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REAGANIST REALISM COMES TO DETROIT

Stephen F. Ross*

Four days before resigning under an ethical cloud in the midst of the 1988 presidential election campaign,1 Attorney General Edwin Meese issued a decision and order approving, pursuant to the Newspaper Preservation Act,2 the Detroit Free Press’s and the Detroit News’s application for permission to enter into a Joint Operating Agreement (JOA). The agreement preserved editorial independence for the two newspapers but effectively merged their business operations, thus ending economic competition in the Detroit newspaper industry, the nation’s fifth largest newspaper market.3

Two years earlier, Douglas Ginsburg, then the Assistant Attorney General in charge of the Antitrust Division, had concluded that the applicants had “not yet sustained their burden of proof of showing that the Detroit Free Press is a ‘failing newspaper’ within the meaning of the Act.”4 Pursuant to Justice Department regulations,5 an expert administrative law judge was appointed to resolve the factual issues and to recommend a decision.6 The Antitrust Division appeared at the hearings in opposition to the JOA.7 The Division opposed the JOA because the parties had deliberately engaged in a strategy of accepting short-run finan-

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1. See Wash. Post, Aug. 12, 1988, at A12, cols. 1-5 (Meese resigned the same day that an independent counsel had determined that he probably violated federal conflict of interest and tax laws).
3. Michigan Citizens for an Indep. Press v. Thornburgh, 868 F.2d 1285, 1288-89 (D.C. Cir.), aff’d per curiam, No. 88-1640 (U.S. Nov. 13, 1989) (lower court decision upheld by an equally divided court). This case will be referred to as “Detroit Newspapers” throughout this article. Meese denied that decisions by the Free Press and its sister newspaper, the Miami Herald, to pull critical cartoons had any effect on his decision. Randolph, Detroit Papers Permitted to Publish Jointly, Wash. Post, Aug. 9, 1988, at A1, col. 1, A4, cols. 1-5.
4. Detroit Newspapers, 868 F.2d at 1289.
cial losses in return for the prospect of long-run monopoly profits. Each newspaper hoped to realize monopoly profits after eliminating economic competition in the Detroit newspaper market, through either the demise of the other paper or an antitrust-exempt JOA. The judge recommended that the Attorney General deny the application. Nevertheless, Attorney General Meese approved the JOA after deliberating for eight months. In approving the JOA Meese concluded that the papers' strategy was legitimate, thus rejecting the advice of both his subordinate and an independent reviewer who had strong expertise in antitrust law.

In *Michigan Citizens for an Independent Press v. Thornburgh (Detroit Newspapers)*, a group of consumers, advertisers, and newspaper employees sought judicial review of the Attorney General's decision. A divided court of appeals sustained the decision, and the Supreme Court affirmed the appeals court by a 4-4 vote. In sustaining Meese's decision, Judge Laurence Silberman's majority opinion relied almost exclusively on the principle of deference to administrative interpretations of statutes. Judge Silberman's reliance on the deference principle was so complete that he ignored or rejected every other potential tool of statutory construction that judges might be expected to use in this context. Indeed, use of any of these commonly used tools of statutory interpretation would suggest that Attorney General Meese's construction of the Act was incorrect.

Judge Silberman's decision is one of a number of opinions written by Reagan judicial appointees that, in at least three important areas, frustrate congressional policy judgments in favor of executive or judicial policy or value judgments. First, as exemplified by *Detroit Newspapers*, an administrator's decision effectively trumps traditional judicial techniques used to determine congressional intent in enacting a statute. Second, several Reagan judicial appointees have written decisions decrying the use of various indicia of congressional intent to interpret statutes, preferring instead to rely on the "plain meaning" of the statute. However, in most

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8. *Id.* at 27-29.
10. *Id.* at 1291 (quoting Attorney General's opinion noting that "newspapers cannot be faulted for considering and acting upon an alternative that Congress had created").
12. The plaintiffs alleged that the decision violated both the Newspaper Preservation Act, 15 U.S.C. §§ 1801-1804 (1982) and the Administrative Procedure Act, 5 U.S.C. § 706 (1982), because, inter alia, it was arbitrary and capricious and otherwise in violation of law. 868 F.2d at 1287.
13. Judge Lawrence Silberman wrote the panel opinion, which was joined by Judge Spottswood Robinson III. Judge Ruth Bader Ginsburg dissented. *Id.* at 1286. A petition for rehearing en banc was denied by the entire court over the dissents of Judges Patricia Wald, Harry Edwards, Abner Mikva, and Ruth Bader Ginsburg. *Id.* at 1301.
15. 868 F.2d at 1291 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)).
controversial cases a judge’s determination of the statute’s “plain meaning” will turn on the judge’s individual background and policy preferences. By ignoring indicia of actual legislative intent in favor of a meaning based on a judge’s inevitably personal reading of the words of a statute, the judiciary inevitably tilts the process of interpretation in favor of its preferences and away from the legislature’s.

Finally, one of President Reagan’s three Supreme Court nominees, Justice Antonin Scalia, has forcefully expressed the view that the constitutionally mandated doctrine of separation of powers prevents Congress from restraining executive branch action in a number of ways. The political effect of Scalia’s view is to impede advancement of congressional policy preferences where they conflict with those of the President.

Of course, academics and judges of various political perspectives have put forth sound arguments in support of deference to administrative interpretations of statutes, increased emphasis on statutory language at the expense of legislative history, and a strict wall of separation between the branches of the federal government. It is somewhat disturbing, however, that conservative Republican judges are promoting these doctrines at a time when the Republican party controls the presidency, Republican appointees increasingly dominate the federal bench, the Democrats control Congress, and political prognosticators predict that this stand-off is likely to continue. This trend toward frustration of congressional policy preferences is even more troubling when one considers that a hypothetical conservative unaware of the current partisan make-up of the three branches of government probably would oppose deference to administrative agencies, would be skeptical of giving judges the power to construe statutes based on their own values instead of the intent of Congress, and would prefer governmental procedures that check the power and intrusiveness of executive branch regulation. Therefore, although many reasonable and nonpartisan lawyers, judges, or scholars may sincerely believe in each or all of these three trends, one


17. See infra text accompanying notes 119-40.
18. See infra text accompanying notes 143-47.
19. See infra text accompanying notes 159-61.
21. See Broder, A Troubling Agenda From Carter and Ford, Wash. Post, Nov. 27, 1988, at D7, col. 5 ("voters have institutionalized a new set of checks and balances between a near-permanent Democratic Congress and a near-permanent Republican presidency").
explanation for their current ascendancy is their effect of elevating Republican policy preferences over Democratic ones. Before judges with a less partisan orientation follow these trends, they should pause to consider their impact on the separation of powers in an era when different parties control different branches of government.

Part I of this article discusses Detroit Newspapers and explains how in deferring to the Attorney General's interpretation of the Newspaper Preservation Act, Judge Silberman disregarded every applicable technique of statutory interpretation typically used to resolve the issue. Indeed, each of these techniques suggests that Meese's interpretation of the Act was incorrect. This part of the article also demonstrates why deference to Attorney General Meese was particularly inappropriate in light of the generally accepted justifications for judicial deference to administrative interpretations of statutes.

Part II explains that Detroit Newspapers is one of several opinions by conservative Reagan judicial appointees that rely on techniques that have the foreseeable effect of obstructing congressional policy preferences. Specifically, opinions that defer to administrative interpretations, use "plain meaning" instead of other indicia of legislative intent, and impose constitutional limits on Congress's ability to delegate policy decisions to nonexecutive branch officials all result in aiding Republicans who now control the presidency and who predominate in the judiciary. This benefit to the Republicans comes at the expense of a Democratic controlled Congress.

Finally, Part III argues that conservatives who did not know that liberal Democrats controlled the Congress and that conservative Republicans controlled the Presidency and much of the federal judiciary would not prefer deference to administrators, reliance on "plain meaning," or constitutional straitjackets on congressional oversight of executive branch regulators. Indeed, such persons could be expected to reach the opposite result if blinded to the partisan realities of the post-Reagan era.

I. THE DETROIT NEWSPAPERS CASE: DEFERENCE IN THE EXTREME

Detroit Newspapers ultimately involved a question of statutory interpretation of the Newspaper Preservation Act, even though the plaintiffs framed the case as one requiring judicial review of the Attorney General's decision approving the JOA under the Administrative Procedure Act. Attorney General Meese approved the JOA based on his finding, as required by the Newspaper Preservation Act, that the Free Press was a "failing newspaper." The Act defines a "failing newspaper" as one that, "regardless of its ownership or affiliations, is in probable danger of financial failure."  

23. See supra note 12.
In all prior executive and judicial interpretations of the Act, the allegedly failing newspaper was caught in a downward spiral of reduced circulation, followed by reduced advertising, followed by reduced circulation, and so forth. This situation usually occurred because the relevant market could no longer support two major metropolitan daily newspapers. In *Detroit Newspapers*, however, the administrative law judge found, and Attorney General Meese did not dispute, that Detroit could support two dailies and that neither paper had begun to suffer the downward spiral that so often leads to a newspaper's demise. Rather, each newspaper was suffering financial losses because they were engaged in a fierce battle and each was pricing subscriptions and advertising at money-losing rates. The battle was designed so that if either lost too much money without prevailing over the other, they could seek a lawful, competition-ending agreement which would be exempt from the antitrust laws. The remaining entity would then enjoy the economic advantages of a monopolist. The case raised the statutory question of whether a newspaper suffering losses because of such strategic behavior is "in probable danger of financial failure." In upholding the Attorney General's interpretation and concluding that the *Free Press* came within the Act's definition of a "failing newspaper," the court of appeals correctly found that neither the plain meaning of the statute nor any evidence of specific legislative intent answered this question. The majority seriously erred, though, in choosing to defer to Attorney General Meese's interpretation of the statute while eschewing other major tools of statutory construction, all of which suggest that the Meese interpretation is incorrect.


26. See, e.g., 116 Cong. Rec. 1788 (1970) (statement of Sen. Fong) (it is "increasingly difficult for many newspapers to coexist in the same community under conditions of all-out economic competition"). Senator Fong was a cosponsor of the Newspaper Preservation Act and a member of the Antitrust and Monopolies Subcommittee of the Committee on the Judiciary.

27. Decision and Order, In the Matter of: Application by Detroit Free Press, Inc., and The Detroit News, Inc., for Approval of a Joint Newspaper Operating Arrangement Pursuant to the Newspaper Preservation Act, 15 U.S.C. §§ 1801, et seq., No. 88-303, at 6, 9 n.3 (Aug. 8, 1988) (Docket No. 44-03-24-8) [hereinafter Meese Decision]. See also Report of the Assistant Attorney General in Charge of the Antitrust Division, In the Matter of: Application by Detroit Free Press, Inc., and The Detroit News, Inc., for Approval by the Attorney General of a Joint Operating Arrangement Pursuant to the Newspaper Preservation Act, 15 U.S.C. §§ 1801, et seq., at 3 (July 23, 1986) (Public File No. 44-03-24-8) [hereinafter AAG Report]. (*Free Press* never had less than 49% of total daily circulation in prior 10 years and had generally shown improvement in circulation.) The *Free Press*'s percentage of total circulation varied from 49.0% to 49.9% during the 1980-85 period. *Id.* In terms of both the amount and revenue generated from advertising, competition had also remained constant. *Id.* at 34.

