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Why Independent Agencies Deserve *Chevron* Deference

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Abstract[*]

In Chevron U.S.A. v. Natural Resources Defense Council, Inc, the Supreme Court updated the debate about the allocation of statutory interpretation powers between the administration and the courts. This case added new arguments and rationales for sustaining judicial deference when courts review agencies' statutory interpretations. Chevron, however, did not distinguish between the scope of judicial deference to be accorded executive and independent agencies. Post-Chevron cases have also not differentiated between these two kinds of agencies. As Randolph May points out in his article Defining Deference Down: Independent Agencies and Chevron Deference (2006), scholars have paid surprisingly little attention to how independent agencies fit with respect to the Chevron framework. May concludes that independent agencies deserve less judicial deference under Chevron rationales because the secure tenure of the heads of independent agencies diminishes their political accountability.

In this paper I take up May's suggestion that there is more to be said about theories of judicial deference, the Chevron framework and independent agencies. I begin by clarifying the debates surrounding Chevron. I argue that post-Chevron cases have resolved Chevron's initial ambiguity in favor of democratic rationales rather than expertise and conclude that the Supreme Court's jurisprudence after Chevron fits well with pluralist and deliberative understandings of democracy. These theories emphasize procedural safeguards rather than electoral mechanisms in order to ensure citizen participation in the public sphere.

I then subject independent agencies to the scrutiny of these democratic procedural safeguards, exploring the mechanisms that allow citizens to participate in framing and monitoring independent agency statutory interpretations, notably transparency requirements and administrative processes. I also introduce the concept of dialogue among institutions to describe the institutional advantages that independent agencies have over executive agencies from the perspective of theories of deliberative democracy. Finally, I briefly suggest how the independent agency model can guarantee the use of expertise in framing statutory interpretations. I conclude that, under democratic theories that prioritize procedural safeguards, the claims that call for less judicial deference to independent agencies are not well founded.

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Summary

1. Introduction

Chevron U.S.A. v. Natural Resources Defense Council, Inc.[1] has been one of the most influential cases in American public law.[2] The Clean Air Act banned the emission of certain levels of pollution to what it called "stationary sources". The Environmental Protection Agency (EPA) faced a statutory ambiguity because the legislator did not define "stationary sources". Taking into account an industrial plant with several separated units, the EPA had two possibilities. First, the level of pollution could be determined according to the whole plant which is considered the stationary source. The owner, therefore, would be free to exceed the level of pollution in one unit if the total amount of pollution of the plant observes the Clean Air Act levels of pollution. But another possible statutory interpretation pointed out to understand as a stationary source each of the separated units. Each of these units separately considered must not exceed the levels of pollution. The EPA chose the former interpretation and the Supreme Court upheld it. A new formulation of the theory of judicial review of agencies' statutory interpretation was born: the *Chevron* deference.

This new formulation was based on a two-step inquiry. Under the first step, "[w]hen a court reviews an agency's construction of the statute which it administers," it must ask "whether Congress has directly spoken to the precise question at issue."[3] If Congress has solved the question, the clear intent of Congress binds both the agency and the court. Under the second step, "if Congress has not directly addressed the question at issue," that is, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's

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[1] 467 U.S. 837 (1984). The opinion, delivered by Justice Stevens, was unanimous. Justices Marshall, Rehnquist and O'Connor took no part in the consideration or deliberation of the case.

[2] Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 188 (2006) (calling *Chevron* quasi-constitutional, raising it to the category of one of the foundational cases of American public law). Some authors, however, have mitigated the impact of the *Chevron* case, emphasizing that this case did not imply a fundamental change in the attitude of the judicial branch in reviewing public administration's powers. Some empirical studies have shown that the outcomes of judicial review cases of the administration in the federal judiciary level did not vary significantly after the *Chevron* case. *See*, for instance, the works of William Eskridge and Lauren Bauer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008); Orin S. Kerr, *Shedding Light on Chevron: An Empirical Stduy on the Chevron Doctrine in the U.S. Courts of Appeals,* 15 YALE J. ON REG. 1 (1998); Richard Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit,* 83 VA. L. REV. 1717 (1997); Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1026 (1991). In this regard, there are debates about the magnitude of the Chevron effect, but not about the existence of the effect.

[3] *Chevron*, 467 U.S. at 842.

answer is based on a permissible construction of the statute." [4]

In this decision, the Supreme Court tries to answer one of the key questions of administrative law in the modern regulatory state: given that Congress leaves substantial matters unresolved when it passes statutes, who should resolve any conflicts that emerge in their day-to-day application? Or, in other words, who is responsible for statutory interpretation? Although administrative agencies are a suitable candidate, another plausible candidate is the judiciary. The *Chevron* doctrine attempts to resolve the tension between agencies and courts when an issue of statutory interpretation is at stake by determining that courts must defer to an agency's interpretation when Congress has provided an ambiguous statutory framework.

In the context of this tension the impact of agencies' design and, specifically, how the independent agency model fits under the *Chevron* framework have scarcely been studied. I adopt for the purposes of this article Froomkin's definition that basically construes the independent agency as an opposite model to the executive agency: "implementing regulatory, and/or adjudicative bodies outsider both the legislature and the judiciary, the top officials of which serve for a fixed term during which they are not subject to official direction by the President and may be removed, if at all, only for cause."[5]

Two main characteristics of this form of organization can be extracted from this definition. Firstly, independent agencies are separated both from legislative and judicial powers. Secondly, the President lacks, at least in theory, a direct control of their activities, a lack of control that is accomplished by articulating fixed time tenure for the top officials of independent agencies. During the commissioner's tenure, the President can only dismiss them due to good cause or due to the concurrence of inefficiency, neglect of duty or malfeasance in office.

Froomkin does not define the specific functions that an independent agency can exercise, which can be regulatory (with policymaking power) or merely adjudicative. Martin Shapiro characterizes the role of these organizations in American legal system in the following terms: "these commissions are regulatory in the sense that they conduct government interventions into the private economic sector designed to correct some market failure or other anomaly concerning which the private sector is allegedly not self-correcting."[6] Similarly, Shapiro also stresses two further characteristics to add to Froomkin's definition. First, independent agencies adopt the form of commissions or, in other words, they are multi-headed agencies. Secondly, it is

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[4] *Id.* at 843.

[5] *See* Michael Froomkin, *In Defense of Administrative Agency Autonomy*, 96 YALE L.J. 788, 2 (1987).

