1989) 98 Yale L.J. 679; Samuel Estreicher & Richard Revesz, 'The Uneasy Case against Intracircuit Nonacquiescence: A Reply' (1990) 99 Yale L.J. 831. But see Matthew Dillar, 'Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz' (1990) 99 Yale L.J. 801.

question is not entirely free from doubt.<sup>43</sup> The Supreme Court's power to resolve a conflict among the circuits is not the same as a power to resolve the interpretive question for the other branches of the government. As a practical matter, of course, agencies are unwilling to flout Supreme Court decisions, and even district court interpretations of their statutes may have binding nationwide effect when the review proceeding involves a general regulation. Indeed, simply as the law of the case, an injunction preventing an agency from implementing a regulation has nationwide force. But apart from these circumstances, federal agencies have been directed to implement nationally uniform programs. Program variation based on local judicial rulings, rather than on some statutorily relevant differences in local contexts, is not a part of the congressional scheme that has been put in their charge.

This is not the place to rehearse the subtleties of the question of agency non-acquiescence. The point is simply that, as a structural constitutional matter, judicial precedent looks different as a source of either binding or persuasive evidence for agency interpretations of statutory terms. Indeed, given the context of most judicial constructions of agency statutes – the review of some prior action of the agency – it is often unclear what binding force the judicial interpretation was meant to have for future policy. A determination that the agency's interpretation was impermissible is not the same thing as a finding that there is a judicial interpretation providing the only correct way to understand the statute.<sup>44</sup> And a substantial portion of court–agency interpretive disagreement is glossed over by the ubiquitous practice of remanding for a further articulation of an agency's reasons.

43 For a flavour of this debate, consult H. Jefferson Powell, *The Constitution and the Attorneys General* (Durham, NC: Carolina Academic Press, 1999); Lawrence H. Tribe, *American Constitutional Law*, 3d ed. (New York: Foundation Press, 2000) vol. 1 at 264–7; Larry Alexander & Frederick Schauer, 'On Extrajudicial Constitutional Interpretation' (1997) 110 Harv.L.Rev. 1359; Christopher L. Eisgruber, 'The Most Competent Branches: A Response to Professor Paulsen' (1994) 83 Georget.L.J. 347; John Harrison, 'The Role of the Legislative and Executive Branches in Interpreting the Constitution' (1988) 73 Cornell L.Rev. 371; Sanford Levinson, 'Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics' (1994) 83 Georget.L.J. 373; Michael Stokes Paulsen, 'The Most Dangerous Branch: Executive Power to Say What the Law Is' (1994) 83 Georget.L.J. 217; Symposium, 'Elected Branch Influences in Constitutional Decisionmaking' (1993) 56 Law & Contemp.Probs. 1; Symposium, 'Executive Branch Interpretation of the Law' (1993) 15 Cardozo L.Rev. 21.

44 *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). See Kenneth A. Bamberger, 'Provisional Precedent: Reestablishing the Primacy of Agency Constructions of Administrative Statutes' (2002) 77 N.Y.U.L.Rev. 272 (arguing that agencies should treat judicial interpretations of their statutes as provisional precedent until such time as the agency has a chance to visit or revisit the question).

The preceding paragraphs probably only scratch the surface of the interpretive problems that take on a distinctive flavour when approached from an administrative rather than a judicial perspective. The US Supreme Court's recently rejuvenated concern to interpret statutes to protect state prerogatives<sup>45</sup> from congressional suppression via the Commerce Clause, for example, might look quite bizarre to the many agencies whose statutes place them in state-federal partnerships<sup>46</sup> that presume a collaborative exercise of power rather than a clear structural division of jurisdiction. Within these programs of 'cooperative federalism,' both state and federal 'prerogatives' emerge from the practical necessities of ongoing, statutorily mandated joint ventures, not from constitutionally embedded presumptions or default rules. Indeed, the whole idea of 'clear statement' principles when dealing with intergovernmental affairs may seem quite preposterous from an agency, or from the congressional, perspective.<sup>47</sup> Again, examples could be multiplied, but enough has been said to illustrate the central idea.

#### B PRUDENTIAL CONSIDERATIONS

Virtually any argument about interpretive methodology relies on a vision of the legal order shaped by the Constitution and the interpreter's place in that legal order. Pressed hard enough, any interpretive approach based on 'prudence' or 'good practice' will be found to have its underpinnings rooted in some vision of the constitutional order. Yet, in the judicial context, there are surely common methodological commitments that seem to be largely prudential.

One may be unconvinced, as I am, by the constitutional arguments put forward for the proposition that courts should ignore legislative history. Yet there is certainly something to the notion that 'rummaging about' in legislative history materials can be misleading as well as enlightening. And one might think that legislative history has a particular capacity to mislead when presented to courts in adversary litigation. Caught in adversarial verbal crossfire, and largely excluded from independent exposure to the legislative context, courts may have strong prudential reasons to doubt their capacity to separate the wheat from the chaff when exposed to pre-enactment legislative materials.

45 *E.g.*, *Solid Waste Agency v. US Army Corps of Engineers*, 531 U.S. 159 (2001).

46 Descriptions of many of these partnerships can be found in the Green Book. See U.S., Staff of House Committee on Ways and Means, 106th Cong., *2000 Green Book: Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means*, Committee Print (2000).

47 For a classic description of the subtleties of cooperative federalism, see Martha Derthick, *Influence of Federal Grants* (Cambridge, MA: Harvard University Press, 1970).

Similarly, one might be unconvinced that the canon counselling courts to construe statutes in ways that avoid constitutional questions has any firm basis in the separation of powers. But it is surely the case that judicial political capital is not infinite. Courts that routinely strike down legislative enactments might quickly lose favour with the body politic, not just with the legislature. A prudent court should conserve judicial political capital, as Alex Bickel famously argued.<sup>48</sup>

Nor are courts above construing statutes in ways that enhance judicial effectiveness as an independent prudential or bureaucratic concern. When the Supreme Court said in the famous *NLRB v. Hearst Publications*<sup>49</sup> case that the meaning of the word 'employee' in the National Labor Relations Act<sup>50</sup> was to be treated as a 'fact' within the experience of a NLRB, it affirmed the power of Congress to confer significant interpretative authority on the NLRB. It also protected the federal judiciary from thousands of essentially fact-based appeals that would have swamped the federal district courts. And when it interpreted the federal Administrative Procedure Act<sup>51</sup> as a barrier to the creation of novel procedural requirements by federal circuit courts,<sup>52</sup> it may have done more to maintain its authority over the federal circuits than it did to elaborate a proper understanding of the reach of the APA.<sup>53</sup>

*Prudential* approaches to statutory interpretation, as the concerns just discussed illustrate, seem to have three major purposes: (1) increasing the interpreter's capacity to avoid error, (2) increasing or maintaining the legitimacy of the interpreter as an interpreter, and (3) enhancing the interpreter's capacity to make its interpretations effective. All of these prudential considerations are relevant with respect to agency interpretation of statutes as well. They simply may press an agency in slightly different directions.

For example, an agency that has been heavily involved in the negotiation of statutory language, has been privy to both formal and informal legislative debates, and is cognizant of the multiple motives that have prompted particular legislative utterances, may feel that its capacity to avoid error in statutory interpretation is enormously advanced by its use of pre- and even post-enactment legislative history. Indeed, American reviewing courts recognized this special competence by giving agency

48 See generally Alexander Bickel, *The Least Dangerous Branch* (Indianapolis: Bobbs-Merrill, 1962).

49 322 U.S. 111 (1944).