28. In calculating the profitability of any action, behavior is strategic when firms not only consider the direct effects of their own conduct, but also the indirect profit effects that result from the reactions of others. See Ordover & Wall, *Proving Predation After Monfort and Matsushita: What the “New Learning” Has to Offer*, ANTITRUST, Summer 1987, at 5, 6. In this context, newspapers behave strategically when they consider the expected responses of both their rivals and the Justice Department, acting under the Newspaper Preservation Act, in deciding whether to engage in or continue a price war that results in short-term losses.
A. Plain Meaning and Specific Legislative Intent

There is no dispute that the two primary tools of statutory construction—the "plain meaning" of the statute's words and specific legislative intent about the question at issue—do not resolve Detroit Newspapers. The term "probable danger of financial failure" could plausibly allow the Attorney General to approve the JOA based on his factual finding that without the JOA, the Free Press would probably fold. On the other hand, because a change in managerial tactics could reverse both newspapers' financial losses, the term could also plausibly be construed so as to exclude a newspaper losing money solely because of an artificially generated and maintained below-cost bidding war. Indeed, the one other appellate decision interpreting the Act held that where financial losses were due to correctable managerial problems, the paper would not be considered in "probable danger of financial failure."30

Likewise, review of other relevant provisions in the statute does not assist in resolving the issue. The Act's stated purpose is to permit JOAs when "effected in accordance with the provisions of this chapter."31 Prior to passage of the Act, the Supreme Court had interpreted the Sherman Act in Citizen Publishing Co. v. United States32 as requiring JOA participants to show that bankruptcy was imminent. The Act was intended to alter the status quo by imposing a more lenient standard for approving JOAs than would be applicable generally to failing companies under the Sherman Act.33 On the other hand, the Act's inclusion of a special standard ("not likely to remain or become financially sound") for JOAs in existence at the time the Act was being considered34 shows that Congress intended the phrase "probable danger of financial failure" to be construed more strictly.

Even within these boundaries, the proper result in Detroit Newspapers is not apparent. As Judge Silberman noted, the more lenient standard applicable to existing JOAs could mean that such JOAs could continue in effect if either newspaper was unable to realize a profit sufficient to generate a reasonable return on investment.35 The Detroit papers could easily satisfy a stricter standard because both were actually suffering monetary losses. At the same time the plaintiffs could argue that the Act merely meant to impose a looser standard than Citizen Publishing's requirement of imminent bankruptcy. A standard that necessitated a finding that the weaker newspaper had begun to suffer a "decline

29. See Meese Decision, supra note 27, at 10, 11.
35. 868 F.2d at 1295.
in a pattern that will *ultimately* force it out of business" absent a JOA\(^3\) could not be met by the Detroit papers. Yet this standard would be a more permissive standard than *Citizen Publishing's* requirement that the paper have neared the end of the downward cycle of lost circulation and advertising and was facing imminent bankruptcy.

Neither the opinions nor the briefs cite any evidence that Congress considered this specific problem in enacting the Newspaper Preservation Act.\(^3\)\(^7\) The only legislative history cited by the court of appeals is the fact that the phrase "probable danger of financial failure" was borrowed from the Bank Merger Act.\(^3\)\(^8\) The Bank Merger Act's legislative history does indicate that a bank does not meet this standard when its financial losses are due to "managerial deficiencies."\(^3\)\(^9\) But there is no suggestion by the court or the litigants that Congress, in deliberating on either statute, considered whether strategic behavior of the kind engaged in by the warring Detroit newspapers could be considered a "managerial deficiency."

### B. Other Interpretive Tools

A variety of other interpretive tools remain for a court to employ once it finds that neither the "plain meaning" nor specific evidence of legislative intent determines the issue of how a court is to interpret a statute. Techniques used by courts to resolve issues of statutory construction include: the application of well-understood canons of construction; an inquiry into which interpretation is most consistent with Congress's purpose in enacting the statute; an imaginative reconstruction of how Congress would have decided this issue if members had thought about it; a narrow construction based on separation of powers concerns; or a broad dynamic interpretation based on the court's view of how the statute can best further desirable policy in today's world.

Judge Silberman refused to employ any of these techniques. Rather,

\(^3\)\(^6\) Brief for Appellants at 21, *Detroit Newspapers* (No. 88-5286) (emphasis added).

\(^3\)\(^7\) Congress did recognize the need for JOAs where "vigorous competition resulted in financial difficulty." *House Report*, supra note 33, at 3. *See also Senate Report*, supra note 33, at 3 (Act intended to cover newspapers "under competitive pressure"); 116 CONG. REC. 1788 (1970) (statement of Sen. Fong) (noting that it was increasingly difficult "for many newspapers to coexist in the same community under conditions of all-out economic competition"). But the difficulty Congress envisioned occurred where market changes made it difficult for two major metropolitan dailies to exist, or where competition had given one paper such a dominant position that the weaker paper was unlikely to be able to continue to operate without a JOA. *See Newspaper Preservation Act, Hearings Before the Antitrust Subcomm. of the House Comm. on the Judiciary on H.R. 279 and Related Bills*, 91st Cong., 1st Sess. 10-11 (1969) (written statement of bill's authors) [hereinafter *House Hearings*]. There is no suggestion that Congress envisioned a situation involving a market capable of supporting two dailies, where neither one had achieved dominance, and where the paper with fewer resources for a predatory war of attrition would be considered in "probable danger of financial failure."


\(^3\)\(^9\) 868 F.2d at 1291-92 (citing United States v. Third Nat'l Bank, 390 U.S. 171, 190 (1968)).
once he was "unable to discern a specific congressional intent governing this case," Judge Silberman removed his interpretive hat and deferred to the Attorney General's interpretation. He chose a particularly bad case to allow an administrative interpretation to trump any judicial effort at statutory construction because, as demonstrated below, every seemingly relevant tool of statutory construction that judges would otherwise use suggests that the Attorney General's interpretation was wrong.

1. Narrowly Construing Antitrust Exemptions

Both Judge Ruth Bader Ginsburg, in dissent, and the Ninth Circuit, in another case construing the Act, concluded that the Act should be read in light of the long-standing interpretive canon that antitrust exemptions are to be narrowly construed. Judge Silberman's refusal to apply this canon was unfortunate because the canon reflects both, as a descriptive matter, what Congress probably means when it enacts antitrust exemptions, and, as a normative matter, how courts should construe ambiguous language in an exempting statute.

Antitrust exemptions generally originate in the House and Senate Judiciary Committees. Most members of these committees are attorneys who are well aware of the long-standing Supreme Court precedents holding that exempting statutes are to be narrowly constructed. Lobbyists and committee staff involved in drafting the statutes are also well aware of these precedents. With this knowledge, both the advocates and opponents of a proposed antitrust exception rely on the doctrine of narrow construction in debating and compromising on the statutory language used in creating the new exemption.

Normative considerations also support the practice of narrowly construing antitrust exemptions. The antitrust laws are intended to protect consumers at large, while exemptions generally benefit a small group of owners in a specific industry. In the newspaper context the competition

40. 868 F.2d at 1291 (emphasis added). Cf. Committee for an Indep. P-I v. Hearst Corp., 704 F.2d 467, 473 (9th Cir. 1983) (deferring when administrative construction is "consistent with the intent of Congress").
41. See Detroit Newspapers, 868 F.2d at 1299-1300; Hearst, 704 F.2d at 478 (both opinions citing Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979)).
42. See Senate Rule 25.1(k) 16; House Rule X, cl. 1(m).
44. My own experience as a minority staff counsel to the Senate Judiciary Committee from 1983-85 confirms this practice. During that period, the Committee reported legislation exempting certain research and development joint ventures from treble damage liability. See S. REP. No. 427, 98th Cong., 2d Sess., reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3105. Both the industry supporters seeking a broad exemption and those opposed to such protection were well aware of the "law" in this area and relied on our expectation that the courts would construe the statute narrowly in carefully drafting the definition of a "joint research and development venture" that would qualify for the bill's protection. See id. at 9, 12-13.
mandated by the antitrust laws primarily inures to the benefit of the hundreds of thousands of subscribers and daily purchasers of metropolitan newspapers, as well as the many local and national firms that pay for newspaper advertising. The principal beneficiaries of the Newspaper Preservation Act’s antitrust exemption are the shareholders of the companies owning major metropolitan dailies. Public choice theory suggests that the latter group will be more effective in lobbying Congress to gain exemptions. The shareholder group is smaller and more easily organized, and each individual member has more to gain from the exemption than each individual reader or advertiser has to lose.\textsuperscript{46} The result may be exemptions that do not truly reflect majority will or the public interest.\textsuperscript{47} Therefore, where a special interest group has negotiated a deal with key legislators, that group should bear the full costs of ensuring that the deal is explicitly set forth in a statute.\textsuperscript{48} There is no reason to give special interest groups, who already have advantages that may allow them to prevail at the expense of the public interest, any additional benefits. Narrowly construing antitrust exemptions is thus consistent with Madison’s goal that the Constitution limit the ability of interest groups (factions) to achieve antimajoritarian outcomes in the legislature.\textsuperscript{49}

Applying this canon suggests that Attorney General Meese incorrectly interpreted the Newspaper Preservation Act. Congress clearly did not intend to apply the “probable danger of financial failure” standard to firms suffering financial losses due to “managerial deficiencies.”\textsuperscript{50} Thus narrow construction of “probable danger of financial failure” leads to the conclusion that the phrase does not apply to newspapers suffering financial losses only because they are pursuing predatory strategies with the


\textsuperscript{47} See, e.g., W. Eskridge & P. Frickey, supra note 46, at 48-49 (citing M. Schattschneider, The Semisovereign People: A Realist’s View of Democracy in America 34-35 (1960)).

\textsuperscript{48} Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 Colum. L. Rev. 223, 238, 251-56 (1986).

\textsuperscript{49} Id. at 243 (citing Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 39-40 (1985)).

\textsuperscript{50} See supra text accompanying note 30. The Attorney General’s decision at times appears to imply that the JOA should be approved because there had been no “managerial deficiencies” on the part of the Free Press; rather, the News’s decision to continue the price war left the Free Press no alternative but to cease operations or enter a JOA. Meese Decision, supra note 27, at 12, 15. A narrow construction of the exemption created by the Newspaper Preservation Act would not give such a limited interpretation to “managerial deficiencies.” As three court of appeals judges dissenting from denial of rehearing en banc noted, “the economic behavior on which the Attorney General’s grant of immunity rests comes perilously close if it does not actually constitute a practice inimical to the purpose of the antitrust laws.” Detroit Newspapers, 868 F.2d at 1305 (Wald, C.J., Mikva, Edwards, JJ., dissenting from denial of rehearing en banc) (footnote and internal quotation omitted).