[6] *See* MARTIN SHAPIRO, INDEPENDENT AGENCIES: US AND EU 7 (1996).

customary for independent agencies to establish restrictions with respect to the number of commissioners from the same political party that can be on its managerial council at the same time.[7]

Does it matter for the allocation of responsibility for statutory interpretation that this interpretation is done by an independent agency rather than an executive agency? Should courts address the issue differently, depending on the type of agency that makes the statutory interpretation? Current jurisprudence does not distinguish between independent and executive agencies when the applicability of the *Chevron* deference is discussed. *Chevron* reviewed a statutory interpretation carried out by an executive agency: the Environmental Protection Agency. But courts have applied this deferential treatment to the statutory interpretation of independent agencies.[8]

Some authors have argued against applying *Chevron* deference to independent agencies. In particular, Randolph May is championing the cause of jurisprudential change in this area.[9] He argues on the grounds of accountability, separation of powers and democratic concerns that judicial review should be more intense in the case of independent agencies because their characteristics diminish their democratic pedigree. If these claims are correct, jurisprudence should distinguish between independent and executive agencies when statutory interpretation issues arise. In sum, the question whether independent agencies merit *Chevron* deference and, therefore, the suitability of the current approach of courts in dealing this matter is still an open, and seldom discussed, question. The aim of this paper is to contribute to this normative debate in the context of the American law system and to introduce the Spanish reader in this debate that will be articulated in this paper in terms of American law. In this regard, this paper is not intended to be a comparative law analysis. To the contrary, the Spanish reader will found that the issue will be addressed through American legislation and scholarship, with few references to Spanish scholarship or sources of Spanish law.

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[7] *Id.* at 11.

[8] The following are some examples of cases in which courts applied the *Chevron* framework to the independent agencies statutory interpretation. In relation to the Federal Communications Commission (FCC): *National Cable and Telecommunications ASS'N v. Brand X Internet Services*, 545 U.S. 967 (2005) and *MCI Telecommunications Corporation v. American Telephone and Telegraph Company United States*, 512 U.S. 218 (1994). In relation to the National Labor Relations Board (NLRB): *Lechmere v. NLRB*, 502 U.S. 527 (1992) and *NLRB v. Viola Industries-Elevator Div.*, Inc. 979 F.2d 1384 (10th Cir. 1992). In relation to the Federal Trade Commission (FTC): *Trans Union Corporation v. FTC*, 267 F.3d 1138, 1143 (D.C. Cir. 2002), *California Dental Association v. FTC*, 526 U.S. 756 (1992). In relation to the Federal Energy Regulatory Commission (FERC): *California Independent System Operator Corporation v. FERC*, 773 F.2d 1368 (D.C. Cir. 2004).

[9] Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 453 (2006).

In section 2, I examine *Chevron* and its rationales for sustaining judicial deference to agency statutory interpretation. I argue that post-*Chevron* cases have clarified *Chevron's* initial ambiguity in favor of democratic rationales and conclude that the Supreme Court's jurisprudence after *Chevron* fits well with pluralist and deliberative understandings of democracy. These theories emphasize procedural safeguards rather than electoral mechanisms in order to ensure citizen participation in the public sphere. The features that determine whether courts should defer to agency statutory interpretation include the administrative process followed by the agency in order to engage citizens, the adequacy of its institutional design for cultivating reflective judgments, and, finally, the role of expertise in framing the interpretation.

In section 3, I address the relationship between these key procedural safeguards of democracy and the independent agency model. I explore the mechanisms that allow citizens to participate in framing and monitoring independent agency statutory interpretations, notably transparency requirements and administrative processes. I also introduce the concept of dialogue among institutions to describe the institutional advantages that independent agencies have over executive agencies from the perspective of theories of deliberative democracy. Finally, I briefly suggest how the independent agency model can guarantee the use of expertise in framing statutory interpretations. I conclude that, under democratic theories that prioritize procedural safeguards, the claims that call for less judicial deference to independent agencies are not well founded.

2. Building the Chevron's framework: the triumph of democratic rationales over expertise

2.1. The uncertainty of Chevron's rationale

The Supreme Court reshaped its judicial deference doctrine in *Chevron*.[10] The meaning of the

[10] Before *Chevron*, the Supreme Court had not applied a general and universal approach to the question of judicial review of statutory interpretation by administrative agencies. Pre-*Chevron* cases oscillated between cases that granted some degree of deference and other cases that allocated the ultimate duty of interpretation of the law to courts. In words of Judge Williams, case law has not crystallized around a single doctrinal formulation which captures the extent to which courts should defer to agent interpretations of law. Instead, two 'opposing platitudes' exert countervailing 'gravitational pulls' on the law. At one pole stands the maxim that courts should defer to 'reasonable' agency interpretative positions, a maximum increasingly prevalent in recent decisions. Pulling in the other direction is the principle that courts remain the final arbitrators of statutory meaning: that principle, too, is embossed with recent approval.

Chevron's two-step inquiry –whether Congress has left a statutory ambiguity and if the agency's interpretation in resolving this ambiguity is reasonable- casts both light and shadows. What does *Chevron* clarify? It articulates the principle of judicial deference in a procedural formula that, as stated, can be described as a two-step inquiry, defining the type of judicial deference that must govern the review of agency statutory interpretation. It is binding on courts. If Congress does not resolve the object of controversy and the administration's interpretation is reasonable, courts must accept the interpretation of questions of law carried out by the administration. In other words, the merely-persuasive deference shaped primarily in *Skidmore v. Swift & Co.* was abandoned.[11]

Chevron does not explain, however, many crucial aspects of the principle of judicial deference with regard to agency statutory interpretation. It does not define the role of courts in each of the two steps with precision. In the first step, the interpretive mechanisms that courts can use to decide whether Congress has spoken clearly are still an open question. In the second step, the vagueness of the term "reasonableness" can mean a greater or lesser degree of intensity of judicial review. Thus, while the procedural design of the two-step inquiry seems clear and simple, its specification in concrete cases presents great difficulties. Even less clear in *Chevron* is

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NRDC v. EPA, 725 F.2d 761, 767 (D.C. Cir. 1984).

The case that probably provides the best formulation of the pre-*Chevron* doctrine is *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944):

> We consider that the ruling, interpretations and opinions of the Administrator under this Act, while not controlling upon courts by reason of their authority, do constitute a body of experience and informed judgement to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of the reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control. . . .
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> *Id.* at 140.