50 29 U.S.C. § 452 (2005).

51 5 U.S.C. §§ 551-706 (2005).

52 *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978).

53 See Nathaniel L. Nathanson, 'The *Vermont Yankee* Nuclear Power Opinion: A Masterpiece of Statutory Misinterpretation' (1979) 16 *San Diego L.Rev.* 183.

interpretations what is now called 'Skidmore deference' long before *Chevron*.

As a prudential (perhaps even constitutional) matter, courts and agencies might also have different approaches to interpretive decision making under uncertainty. The question when interpreting is often not just how to avoid error but in what direction to skew errors given irresolvable interpretive uncertainty. Cass Sunstein has suggested, for example, that courts might properly skew their interpretive utterances in the direction of enforcing otherwise under-enforced constitutional norms.<sup>54</sup> This argument may or may not be persuasive in the judicial context, but it is surely less persuasive for administrators. In the American constitutional machine, which does not quite 'run of itself,' courts have long been viewed as rights-protecting institutional brakes, while executive departments and administrative agencies are institutional accelerators. A prudent court may say to itself, 'When in doubt, protect the constitutional commitment to a government of limited powers.' A prudent administrator might be better advised to adopt this counsel: 'When in doubt, make the statutory scheme effective.' Here, of course, the prudential rules edge very close to convergence with constitutional scruples. When asked why these divergent presumptions are appealing, one would have difficulty in constructing an answer that did not implicate a particular vision of constitutional structure.

Similar differences emerge when we consider how judicial and administrative interpreters might conserve or enhance their perceived legitimacy. While Bickel may have oversold the 'passive virtues,' judicial legitimacy is more often called into question by activism than by avoidance. (I assume that *Bush v. Gore*<sup>55</sup> is leaping unbidden into your mind). Almost the opposite might be true for administrators. Hyperactive administrators can be reined in by legal and political controls. By contrast, stodgy bureaucracies are hard to get moving: legal controls on agency inaction are weak, and congressional clear statements and deadlines tend to undermine precisely the exercise of informed discretion that statutory delegations to administrative agencies are meant to provide.

We tend to admire and reward agencies that are evidently doing their jobs. By contrast, agencies that fail to give needed interpretive guidance, are unresponsive to new issues by requiring reinterpretation of statutory terms, and leave potential statutory jurisdiction undeveloped are likely to be viewed as ineffective and, to that degree, illegitimate.<sup>56</sup> Hence, when

54 See Cass Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge, MA: Harvard University Press, 1990).

55 531 U.S. 98 (2000).

56 Daniel Carpenter has argued persuasively that politically effective agencies can gain a species of legitimacy that makes them essentially impervious to political control by

choosing occasions for interpretation, agencies may well have an interpretive predisposition to elaborate their statutes as fully as possible. This not only gives guidance to affected parties, it gets the agency's job done. The proactive administrative interpreter may gain both prestige and legitimacy in administrative domains where efficacy is legitimacy's crucial metric. 'Activist court' is, by contrast, seldom a term of approbation.

More controversially, the prudent American administrative agency may also seek political capital by constant attention to the preferences of the president and Congress. Not only does Congress control the agency's budget (with additional control being exerted by the president *via* the Office of Management and Budget), but the Justice Department (under presidential direction) controls the agency's litigating authority. In this political context, an agency that wants to be effective in its overall program would often do well to avoid battles with its political controllers on issues about which those controllers have strong views. A prudent agency will almost certainly allow current politics to guide not only its interpretive agenda but sometimes the interpretations themselves.

To be sure, we expect some autonomy from agencies, some fidelity to statutes and programs that outruns the political preferences of current office holders. But, if we expect agencies to be effective, we also expect them to be politically sensitive. Such prudential advice would seem odd if given to a court. The judiciary must maintain its political capital in some macro-political sense.<sup>57</sup> But the court that trims interpretation to current political fashion will be thought irresponsible, not prudent.

The agency that takes current political preferences into account in its interpretations risks irresponsibility as well. But agencies have much larger tool kits with which to shape opinion, test political waters, and negotiate accommodations than do the courts. Agencies can float trial balloons in 'policy statements' or 'Advanced Notices of Proposed Rulemaking.' They can create the groundwork for interpretive innovation through factual inquiry and by cultivating allies both inside and outside the political branches. Agency interpretations are not all-or-nothing or one-time things. Bending with the political winds can end up as political ju-jitsu that legitimizes agency interpretive positions in the long run, notwithstanding the preferences of either presidents or congresses.<sup>58</sup>

either the president or the Congress. These 'hyper-legitimate' agencies become, at least for a while, politically autonomous. See generally Daniel P. Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862-1928* (Princeton, NJ: Princeton University Press, 2001) [*Forging Bureaucratic Autonomy*].

57 See Harry H. Wellington, 'The Nature of Judicial Review' (1982) 91 Yale L.J. 486.

58 See Carpenter, *Forging Bureaucratic Autonomy*, supra note 56.

The basic point is that agency interpretation is a part of agency policy development, and the development of legitimate policy flows from the prudent exercise of a wide range of administrative capacities. Administration is not just a question of exercising authoritative jurisdiction within a hierarchical system of political and legal accountability.

Finally, agencies may have much more reason than courts to look at interpretation from the perspective of internal bureaucratic or hierarchical control. If the US Social Security Administration, for example, is going to regulate the interpretive discretion of approximately 10 000 state agency personnel and 1 100 administrative law judges in the determination of disability benefits, it had better have some hard-edged regulatory policy interpreting the extremely broad language of the Social Security Act. By providing hard edges the Social Security Administration necessarily gives up nuance and texture. Its regulations disable contextual interpretive discretion by individual deciders in order to maintain some consistency in a nationwide program.

Similar considerations affect all agencies with broad mandates and 'mass justice' adjudicatory responsibilities. 'Rulishness' may not make a statute 'the best that it can be,'<sup>59</sup> but it guards against the best defeating the good. Obviously, courts too are influenced by needs for hierarchical control over lower court judgments.<sup>60</sup> But this is not an ever-present prudential concern for courts as it is for administrators. Courts can strive for the 'best' interpretation with less risk that they will thereby drive out 'good.'<sup>61</sup>

Agencies can also more easily avoid interpretive closure when that approach seems to enhance effectiveness. For example, the NLRB has long maintained, critical commentary notwithstanding,<sup>62</sup> that the varied contexts of labour disputes make hard-edged interpretation of the National Labor Relations Act an imprudent administrative technique. The board has, therefore, allowed its rule-making powers to atrophy and has only rarely developed '*per se*' rules in adjudication. The NLRB seems to believe that, in its particular political context, to act like an arbitrator

59 This is Ronald Dworkin's formulation of the goal of judicial statutory interpretation. See Dworkin, *Law's Empire*, supra note 28.

60 See the discussion of the Supreme Court's regulatory difficulties in Peter Strauss, 'One-Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action' (1987) 87 Colum.L.Rev. 1093.

61 This risk, of course, provides fodder for many a dissenting opinion. See, e.g., *Mead Corp.*, supra note 14 at 239 (Scalia J. dissenting); *Butz v. Economou*, 438 U.S. 478 at 517 (1978) (Rehnquist J. dissenting).