\textsuperscript{51} The Antitrust Division found that the Free Press’s clear goal was to achieve dominance in Detroit, even at the cost of short-term profitability. AAG Report, supra note 27, at 45. Sacrificing short-term profits in anticipation of a greater long-term return from the monopoly profits that market dominance will bring is the essence of predation. See L. Sullivan, Antitrust 113 (1977) ("the characteristic feature of [predation] is that the predator is acting in a way which will not
knowledge that victory is inevitable, either from monopolization or from a "self-serving, competition-quieting arrangement."\textsuperscript{52}

2. Purposive Interpretation

One of the oldest and most venerable rules of statutory interpretation is to construe a statute in light of its intended purpose.\textsuperscript{53} English courts used this guideline as early as 1584,\textsuperscript{54} reasoning that a judge's task maximizes present or foreseeable future profits unless it drives or keeps others out or forces them to tread softly”). C\textsuperscript{f}. AAG Report, supra note 27, at 46 ("eventually dominance would mean that the Free Press would have pricing power in the Detroit market, whether the News left the market, remained as a second paper that was not a significant economic threat, or agreed to the formation of a JOA"). The Free Press's incentive to predate was aided by its serious overestimation of losses suffered by the rival News and by its recognition that the financial resources of the Knight-Ridder chain, which owned the Free Press, significantly exceeded those of the News prior to the latter's purchase by the Gannett chain. See id. at 59.

The Administrative Law Judge reached the same conclusion. He found that the operating losses suffered by both Detroit newspapers were "attributable to the same causes," which he identified as an effort "by a deep-pocketed chain to achieve market domination and future profitability at the cost of current profits." Administrative Law Judge Morton Needelman's Recommended Decision, In the Matter of: Application by Detroit Free Press Inc., and The Detroit News, Inc., for Approval of a Joint Operating Arrangement Pursuant to the Newspaper Preservation Act, 15 U.S.C. §§ 1801, et seq., at 114 (Dec. 29, 1987) (Docket No. 44-03-24-8) [hereinafter ALJ Decision].

\textsuperscript{55} 868 F.2d at 1299 (R.B. Ginsburg, J., dissenting). See also Brief of Appellee The Detroit Free Press, Inc. at 45 n.\textsuperscript{a}, \textit{Detroit Newspapers} (No. 88-5286) (\textit{Free Press}'s strategy to achieve dominance was not inconsistent with future negotiations to obtain a JOA because greater success at dominance strategy would only enhance favorable JOA negotiations).

Judge Silberman distinguished the practice of narrowly construing antitrust exemptions from other interpretive canons that might illustrate a "specific intent" on Congress's part to exclude the Detroit Newspaper situation from the scope of firms in "probable danger of financial failure." 868 F.2d at 1292-93. He noted, for example, that a congressional ban on imported apples, oranges, and bananas could be construed, using the canon of \textit{expresio unius est exclusio alterius}, to indicate no congressional intent to ban imported grapefruit, and implied that courts should so hold even if an administrator construed the statute to cover a grapefruit ban. \textit{Id.} at 1293.

Although this distinction among canons may draw support from some language in \textit{Chevron U.S.A. Inc. v. Natural Resources Defense Council,} Inc., 467 U.S. 837, 843 n.9 (1984), it ultimately remains unpersuasive. The \textit{expresio unius} canon has some descriptive validity in ascertaining congressional intent, not because members of Congress actually think this way, National Petroleum Refiners Ass'n v. Federal Trade Comm'n, 482 F.2d 672, 676 (D.C. Cir. 1973), but because members and their staffs are so familiar with that canon that a judge can safely assume that they would realize that failing to include grapefruits in the list of the enumerated banned fruits would lead a court to apply the canon to exclude grapefruit. Similarly, judges should assume that the canon calling for narrow construction of antitrust exemptions is sufficiently well-known to members and their drafting assistants to justify a finding that Congress had a "specific intent" that courts narrowly construe the phrase "probable danger of financial failure."

Judge Silberman's refusal to consider the canon of narrow construction of antitrust exemptions is also inconsistent with Supreme Court decisions both before and after \textit{Chevron} that reversed agency determinations in light of accepted canons. See, e.g., \textit{Immigration & Naturalization Serv. v. Cardoza-Fonseca}, 480 U.S. 421, 449 (1987) (agency decision rejected because, inter alia, of canon that ambiguities in deportation statutes should be construed in favor of alien); \textit{Federal Maritime Comm'n v. Seatrain Lines, Inc.}, 411 U.S. 726, 733 (1973) (agency construction of \textit{Shipping Act} rejected based on canon of narrowly constraining antitrust exemptions).

\textsuperscript{53} \textit{R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES} 87 (1975).

\textsuperscript{54} \textit{Heydon's Case,} 30 Co. 7a, 76 Eng. Rep. 637, 638 (Exch. 1584) (after determining the "mischief and defect for which the common law did not provide," courts are to discern the "true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, . . . according to the true intent of the makers of the Act, \textit{pro bono publico}.") (emphasis in original).
when interpreting a statute was to give effect to the intent of the legislature. In 1899, the United States Supreme Court recognized that "the well-settled" general rule for construing ambiguous statutes called for a judicial inquiry into "the reasons which induced" the statute, "the mischiefs intended to be remedied," and "the purpose intended to be accomplished" by the statute. Where statutory language is ambiguous, one would expect an interpreter attempting to carry out the intent of the enacting legislature to construe the statute in the manner most consistent with the statute's overall purpose. Indeed, the Supreme Court has made clear that a court is not to "stand aside and rubber-stamp" an agency decision that would "frustrate the congressional policy underlying the statute."

As with most statutes, the Newspaper Preservation Act reflects a balance of legislative concerns. Congress was clearly unhappy with the strict failing-company standard the Supreme Court had established in the Citizen Publishing case. By the time a paper's financial condition deteriorated to the extent that it would pass the Court's standard of imminent bankruptcy, Congress feared, the newspaper would be "virtually beyond salvage," and thus of little value as an acquisition or a joint arrangement partner. The result—the end of both editorial and economic competition—was precisely what Congress was determined to avoid. At the same time, however, the standard applicable to proposed JOAs was clearly intended to be "far more stringent" than the lenient test adopted for existing JOAs. The "probable danger of financial failure" standard was to be "limited only to those situations where a joint newspaper operating arrangement is demonstrably essential to prevent a

55. Id.
56. Hamilton v. Rathbone, 175 U.S. 414, 419 (1899); see also J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) (inferring private cause of action as necessary to effectuate legislative purpose).
58. See, e.g., HOUSE REPORT, supra note 33, at 10; SENATE REPORT, supra note 33, at 4.
60. "The Court failed to articulate a doctrine which recognized the fundamental importance of placing a failing newspaper on a sound financial basis in order to preserve these two voices before there is a grave possibility of failure." 116 CONG. REC. 1786 (1970) (remarks of Sen. Bennett) (emphasis added).
In adopting a "probable danger" standard with a "bite," Congress's obvious purpose was to preserve editorial competition between newspapers where economic competition was no longer feasible, but to retain both editorial and economic competition where both were still realistic possibilities.

Judge Silberman incorrectly saw a tension in *Detroit Newspapers* between the "pro-consumer direction of the antitrust laws" and a "congressional desire . . . that diverse editorial voices be preserved despite the unique economics of the newspaper industry." As Judge Silberman noted, Congress thought the economics of the newspaper industry were unique in that a downward spiral would be inevitable once the weaker of two competing papers began to lose circulation. Congress also saw a special public interest in preserving editorial independence for two newspapers even if they were no longer economic rivals. No tension between these two purposes arises when newspapers are suffering strategically induced losses. The pro-consumer direction of the antitrust laws generally points, of course, to denying JOA applications. The special concern about preserving potentially failing newspapers before they

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62. 116 CONG. REC. 23,148 (1970) (statement of Rep. McCulloch). Representative McCulloch was the ranking Republican on the House Judiciary Committee. When the chairman or his designated floor manager joins forces with the ranking minority member of a committee, it becomes very difficult for any other senator or representative to break up the committee consensus. See A. MIKVA & P. SARIS, THE AMERICAN CONGRESS: THE FIRST BRANCH 151-52 (1983). Because of his pivotal role in the winning coalition, Representative McCulloch's views should be entitled to great weight in reviewing the legislative history.

63. See *Detroit Newspapers*, 868 F.2d at 1299 (R.B. Ginsburg, J., dissenting).

64. Attorney General Meese overruled his administrative law judge's prediction that, should the JOA be denied, the News would respond by ending below-cost pricing, resulting in the profitable operation of both newspapers. Meese thus concluded that economic competition was not a realistic possibility. The Attorney General's determination was based on testimony by executives of the News and its parent company, Gannett, that they would continue to pursue below-cost pricing until they dominated the Detroit market. Meese Decision, supra note 27, at 9, 15.

The Attorney General's decision was legally incorrect under a purposive interpretation. The congressional intent to preserve editorial and economic competition where possible is ill-served by a policy that permits a dominant firm with a deep pocket to outlast its weaker rival in a price war in order to achieve a JOA. The decision was probably incorrect factually as well, and raises a distinct irony about the Reagan administration's antitrust policy. Reagan antitrust officials often considered the work of Robert Bork and other like-minded scholars to be economic gospel. Nonetheless, the Attorney General credited the unsupported assertions of Gannett and News executives that they would continue below-cost pricing even though these scholars' works suggest that, absent the prospects of a JOA, such conduct makes no economic sense. See, e.g., R. BORK, THE ANTITRUST PARADOX 149-55 (1978); Easterbrook, Predatory Strategies and Counterstrategies, 48 U. CHI. L. REV. 263, 268 (1981); McGee, Predatory Pricing Revisited, 23 J.L. & ECON. 289, 292-94 (1980).

65. 868 F.2d at 1293.

66. Id. at 1288. See, e.g., *House Hearings*, supra note 37, at 10-11 (written joint statement of bill's sponsors); 116 CONG. REC. 1788 (1970) (statement of Sen. Fong) (quoting Honolulu newspaper publisher's testimony that newspapers are "peculiarly different from most other businesses" because of downward spiral). Even under the more lenient test initially adopted by the Senate for all JOAs ("appears unlikely to remain or become a financially sound publication"), Congress's intent was to adopt a standard that was "able to recognize the trend toward failure and not be required to wait until it is irreversible" because "continued life of a newspaper cannot be achieved by requiring an exhaustion of all available resources before the failing company doctrine is deemed applicable." See *Senate Report*, supra note 33, at 4; 116 CONG. REC. 1786-87 (1970) (statement of Sen. Bennett).

fall irretrievably into a "downward spiral" is not present when neither newspaper is in a downward spiral. The congressional desire to preserve both economic and editorial competition where possible is thus best served by interpreting the phrase "probable danger of financial failure" to exclude those newspapers whose losses are strategically induced.