The so-called *Skidmore* deference, therefore, could be characterized by three main features. First, courts addressed the question of judicial deference to agency interpretation of questions of law case-by-case. In other words, there was not a general doctrinal framework in this regard: in each case, courts analysed whether the agency's statutory interpretation merited deference. Second, the determination whether the administrative agency is entitled to deference was based on several factors, such as the expertise, the quality of the reasoning and agency's consistency or coherence over time (multi-criteria approach). Third and finally, the nature of the deference is not binding, but only persuasive for the courts.

[11] Thomas W. Merrill, however, argues that since *Christensen v. Harris County*, 529 U.S. 576, 689 (2000), the Supreme Court has maintained alive the *Skidmore* persuasive deference rule. The latter would apply when *Chevron* deference is not applicable in a given case. *See* Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L. J. 833, 852 (2000-2001).

the foundation of the principle of judicial deference.[12] Cass R. Sunstein gives three possible justifications implied in the text of the *Chevron* case: congressional intent, expertise and political accountability.[13]

The theory of congressional intent or congressional power to delegate to the administration appears most predominantly in the decision.[14] The theory of delegation means that "[c]ourts must defer to agency interpretations if and when Congress has told them to do so."[15] The decision to grant interpretive power to agencies, therefore, belongs to Congress. The judge must respect its decision and accept the agency's interpretation, if it is reasonable.

Despite the emphasis on congressional intent, references to expertise as grounds for the principle of judicial deference are clearly present, if not abundant, in the Court's arguments in *Chevron*. The Court recognizes that "the Clean Air Act Amendments of 1977 are a lengthy, detailed, technical, complex, and comprehensive response to a major social issue"[16] and that, therefore, EPA's action unfolds "in the context of implementing policy decisions in a technical and complex arena."[17] It acknowledges that "judges are not experts in the field" and that the technical and complex character of the regulatory scheme is a reason to defer to agency interpretations. [18]

The argument for deference based on political accountability appears in the final part of the Court's opinion.[19] The role of the administration and the judge in the constitutional scheme

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[12] Sunstein, *Chevron Step Zero*, *supra* note 2, at 195; Jacob E. Gersen & Adrian Vermeule, *Chevron as a voting rule*, 116 YALE L. J. 676, 688 (2007).

[13] Sunstein, *Chevron Step Zero*, *supra* note 2, at 195-198. David M. Gossett has also identified these three possible theories or rationales that explain the reasons why the judge must differ to agency statutory interpretation: David M. Gosset, *Chevron, Take Two: Deference to Revised Agency Interpretations of Statutes*, 64 U. CHI. L. REV. 681, 688-690 (1997).

[14] *Chevron*, 467 U.S. at 843-844 ("If Congress has explicitly left a gap for the agency to fill; there is an express delegation of authority to the agency . . . . Sometimes the legislative delegation to an agency on a particular question is implicit.").

[15] Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071, 2084 (1990).

[16] *Chevron*, 467 U.S. at 848.

[17] *Id.* at 863.

[18] *Id.* at 865.

[19] *Id.*:

determines that "the responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones."[20] In Sunstein's words, "agency decisions must rest on judgments of value, and those judgments should be made by political rather than judicial institutions."[21] When Congress has not resolved the precise issue at stake, the administration must close the debate because the discussed question involves a value judgment. Given its institutional role within the constitutional scheme, these kinds of judgments belong to the administration, which is politically accountable.

It is precisely because independent agencies appear to lack political accountability that they seem ill-suited for judicial deference. Elena Kagan argues that the degree of judicial deference to the administration should be connected to presidential control, so that when this control decreases, the degree of judicial deference to which its decisions are subjected must also decrease. [22] While Elena Kagan did not apply specifically this argument to the case of independent agencies, Randolph May extrapolates the same to it: due to their low-level of presidential control, independent agencies must be subjected to greater judicial review in compensation.[23]

May acknowledges that scholars have handled the question of the application of judicial deference to independent agencies with little depth, but he nevertheless thinks that independent agencies do not seem to fit well with "*Chevron*'s political accountability rationale."[24] He argues that the principle of separation of powers is the main ground of support for judicial deference:

> [A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's view of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . .

[20] *Id.* at 866.

[21] Sunstein, *Chevron Step Zero, supra* note 2, at 197.

[22] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, at 2376 (2001).

[23] In defending the lack of political accountability of independent agencies and its consequence for a stronger judicial review, Randolph May also quotes authors like Barry Friedman, John Duffy, David Gosset and Chrisotpher Sprigman who, like Kagan, determine that, as a consequence of their lack of political accountability, independent agencies should have less judicial deference. *See* Barry Friedman, *The Birth of an Academic Obsession: The history of the Counterrmajority Difficulty, Part Five*, 112 YALE L.J. 153, 164 n.31 (2002); John Duffy, *Administrative Common Law in Judicial Review*, 77. TEX. L. REV. 113, 203 n 456 (1998); David M. Gosset, *Chevron, Take Two: Deference to Revised Agency Interpretations of Statutes*, 64 U. CHI. L. REV. 681, 689 n.40. (1997); Christopher Springman, *Standing on Firmer Ground: Separation of Powers and Deference to Congressional Findings in Standing Analysis*, 59 U. CHI. L. REV. 1645, 1668 n.145 (1992).

[24] May, *supra* note 9, at 442.

"in our tripartite constitutional system, the political branches, not the judiciary, should make policy."[25] For May, the main objective of independent agencies, the fruit of *New Deal* ideals, is to prevent presidential control and thus promote the isolation of politics.[26] Although May admits that the President and Congress "certainly subject independent agencies to some measures of political influence," this influence is not enough to satisfy the political accountability rationale of *Chevron*.[27] In any case, he concludes that the expertise of independent agencies should lead to the application of the *Skidmore* doctrine. Statutory interpretation by independent agencies, therefore, should be merely persuasive, not binding.[28]

2.2. Post-Chevron cases: Solving the uncertainty in favor of democratic rationales

Three important Supreme Court cases popularized by Sunstein as the "Step Zero Trilogy"[29] have resolved the uncertainty that arises from *Chevron* regarding the rationales for judicial deference to agency statutory interpretation. In the first case of this "trilogy", *Christensen v. Harris County*,[30] Justice Breyer's dissenting opinion stated that *Chevron* doctrine "simply focused upon an additional, separate legal reason for deferring to certain agency determinations, namely, that Congress had delegated to the agency the legal authority to make those determinations."[31] The Court adopted this justification in the second case of the "trilogy", *United States v. Mead Corporation*.[32] According to the majority opinion of the Court, "*Chevron* was simply a case recognizing that even without express authority to fill a specific statutory gap, circumstances pointing to implicit congressional delegation present a particularly insistent call for deference."[33] Finally, in the third case of the "trilogy", *Barnhart, Commissioner of Social Security v. Walton*,[34] the majority opinion stated that "the statute's complexity, the vast number of claims that it

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[25] *Id.* at 435.