62 See, e.g., Merton Bernstein, 'The NLRB's Adjudication-Rulemaking Dilemma Under the Administrative Procedure Act' (1970) 79 Yale L.J. 571. See also Julius G. Getman, Stephen B. Goldberg, & Jeanne B. Herman, *Union Representation Elections: Law and Reality* (New York: Russell Sage Foundation, 1976).

operating under vague statutory standards is the best way to maintain the legitimacy and effectiveness of its essentially conflict-resolving role. If the lack of rules and clear precedent allows geographic variation in labour law, that may be politic in a field marked by fierce ideological conflict and significant regional variation in public support for the rights of both labour and management.

To be sure, courts also engage in strategic manipulation of their interpretive agendas. But their techniques of both avoidance and activism are feeble by comparison with those of most administrative agencies. And, given the courts' duty to resolve conflicts properly before them, their strategic concerns are both secondary to their primary function and focused almost exclusively on maintaining authoritative conflict-resolving capacity. Agencies, by contrast, are implementers of programs whose success or failure may depend less on the persuasiveness of any particular instance of statutory construction than on how they order and implement their interpretive agendas.

#### C SUMMING UP

There is – I hope – much to quarrel with and argue about in the preceding discussion. The categories of 'Constitutional Demands' and 'Prudential Concerns' are overlapping, perhaps coterminous. My discussion is deliberately vague about what is in fact 'demanded' by a 'Constitutional Demand.' My understanding of the responsibilities devolving upon administrators and courts by virtue of our constitutional structure is deeply controversial. I have failed to articulate and defend any particular methodology of statutory interpretation for administrators. The set of both constitutional and prudential considerations that I have invoked is surely incomplete. So be it.

The point of the discussion is to begin to frame a missing debate and to convince you that there is an interesting and important subject, 'Agency Statutory Interpretation,' that needs attention. The framing task has been approached by comparing and contrasting a legally familiar practice, judicial interpretation of statutes, with a ubiquitous but nevertheless unfamiliar one, administrative interpretation. From that discussion it seems fair to conclude that judges and administrators interpret – indeed, should interpret – within divergent normative contexts. A set of 'Canons of Responsible Interpretive Practice' would look different if addressed to administrators than if addressed to judges. Table 1 suggests, in an oversimplified bipolar fashion, the likely acceptance or rejection of a series of canons of construction that might be addressed to both groups of interpreters.

Like most canons of professional responsibility, these statements would need commentary, qualification, and example to provide anything like a workable guide. Many more canons are needed for a complete set

TABLE 1  
Canons for institutionally responsible statutory interpretation

	Agency	Court
1. Follow presidential directions unless clearly outside your authority.	+*	-*
2. Interpret to avoid raising constitutional questions.	-	+
3. Use legislative history as a primary interpretive guide.	+	-
4. Interpret to give energy and breadth to all legislative programs within your jurisdiction.	+	-
5. Engage in activist law-making.	+	-
6. Respect all judicial precedent.	-	+
7. Interpret to lend coherence to the overall legal order.	-	+
8. Pay particular attention to the strategic parameters of interpretive efficiency.	+	-
9. Interpret to insure hierarchical control over subordinates.	+	-
10. Pay constant attention to your contemporary political milieu.	+	-

\* '+' means appropriate, '-' inappropriate. Given my discussion, many of these notations might realistically be more nuanced – '++' or '+/-' or even '+/?', for example.

for either institution. The canons need tweaking to reflect the complexity of cross-cutting demands. Indeed, I am extremely sceptical of attempts to use canonized rules for interpretation as a means of establishing responsible interpretative practice.<sup>63</sup>

Table 1's purpose is only to suggest how starkly the normative institutional presuppositions of administrative and judicial interpretation might diverge. And if that is true, in an ubiquitously administrative state, debating interpretive method from a relentlessly judiciocentric perspective misses a lot of the action. Moreover, normative divergence casts new light on the much-rehearsed question of agency–court interpretive power sharing. Our governmental powers are not just separated, they are distinct. They respond to different normative perspectives. If both agencies and courts are doing their proper interpretive jobs, it would appear that they should constantly disagree about interpretative method and, if method matters, about meaning.

This recognition raises quite fundamental questions about judicial deference to agency interpretive discretion – indeed, about the conception of law that should be in play when interpretive methodology is debated or chosen. For example, can it possibly be deferential for courts to use, as the Supreme Court has said, 'ordinary techniques of statutory

63 For an argument that this would be constitutionally permissible for Congress with respect to courts, although without a demonstration that it would be feasible, see Rosenkranz, 'Federal Rules,' supra note 12. That Congress has often debated this matter, at least in the context of judicial review of agency interpretation, and has been unable to agree on the appropriate formulation of interpretive principles, suggests that feasibility may be the sticking point. See Burge, 'Regulatory Reform,' supra note 5.

interpretation,' meaning surely 'ordinary techniques of judicial statutory interpretation,' when reviewing the correctness or the reasonableness of agency statutory interpretations that almost certainly employ 'ordinary techniques of *agency* statutory interpretation'? If not, is this implicit non-deference normatively justifiable? Constitutionally required?

Even more fundamentally, do we not need to explore more carefully Ed Rubin's argument<sup>64</sup> that 'law' in the federal administrative state is fundamentally about empowering and instructing administrative officials, not about prescribing rules of conduct? From this perspective, should we not imagine agency statutes as works in progress, to be shaped and moulded by continuous interaction among the implementing agency, the political branches, and affected interests? And, if that is true, then do we not need to ratchet up the authoritative interpretive role of agencies, the president, and Congress in the ongoing process of agency implementation? To put the matter in an extreme form, why should our understanding of the 'rule of law' when dealing with agency implementation imagine more than a minor or marginal place for judicial interpretation? Why should an agency's interpretive legitimacy – our reasons for finding its actions politically acceptable – have much of anything to do with whether courts agree with the meaning it gives to statutes?

These questions obviously implicate our most basic understandings of the rule of law in an administrative state. And they lead off into deep and complex questions of the role of legal *accountability* in legal *legitimacy* – questions similar to those Larry Kramer has so trenchantly raised with respect to the evolution of judicial review and the increasingly monopolistic hold of the federal courts on constitutional meaning.<sup>65</sup>

As I said early on, these are also questions that are consistently raised by John Willis's administrative law scholarship. Yet, so far as I can discern, Willis never gave a definitive answer himself. He argued strenuously against a facile understanding of the rule of law as the rule of courts. And he pointed out the numerous ways in which courts inserted themselves into administrative business where they arguably have no jurisdiction to intrude.<sup>66</sup> Yet he never firmly rejected the presumption of reviewability of

64 See Rubin, 'Law and Legislation,' *supra* note 5.

65 See generally Kramer, 'Foreword: We the Court,' *supra* note 24. See also Edward L. Rubin, 'Getting Beyond Democracy' (2001) 149 U.Pa.L.Rev. 711 (arguing that participation within administrative processes should have as much claim to satisfying democratic ideals as the capacity of voters or elected representatives to hold administrators accountable).

66 In addition to works previously cited, these matters are perceived in John Willis, 'Administrative Law and the British North America Act' (1939) 53 Harv.L.Rev. 251; John Willis, 'The Delegation of Legislative and Judicial Powers to Administrative Bodies: A Study of the Report of the Committee on Ministers' Powers' (1932) 18 Iowa L.Rev. 150; and John Willis, 'Canadian Administrative Law' (1961) 6 J.S.P.T.L. 53.

administrative action.<sup>67</sup> That would, perhaps, be much too general a principle for a scholar who believed deeply in the force of contextual understanding as a guide to appropriate legal resolution.