3. Imaginative Reconstruction

Judge Silberman cannot be faulted for failing to adhere to a "purposive" approach to statutory construction. The "purposive" approach has attracted a number of critics. According to law and economics jurisprudence, any attempt to ascribe an overriding "public purpose" to legislation enacted by a majority of 535 members of Congress makes little sense. For example, Judge Richard Posner has argued that, like commercial contracts, legislation represents a bargain and compromise between competing interests. Like contracts, therefore, statutes should be construed to give effect to the bargain, but no further. Thus, interpreting courts should not extend a statute to cover something within its "spirit," but rather should "imaginatively reconstruct" what members of the enacting Congress would have done, if they had thought about the issue not actually considered, when enacting the statute. Judges should study not only the language and structure of the statute, but also its history and the values and attitudes of the period when the legislation was enacted.

An imaginative reconstruction of the Newspaper Preservation Act suggests that an otherwise healthy newspaper in a market capable of supporting two dailies should not be considered in "probable danger of financial failure" when its losses are attributable to strategic behavior. The prime concern of lobbyists supporting the Act was to preserve existing JOAs whose status was threatened by the Supreme Court's Citizen Publishing decision. It is important to note that, under Citizen Publishing...
ing, a paper could not enter into a JOA unless bankruptcy was imminent, even if an inevitable downward spiral had begun or the market clearly could no longer support two newspapers.

To ensure strong bipartisan support for the Act, its proponents frequently emphasized the "limited" nature of the exemption the statute would create. For example, the ranking Republican on the Senate Judiciary Committee observed that the Attorney General's approval of JOAs was made part of the process in order "to act as a brake upon other newspapers which might otherwise prematurely turn to joint operating arrangements, without testing other means of maintaining full commercial and editorial competition." A key Republican member of the House Judiciary Committee likewise noted that the bill reported by the Committee (which generally reflected the final product) was a "substantial improvement" over earlier proposals because, inter alia, the "prospective availability of the exemption has been sharply restricted" by requiring prior approval of the Attorney General "and by circumscribing his power to consent through the use of a strict definition of 'failing newspaper.'" Congress saw JOAs as necessary evils to preserve the desired editorial competition between newspapers. These legislators would likely not have permitted JOAs that ended economic competition if the cessation of strategic behavior would make a JOA unnecessary.

Although the Act sparked some private opposition from the AFL-
CIO and some suburban newspapers, most of the major metropolitan dailies were strongly in favor of the bill. If Congress—or major independent newspapers supporting the bill through their trade association—had foreseen the possibility that the Act could be invoked on behalf of a powerful chain that was able to generate strategic losses for itself or its rival, this unified special interest lobbying group would likely have begun to factionalize as independently-owned papers questioned whether they could compete against a chain-owned rival. To the extent Congress thought about the possibility of newspapers engaging in predatory behavior, it acted to prohibit such misconduct. Congress provided that when this behavior occurs after the approval of a JOA, it is not exempt from the antitrust laws. This provision was intended to "allay fears expressed that the bill would help strong newspapers gobble up weaker ones." This provision suggests that Congress would have reacted with disfavor had it considered the potential for predatory practices occurring before formation of a JOA.

4. **Strict Statutory Construction**

Another scholar of legisprudence, Judge Frank Easterbrook, has criticized both the purposive and imaginative reconstruction approaches to statutory interpretation, arguing that all statutes should be narrowly construed unless they clearly authorize a broad judicial interpretation.

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80. *Id.* at 515 (testimony of Paul Conrad of National Newspaper Ass'n).
82. The fear that Meese's decision would invite newspaper chains to embark on this strategy led the *Arkansas Democrat*, a Little Rock daily that competes with the Gannett-owned *Arkansas Gazette*, to file an amicus brief with the court of appeals seeking a reversal of the Attorney General's decision. *See Brief for Amicus Curiae Little Rock Newspapers, Inc., In Support of Appellants at 2-4, 13-16 (D.C. Cir. 1989)* (No. 88-5286). Indeed, the *Democrat* alleged that six days after Meese's approval of the Detroit JOA, Gannett reduced subscription rates in Little Rock by 57.5% in an act of predation. *Id.* at 15.
85. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 544-45 (1983) [hereinafter Easterbrook/Chicago]. As Judge Easterbrook notes, *id.* at 545 & n.15, his thesis really expands to all statutes the "clear statement" rule that courts have traditionally applied in requiring clear congressional intent in specific instances. See, e.g., United States v. Security Indus. Bank, 459 U.S. 70, 80-81 (1982) (absent clear statement, statutes will not be construed to have retroactive effect); Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 16-18 (1981) (absent clear statement, federal statutes will not be construed to impose significant financial obligations on states or to constitute congressional authority to enforce the 14th amendment); Hawaii v. Standard Oil Co., 405 U.S. 251, 265 (absent clear statement, Sherman Act would not be construed to permit award of damages for harm to the general economy of a state).

Judge Easterbrook's thesis is based on several normative arguments in favor of narrow construction, including its superiority to purposive interpretation because legislatures, as multimember bodies, are incapable of having a collective "intent," Easterbrook/Chicago, *supra* at 547, because
Easterbrook contends that the principles underlying the constitutional requirements that two houses of Congress enact legislation and the President must sign the legislation reflect a deliberate constitutional bias toward the status quo—legislation must pass through a number of difficult hurdles before it can have legal effect.\textsuperscript{6} Where a statute does not clearly apply to a given case, it should not be applied, Easterbrook argues, lest the courts, through the interpretive process, give effect to "bargains" for which there was never a constitutionally-required consensus.\textsuperscript{8}

Under this theory, the Newspaper Preservation Act would not permit the JOA application in \textit{Detroit Newspapers}. Both houses of Congress passed the Sherman and Clayton Acts and the President signed the acts into law. Both acts would prohibit the proposed agreement to end economic competition between two rivals in Detroit. There was no clear agreement between the House, the Senate, and the President on the question whether newspapers suffering strategically induced financial losses should be allowed to enter into a JOA. To give them this benefit would improperly allow the Detroit papers to achieve an exemption from the status quo without achieving the constitutionally required consensus.

5. \textit{Dynamic Interpretation}

The purposive approach to interpretation has also received criticism from those who believe it is too static.\textsuperscript{88} Advocates of the "dynamic interpretation" of statutes agree with the law and economics critics that divining the "purpose" of a statute is often difficult and probably inaccurate.\textsuperscript{89} Dynamic interpretation justifies statutes by a description of the probable intent of a previous legislature, while narrow construction reflects the law and economics critique that extending the jurisdiction of an adjourned body improperly extends the domain of a now-adjourned body, \textit{id.} at 548-49, and because narrow construction is more consistent with laissez faire principles that, in Judge Easterbrook's view, underlie our political order, \textit{id.} at 549-50. In contrast, the three clear statement rules enunciated by the Supreme Court and cited by Easterbrook all can be justified by a totally different rationale—as a descriptive matter, they represent the Court's best guess as to what Congress probably intended in enacting the legislation. This distinction between normative and descriptive canons of construction is, unfortunately, all too often ignored.

In another work, Judge Easterbrook offers another mode of statutory construction, applying his clear statement principle only to special interest statutes. Easterbrook, \textit{The Supreme Court, 1983 Term—Foreword: The Court and the Economic System}, 98 \textsc{Harv. L. Rev.} 4, 14-15 (1984). His conclusion about the Newspaper Preservation Act would doubtless be the same under either standard, however, for it clearly represents special interest legislation.

\textsuperscript{86} Easterbrook/Chicago, \textit{supra} note 85, at 539.

\textsuperscript{87} \textit{Id.} at 540-41.

rate.\textsuperscript{89} Observing that statutes can reflect special interest bargains, dynamic interpreters argue that judges should construe ambiguous statutory provisions to best effectuate today's public purposes, recognizing that Congress is free to modify the judicial interpretation if it so desires.\textsuperscript{90}

Recent work by political scientists and economists supports dynamic interpretation. Changes in social views, technology, or congressional and presidential political shifts can alter current officials' policy preferences. Yet special interests, or views dominant in only one house or branch of government, can block any new legislation.\textsuperscript{91} Dynamic statutory construction may actually result in a more accurate reflection of the policy preferences of currently elected officials and the general public than does a system that requires courts to construe statutes in light of outdated preferences that a minority can preserve through legislative inaction.

A dynamic construction of the Newspaper Preservation Act would construe "probable danger of financial failure" to exclude newspapers suffering strategically induced financial losses. A dynamic interpreter would reason that the antitrust laws should generally apply to the newspaper industry for the same reasons they apply elsewhere: to protect consumers (both businesses who advertise in newspapers and readers who subscribe to them) from monopolistic exploitation and to promote efficient allocation of resources.\textsuperscript{92} Legitimate socio-political reasons exist, however, to prefer two editorially independent newspapers even where two economically independent newspapers apparently cannot survive. Our society prefers editorial independence. Although we might be willing to take a chance on bankruptcy before sanctioning mergers or cartels in other industries, we are unwilling to take that risk in the newspaper industry on the slim chance that either the failing firm will right itself or an independent buyer will appear on the scene.

The dynamic interpreter would recognize that \textit{Detroit Newspapers} raises a different issue. As posed by Antitrust Division Chief Douglas Ginsburg, "[w]hen a newspaper owner consciously and deliberately decides to sacrifice short-term profits in a quest for greater long-term profits, indeed potential monopoly profits,\textsuperscript{93} should a JOA be available as a

\textsuperscript{89} See, e.g., Eskridge, supra note 88, at 1511-12.
\textsuperscript{90} Id. at 1529-33; see also R. Dworkin, Law's Empire ch. 9 (1986).
\textsuperscript{91} See, e.g., R. Gely & P. Spiller, A Rational Choice Theory of the Supreme Court (1989) (unpublished working paper, Univ. of Illinois). The ability of one group to block new legislation and thereby upset what may be the public interest, the will of the majority, or both, is graphically described in McCubbins, Noll & Weingast, Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies, 75 Va. L. Rev. 431, 435-40 (1989) [hereinafter McCubbins/Noll].
\textsuperscript{92} Lande, supra note 45.
\textsuperscript{93} Gannett Newspapers, the owners of the \textit{Detroit News}, and Knight-Ridder, owner of the \textit{Detroit Free Press}, projected that by its fifth year the JOA would result in at least $88 million in profits for each paper. Financial analysts predict that approval of the JOA will result in an increased
It is difficult to see the public interest in rewarding managerial strategies that allow firms to ruin themselves and then seek protection. Indeed, the Attorney General's interpretation would allow a wealthy newspaper chain to obtain a competition-ending JOA at will. The wealthy chain could acquire one of two rival newspapers, launch a price war, and then ask the Justice Department for a JOA. Thus, although Congress did not recognize this problem when drafting the "probable danger of financial failure" standard, our current concerns with promoting competition and preserving editorial voices are best accommodated by concluding that firms suffering strategically induced losses do not meet the standard.