[26] *Id.* at 445.

[27] *Id.* at 447.

[28] *Id.* at 446.

[29] Sunstein, *Chevron Step Zero*, *supra* note 2, at 211.

[30] 529 U.S. 576 (2000) (Breyer, J., dissenting) (joined by Ginsburg, J.).

[31] *Id*. at 596.

[32] 533 U.S. 218 (2000).

[33] *Id*. at 237.

[34] 535 U.S. 212 (2002).

engenders, and the consequent need for agency expertise and administrative experience lead us to read the statute as delegating to the agency considerable authority to fill in, through interpretation, matters of detail related to its administration."[35]

The uncertainty of *Chevron*'s justification for granting judicial deference to agency statutory interpretations has thus been resolved in favor of the congressional intent rationale, that is, the theory of congressional delegation. It seems that, among the three possible rationales that could be inferred from its text, "this reading of *Chevron* has prevailed."[36] The other two arguments – expertise and political accountability– have moved into a secondary role.

But the "Step Zero Trilogy," particularly *Mead*, also clarifies another element of the delegation theory. Shortly after the *Chevron* case, Justice Breyer argued that "courts may input on the basis of various 'practical' circumstances" congressional intent to delegate statutory power interpretation to agencies. [37] He rejected "the simplicity" of the approach that calls for applying, as a "blanket rule," judicial deference in case of statutory ambiguity.[38] In contrast, in his dissenting opinion in *Mead*, Justice Scalia argued that it was desirable in principle and in practice to recognize a general presumption of congressional delegation in the event of ambiguity in a statute.[39] The majority opinion in *Mead*, delivered by Justice Souter, rejected Scalia's position and affirmed a case-by-case analysis to determine congressional intent: "we think, in sum, that Justice Scalia's efforts to simplify ultimately run afoul of Congress's indications that different statutes present different reasons for considering respect for the exercise of administrative authority or deference to it."[40]

The questions that arise now seem almost inevitable. How can we determine the legislator's intention to delegate statutory interpretation to the agency? What indicators point out to the existence of this delegation? The delegation theory leaves the final decision about who has the power of interpretation in cases of ambiguous legal provisions in the hands of the legislator. The body in which this power must be placed is not determined *a priori* or, namely, not owing to its expertise or its political accountability. Agencies are not automatically assigned to carry out the task of statutory interpretation, removing the courts from exercising this duty. Thus, the final

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[35] *Id*. at 225.

[36] Sunstein, *Chevron Step Zero*, *supra* note 2, at 198.

[37] Stephen Breyer, *Judicial Review of questions of law and policy,* 38 ADMIN. L. REV. 363, 372 (1986).

[38] *Id*. at 373.

[39] *Mead*, 533 U.S. at 241-250.

[40] *Id*. at 238.

decision remains in the hands of the legislator and, as Sunstein suggests, "the court's task is to make the best reconstruction that it can of congressional instructions."[41] The judge must thoroughly examine the entire legal framework and determine, for the case in question, if the legislator's intention was to leave the solution to the agency. This task "calls for a frankly value-laden judgment about comparative competencies" between agencies and courts.[42]

Here the rationales for expertise and political accountability announced in *Chevron* play a role. While they alone do not support the deference theory, they are valuable when determining the legislator's intention. Indeed, they have been used by the Supreme Court as indicators to make "the best reconstruction of legislative instructions on the question of deference."[43] This is the "secondary role" I mentioned earlier.

The expertise rationale is crucial for the application of *Skidmore*'s persuasive-deference standard.[44] Under the multi-criteria approach of the *Skidmore* deference, the expertise rationale is a key aspect to determining that an agency's interpretation is "persuasive."[45] The expertise rationale is also important in the *Chevron* framework. In order to determine whether the legislator has delegated the resolution of statutory ambiguities to the agency, courts must discern whether the agency acted in a highly technical or complex area and whether its interpretation falls within its expertise. *Barnhart* expresses the relevance of expertise in the area of Step Zero.[46] It suggests that when agency statutory interpretation takes place outside of the procedural channels indicated by *Mead*, if the matter to be resolved is an "interstitial" matter which the agency is used to handling on a daily basis, then it is a question that the agency is competent to resolve. Therefore, the agency's expertise with regard to these matters is a powerful argument, closely related to the deferential attitude that the courts must adopt. In connection to the cases called "major question trilogy,"[47] *Barnhart* would draw a competency line as follows: while matters of

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41 Sunstein, *Law and Administration after Chevron*, *supra* note 15, at 2086.

42 *Id.*

43 *Id.* at 2090.

44 *See supra* note 11.

45 *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944).

46 *Barnhart*, 535 U.S. at 225.

47 The three cases that comprise the trilogy are the following (in Sunstein, *Chevron Step Zero*, *supra* note 10, at 236-242): *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *FDA v. Brown &Williamson Tobacco Corp.*, 529 U.S. 120 (2000). More recently, *Gonzalez v. Oregon*, 546 U.S. 243 (2006) can be seen as an example of case in which the Supreme Court decided that an important question had not been delegated by the legislator in favour of the agency. In the other side, as an example in which the Supreme Court decided that a question of great importance affirmatively had been

lesser importance pertain to the agency, questions of great importance or repercussion not resolved by the legislator indicate its intent not to delegate.

Barnhart is not the only pertinent case to this question. Procedural mechanisms confirmed in the *Mead* case, can be also related to expertise.[48] Every time an agency acts through a specific proceeding it is not necessarily acting under technical criteria. Nonetheless, the procedure followed is a good indicator "that agency work product is demonstrably rational."[49] The relation between the procedure and the quality of the resulting rule is clear to courts. That the procedure improves the proposed rule has been declared in *AFL-CIO v. Donovan*.[50] The publication of the proposed rule and the comments in the heart of the notice and comment rulemaking procedure "bring to the agency's attention all relevant aspects of the proposed action and thereby enhance the quality of agency decisions." [51] In this regard, the agency's final decision is improved thanks to the "broad range of criticism, advice, and data"[52] that arise from the comments received. The procedure allows the agency "to educate itself"[53] and issue an "intelligent" decision.[54]

The political accountability rationale also has a place in establishing procedural values. Since *Mead*, the Court has stated that one of the clearest indicators for deciding whether Congress has granted interpretive power to the agency is whether the agency has been authorized "to engage in the process of rulemaking or adjudication that produces regulations or rulings (...)"[55] For the Court "it is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."[56] When the agency's statutory interpretation is carried out through notice and comment rulemaking and

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delegated by the legislator, *see Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007). For in depth analysis of the latter case, *see* section 2.3 of this paper.