At a general level, the proper roles of administrators and courts in moulding the law cannot be cogently specified. Some balance between general and special law perspectives is required. We 'agency' or 'government' men (and women) will continue to think that the balance is tilted too far in the direction of judicial theologians. And those who preach from the opposing pulpit will continue to see the glaring dangers of agency autonomy. In that struggle, a balance will be achieved. Whether it is the right one is perhaps unknowable.

### III *Interpretive practice*

As John Willis would surely remind us, the proper balance in any particular context should depend upon what we take agency practice to be. What are agencies actually doing? And who is being hurt or helped by their interpretive activities or practices? In short, how do administrators go about the business of statutory interpretation? That question has two related parts: (1) What are the occasions, forms, and processes for agency statutory interpretation? (2) How do administrators interpret; that is, what is their interpretive methodology?

The first issue requires scrutiny in part because both courts<sup>68</sup> and commentators<sup>69</sup> have argued that the occasion, form, and process for agency statutory interpretation bear directly on the respect that courts should give to agency determinations of statutory meaning. These arguments presume, to a greater or lesser degree, that occasion, form, and process are probative both about whether an agency is exercising authoritative law-making power when interpreting a statute and about the degree to which the agency's views are 'well considered' and, therefore, highly persuasive if not authoritative. Are these presumptions correct?

67 Willis agreed explicitly with Peter Hogg's statement that in reviewing the question of whether a statute 'will reasonably bear the meaning which its administrator has placed upon it,' a reasonable court 'must ... weigh the official perception of the needs of effective government against the general values of civil liberty which are asserted by the individual affected.' But he deeply doubted Hogg's conclusion that Canadian courts had by and large been restrained in the exercise of their judicial review function. As Willis puts it, '[M]y impression, and it is only an impression, is that the courts have always been, and still are, far too ready to impose on twentieth-century collectivist agencies, in the name of what Professor Hogg calls "general values which were fundamental to the legal order as a whole," individualist values whose sole claim to validity is that they are lawyers' values based, as lawyers' values always are, on a long-dead eighteenth-century past.' Willis, 'Retrospect,' supra note 1 at 244-5.

68 *Mead Corp.*, supra note 14.

69 See, e.g., Robert A. Anthony, 'Which Agency Interpretations Should Bind Citizens and the Courts?' (1990) 7 *Yale J.Reg.* 1.

These issues also bear examination in their own right. We know the answer to occasion, form, and process questions when considering judicial interpretation of statutes. The occasion is a lawsuit. The form of interpretation is a judicial opinion rationalizing the court's resolution of the lawsuit. The process is the conventional judicial process of adversary argument followed by independent judicial consideration.

Agency interpretations, by contrast, take myriad forms: legislative rules, interpretative rules, statements of policy, manual issuances, advisory opinions, letters, press releases, after-dinner speeches, formal adjudications, informal adjudications, interpretive memoranda, guidelines, 'rulings,' and so on, and so on. The occasions for interpretation are not just disputes but queries, political provocations, and autonomous policy decisions. And the process through which interpretations are formulated varies with the occasion for interpretation and the form in which it will or must be rendered. It would be surprising for agency interpretive methodology to be invariant across these differing contexts (although it may be). Hence, if we are to understand 'how,' we must extend our interest to 'when,' 'what,' and 'through what process.'

These contextual considerations complicate matters considerably. We build our understandings of judicial interpretive method from reading and analysing judicial opinions. Some opinions self-consciously address issues of method; in others we can merely observe and catalogue practice. But the critical feature of (published) judicial opinions is that method is observable. Judicial explanation is, of course, always partial, sometimes strategic, perhaps often myopic about the judges' own mental processes. But, accepting these irremediable limitations, the materials for descriptive analysis of judicial interpretive methodology are not elusive.

Not so with agencies. When agencies issue orders in formal adjudicatory proceedings or providing supporting rationales for published rules, their interpretive method may be both as transparent and as irreducibly opaque as judicial methodology. But when speaking interpretively in other forms, administrators often have less need to explain themselves and no need to formalize, preserve, or make available sources from which we might glean their methodological commitments. Remember that now-hoary chestnut, the *Overton Park*<sup>70</sup> case. The Federal Highway Administration's interpretation of 'feasible and prudent alternative' was critically at issue, but its approach was buried under tons of informal record keeping and obscured by years of intergovernmental negotiations. Yet, as Strauss's splendid reconstruction of the events leading up to the litigation reveals,<sup>71</sup> it would be hard to say that the administration did not have a

70 *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

71 Peter Strauss, 'Revisiting *Overton Park* Political and Judicial Controls over Administrative Actions Affecting the Community' (1992) 39 U.C.L.A.L.Rev. 1251.

sophisticated understanding of its statutory scheme, one whose subtle trade-offs between engineering, environmental, social, economic, and political concerns would be almost impossible to recapture for purposes of examination and review.

Agency manuals, to take another example, are chock full of interpretive prescriptions directed to lower-level or field personnel. But agency executives have little reason here to give reasons for their pronouncements. The audience is lower-level personnel; that agency superiors have said 'do it this way' is enough. Explanation may come in 'field letters' or training sessions. But both of these types of explanations are likely to be couched in operational, not abstract, interpretive language, and the substance of the latter will not be reliably recoverable at all. This is employer-to-employee or lawyer-to-client talk, not the rationalization of a formal decision for public consumption.

A huge proportion of agency interpretations also lies hidden in decisions not to act. Some interpretive practices of this sort can be uncovered – the US Securities and Exchange Commission's 'no-action' orders sometimes give reasons, and NLRB General Counsel's opinions almost always do, as do agency responses to petitions for rules and IRS 'Rulings' and advice letters. But much more is buried in internal memoranda, unrecorded meetings, unrevealing settlement statements or consent orders, or the mental operations of a responsible official. Developing a reasonably accurate picture of the practice of administrative interpretation is a daunting task. We need careful comparisons across varying domains of occasion, form, and process in order to build up a reasonable set of pictures, images, rules of thumb. This work has hardly begun.<sup>72</sup>

Even the most accessible materials, such as promulgated rules or decisions in formal adjudications, raise difficult methodological issues. Agencies are multiple and various, and they publish thousands of rules and formal opinions every year. An investigator could not begin to look at them all. Where should investigation begin? What are the relevant axes of similarity or difference, task or technique, context or jurisdiction, that would yield a reasonable sample? Should one take a random walk through the Federal Register and the formal adjudicatory opinions of major regulatory agencies? Or should one look at examples of major interpretive controversies? The former risks focusing on the insignificant and unrevealing, the latter on interpretive utterances shaped by the

72 See, e.g., Dale F. Rubin, 'Private Letter and Revenue Rulings: Remedy or Ruse?' (2001) 28 N.Ky.L.Rev. 50; Donna M. Nagy, 'Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework' (1998) 83 Cornell L.Rev. 921. Both of these pieces focus largely on the propriety of judicial deference to such issuances, but each also discusses the nature of these agency decision-making tools.

selection biases of litigants and the strategic behaviour of agencies in political and legal battles. What time period should be considered relevant? Last year? The last decade? Post-*Chevron*? The decades before and after *Chevron*?