In affirming Attorney General Meese's interpretation of the Newspaper Preservation Act, Judge Silberman's opinion ignores all these interpretive tools and rests solely on one rationale—deference to an executive interpretation of the statute. The Judge's singular reliance on that rationale is easily explained, for application of other major interpretive tools, whose advocates span the entire spectrum of legisprudence, would have required the opposite result. The question remains whether the argument for deference is so strong in this case that it should trump all these other means of statutory construction.

C. Is Deference Appropriate Here?

The deference courts often give to an agency's construction of a statute is supported by a number of considerations. In cases where these considerations make a strong case for deference, deciding whether an agency's interpretation should "trump" all other interpretive tools might be difficult. In deciding Detroit Newspapers, however, the court of appeals did not have to resolve this difficult question because the strongest arguments that support judicial deference to an agency's statutory construction are inapplicable to Attorney General Meese's decision to approve the JOA in Detroit Newspapers.

A persuasive functional argument in favor of deference relies on an agency's expertise with respect to statutes with which it works daily. The agency is more familiar than generalist judges with the specific statute, its relationship with other similar statutes, and the consequences of particular interpretations. Unless the Attorney General happened to bring to the job a particular background in antitrust or newspaper law, the agency will typically bear a significant portion of the costs of disruption caused by an ill-fitting policy. Id. at 590. For example, in the wake of the Meese decision that firms suffering losses due to strategic behavior are in "probable danger of financial failure," the Antitrust Division must continue to enforce the Bank Merger Act.

value for both newspapers by $2.6 billion. N.Y. Times, Sept. 15, 1988, at D1, D26, col. 6 (citation added).

94. AAG Report, supra note 27, Executive Summary at 6-7.

95. See supra note 82.

96. See, e.g., Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933); Diver, Statutory Interpretation in the Administrative State, 133 U. PA. L. REV. 549, 589-90 (1985). As Dean Diver notes, the agency will typically bear a significant portion of the costs of disruption caused by an ill-fitting policy. Id. at 590. For example, in the wake of the Meese decision that firms suffering losses due to strategic behavior are in "probable danger of financial failure," the Antitrust Division must continue to enforce the Bank Merger Act.
however, the bizarre structure of Justice Department decision making robs the Attorney General of any claim to such expertise.

The Department's Antitrust Division is responsible for enforcing the antitrust laws against newspapers, and for preliminarily evaluating JOA applications. Where the Division opposes a JOA and a formal hearing is scheduled, however, the Division becomes an adversarial party and, under the Department's rules, is precluded from advising the Attorney General except through formal proceedings. Although the hearing officer is usually an administrative law judge with substantial antitrust experience, the Attorney General's decision whether to approve or disapprove the officer's recommendation is not based on any advice from internal experts. Unless some Justice Department attorney outside the Antitrust Division fortuitously has special expertise in this area, no basis exists for believing that the Attorney General understands the impact his decision will have on other cases or the relationship between his interpretation of the particular statute and other statutes. In short, there is no reason to believe that Edwin Meese's interpretation is superior, by any standard, to that of the combined efforts of Judges Laurence Silberman, Spottswood Robinson III, and Ruth Bader Ginsburg.

Where the agency has a consistent and long-standing construction of a statute, several additional factors support deferring to the agency. Private parties may and should be able to rely on administrative interpretations in planning their activities, and considerations similar to those underlying the doctrine of stare decisis support stability in the law. Moreover, Congress is probably aware of long-standing interpretations. Although legislative inaction is generally not a sound basis for concluding that Congress supports the administrative construction, at least Congress has had the opportunity to consider the interpretation. Finally, administrations of both political parties are likely to have preserved long-standing interpretations, and thus such interpretations are less likely to reflect a partisan policy preference that probably could not have prevailed in Congress.

None of these considerations supports deference in *Detroit Newspapers*. This was a case of first impression; no prior Attorney General had ruled on the particular issue. Thus, the newspaper industry had no

97. 28 C.F.R. § 48.10(b) (1988) (Antitrust Division appears as party before administrative law judge); id. § 48.12 (barring ex parte communications with administrative law judge or Attorney General).
98. See supra note 6.
99. See supra note 96.
100. See, e.g., Helvering v. Hallock, 309 U.S. 106, 119-20 (1940). The ease with which minorities can block legislation by, for example, securing opposition of a committee chair or a bare majority of a single subcommittee or through engineering dilatory tactics in the Senate supports exercising caution in reading anything into legislative inaction. The courts have not been consistent in their approach to this issue. See Bob Jones Univ. v. United States, 461 U.S. 574, 600-01 (1983). See generally Eskridge, *Interpreting Legislative Inaction*, 87 *Mich. L. Rev.* 67 (1988).
long-standing interpretations to rely on, and Congress had little opportunity to review the interpretation. Moreover, an administration that had "revolutionized" traditional enforcement of the antitrust laws,\textsuperscript{102} often in opposition to congressional policy preferences,\textsuperscript{103} made the decision.

Another situation calling for deference to an agency is when the time lapse between passage of the statute and the agency's interpretation is short.\textsuperscript{104} In such cases, the administrator was probably actively involved in the legislative process and familiar with both the formal and informal agreements that led to the statute's enactment. Other political actors would see any deviation from these understandings coming so soon after the statute's passage as a betrayal. Agency heads would be loath to risk political and budgetary retribution possibly resulting from such a breach of trust. The Newspaper Preservation Act, however, was passed eighteen years prior to Attorney General Meese's decision in \textit{Detroit Newspapers}, and Meese had no role in its passage.

Finally, Judge Silberman relied heavily on the Supreme Court decision in \textit{Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.}\textsuperscript{105} \textit{Chevron} suggests that deference is appropriate where Congress consciously desires that an agency reach a reasonable accommodation among competing interests, either because Congress recognizes that the agency has superior expertise in the area, or because neither side prevailed in the congressional deliberations and both chose to "take their chances" on the agency's decision.\textsuperscript{106} In both cases, judicial deference to the agency fulfills congressional intent. Indeed, under these circumstances the agency is not really "interpreting" the statute and thus resolving a legal issue the way a court would, but rather is determining congressionally delegated policy matters.\textsuperscript{107}

The legislative history indicates that neither of these two scenarios


\textsuperscript{104} As Dean Diver notes:

Agency decisionmakers often have direct knowledge of the circumstances surrounding enactment of the statutes that they administer. Such knowledge may be derived from personal participation in that process or from close and frequent contact with other participants. To the extent that lawfinding entails an accurate reconstruction of the enactors' actual intentions, then, we should conclude that administrative agencies will interpret statutes more accurately than courts.


\textsuperscript{105} 467 U.S. 837 (1984).

\textsuperscript{106} \textit{Id.} at 866.

occurred during enactment of the Newspaper Preservation Act. The phrase “probable danger of financial failure” was not written to give the Attorney General a policy-making role. Rather, that standard was selected for evaluation of future JOA applications because the House Antitrust Subcommittee approved of the Court’s prior judicial interpretation (with no deference to any administrator) of similar language in the Bank Merger Act.\(^ {108} \) Similarly, the reason the Attorney General was given authority to approve JOAs was not because opposing sides in a congressional fight were unable to agree on a more definite standard and each decided to “take its chances” with the Attorney General. Rather, Congress gave the Attorney General a role in the JOA approval process in order to “sharply restrict[]” the availability of JOAs;\(^ {109} \) and the “probable danger of financial failure” test was meant to “circumscrib[e] [the Attorney General’s] power to consent through the use of a strict definition of ‘failing newspaper.’”\(^ {110} \) Thus, there is apparently no support for Judge Silberman’s claim that Congress “delegated to the Attorney General, not to us, the delicate and troubling responsibility of putting content into the ambiguous phrase ‘probable danger of financial failure.’”\(^ {111} \)

Judge Silberman’s sole basis for deferring to the Attorney General’s application of “probable danger of financial failure” to the *Free Press* was his reading of *Chevron* for “the principle that the political branches of government, rather than the judiciary, should make policy choices.”\(^ {112} \) As applied to the Detroit JOA, this argument ignores the reality that the executive branch alone, and not both political branches of government, made this policy choice.

Studies have demonstrated how administrative decisions can frustrate, rather than further, political compromises that have resulted in successful legislation. Administrators who oppose a particular bill, or who are antagonistic to previously passed legislation, can engage in “opportunistic behavior” that solely reflects their own policy preferences, knowing that corrective legislation can be blocked by threat of presidential veto, or an alliance with a key committee chair or a few members of a

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108. 116 CONG. REC. 23,146 (1970) (statement of Rep. Kastenmeier). Whether or not Representative Kastenmeier was correct in stating that the phrase was “well known” and “understood by the courts in the field,” id., his statement clearly demonstrates that Congress did not intend the phrase to be subject to deferential, policy-oriented construction by the Attorney General. See also United States v. First City Nat’l Bank, 386 U.S. 361, 369 (1967) (court, not agency, determines whether merger meets standard set forth in Bank Merger Act).


111. *Detroit Newspapers*, 868 F.2d at 1297.

*Chevron* also noted a third possible explanation for statutory ambiguities in that Congress simply did not consider the question. *Chevron* U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865-66 (1984). If the Court really meant to require deference to an agency regardless of congressional intent and regardless of the applicability of the other general arguments for deference discussed below, its analysis suffers from the same flaws as Judge Silberman’s. But the Court has not spoken directly on this issue, yet.

key panel.113 Deference to these decisions hardly furthers *Chevron*’s concern that the political branches should make policy choices. Moreover, in many cases no reason exists to believe that the political branches of government agreed that an agency should have broad reign to interpret a statute as it sees fit. Indeed, the fact that legislators chose a specific statutory standard (in this case, “probable danger of financial failure”), instead of delegating rule-making authority over a particular issue to an agency, suggests a legislative desire to avoid later administrative revision of a carefully negotiated legislative outcome.114

In sum, Judge Silberman’s opinion in *Detroit Newspapers* represents the most extreme form of deference to an administrator’s interpretation of a statute. Once Silberman was unable to resolve the case by looking to the plain meaning of the statute or evidence that Congress had specifically considered the question before him, he chose to defer to the Attorney General’s opinion without considering any of the other standard interpretive tools judges use in construing statutes. In fact, each of these tools suggests the error of the Attorney General’s decision to consider a newspaper in “probable danger of financial failure” when its financial losses are strategically induced. Judge Silberman’s reliance on the agency’s interpretation is all the more extreme because many of the traditional justifications for deferring to an agency are inapplicable in this case.