48 Ronald J. Krotoszynski, Jr. *Why deference?: Implied delegations, agency expertise, and the misplaced legacy of Skidmore*, 54 ADMIN. L. REV. 735, 752 (2002).

49 *Id.* at 752-753.

50 582 F.Supp. 1015, 1024 (D.D.C. 1984).

51 *Community Nutrition Institute v. Butz,* 420 F.Supp. 751, 754 (D.D.C. 1976).

52 *National Petroleum Refiners Association v. Federal Trade Commission*, 482 F.2d 762, 683 (D.C. Cir. 1973).

53 *Texaco, Inc. v. Federal Power Commission*, 412 F.2d 740, 744 (3d Cir. 1969).

54 *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982).

55 *Mead*, 533 U.S. at 229.

56 *Id*. at 229-230.

formal adjudication, the Supreme Court generally finds the *Chevron* deference suitable. Although in the *Mead* case the Court left the door open to applying *Chevron* deference to the agency outside of the mentioned procedural mechanisms, since *Mead,* the rule is that Congress has delegated the power to interpret if the agency is authorized to create rules through an administrative procedure with all guarantees of fairness and deliberation.[57] For the Supreme Court, both the notice and comment and formal adjudication procedures fulfill the minimum requirements to assure these guarantees.[58]

But what is the relationship among the political accountability rationale, the administrative process and judicial deference? One possible way of reconstructing the political accountability justification announced in *Chevron* is to relate it to procedural values. In fact, given that the Court has established the delegation theory as the last ground for the deference principle, it seems that after *Mead*, the most plausible way to articulate the political accountability rationale, or the democratic foundations of *Chevron* doctrine, is according to procedural values. Political accountability, therefore, is assured by observing procedural safeguards in the decision-making process. There are two possibilities for framing the political accountability rationale on procedural grounds: pluralist political theory and deliberation or discourse theory.

Pluralist political theory requires little explanation. Martin Shapiro has adequately characterized the value of procedure in a pluralist political conception of democracy.[59] Considering democracy as a gambling table where different groups of citizens and interests are competing against each other and characterizing the general interest as the sum of their preferences, he concludes that "public polices were to be considered correct that were arrived at by a process in which all the relevant groups had actively participated, each with enough political clout to insure that its views had to be taken into account by the ultimate decision makers."[60] Pluralist political theory does not place much emphasis on electoral formulas of political responsibility, but rather focuses on articulating procedures in which all interests and rights can be represented and defended. Administrative decision-making procedures aim to accommodate this vision of democracy. The aim of the notice and comment procedure, with its publication phases for the proposed rule and the reception of comments, is to ensure that the content of the rule suitably reflects conflicting interests and produces a "competence of ideas."[61] This connection between administrative

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[57] Suntein, *Chevron Step Zero*, *supra* note 2, at 218.

[58] For a description of the notice and comment and formal adjudication procedures, *see* 5 U.S.C. § 553 and 554 (2009).

[59] MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION (1988).

[60] *Id*. at 5.

[61] Expression used by the Temporary Emergency Court of Appeals in 1978 in relation to the rulemaking procedure created by the Federal Energy Administration Act (a procedure very similar to the notice and comment

decision-making procedure and the pluralist definition of democracy is based on an analogy to the free market, in which supply and demand converge.[62] The fact that different groups and interests can participate in the procedure and that their comments influence the decision maker are manifestations of clear exercises of political power and, therefore, the procedure generates considerable democratic value.[63]

A vast literature has addressed the so-called deliberative theory.[64] Shapiro's approach is especially well-suited for discussion here because of its administrative law standpoint.[65] This theory shares with the pluralist political theory the assumption that any policy decision must be subjected to the close scrutiny of all affected groups and interests. Once again, process is essential to ensuring the deliberation required to adopt a decision: "administrators should adopt those policies which a fully informed and attentive public itself would have adopted after engaging in serious public debate."[66] The participation of all groups and interests and their possibility of contributing to a "serious public debate" lead us again to a procedural theory of policymaking.

Up to this point, the pluralist and deliberative theories follow similar paths. However, the deliberative theories depart from the former with regard to the results expected after the "serious public debate." Pluralist political theories only require the decision to accommodate all the interests represented in the public process, whereas the deliberation model expects the decision maker to perform a discursive analysis of all information received during the "serious public debate" and to adopt "good public policy, that is, policies that are in accord with deontological standards of right and wrong and/or serve the public interest."[67] The decision maker is not simply to be a neutral observer dedicated to managing the different interests that come together into a decision. The decision must be framed in an "ethical discourse quite comparable to that

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procedure of the APA). *Shell Oil Co. v. Federal Energy Administration*, 574 F.2d 512, 516 (Temp. Emer. Ct. App. 1978).

62 GARY C. BRYNER, BUREAUCRATIC DISCRETION. LAW AND POLICY IN FEDERAL REGULATORY AGENCIES 32 (1987).

63 KENNETH F. WARREN, ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM 64 (1982).

64 The following is not an exhaustive list of the relevant literature on deliberative theories: SHEILA BENHABIB (ED.), DEMOCRACY AND DIFFERENCE. CONTESTING THE BOUNDARIES OF THE POLITICAL (1996); J.M. BESSET, THE MILD VOICE OF REASON. DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT (1994); JOHN ELSTER (ED.), DELIBERATIVE DEMOCRACY (1998); JÜRGEN HABERMAS, THE INCLUSION OF THE OTHER. STUDIES IN POLITICAL THEORY (1998); YOUNG IRIS, INCLUSION AND DEMOCRACY (2000); CARLOS SANTIAGO NINO, THE CONSTITUTION OF DELIBERATIVE DEMOCRACY (1996); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996).

65 SHAPIRO, WHO GUARDS THE GUARDIANS?, *supra* note 59, at 18-35.

66 *Id*. at 27.