Empirical investigation without a strong theoretical basis for the inquiry presents endless possibilities. The wide range of interesting and plausible hypotheses about agency interpretive practices yields a host of potentially enlightening descriptive investigations. Do agencies, as some wag once put it, 'consult the statute only if the legislative history is ambiguous?' Are 'political' factors exploited or concealed in rendering interpretive explanations? Do matters of 'policy' and bureaucratic necessity dominate agency interpretive practices? Where and how does judicial precedent intrude on agency interpretive judgements? Do agencies have distinctive styles of interpretation? Exactly how does interpretation vary with occasion, form, and process? The empirical agenda stretches before us like an uncharted sea.

Differing empirical methodologies may also yield quite different impressions of agency interpretive method and practices. Examining the statement of basis and purpose for the rescission of the National Highway Traffic Safety Administration's (NHTSA) Motor Vehicle Safety Standard 208 (the 'passive restraints' or 'airbags' rule) that was at issue in the famous *State Farm*<sup>73</sup> case reveals little of the political context within which that decision was made or insight into how the criterion of 'reasonableness' in the Motor Vehicle Safety Act<sup>74</sup> was being reinterpreted at the Department of Transport. By contrast, a study of NHTSA policy development, including the battles over Standard 208, would doubtless emphasize those factors.<sup>75</sup> Hence, a broad survey of agency interpretive practice as revealed in rule-making issuances may describe a different elephant than a case-study literature, even if devoted to the same agency.

For the purposes of this essay, I made two brief forays into interpretive practice, both limited to published legislative rules in the post-*Chevron* era. Querying the Federal Register rules database yielded well over 600 hits where 'statutory interpretation' was at least mentioned. From that set I selected two agencies, the Environmental Protection Agency (EPA) and the Department of Health and Human Services (HHS), for a closer look. Both had substantial numbers of issuances, and the two are engaged in disparate administrative tasks and enmeshed in different politico-legal

73 *Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance*, 463 U.S. 29 (1983).

74 15 U.S.C. §§ 1381–1409 (2005).

75 See, e.g., Michael Herz's case study of the EPA's permit-modification rule: Herz, 'Imposing Unified Executive Branch Statutory Interpretation,' supra note 22. For a discussion and analysis of Standard 208 and *State Farm*, see Jerry L. Mashaw & David Harfst, *The Struggle for Auto Safety* (Cambridge, MA: Harvard University Press, 1990).

contexts. I selected a few rule-making activities from these agencies that had resulted in judicial review.

The resulting data are impressionistic<sup>76</sup> and obviously incomplete, not only in the myriad ways previously discussed but because of the arbitrary (*i.e.*, atheoretical) choice of agencies and issues. My findings are more in the nature of ‘notes from the field’ by an explorer in uncharted territory than even a rudimentary guide to administrative interpretation as a legal-cultural practice. When reading what follows, remember that Columbus initially thought – and then stubbornly maintained – that the eastern coast of Cuba was the beginning of the Asian mainland.

#### A A (SOMEWHAT) RANDOM WALK THROUGH THE RULES

A search in the Lexis Federal Register data base for EPA and HHS rules that at least mentioned statutory interpretation produced sixty hits for HHS and 179 for EPA.<sup>77</sup> This was an obviously under-inclusive approach, but broader searches yielded thousands of results that Lexis would not display. The intuitive underpinning of the search was simply to find some instances in which the agencies were attending ‘self-consciously to statutory interpretation. Of the returned hits, I selected approximately a dozen rules from each agency where interpretive practice was most prominently on display.<sup>78</sup>

76 Where possible, I have tried to cite directly to the rules that support my claims about interpretive practice. In some cases, however, my conclusions are general enough that such citation is impossible.

77 The search was ‘(statut! interp!) and “final rule” and (either “human services” or “environment”),’ with the range of results limited to rules issued between 25 June 1984 (the date the Supreme Court decided *Chevron*) and 31 December 2001. Not all of the returned hits were HHS or EPA rules, and not all of the HHS and EPA rules were final rules.

78 The surveyed HHS rules are as follows: Foreign Establishment Registration and Listing, 66 Fed. Reg. 59,138 (2001); Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462 (2000); Standards of Compliance for Abortion-Related Services in Family Planning Services Projects, 65 Fed. Reg. 41,270 (2000); TANF Revisions, 64 Fed. Reg. 17,720 (1999); National Vaccine Injury Compensation Program: Revision of the Vaccine Injury Table, 60 Fed. Reg. 7678 (1995); Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2302 (1993); Patent Term Restoration Regulations, 53 Fed. Reg. 7298 (1988); Temporary Assistance for Needy Families Program (TANF), 64 Fed. Reg. 17,720 (1999); Child Care and Development Block Grant, 57 Fed. Reg. 34,352 (1992); Methodology for Determining Whether an Increase in a State or Territory’s Child Poverty Rate Is the Result of the TANF Program, 65 Fed. Reg. 39,234 (2000).

The surveyed EPA rules are as follows: National Pollutant Discharge Elimination System: Regulations Addressing Cooling Water Intake Structures for New Facilities, 66 Fed. Reg. 65,256 (2001); Montana: Final Authorization of State Hazardous Waste Management Program Revision, 65 Fed. Reg. 81,381 (2000); Technical Assistance Grant Program, 65 Fed. Reg. 58,850 (2000); Findings of Significant Contribution and

The surprise here, if there is one, is how unsurprising agency practice appears from this type of sampling. At both agencies much of the discussion of statutory interpretation comes in the agencies' replies to comments. Although the agencies sometimes anticipated interpretive problems and noted them in setting forth the rules, I focused my analysis primarily on the agencies' responses to comments that attacked their proposed interpretations in an attempt to influence them to change proposed rules. In other words, I focused on instances in which statutory interpretation was contested.

In both sets of rules 'textualism' is often in evidence, including some highly formalistic 'plain meaning' arguments. Legislative history is not as prominent as one might have expected.<sup>79</sup> On the other hand, the agen-

Rulemaking on Section 126 Petitions for Purposes of Reducing Interstate Ozone Transport, 65 Fed. Reg. 2674 (2000); Approval and Promulgation of Implementation Plans: Nevada State Implementation Plan Revision, Clark County, 64 Fed. Reg. 29,573 (1999); Control of Air Pollution from New Motor Vehicles: Compliance Programs for New Light-Duty Vehicles and Light-Duty Trucks, 64 Fed. Reg. 23,906 (1999); Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254 (1998); Opting into the Acid Rain Program, 60 Fed. Reg. 17,100 (1995); Determining Conformity of General Federal Actions to State or Federal Implementation Plans, 58 Fed. Reg. 63,214 (1995); Protection of Stratospheric Ozone, 58 Fed. Reg. 4768 (1993); Hazardous Waste; Codification Rule for the 1984 RCRA Amendments, 52 Fed. Reg. 45,788 (1987).