II. THE RECENT TREND TOWARD FRUSTRATION OF CONGRESS

Judge Silberman’s opinion in *Detroit Newspapers* is just one of several by Reagan judicial appointees that have had the systematic effect of making it more difficult for congressional policy preferences to ultimately prevail. This trend is particularly troublesome in today’s political context—a Republican President, a judiciary composed predominantly of Republican presidential appointees,115 and a Democratic Congress. All but the most cynical Republican legal realists should be concerned about doctrines that systematically distort the balance chosen by the voters in electing legislators and a President of different parties.116 Yet recent judicial appointees propose to accomplish this very result in three distinct ways: (1) by advocating deference to the interpretations Republican administrators have given statutes passed by Democratic Congresses, (2)

113. McCubbins/Noll, supra note 91, at 435-40; see also Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 810-11 (1983) (administrative interpretations more likely to reflect policy preferences of current administration than that of enacting Congress and President).


115. See supra note 20.

suggesting that federal judges (who are more likely than not to be Republican) interpret statutes in light of their own personal reading of the "plain meaning" of the statute without reference to the legislative record (which is more likely to be controlled by Democratic congressional leaders), and (3) calling forth constitutional doctrines that severely limit the powers of Congress without imposing similar constraints on executive power. Although each of these three trends may have merit apart from their partisan consequences, these consequences should be thoroughly considered before these trends are given full judicial effect.

Unless a judge is persuaded that, as *Chevron* suggested, Congress left a statutory term deliberately ambiguous in order to allow the agency to resolve the issue,\(^{117}\) deference to administrative interpretation of statutes may be inappropriate where the administration and leading congressional sponsors have different policy preferences. Whatever the benefits of deference, these benefits are seriously undercut in today's context because such deference effectively gives Republicans two bites at the apple. First, congressional Democrats must compromise with Republican executive branch officials in order to enact legislation the President is willing to sign. But Republicans can still win any policy victories they could not achieve through political bargaining—unless the Democrats have clearly protected against it—when a Republican administrator interprets the statute.

An era of two-party rule\(^ {118}\) also presents a troublesome context for increased reliance on the plain meaning of a statute at the expense of legislative history. Advocates of plain meaning claim that their approach will decrease the subjectivity of judicial decisions.\(^ {119}\) However, this claim is incorrect for most difficult cases. Of course, legislative interpretation must begin with the language of the statute.\(^ {120}\) But where opposing parties can each make a reasonable argument that the statutory language supports their position, those who would insist that their own reading of

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117. See supra text accompanying notes 105-07.
118. See supra note 21.
119. See, e.g., Address by Judge Antonin Scalia, Speech on Use of Legislative History, at 13 (delivered between fall 1985 and spring 1986 at various law schools in various forms) (copy on file with the University of Illinois Law Review) (use of legislative history "substantially increases, rather than reduces, the scope of judicial discretion"); see also Public Citizen v. United States Dep't of Justice, 109 S. Ct. 2558, 2576 (1989) (Kennedy, J., concurring) (interpreting statute contrary to literal language but consistent with purpose, where result not truly absurd, allows judges to "substitute their personal predilections [sic] for the will of the Congress"). Even some critics of the plain meaning rule claim that "textualism attempts to prevent the creative judicial lawmaking that can occur when judges consult legislative materials and the social context of the statute." Aleinikoff, supra note 88, at 23. Ironically, the movement toward greater use of legislative history was originally motivated by a desire to limit the ability of *Lochner*-era judges to construe the "plain meaning" of the statute to their liking, through the selective use of canons of construction. See Landis, *A Note on "Statutory Interpretation,"* 43 Harv. L. Rev. 886, 889-91 (1930).

It is important to note that many of those opposing reliance on legislative history base their opposition on other arguments as well. See infra note 160.
plain meaning is correct are simply incorporating their own values and preferences into the construction.

Four cases from a recent Supreme Court term provide evidence, albeit anecdotal, to support this point. *K Mart Corp. v. Cartier, Inc.* involved efforts by multinational owners of trademarks to bar the importation of their products by discount retailers. Justice Brennan read the plain meaning of the statute, as the phrase was understood when the statute was enacted in 1930, to favor the discounters. Conversely, Justice Scalia read the plain language of the statute to favor the trademark holders.

*Equal Employment Opportunity Commission v. Commercial Office Products Co.* raised the question whether an employee alleging sex discrimination had filed her complaint in a timely manner. Justice Marshall's majority opinion found the statutory language ambiguous. Marshall relied on a contextual interpretation and the agency's interpretation of the statute to rule that the complaint could proceed. Chief Justice Rehnquist and Justice Scalia joined Justice Stevens in reaching the contrary conclusion that the statutory language was plain and hence dictated judgment for the defendant.

A limitations period was also at issue in *McLaughlin v. Richland Shoe Co.*, where the Secretary of Labor sought to prosecute the respondent for failing to pay overtime wages. Justice Stevens, joined by Chief Justice Rehnquist and Justices White, O'Connor, Scalia, and Kennedy, concluded that the plain language favored the defendant. Justices Marshall, Brennan, and Blackmun, in dissent, found the relevant statutory term ambiguous, and would have held that a contextual examination supported the government.

Finally, in *Sheridan v. United States*, Justice Stevens wrote an opinion concluding that a disputed provision of the Federal Tort Claims Act did not bar a tort suit alleging governmental negligence. Justice O'Connor, joined by Chief Justice Rehnquist and Justice Scalia, dissented based on her reading of the plain statutory language.

President Reagan's appointees do not always invoke plain meaning to reach a conservative result. Moreover, in the cases just discussed, their reading of the plain meaning may well have been correct. Similarly,

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122. Id. at 1829 (Brennan, J., concurring in part and dissenting in part).
123. Id. at 1831 (Scalia, J., concurring in part and dissenting in part).
125. Id. at 1671.
126. Id. at 1677 (Stevens, J., dissenting).
128. Id. at 1682.
129. Id. at 1683-84 (Marshall, J., dissenting).
132. 108 S. Ct. at 2458 (O'Connor, J., dissenting).
reference to the legislative history would not necessarily have resulted in either more enlightenment or less ideological polarization. In fact, consideration of the legislative history might not have changed a single vote in any of the four cases. These cases should, however, arouse some skepticism concerning the view that greater reliance on plain meaning results in increased judicial "objectivity."

As several lawyers who have studied literary criticism have observed, "[a] sentence will never mean exactly the same thing to any two different people or even the same thing to one person on different occasions." For this reason, scholars of divergent views agree that "statutory interpretation in hard cases involves substantial judicial discretion and political judgment." Legislative history may be unhelpful in many instances because the same ambiguities that infect the statute also affected legislative deliberations. Legislative history may also be manipulated and abused in some cases. However, legislative history often can

(1987) (Scalia, J., concurring in the judgment) (joining liberals in agreeing that Immigration and Naturalization Act's plain language supports respondent's request for asylum).


135. W. Eskridge & P. Frickey, supra note 46, at 570 (citing Posner, Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution, 37 CASE W. RES. L. REV. 179 (1986/87)).

136. Virtually all commentators on this issue have their own favorite stories of abuse. See, e.g., W. Eskridge & P. Frickey, supra note 46, at 748-50 (noting Judge Norris's reliance in Montana Wilderness Ass'n v. United States Forest Serv., No. 80-3374 (9th Cir. May 14, 1981), vacated, 655 F.2d 951 (1981), cert. denied, 455 U.S. 989 (1982), on a floor statement by Representative Udall inserted into the Congressional Record, after the bill had already passed); id. at 751-52 (noting court's refusal in Monterey Coal Co. v. Federal Mine Safety & Health Review Comm'n, 743 F.2d 589 (7th Cir. 1984), to rely on floor remarks by House sponsor of bill concerning provision of conference report where House conferees had deferred to the Senate position); Mikva, Reading and Writing Statutes, 48 U. PITK. L. REV. 627, 636-37 (1987) (recounting experience as member of Congress when Representative Udall assured two opposing colleagues that each of their mutually exclusive interpretations was correct).

My own contribution to this lore concerns the Local Government Antitrust Act of 1984, 15 U.S.C. § 35 (Supp. V 1987), which immunizes cities from suits for money damages for violations of federal antitrust law. (I served as antitrust counsel to Senator Howard Metzenbaum during this period.) The Act contains a special section to deal with pending cases against cities, which provides that the Act will not apply (and thus the suit can continue) unless, after considering "all the circumstances," the court determines that the defendant city has shown that it would be "inequitable" for the case to proceed. Id. § 35(b). The statute specifically directs the court to consider the availability of alternative relief and the stage of litigation in determining the equities, and further directs that a jury verdict or subsequent proceeding is "prima facie evidence" that the case should go forward. Id.

When the conference committee met to deliberate on the bill, several of the House conferees, led by Representative Henry Hyde of Illinois, sought changes in the retroactivity section that would have made municipal exemptions easier to obtain in pending cases. (A jury had recently assessed a $29 million verdict against an Illinois city in a nearby congressional district.) Senate conferees rejected this proposal. Representative Hyde then proposed changes in the conference report that would focus courts' attention on factors favorable to cities. Again, the Senate conferees demurred. House conferees were then presented with the option of accepting Senator Metzenbaum's proposed language or foregoing any language in the report. The House managers accepted the Metzenbaum language, which featured the two criteria stated in the statute and emphasized that in cases proceeding past a jury verdict, a defendant would need "compelling equities" to get out of the suit. H.R. REP. NO. 1158, 98th Cong., 2d Sess. 3-4 (1984), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 4627.

Shortly thereafter (it was the penultimate day of the session), the House began consideration of
shed additional light on a statutory issue. Courts therefore should not precipitously jettison legislative history.

Neither the cabin of precedent nor consistency constrains a judge relying on a statute's plain meaning from applying subjective values to statutory interpretation. Tools of construction such as canons of statutory interpretation or legislative history are "neutral" in the Wechslerian sense that they constitute rules of decision that transcend the case at hand. A judge who advocates reliance on floor debate in one decision will be forced to distinguish the next case when seeking to avoid the force of a floor remark. But each ruling on the "plain meaning" of a statute is precedential only for interpretations of the same statute or the same wording of a related law. Judges thus face fewer constraints in choosing a plain meaning that suits their own preferences.

If judicial advocates of plain meaning propose increased reliance on their own values and perspectives, what are they forsaking in the process? Their main target is judicial use of legislative history, principally committee reports and the sponsor's floor statements. The narrative form of committee reports and floor debates can be a more effective way for Congress to communicate its policy preferences than the phrasing of a statute. Of course, today these policy preferences will likely reflect

the conference report. During the floor debate, Representative Crane of Illinois and Representative Hyde engaged in a colloquy concerning the meaning of the retroactivity provision. They both agreed that courts should consider whether municipal taxpayers would suffer financial harm and whether the municipality was proceeding under state law. See 130 Cong. Rec. H12,186 (daily ed. Oct. 11, 1984). This was the precise language that the Senate conferees had rejected!

Modern technology being what it is, these proceedings were televised to offices on the Senate side. Thus, several hours later when the Senate considered the conference report, Senator Metzenbaum responded to the Hyde-Crane colloquy by noting that their views had been rejected in conference. Id. at S14,368.