67 *Id.* at 26.

conducted by philosophers and judges."[68] The design of the decision-maker is crucial to ensuring this deliberative discourse. While pluralist theories only focus on procedural values, deliberative theories add to them institutional concerns that pursue to build a decision-maker capable to carry out the required deliberative discourse. In short, in addition to the procedure that the decision-maker is subjected, it is essential also to focus on its form of organization, its institutional capacity and to study its interaction with all the other institutional actors that participate in the decision-making process.

Lawrence Sager's version of the deliberative model shows how important the institutional design of the decision-maker is for deliberative theories.[69] Sager argues that democracy presents two faces or modes. In the first "electoral" modality, citizens participate as equals in the exercise of the right to choose, through the right to vote for their political representatives.[70] In the second "deliberative" modality,

> Any member of the community is entitled […] to have each deliberator assess her claims on its merits, notwithstanding the number of votes that stand behind her, notwithstanding how many dollars she is able to deploy on her behalf, and notwithstanding what influence she has in the community.[71]

Sager adds that "[i]mplicit in this form of equal participation is the right to be heard and to be responded to in terms that locate each person's claim of rights against the backdrop of the community's broad commitment to and understanding of the rights that all members have."[72]

Sager's arguments rest on the same grounds on which Shapiro reconstructed the deliberative model: while all interests and rights of the citizens must be carefully studied, in the end the decision maker must perform an ethical discourse that leads him to a decision that goes beyond the simple accommodation of the conflicting interests. In fact, while Sager writes about constitutional justice, he states that "at the heart of the social project of constitutional justice is the impartiality and generality of the moral perspective."[73]

Sager thinks that "legislatures," or what he calls "popular political institutions," are the main institutional device for framing the electoral mode of democracy. Conversely, the deliberative model is better represented in a "deliberative authority," which seriously considers the rights and interests of the affected parties and decides on the best option possible. To Sager, this

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[68] *Id.* at 33.

[69] LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE (2004).

[70] *Id.* at 202.

[71] *Id.* at 203.

[72] *Id.*

[73] *Id.* at 73.

"deliberative authority" is the judge.[74] The judicial model, Sager claims, has a number of characteristics that allow judges to undertake the task of meticulously analyzing the merits of all the arguments and reaching the correct solution. Judges' independence let them be impartial, they are specialists in the task of interpreting rules, and, no less important, they have to "engage in what some philosophers describe as reflective equilibration" in applying general principles to specific cases, so as to identify solutions that can be used in both present and future cases.[75]

Deliberative theories emphasize procedural values and concerns about institutional design. Shapiro also includes one more element in the deliberation model. The decision-maker not only has to be engaged in a rigorous public debate (something that is guaranteed through an administrative process that allows all affected groups and interests to participate) and produce an ethical discourse. The decision-maker also has to take into account technical criteria in making the final decision. While Shapiro is indifferent to where expertise falls in the ordering criteria that must govern the decision, he states that it must undoubtedly be present in the final decision.[76]

Both pluralist and deliberative theories agree on the intrinsic democratic value of the procedures used in drawing up rules and the citizens' rights to participate in agency decision-making. A good indicator that the legislator has truly wanted to delegate interpretive authority to an agency is that the agency -both in its organizational structure and in its procedures- responds to the requirements of a deliberative model of democracy, or, at least, to a plural understanding of democracy. *Mead* and its emphasis on the presence of procedures that "foster fairness and deliberation" points in this direction.[77] In its articulation of the political accountability rationale, *Chevron* itself presupposes a pluralist theory of democracy: "resolving the struggle between competing views of the public interest are not judicial ones [responsibilities]".[78]

The democratic value of procedures has long been considered an important feature by courts. In

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[74] *Id.* at 203.

[75] *Id.* at 199-201.

[76] In Shapiro's words:

> Administrators are to add to this discourse a technical expertise that, within reasonable time and cost constraints, allows them to discover all the facts and consider all the alternatives policies. Putting values, facts, and alternatives together, they are to arrive at correct public policies – policies that accord the deontological values of the society and move it toward its vision of the good person in the good state.

SHAPIRO, WHO GUARDS THE GUARDIANS?, *supra* note 59, at 34.

[77] *Mead*, 533 U.S. at 229-230.

[78] *Chevron*, 467 U.S. at 866.

Kelly v. United States Department of Interior,[79] the court confirmed that public participation in rulemaking procedure serves an important interest, the right of the people to present their views to the government agencies which increasingly permeate their lives. The interchange of ideas between the government and the citizenry provides a broader base for intelligent decision making and promotes greater responsiveness to the needs of the people . . . .[80] This principle, which is connected to procedure, contributes to self-government[81] and reconciles "agencies' need to perform effectively with the necessity the law must provide that the governors shall be governed and the regulators shall be regulated . . . ."[82] As Justice Douglas concluded in his dissenting opinion, "public airing of problems through rulemaking makes the bureaucracy more responsive to public needs and is an important brake on the growth of absolutism . . . .".[83]

2.3. A possible new trend? Coming back to expertise

The picture described in the previous sections shows a strong jurisprudential inclination to favor democratic rationales as a basis for granting judicial deference to agency statutory interpretations. Taken together, the delegation theory rooted in congressional intent and the political accountability rationale based on procedural grounds, suggest that democratic concerns configure the core of the *Chevron* doctrine. On the one hand, the criterion of expertise is confined to *Skidmore* deference, characterized as merely persuasive, not binding. On the other hand, this criterion is only relevant to the *Chevron* framework as a canon of construction to clarify Congression's allocation of statutory interpretation powers among agencies and courts.

Jody Freeman and Adrian Vermeule, however, detect a renewed emphasis on expertise in the jurisprudence of the Supreme Court.[84] They focus on the recent case of *Massachusetts v. EPA*,[85] which addressed the question whether the EPA, given the statutory framework in which the agency operates, was necessarily obligated to enact regulations to cut off green house gases emissions. The EPA did not initiate a notice and comment procedure to enact the relevant rule,

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[79] 339 F.Supp. 1095 (E.D. Cal. 1972).

[80] *Id*. at 1102.

[81] *Levesque v. Block*, 723 F.2d 175, 187 (1st Cir. 1983).

[82] *National Labor Relations Board v. Wyman-Gordon*, 394 U.S. 759, 778 (1969) (Douglas, J., dissenting).

[83] *Id*.

[84] Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51 (2007).