79 See, e.g., Foreign Establishment Registration and Listing, 66 Fed. Reg. 59,138 at 59,140-1 (2001) ('Section 510(I) of the act clearly and unequivocally requires foreign establishments to register the name of a United States agent. As stated in the preamble to the proposed rule, FDA interprets section 510(I) of the act as allowing only one United States agent for each foreign establishment because section 510(I) of the act refers to the United States agent in singular, rather than plural, terms ... The most logical interpretation of the term, "United States agent," is that the agent must be in the United States. If Congress intended foreign establishments to be able to designate agents outside the United States, the words "United States" would be unnecessary in section 510(I) of the act. Indeed, if Congress intended to require foreign establishments to be able to designate agents outside the United States, there would be no need for any agent at all because FDA could simply contact the foreign establishment directly.');

Findings of Significant Contribution and Rulemaking on Section 126 Petitions for Purposes of Reducing Interstate Ozone Transport, 65 Fed. Reg. 2674 at 2681 (2000) ('[T]here is simply no statutory basis for EPA to indefinitely deny relief to downwind States harmed by pollution transported from upwind States. Congress provided section 126 to downwind States as a critical remedy to address pollution problems affecting their citizens that are otherwise beyond their control, and EPA has no authority to refuse to act under this section.');

Methodology for Determining Whether an Increase in a State or Territory's Child Poverty Rate Is the Result of the TANF Program, 65 Fed. Reg. 39,234 at 39,243 (2000) ('Based on our analysis, we believe that there is enough reliability in the poverty estimates that, using statistical techniques, we can make reasonable estimates of changes. We also believe that this is the clearest reading of the statute and is the interpretation intended by Congress, given the sources of data specified in the statute.');

Control of Air Pollution From New Motor Vehicles; Compliance Programs for New Light-Duty Vehicles and Light-Duty Trucks, 64 Fed. Reg. 23,906 at 23,912 (1999) ('[T]he terms used by Congress, "establish methods and

cies do not apologize (as many contemporary courts do) when invoking legislative history, nor do they question its reliability. Floor statements from the Congressional Record are used occasionally, but most reliance is on committee reports.<sup>80</sup>

procedures,” are not defined in the Clean Air Act. These terms are general in nature, and can be readily interpreted as covering a broad range of agency action. “Methods” and “procedures” would encompass both detailed prescriptions of how to conduct a test, as well as broad general provisions, such as a requirement that testing be conducted using good engineering practices. These terms are broad enough in nature to include a process for future determination of the specific details of a test program, based on submission of a proposed program for EPA review according to pre-set criteria. The term “establish” also appears general enough to include both the establishment of detailed specifics at one time, as well as establishment of a process to set detailed specifics at a future point. The text of section 206(d) does not appear to indicate a clear Congressional intent to prohibit the adjudicatory approach proposed by EPA, but instead employs terms that are broad and general in nature, allowing a variety of potential ways to establish methods and procedures for testing. The legislative history is limited, and does not provide any indication of a contrary congressional intent.’); Temporary Assistance for Needy Families Program (TANF), 64 Fed. Reg. 17,720 at 17,773 (1999) (‘[T]he law plainly states that a parent may be disregarded from the rate for not more than 12 months. We interpret this language to mean a cumulative, lifetime limit of 12 months.’).

- 80 See, e.g., Montana: Final Authorization of State Hazardous Waste Management Program Revision, 65 Fed. Reg. 81,381 at 81384 n.8 (2000) (‘Congress has already considered, and rejected an explicit prohibition against EPA enforcement unless the State failed to bring an action. Legislative History of the Solid Waste Disposal Act, 102d Cong., 1st Sess. At 370 (Comm. Print 1991).’); Approval and Promulgation of Implementation Plans; Nevada State Implementation Plan Revision, Clark County, 64 Fed. Reg. 29,573 at 29,578 (1999) (‘The legislative history indicates that Congress intended to provide flexibility to states regarding oxygen content, and did not want to restrain that flexibility by setting a federal mandate for a specific oxygen level that states must require. While Congress deliberately rejected a federal mandate that would reduce the market opportunities for various oxygenates, it did this with the goal of preserving state flexibility, not limiting it, and the latter interpretation is consistent with this goal.’); Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254 (1998) (‘This interpretation of the CAA as generally delegating such authority to approved tribes is also supported by the legislative history, which provides additional evidence of Congressional intention regarding this issue. See S. Rep. No. 228, 101st Cong., 1st Sess. 79 (1989) (“the Act constitutes an express delegation of power to Indian tribes to administer and enforce the Clean Air Act in Indian lands”).’); Opting into the Acid Rain Program, 60 Fed. Reg. 17,100 at 17,104 (1995) (‘By its own terms, the March 7, 1991 letter did not provide guidance, much less a statutory interpretation or an applicability determination for the units in question, that could be relied upon. In fact, the March 7, 1991 letter indicated that this was a preliminary view based only on the statutory language itself and did not indicate that any other material relevant to statutory interpretation (such as legislative history) had been considered. Several months thereafter, EPA sent a retraction letter on January 7, 1992 to the City of Dover reiterating that EPA’s response in the March 7, 1991 letter was preliminary and that the Agency was reconsidering the legal and analytic basis of the position it had taken in the March 7, 1991 letter.’) [citations omitted]; Medicaid Program; Eligibility and Coverage

Neither agency makes much of anything of its relationship to other 'political' actors. There is some reliance on congressional acquiescence in past practice<sup>81</sup> and on the necessity of complying with general executive orders.<sup>82</sup> These agencies may be relying on the dynamics of their political environment to inform their interpretations, but their enunciation of interpretive reasons leaves these factors decidedly in the background.

As one might expect, there is no attempt to address methodological issues in interpretation. Those sorts of methodological controversies bubble up in multi-member judicial panels where the judges or justices disagree about outcome and pursue their disagreements through the medium of methodological controversy. These agency final rules 'lay down the law' with one voice, and their drafters seem to use whatever methods are convenient to deal with the questions before them.

Requirements, 58 Fed. Reg. 4908 at 4919 (1993) ('The passage of section 1902(r)(2) was the Congress' solution to the problem identified in 1984 when it first imposed the DRA moratorium on the Department. Under the moratorium, the Secretary was not permitted to take adverse actions against States because they were using more liberal income and resource methods than those used under the cash assistance programs. The Senate Report accompanying the 1987 amendment to the moratorium made clear that: "The moratorium does not eliminate the limits on income and resources of eligible individuals and families under section 1903(f)" ... Since, as its legislative history indicates, section 1902(r)(2) is essentially the permanent codification of the DRA moratorium, we see no reason to interpret it in a manner that would conflict with the explicit guidance provided by the Senate Report with respect to its predecessor.');

Hazardous Waste; Codification Rule for the 1984 RCRA Amendments, 52 Fed. Reg. 45,788 (1987) ('EPA does not believe that Congress intended the exemptions in section 3001, which were clearly aimed at hazardous waste, to extend to corrective action for solid wastes under section 3004(u). Certainly nothing in the plain language of the legislative history of section 3004(u) suggests that Congress intended to create any exemptions for any category of solid waste.'). See also Standards of Compliance for Abortion-Related Services in Family Planning Services Projects, 65 Fed. Reg. 41,270 at 41,272 (2000) ('[W]hile the Secretary agrees that the statute could on its face be read only to proscribe the use of Title X funds for the provisions of abortion, this is not considered to be the better reading of the statutory language. Rather, the legislative history of section 1008 indicates that that section was intended to restrict the permissible scope of abortion-related services provided under Title X. The floor statements by the section's principal sponsor, Rep. Dingell, indicated that the section's restrictions on the "use" of Title X funds should be read as having a broader scope that is urged by these comments ...') [citations omitted].

81 See, e.g., Standards of Compliance for Abortion-Related Services in Family Planning Services Projects, 65 Fed. Reg. 41,270 at 41,272 (2000) ('The Department has consistently, since 1972, read section 1008 as incorporating this legislation on activities that "promote or encourage" abortion as a method of family planning. This interpretation is well-known to Congress, which has not, to date amended section 1008. Thus, there is legal support for this longstanding interpretation of the statute').