Two courts have directly addressed the precise issue raised by the Hyde-Crane manufacture of legislative history. One court, correctly, in my view, took note of both the House debate and Senator Metzenbaum's comments in recognizing that the two criteria stated in the statute were to be given prime effect, but that the statutory instruction for courts to consider "all the circumstances" made it appropriate to consider secondarily those enunciated by the Illinois representatives. Miami Int'l Realty v. Town of Mt. Crested Butte, 607 F. Supp. 448, 452-53 & n.2 (D. Colo. 1985). Although the defendants in Woolen v. Surtran Taxicabs, Inc., 801 F.2d 159 (5th Cir. 1986) (affirming and incorporating as its opinion the district court's opinion, 615 F. Supp. 344 (N.D. Tex. 1985)), probably would have prevailed based solely on the two principal criteria, the court differentiated the primary and secondary criteria only in its order of consideration, and merely referenced the Metzenbaum floor statement with a "But see" citation. Id. at 166.

These examples of abuse do not necessarily suggest that legislative history is wholly unreliable. Rather, several courts have expressed a sensitivity to the problem illustrated by this story by refusing to credit legislative history where those in the other house do not have an opportunity to respond. See, e.g., National Ass'n of Greeting Card Publishers v. United States Postal Serv., 462 U.S. 810, 833 & n.28 (1983); Monterey Coal., 743 F.2d at 589.

138. See generally authorities cited supra note 16.
139. See Mikva, A Reply to Judge Starr's Observations, 1987 Duke L.J. 380, 386 ("If judges are to make congressional primacy meaningful, they cannot afford to ignore the obvious tools which members of Congress use to explain what they are doing and to describe the meaning of the words used in the statute.")

Legislative history is often reliable because it is the most contemporaneous construction of the
the Democratic control of the House and the Senate. Thus, a judicial mode of interpretation that ignores legislative history and relies instead on each judge's personal reading of the statute's plain meaning will, in the context of a Republican-appointed judiciary and a Democratic Congress, result in more rulings favoring conservative, Republican policy preferences as opposed to favoring liberal, Democratic ones.\footnote{140} Although this may suit conservatives with a short-term outlook, the judicial activism of the Warren Court that is so vilified by conservatives today provides an example of the results occurring when judicial policy preferences are more liberal than congressional policy preferences.

Increased reliance on plain meaning frustrates congressional policy objectives in another important way. Congressional policy preferences do not always find their way into the "plain meaning" of a statute. Given the nature of the legislative process, Congress may not consider every current possible application of the legislation, and cannot foresee all future problems. Even where Congress explicitly intends to apply the legislation to a particular problem in a certain way, the statutory language may not fully capture the congressional meaning.\footnote{141} When these factors are coupled with the inertia that hinders the passage of legislation to correct judicial misinterpretations of congressional intent, a court's insistence that the plain meaning of a statute serve as the sole basis of its interpretation diminishes Congress's ability to legislate its policy preferences.\footnote{142}

A third example of this pattern of judicial efforts to frustrate congressional policy objectives is Justice Scalia's view of the severe constitutional limits on Congress's ability to interfere with executive prerogatives, as set forth in his dissenting opinion in \textit{Morrison v. Olson}.\footnote{143} In \textit{Morrison}, the other eight Justices voted to uphold the constitutionality of a statute establishing an independent counsel to investigate and prosecute high-ranking executive branch officials accused of committing crimi-
nal offenses. Justice Scalia began the dissent by noting that the "proud boast of our democracy that we have 'a government of laws and not of men'" is derived from a provision of the Massachusetts Constitution of 1780, which itself is based on a strict separation of powers between the legislative, executive, and judicial branches of government. In Scalia's view, the United States Constitution has incorporated this concept: when article II provides that "[t]he executive Power shall be vested in a President of the United States," "this does not mean some of the executive power, but all of the executive power." Accordingly, once Justice Scalia determined that the independent counsel's duties involved the exercise of purely executive power and that the President did not enjoy exclusive control over that power, he would have found the statute unconstitutional.  

Justice Scalia's wall of separated powers is really a one-way mirror. Once he concludes that a function is properly characterized as "executive," the President's exercise of that function may not be circumscribed. In contrast, he would permit the delegation of legislative power to executive branch officials, apparently endorsing the established constitutional doctrines permitting such delegations as long as the standard is "intelligible"—which includes as vague a standard as "the public interest." Scalia does not seem to believe that once a function is determined to be legislative, only Congress can perform the function.

In applying the wall of separation to protect the executive from congressional incursions, Scalia's standard is not only strict in theory, but also strict in application. Thus, Scalia is quick to find that the prosecutorial function is "purely executive." A strong case can be made, though, that the Constitution expressly provides for legislative control over prosecutors, and substantial historical evidence refutes

144. Justice Scalia's opinion sets forth the full quotation from Part the First, Article XXX: In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men. Id.

145. U.S. CONST. art. II, § 1, cl. 1.

146. 108 S. Ct. at 2626 (emphasis in original).

147. Id.


149. Morrison, 108 S. Ct. at 2626-27 ("[g]overnmental investigation and prosecution of crimes is a quintessentially executive function").

Scalia's argument\(^{151}\) that prosecution has always been an executive function, beyond control by other branches of government.\(^{152}\) Scalia is more flexible, however, on the permeability of the wall of separation when it comes to legislative functions. Delegation of legislative authority to executive branch officials is permissible because, in Scalia's view, "a certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be."\(^{153}\)

Under Justice Scalia's analysis, then, the Constitution requires that the delegation of any executive function be subject to complete and total presidential review and control. However, Congress can lawfully delegate to the President the power, for example, to "issue such orders and regulations as he deems appropriate to stabilize prices, rents, wages, and salaries,"\(^{154}\) and Congress may not alter or withdraw that delegation by any means short of legislation, subject, of course, to presidential veto.\(^{155}\)

Justice Scalia's one-way mirror has a clear effect on the outcome of profound disputes about policy preferences between Democratic Congresses and Republican Presidents: it systematically favors the latter over the former. For example, legislative vetoes provide Congress with flexibility that may be desirable in legislating but at the same time protects against later administrative decisions that are not faithful to the political compromises made during legislative deliberations. Without such protection, Congress faces the dilemma of either allowing the executive free reign to impose its own policy preferences in areas where legislation cannot foresee specific problems, or so restricting the legislation that the federal government will be unable to respond quickly to unanticipated future events.

Similarly, the use of independent officials to carry out important governmental tasks is important when a Democratic Congress does not trust a Republican executive to carry these tasks out faithfully in accordance with the Congress's policy preferences. Unlike the dilemma faced with legislative vetoes, however, adoption of Justice Scalia's views in cases such as *Morrison v. Olson* would inevitably result in wholesale delegation from Congress to the executive branch. If high-level corruption can constitutionally be prosecuted only with the Attorney General's authorization, or if the only means of regulating industries is by providing

\(^{151}\) See *Morrison*, 108 S. Ct. at 2626 (prosecutorial function "has always, and everywhere... been conducted never by the legislature, never by the courts, and always by the executive").


that regulatory commissioners serve at the pleasure of the President,\footnote{Although the Court, in Humphrey's Executor v. United States, 295 U.S. 602 (1935), expressly upheld the constitutionality of an independent Federal Trade Commission whose members the President could not remove at will, Justice Scalia has questioned its continuing validity in light of the many functions the Commission now performs. Mistretta, 109 S. Ct. at 681. One lower court has recently upheld the constitutionality of the FTC, relying on Humphrey's Executor. Federal Trade Comm'n v. American Nat'l Cellular, Inc., 810 F.2d 1511 (9th Cir. 1987).} Congress will surely choose to delegate.

In the past few years, President Reagan's judicial appointees have used several doctrines governing congressional interaction with the President to adopt new and relatively extreme positions: extremely broad deference to administrative interpretations of statutes, extreme reluctance to divine congressional intent from sources controlled by congressional leaders, and extremely strict limits on Congress's ability to legislate in areas of "executive" prerogative. The debate concerning the proper balance between legislative and executive power has been raging since—and even before—the founding of our Republic.\footnote{See, e.g., J. Locke, The Second Treatise of Government chs. xi-xiv (T. Peardon ed. 1952); The Federalist No. 47 (J. Madison).} But when the Framers debated such issues, they did not envision a two-party system and certainly not one where the President's party did not control Congress. The timing of this judicial effort to shift power from Congress to the President at this particular point in American history should give pause to those concerned with more than victory for Republican policies.

**III. THE HYPOCRISY OF CONGRESSIONAL FRUSTRATION BY CONSERVATIVES**

The point of this article is not to conclusively demonstrate that each or any of these three trends is wrong. Nor does it suggest that only Reagan appointees support this trend. After all, Judge Silberman was able to command a majority in \textit{Detroit Newspapers} by securing the concurrence of Judge Spottswood Robinson, a Johnson appointee.\footnote{Neither should Dean Diver or Professors Dickerson or Strauss, who support many aspects of these trends, see infra notes 159-61, be accused of attempting to frustrate Democratic policy preferences.} Indeed, strong arguments exist to support judicial deference to administrative interpretation of statutes,\footnote{Dean Diver has presented a comprehensive argument for presumptive deference. Diver, \textit{supra} note 96. He argues, inter alia, that deference will usually preserve judicial resources, more accurately reconstruct congressional intent, more accurately predict the nature, magnitude, and incidence of the consequences of each litigant's proffered construction, promote harmony among statutes and policies, and more speedily implement official acts. Professor Peter Strauss has also argued that deference promotes national uniformity in regulation that could be fragmented by inconsistent judicial review of administrative decisions. Strauss, \textit{One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action}, 87 COLUM. L. REV. 1093, 1118-26 (1987).} a preference for statutory interpretation based on a statute's plain meaning instead of potentially unreliable legislative history,\footnote{For a cogent and thoughtful critique of legislative history, see Starr, \textit{Observations About the Use of Legislative History}, 1987 DUKE L.J. 371, 376-79. The thrust of Judge Starr's critique is that...} and the imposition of strict constitutional limits confining Con-
legislative history is so prone to abuse and manipulation (see supra note 136), such a time-consuming endeavor for lawyers and judges, and is in so many cases inconclusive, that ready resort to these tools is not worth the effort. Professor Reed Dickerson makes a more forceful, although perhaps overstated, attack on the reliability of legislative history as an accurate measure of legislative intent. R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 154-62 (1975). The ability of courts to distinguish reliable from irrelevant morsels of legislative history is made more difficult because, as Judge James Buckley has observed, directives in legislative history are often made to agencies, not to courts. The expectation in these directives is not that the agency will suffer a judicial reversal if its action is inconsistent, but that it will suffer political retribution at the next budget cycle or other convenient opportunity. International Bd. of Elec. Workers v. National Labor Relations Bd., 814 F.2d 697, 716-17 (D.C. Cir. 1987) (Buckley, J., dissenting).