[85] 549 U.S. 497 (2007).

but instead published a final decision announcing that it would not act.

The Supreme Court's holding dealt with three important issues. First, the Court handled the standing doctrine. [86] Secondly, the Court reviewed the EPA's interpretation of the Clean Air Act in order to decide whether the statutory concept of "air pollutant" includes green house gases. Finally, the Court addressed the factors that EPA was entitled to rely in order to decide to act or to remain inactive in this matter. Could the EPA argue only scientific considerations or also political grounds are available to support its regulation's denial?

The Court held that the EPA incorrectly interpreted the Clean Air Act. Given that the regulation of green house gases falls within the clear, plain meaning of the phrase "air pollutant" included in the act, the agency's jurisdiction includes their regulation. Furthermore, the EPA could only rely on factors that stemmed from the statutory provisions, and in this case the Clean Air Act only included scientific considerations to decide the issue. Thus, political factors had no place in the EPA's decision.

Freeman and Vermeule argue that *Massachusetts v. EPA* can be understood as a decision whose "enterprise is expertise-forcing." According to them, the case was not concerned at all with nondelegation issues. Even without a clear statement of Congress, the EPA could handle an important issue with considerable repercussions in the economic and social realms.[87] They assert that the case holds that the EPA is constrained to take into account scientific considerations exclusively.[88] These two points lead the authors to conclude that *Massachusetts v. EPA* seeks to recuperate the "older understanding of the court's role", which was to isolate decisions based on expertise from undue political pressures. The political accountability rationale is subordinated to this primary task.[89]

It is too early to affirm that a new trend is emerging because the authors base their arguments on only one case. They argue that two more cases, *Gonzalez v. Oregon*[90] and *Hamdan v. Rumsfeld*[91] can also be construed as examples of this new trend towards enforcing primarily expertise. But they quickly emphasize that other concerns, federalism in *Gonzalez* and separation of powers and due process in *Hamdan*, possibly provide better explanations for them.[92] Moreover, they recognize that *Massachusetts v. EPA* arose under a particular set of conditions. The general perception that the Bush administration was systematically interfering with and manipulating the decisions of

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[86] I am not going to deal with standing issues, being that matter well beyond the scope of this paper.

[87] Freeman & Vermeule, *supra* note 84, at 76.

[88] *Id.* at 80.

[89] *Id.* at 92.

[90] 546 U.S. 623 (2006).

[91] 548 U.S. 557 (2006).

[92] Freeman & Vermeule, *supra* note 84, at 95.

experts in administrative agencies for political purposes could well have provoked this countervailing decision of the Court in order to protect the place of expertise against too much intrusion by the President. In other words, this decision could be a unique response to a particular historical moment.

Finally, it is possible to read *Massachusetts v. EPA* as a case that fits well within the democratic rationales of the *Chevron* framework. Contrary to the arguments of Freeman and Vermeule, the case could be construed as a clear example where the court is only enforcing the intent of Congress that the EPA should act based on scientific considerations in determining that green house gases are dangerous for the health and life of U.S. citizens. In other words, Congress gave statutory interpretation power to the agency and at the same time Congress constrained its exercise by imposing the obligation to articulate a scientific judgment.

It is possible, however, that we are approaching an era where the expertise criterion is becoming a central feature of the *Chevron* framework. The tension between the democratic and technocratic conceptions of public administration has been a constant theme of American administrative law.[93] After an *époque* more preoccupied with democratic concerns, which had its maximum expression in *Chevron*, a faith in expertise, similar to that born from the *New Deal*, could be arising again. It is hard to believe, however, that democratic considerations will be abandoned. The *Chevron* doctrine and the post-*Chevron* cases have firmly established procedural democratic grounds as a rationale for judicial deference to agency interpretations of legal questions. Nothing suggests that judicial deference will be abandoned when agencies interpret statutes according to procedural conceptions of democracy that ensure broad public participation and willingness to take seriously all relevant interests at stake. Moreover, the reinforcement of expertise is not incompatible with procedural democratic values. The place of expertise is even more desirable in these modes of understanding democracy. Under a deliberative democracy model the debate has to incorporate expertise to pursue "good policies." In this regard, *Massachusetts v. EPA* can be construed as a judicial decision that protects the place of expertise in deliberative discourse. The Supreme Court in this case detected a massive political intrusion in the debate and its decision equilibrated the balance. Precisely, the features of the independent agency model which allow some degree of isolation from the President and Congress, as I will argue in the next section, can be construed as an institutional solution for neutralizing undue partisan political influence.

3. The independent agencies model under the democratic rationales of Chevron

3.1. Reformulating the question: Chevron and independent agencies

[93] *See* Martin Shapiro, *Administrative Discretion: The Next State*, 92 YALE L.J. 1487 (1983).

Do the institutional features of independent agencies make these forms of organization less meritorious for the application of *Chevron* deference? Some scholars have answered affirmatively this question, arguing that independent agencies are less political accountable because presidential and congressional checks are diminished. They blame specifically the removal of President and Congress oversight because the secure tenure of the heads of independent agencies.[94]

The argument is undoubtedly simple. The "transmission belt model" popularized time ago by Jerry L. Mashaw would collapse.[95] Expressed concisely, the democratic legitimacy of administrative agencies comes through "transmission" from entities that are directly elected by citizens, like Congress and the President. The oversight and the directive power of these elected bodies over the administrative agencies make it possible for the administrative apparatus to develop functions that obligate citizens, given that the latter retain the power of removal via voting for the electorally responsible bodies that are at the top of the bureaucracy. In this regard, independent agencies would be isolated from any type of political responsibility by removing control over them through the elected bodies, especially that of the President.

This argument, based on an electoral understanding of democracy, has significant weaknesses with respect to the *Chevron* framework. In Post-*Chevron* cases the Supreme Court has specified that the theory of congressional delegation is the main rationale for applying *Chevron* deference. Congress is the body that decides how to distribute statutory interpretation tasks between agencies and courts. The allocation of tasks, therefore, does not rest automatically with democratically-elected bodies according to the mere fact of them being electoral responsible. Congress can decide, through the determination of judicial review standards, to delegate the statutory interpretation task to courts, non-elected bodies without electoral responsibility. The formulation of policies by courts is a constant in the common law system.[96] Thus, the decision to give statutory interpretation power to elected bodies (the President and the administrative agencies under his supervision) or non-elected bodies (courts) belongs to Congress.