82 Indeed, 136 of the 179 original EPA hits reference one or more executive orders, and fifty-two of the original sixty HHS hits reference at least one executive order.

This small sample suggests some differences between HHS and EPA practices that are probably not unexpected to those who know something of both agencies and their regulatory contexts. HHS interpretations seem much more straightforward and focused. They simply answer the question raised by a commentator and go on to the next question. Case authority is very sparse in HHS issuances, and there seems to be a decided lack of strategic posturing in anticipation of judicial review.

EPA explanations are noticeably different. The interpretive analysis is more elaborate, probably as a result of more extensive commentary by well-organized interests, high levels of litigation, and a continuous need at EPA to harmonize technical sections of multiple statutes that have been passed at different times and are potentially working at cross purposes. Not surprisingly, one finds the EPA citing and using the *Chevron* two-step criterion to structure its interpretive arguments.<sup>83</sup> After all, *Chevron* is an EPA case. The EPA rules also are heavier on judicial jurisprudence and the

83 See, e.g., Control of Air Pollution from New Motor Vehicles; Compliance Programs for New Light-Duty Vehicles and Light-Duty Trucks, 64 Fed. Reg. 23,906 at 23,912-13 (1999) ('Whether section 206 authorizes or prohibits such agency action is a matter of statutory interpretation. The first question is whether Congress has directly spoken to this issue, such that Congressional intent is clear on this specific matter. If the intent of Congress is clear regarding a statutory provision, the Agency must follow that intent. If Congress' intent is not clear on this specific issue, then the question is whether EPA's interpretation of section 206(d) is a reasonable way to implement the authority delegated in that provision. Traditional tools of statutory construction are used to answer these questions.') (citing *Chevron*); Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254 (1998) ('In light of the statutory language and the overall statutory scheme, EPA is exercising the rulemaking authority entrusted to it by Congress to implement the CAA provisions granting approved tribes authority over all air resources within the exterior boundaries of a reservation.') (citing *Chevron*); National Vaccine Injury Compensation Program: Revision of the Vaccine Injury Table, 60 Fed. Reg. 7678 at 7679 (1995) ('In enacting a particular statutory scheme, Congress will often leave particular gaps with instructions to the Department charged with executing the statute to promulgate regulations to fill the gaps and interpret the statutory language. In promulgating regulations, the Department is limited to the authority delegated by Congress, and is obligated to act consistent with Congressional intent. Pursuant to these basic principles of administrative law, the Secretary is promulgating this regulation to amend the Vaccine Injury Table.') (citing *Chevron*); Determining Conformity of General Federal Actions to State or Federal Implementation Plans, 58 Fed. Reg. 63,214 at 63,221 (1993) ('The Clean Air Act does not define "support" for the purposes of section 176(c) of the Act. If read in the broadest conceivable manner, the "support in any way" prohibition might be interpreted to include virtually all Federal activities, since all Federal activities could be argued to support, at least in some remote way, an action that ultimately emits pollution. The EPA does not believe that Congress intended the "support in any way" prohibition to be interpreted in a manner that would lead to such egregious or absurd applications of section 176(c) of the Act. Where the language of a statute is ambiguous, as is the case here, an agency has the discretion to adopt an interpretation that is reasonable.') (citing *Chevron*).

use of interpretive presumptions gleaned from Supreme Court opinions, such as the requirement that there be a 'clear statement' from Congress for a statute to pre-empt state action<sup>84</sup> or the dictum that statutes should be construed for the benefit of Indian tribes.<sup>85</sup>

In at least one of the rules I reviewed, the EPA proceduralized *Chevron*. Its Notice of Proposed Rulemaking for this rule articulates the reasons for finding the relevant statutory provisions ambiguous and invites comments on alternative interpretations of the act.<sup>86</sup> Indeed, the EPA rulemaking responses often move the discussion rapidly away from 'meaning' (*Chevron* step 1) to the question of 'reasonableness' (*Chevron* step 2). The agency then relies on a host of sources to demonstrate the reasonableness of its approach, including everything from the overall purposes of the statute, to canons of statutory construction, to practical problems of enforcement and administration. There is considerable emphasis on its own past practice and on its prior interpretations, whether or not they have ever been blessed by a reviewing court.

In a few instances agency practices seem to mirror some of the normative expectations previously discussed. In one of HHS's rule-making proceedings, commentators attacked the constitutionality of the rules. HHS dismissed the constitutional claims without extended discussion, and certainly without any suggestion that its policies should be trimmed to avoid constitutional challenge.<sup>87</sup> Not much should be made of this finding, of course. The sample here was small, and these constitutional claims bordered on the frivolous.

84 See, e.g., Approval and Promulgation of Implementation Plans; Nevada State Implementation Plan Revision, Clark County, 64 Fed. Reg. 29,573 at 29,578 (1999) ('This interpretation is also consistent with the general principle of avoiding a statutory interpretation that preempts state action unless Congressional intent to do so is clear').

85 Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254 at 7255 (1998) ('Further, it is a well-established principle of statutory construction that statutes should be construed liberally in favor of Indians, with ambiguous provisions interpreted in ways that benefit tribes. In addition, statutes should be interpreted so as to comport with tribal sovereignty and the federal policy of encouraging tribal independence') [citations omitted].

86 Determining Conformity of General Federal Actions to State or Federal Implementation Plans, 58 Fed. Reg. 63,214 at 63,218 (1993) ('On March 15, 1993, EPA proposed that as a legal matter, the statute could be interpreted to support either the inclusive or exclusive definition and both definitions were offered for public comment. As a result of the public comments and consultation with other Federal agencies, the final rule incorporates the exclusive definition of indirect emissions. The exclusive definition is selected because it meets the requirements of section 176(c) of the Act, and it: (1) Is consistent with the manner indirect emissions are covered in the transportation conformity rule, (2) Can be reasonably implemented, and (3) Best fits within the overall framework of the Act').

87 National Vaccine Injury Compensation Program: Revision of the Vaccine Injury Table, 60 Fed. Reg. 7678 at 7679-80 (1995) (rejecting a non-delegation/separation of powers challenge to the Secretary's authority to promulgate the regulations at issue).

In addition, in one of its rule-making proceedings, the EPA had to deal with explicitly contrary circuit court authority. It clearly announced its refusal to acquiesce in the circuit court determination, save in the case in which it was rendered, and explained at length why it believed that the circuit court opinion had been wrong.<sup>88</sup>

#### B LITIGATED RULES

My short field trip into agency statutory interpretation included a top-down sampling of a few rules (four each) promulgated by HHS and EPA and subjected to subsequent circuit court review.<sup>89</sup> Some of these rules were relatively high-profile controversies, such as the HHS rules concerning parental notification requirements applicable to family planning services and the EPA regulation establishing its nitrogen oxide emission reduction program. Others were more run-of-the-mill, technical rules that might have had important impacts on particular parties but were hardly the stuff of high political controversy.

The story here is much the same as that pieced together in the preceding section. EPA interpretive analyses were in general much more extensive than those provided by HHS, and the EPA constantly invoked *Chevron* and emphasized the 'reasonableness' of its interpretations. At both agencies, examination of judicial precedent was scant, and there

88 See, e.g., *Montana: Final Authorization of State Hazardous Waste Management Program Revision*, 65 Fed. Reg. 81,381 at 81,383–85 (2000) (rejecting the statutory interpretation adopted by the Eighth Circuit in *Harmon Industries v. Browner*, 131 F.3d 894 (1999)).