While these arguments have some merit, there is yet another oft-stated argument against the use of legislative history that is entirely unpersuasive. That argument, pressed most vigorously by Justice Scalia, is based on the factual assertion (probably true, from my own experience as a congressional staff member) that only a small minority of elected members of Congress actually read committee reports or listen to floor debates on most legislation. For example, in Blanchard v. Bergeron, 109 S. Ct. 939, 946-47 (1989) (Scalia, J., dissenting), Justice Scalia suggests that:

[as anyone familiar with modern-day drafting of congressional committee reports is well aware, the [matters at issue in the case] were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist . . . .

(Does Justice Scalia suggest that because law clerks insert many footnotes in judicial opinions on their own initiative such notations should not be considered authoritative?) Justice Scalia has republished a Senate floor colloquy designed to show that senators do not read committee reports and therefore, these reports should not have any effect on interpretation. See Hirschey v. Federal Energy Regulatory Comm’n, 777 F.2d 1, 7-8 n.1 (D.C. Cir. 1985). The republication has caused considerable judicial and academic attention. See, e.g., Wallace v. Christensen, 802 F.2d 1539, 1559-60 n.2 (9th Cir. 1986) (Kozinski, J., concurring in the judgment, citing with approval); W. ESKRIDGE & P. FRICKEN, supra note 46, at 715-16; Farber & Frickey, Legislative Intent and Public Choice, 74 VA. L. REV. 423, 439-41 n.60 (1988) (citing more extensive quotation from same Senate colloquy in arguing that the senators did not mean to diminish legislative history as Justice Scalia suggested).

Justice Scalia’s argument fails because it proves too much and too little. It proves too much because anyone familiar with the modern-day drafting of statutes is well aware that committee staffers insert virtually all statutory text, often at the suggestion of a lawyer-lobbyist, and that members rarely read the text. For all bills but the most major and controversial, the majority of members who vote on amendments or a bill’s final passage base their votes on the fact that another member (usually a committee member of the same party or ideology) has endorsed the bill. The few key members, upon whose judgment the majority rely, are either familiar with the committee reports or have entrusted one of their own staff members to review them. If the material in reports was unacceptable, it would not remain. Where lawyer-lobbyists succeed in securing the insertion of favorable material in committee reports, it is often because a member, not a staffer, has made a determination that he or she will support whatever details the particular special interest desires. Unless courts wish to overhaul the entire operation of Congress to make it fit what judges believe is a more legitimate way of legislating, legislative history continues to serve as a reliable and legitimate source for statutory interpretation, accord Farber & Frickey, supra, assuming that continued judicial and academic writings provide courts with tools to sufficiently distinguish the wheat from the chaff. Cf. Starr, supra.

161. Professor Peter Strauss presents a forceful argument that the process by which competing legislative factions might “take their chances with the scheme devised by the agency[.]” Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865 (1984), and then preserve a one-house or one-committee veto, will exacerbate covert and ex parte contacts and create a disincentive for Congress to fulfill its prime responsibility of resolving policy conflicts in the context of concrete legislation. See Strauss, supra note 139, at 449-51.

My critique of Justice Scalia’s wall of separation as a “one-way mirror,” see supra text following note 147, may also be somewhat unfair. My colleague Don Dripps points out that when Congress delegates legislative power to the executive, it is giving up its own power; when it delegates executive power elsewhere, it is giving up the power only the President should be able to delegate. Justice Scalia, however, does not rely on this insight, appearing to favor, in the context of encroachment of presidential prerogatives, a more pristine wall of separation. Morrison, 108 S. Ct. at 2622.
however, these trends have adverse consequences in an era when different political parties control the presidency and Congress. Insufficient attention has been given to these adverse consequences in weighing the wisdom of these trends. The pattern is even more disturbing when one considers the source—conservative Republican judges—because, in all three instances, a conservative who did not know the current partisan makeup of the three branches of the federal government would be expected to reach the opposite result.

First, *Chevron*'s rule of deference to an agency's interpretation of legislation, as applied by Judge Silberman in *Detroit Newspapers*, gives greater power to unelected bureaucrats. Although the Attorney General in *Detroit Newspapers* happened to rule against government intervention, bureaucrats generally interpret statutes to expand their own power and pursue their own agendas. Thus, when partisan control was not at issue, populist and conservative legislators opposed deference to administrative interpretations, while liberals supported deference. The high point of this conservative effort came in 1979 when the Senate approved the so-called Bumpers Amendment, which overturned the practice of judicial deference to administrative agencies. Leading the fight against the Bumpers Amendment was Senator Edward Kennedy.

Conservatives also tend to strongly support free markets and, in other contexts, have warmly embraced the law and economics move-

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162. See, e.g., 125 CONG. REC. 23,483 (1979) (statement of Sen. Domenici) ("[i]n this age of overregulation, . . . the bureaucracy has consistently thwarted the will of Congress by drafting regulations that go far beyond congressional intent"); id. at 23,498 (statement of Sen. Exon) ("[t]he people of this Nation are demanding that the Congress take action to make the Federal bureaucracy accountable to both the Congress and the people").

163. Technically, the Senate rejected a motion to table (kill) the proposal, which was offered as an amendment to S. 1477, the Federal Courts Improvements Act. Id. at 23,499. The amendment provided that courts reviewing administrative regulations shall "interpret constitutional and statutory provisions . . . [with] no presumption that any rule or regulation of any agency is valid . . . ." Id. at 23,478. The vote on the motion to table was 27-51. Of the 27 senators who voted to kill the amendment, all but two (Senators Thad Cochran and Robert Dole) were northern Democrats or moderate Republicans. See id. at 23,499. (After the Senate passed S. 1477, id. at 30,102, the bill was referred to the House Judiciary Committee, which took no further action. See Index, 125 CONG. REC. pt. 29, at 2006 (1979)).

The Senate vote in favor of increased judicial review of agency action is even more remarkable, in light of today's debates, because the contemporary judicial doctrines the Senate disfavored were far more modest than the deference that has occurred since *Chevron*. Judge Carl McGowan noted that he saw nothing in the amendment that "would stop me or any other judge from going about our interpretive job the way we always have." C. McGowan, Remarks to the Section of Administrative Law, Ass'n of Am. Law Schools 7 (Jan. 4, 1981) (quoted in Ginsburg, *Inviting Judicial Activism: A "Liberal" or "Conservative" Technique?*, 15 GA. L. REV. 539, 552 n.72 (1981)). Perhaps this observation was based upon the contemporary view of judges of the District of Columbia Circuit that deference was required when special administrative expertise is actually present or when Congress has acquiesced in an administrative determination actually brought to its attention. See *Action on Smoking & Health v. Harris*, 655 F.2d 236, 238 (D.C. Cir. 1980); see also Democratic Senatorial Campaign Comm. v. Federal Election Comm'n, 660 F.2d 773, 776-77 (D.C. Cir. 1980) (court, in an opinion by Judge Ruth Bader Ginsburg, explained why deference is inappropriate), rev'd, 454 U.S. 27 (1981).

ment. Law and economics scholars have argued that legislation represents a bargain among special interests, and that the legislative process works best when courts enforce the bargain according to its terms. Deference gives administrators an opportunity to upset legislative bargains, and thus renders the legislative "market" less reliable.

Second, increased reliance on each judge's personal reading of the "plain meaning" of a statute allows judges to invoke their own views rather than interpreting the statute consistent with legislative intent. Yet conservatives favor judicial restraint, not judicial activism, and are sharply critical of judges who fail to give effect to the will of the democratically elected branches of government. In the constitutional area, for example, conservatives support an interpretation based on "original intent," as revealed by historical material, and decry interpretation based on a Justice's personal view of the meaning of broad constitutional text. The use of plain meaning, then, results in greater judicial "activism," with judges applying their own values to resolve cases, and less judicial "restraint," with judicial restraint defined as courts enforcing congressional value choices as expressed in the legislative history.

Finally, the principal nonpartisan effect of legislative vetoes and other flexible means that affect the separation of powers is to limit government regulation, and to increase the areas controlled by politically accountable elected representatives. Indeed, when partisanship was not an issue, liberal public interest groups, not conservatives, led the fight against legislative vetoes.

The many conservatives who find economic models of behavior attractive would also recognize, partisan bias aside, that congressional


166. See, e.g., Easterbrook/Chicago, supra note 85, at 540, 547.

167. See supra text accompanying note 91.

168. See supra text accompanying notes 119-40.


170. See STRAUSS, supra note 139, at 436 n.30.

171. See Farber & Frickey, supra note 160, at 459 (ignoring indicia of congressional intent removes judicial role as honest agent of Congress). For a masterful analysis of the judicial activism inherent in the plain meaning rule, see Aleinikoff, supra note 88, at 31-32 (1988). Aleinikoff does not go quite far enough, however. He concludes that the new trend toward reliance on plain meaning "turns out not to be a theory dedicated to or grounded on legislative supremacy," but rather "a political strategy for disciplining both judges and legislators." Id. at 32. He is correct about legislators, but fails to explain how judges' power to construe statutes based on their own personal view of plain meaning is a form of discipline or restraint.


173. See supra note 165.
delegation of tasks to executive branch officials is often necessary, but such delegation creates principal-agent problems, and that legislative vetoes are very useful ways of solving these problems. Yet the model of strict separation of powers provides no room to maneuver.

IV. CONCLUSION

In affirming Attorney General Edwin Meese's approval of a Joint Operating Agreement between Detroit's two rival newspapers, Judge Silberman's opinion in *Detroit Newspapers* rode roughshod over every accepted tool of statutory construction except one—deference to Meese's interpretation of the statutory standard he was required to apply. The court of appeals chose to defer to the Attorney General although every other major tool of statutory construction suggested that his decision was incorrect—and even though the major reasons generally supporting deference to an administrator's statutory interpretation were inapplicable to Meese's decision.

Unfortunately, Judge Silberman's decision is not merely an isolated error. Rather, it is part of a pattern of opinions written by Reagan judicial appointees that have the systematic effect of elevating policy preferences of the Republicans, who control the presidency and are gaining increasing control over the judiciary, over those of the Democrats who control Congress. Before proceeding further to embrace extreme deference to an agency's statutory interpretation, reliance on a judge's personal view of the plain meaning of a statute while ignoring the relevant legislative history, and a constitutional theory that erects strict limits on Congress's ability to interact with executive branch officials to whom it has delegated important responsibilities, judges whose mission is not solely to elevate Republican policy preferences should pause to consider the consequences of these trends in light of the continued split in partisan control of the two elected branches of government. A healthy skepticism toward this trend is particularly justified when one considers that conservative Republicans who are not motivated by short-term partisan concerns would be expected to oppose deference to administrators, reliance on judges' personal views to decide statutory questions, and limits on the ability of Congress to rein in appointed government regulators. Accordingly, the continued use of legislative history in cases requiring statutory interpretation and the continued isolation of Justice Scalia among the

Justices on separation of powers questions\textsuperscript{176} are important steps toward postponing the day when it can be said not only that "all law is politics,"\textsuperscript{177} but also that all politics is a short-term partisan power play. The Supreme Court, however, has not yet spoken dispositively.\textsuperscript{178}