89 These rules and decisions were selected by searching in the Lexis 'Federal Cases After 1944, Combined Courts' database for '(statut! interp!) and "final rule" and (either "health and human services" or "environment protection agency").'

The rules and review decisions for HHS are the following: Parental Notification Requirements Applicable to Projects for Family Planning, 48 Fed. Reg. 3600 (1983), reviewed in *Planned Parenthood v. Heckler*, 712 F.2d 650 (D.C. Cir. 1983); Final Rule, Utilization and Quality Control Peer Review Organizations, 50 Fed. Reg. 15,312 (1985); Review of Photocopy Rule, 57 Fed. Reg. 4779, reviewed in *Queen of Angels v. Shalala*, 65 F.3d 1472 (9th Cir. 1995); 51 Fed. Reg. 16,772 (interim final rule, 1986) and 51 Fed. Reg. 31,460 (final rule, 1986) (interpreting P1 99-272 § 9105), reviewed in *Cabell Huntington Hospital v. Shalala*, 101 F.3d 984 (4th Cir. 1996); Final Rule, 56 Fed. Reg. 8832 (1991), reviewed in *Henry Ford Health System v. Shalala*, 233 F.3d 907 (6th Cir. 2000).

For the EPA, the rules and review decisions are the following: Direct Final Rule, 60 Fed. Reg. 30,189; Final Rule (with response to comments), 60 Fed. Reg. 36,723 (1995), reviewed in *Sierra Club v. EPA*, 99 F.3d 1551 (10th Cir. 1996); Final Rule, Preemption of State Regulation for Nonroad Engine and Vehicle Standards, 59 Fed. Reg. 36,969 (1994), reviewed in *Engine Manufacturers Association v. EPA*, 88 F.3d 1075 (D.C. Cir. 1996); Final Rule, Nitrogen Oxides Emission Reduction Program, 59 Fed. Reg. 13,538 (1994), reviewed in *Alabama Power v. EPA*, 40 F.3d 450 (D.C. Cir. 1994); Final Rule, Regulation of Fuels and Fuel Additives: Renewable Oxygenate Requirement for Reformulated Gasoline, 59 Fed. Reg. 39,258 (1994), reviewed in *American Petroleum Institute v. EPA*, 52 F.3d 1113 (D.C. Cir. 1995).

was considerable reliance on past agency practice, technical industry or scientific understandings of terms, and legislative history.

Looking at agency interpretive discussions side by side with reviewing court opinions allows some further tentative comparisons. Agency effort at explaining or justifying interpretations in their final rules does not seem to correlate with judicial acceptance of the agencies' positions. This may, of course, simply reflect the fact that agency effort is correlated positively with agency uncertainty about the acceptability of its interpretations.

Perhaps most striking are the cases in which an agency's highly nuanced interpretation – based on text, legislative history, statutory history, past agency practice, the balance of competing congressional purposes, and industry or scientific understandings – was rejected in favour of judicial approaches based on pure textual analysis, plain meaning, or the invocation of grammatical rules. These cases highlight the strikingly different contexts of agency and court interpretive activity. They also obviously raise again the question of how 'deferential' judicial review can be when agency and court interpretations are informed by different political, administrative, and procedural contexts that lead to differing methodological commitments.

#### IV *Concluding comments*

Two points. First, my pathetic foray into empiricism suggests to me that there are rich veins of interpretive ore to be mined just in agency rule promulgations. But to really begin to understand agency interpretive practice, other materials must be brought to bear, probably through case studies of individual agencies or programs by scholars who understand the substantive fields. We now know very little. But, unlike judicial deliberations that will mostly remain black boxes, agency interpretive practices may actually be more fully recoverable, if we put our minds to it. The interpretive materials are more differentiated, have multiple sources, stretch over time, and leave paper trails that can be followed.

More importantly, these investigations must be done to inform our normative expectations about the appropriateness of agency interpretive practice and its place in our understanding of what both democracy and the rule of law mean in our ever-evolving administrative state. Doctrinal discussions of these matters seem like cartoons when laid beside the occasional empirical investigation of agency operation.

*Chevron* imagined politically accountable administrators with statutorily delegated policy authority. But how much do we really know about when, how, how often, and by whom agencies are called to account for their interpretations? If hierarchical political accountability provides the foundation for the *Chevron* doctrine, surely we ought to care whether that

image is more than a figment of a fevered judicial brain.<sup>90</sup> Meanwhile, *Skidmore* conjures up an expert interpreter without asking to what degree expertise may be derailed by precisely the accountability regime that *Chevron* postulates.<sup>91</sup>

Meanwhile, the 'new administrative law,'<sup>92</sup> like the 'new public management,'<sup>93</sup> posits an administrative governance system that is more collaborative, flexible, or 'reflexive' than a system of administrative law conceptualized either as a law of rules or as the exercise of delegated law-making power subject to routinely effective political oversight. This new vision is both 'micropolitical' and focused on techniques of guidance, participation, and devolution. From this vantage point the agency becomes not a rule-bound bureaucracy but a change agent; not a politically accountable lawgiver but a focal point for mobilizing and accommodating affected private interests.

Where does agency statutory interpretation fit into this picture? How much of the world of administration does it realistically describe? How reliable are the new mechanisms of accountability that these visions exalt? And what would these revised notions of legitimacy say about the bases upon which a normative conception of agency interpretive authority might be built? Inquiry into the empirical realities of agency interpretive practice can provide a crucial window on these issues and an essential step in assessing the legitimacy of administrative governance. For in the end, I believe, our normative conception of the governance system that we affirm must depend on what we know about the system that we have and how we believe it works. Here surely I stand firmly in the tradition that John Willis and his realist contemporaries pioneered – a tradition that administrative law still too little observes.

90 Students of Congress and of regulatory agencies have quarrelled inconclusively for years over the extent and effectiveness of congressional oversight. Compare Bernard Rosen, *Holding Government Bureaucracies Accountable* (New York: Praeger, 1982); Kenneth W. Clarkson & Timothy J. Muris, *The Federal Trade Commission Since 1970: Economic Regulation and Bureaucratic Behavior* (Cambridge: Cambridge University Press, 1981); and U.S., Senate Committee on Government Operations, *Study on Federal Regulation: Congressional Oversight of Regulatory Agencies* (S. Doc. No. 95-25) (1977); with Barry R. Weingast & Mark J. Moran, 'Bureaucratic Discretion or Congressional Control? Regulatory Policymaking at the Federal Trade Commission' (1983) 91 J.Pol.Econ. 765; and John Ferejohn & Charles Shipan, 'Congressional Influence on Bureaucracy' (1990) 6 J.L.Econ.& Org. 1.

91 This is essentially the story told by Michael Herz, in which EPA eventually signs off on an interpretation that it clearly believes to be incorrect. See Herz, 'Imposing Unified Executive Branch Statutory Interpretation,' supra note 22.

92 See generally Jody Freeman, 'Private Parties, Public Functions and the New Administrative Law' (2000) 52 Admin.L.Rev. 813.

93 For an extensive treatment, see Lester M. Salamon & Odus V. Elliott, eds., *The Tools of Government: A Guide to the New Governance* (New York: Oxford University Press, 2002).