Even if political accountability is not the main rationale of *Chevron*, it still plays a role in its framework. In determining whether congressional delegation of interpretive statutory powers in favor of the administration have been granted or not, the political accountability rationale can serve as a good indicator for reconstructing the intention of the legislator in the best way possible. It is on this point that an additional weakness of arguments based on a merely-electoral understanding of democracy and political accountability appear. Since *Mead,* the Supreme Court

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[94] May, *supra* note 9, at 447.

[95] JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 15-30 (1985).

[96] Antonin Scalia, *Judicial deference to administrative interpretations of law*, 1989 DUKE L.J. 511, 514-515.

has opted to link the existence of delegation with procedural values. It leans towards inferring the existence of congressional delegation when there are procedures that let citizens participate in decision-making. This approach assures results wherever all the interests and rights of citizens are thoroughly analyzed on their own merits.

The electoral angle of political responsibility -directly in the case of the President or indirectly via "transmission" in the case of administrative agencies- is not the best way to determine whether the legislator wanted to delegate statutory interpretation authority to an agency. An executive agency can indeed fulfill the requirement of being politically responsible from the electoral modality standpoint due to the supervision and control of its action by the President. At the same time, however, under the *Chevron* framework the same executive agency might not easily be a candidate for the application of deference because the lack of the procedural guarantees announced in *Mead* in the decision making process.

It is necessary to reformulate the questions to address in our debate. Under the *Chevron* framework, the question whether independent agencies deserve judicial deference in the interpretation of the statutes they administer must not be answered in light of whether the President or Congress are capable of managing or controlling this interpretation. The question to answer is whether independent agencies fulfill the procedural requirements that the Supreme Court has required since *Mead* to conclude that they are authorized to resolve ambiguities in the text of the statutes that they administer: citizens should be able to participate in the decision making process, the decision maker has to conduct a reflexive analysis of all the interests and arguments, taking into account them by their own merits, and expertise has a place in the debate.

3.2. Citizen participation in public debate

The competing interests and values of the society that pluralist theories assume have to be integrated in the decision making process. This integration is possible if citizens and interested groups that seek to participate in the "serious public debate" are fully informed on the relevant issue in order to adequately contribute to the debate. This is the transparency or openness component of the decision making procedure. Furthermore, interested parties must be empowered to express their viewpoints, that is, the decision making process has to articulate optimal channels allowing citizens to make their points. This is citizen participation strictly speaking.

There is no difference between executive and independent agencies with regards transparency issues. Requirements of transparency and access to public documents established by the Freedom

of Information Act of 1966 are fully applicable to independent agencies:[97] administrative agencies have to publish information about its organization and activities,[98] citizens enjoy a right as a general rule to access public documents generated by administrative agencies[99] and the multi-headed agencies must write down a record of the final votes of each member in every agency proceeding available for public inspection.[100] In 1976, the Government in the Sunshine Act completed the battery of measures regarding transparency and publication requirements. Without wanting to be exhaustive, the following measures can be highlighted: the general rule of proceeding through open meetings;[101] if closed meetings are held, a record is needed;[102] the meetings held by the agency must be publicly announced;[103] and, finally, an annual report about compliance with these measures must be submitted to Congress.[104]

Either under their organic statutes or sectorial statutes, independent agencies have to submit reports to Congress.[105] Likewise, independent agencies must establish their "regulatory agenda" annually, making public their objectives and goals in the framework of the sectorial regulation they manage.[106] These reports and documents are a valuable source of information available to the public. Similarly, the Government Performing Results Act of 1993 imposed obligations on executive agencies to report to the Office of Management and Budget (OMB). The strategic plans and the annual performance plans and reports are, once again, a good source of information for the public. While independent agencies are not obliged to submit these documents, in practice they do. They comply with these requirements under the same terms as executive agencies.

The second component of public participation consists of the possibility of citizens presenting

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97 5 U.S.C. § 552(f)(1) (2009).

98 5 U.S.C. § 552(a)(1)-(2) (2009).

99 5 U.S.C. § 552(a)(3)(A) (2009).

100 5 U.S.C. § 552(a)(5) (2009).

101 5 U.S.C. § 552b(b) (2009).

102 5 U.S.C. § 552b(f)(1) (2009).

103 5 U.S.C. § 552b(e) (2009).

104 5 U.S.C. § 552b(j) (2009).

105 *See*, for instance, the annual reports that FCC and SEC should filed to Congress under 47 U.S.C. § 154(k) (2009) and 15 U.S.C. § 78w (b) (2009), respectively.

106 5 U.S.C. § 602 (2009).

and defending their points of view and interests. The administrative process is the suitable place to articulate this requirement. *Mead* determined that *Chevron* deference shall be applicable when agency statutory interpretation occurs through a "relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."[107] Furthermore, in *Mead* the Court mentions both notice and comment and formal adjudication procedures as expressly assuring a result entitled to *Chevron* deference.[108] Formal rulemaking and hybrid procedures (procedures with requirements falling somewhere between the notice and comment procedure and formal rulemaking) are also suitable for the application of *Chevron* deference.

The status of independent agencies does not differ in this respect from executive agencies. Normally, their organic and sectorial statutes establish the procedures through which independent agencies carry out statutory interpretations and, if they remain silent, the notice and comment or formal adjudication proceedings characterized in the Administrative Procedure Act (APA) constitute the minimum applicable procedures. When an independent agency chooses any of these procedural variations, statutory interpretation must be accepted by courts under the *Chevron* framework. Do these procedures comply with procedural models of democracy? Or, in other words, do they generate democratic responsiveness by permitting suitable consideration of the rights and interests of citizens?

In its minimum characterization, the notice and comment procedure is regulated by the APA.[109] The jurisprudence, in the task of developing this minimum statutory core, has established the agency's obligation of taking each of the procedural phases seriously, being possible to conclude that the notice and comment rulemaking is a good mechanism to guarantee adequate citizen participation in a "serious public debate." Hereafter, the three phases of the procedure are briefly analyzed: the publication of the proposed rule in the Federal Register, the opportunity to submit comments and, finally, the consideration of comments by the decision maker with the consequent approval of the rule.

The proposed rule phase has been strengthened by courts so that it plays a crucial role in providing information to citizens, allowing them to submit adequately comments about the proposed norm. The agency must reveal not only the legal grounds of the proposed rule, but also factual, technical or scientific data that support it, so that citizens are able to evaluate correctly the

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107 *Mead*, 533 U.S. at 230.

108 *Id.*

109 5 U.S.C. § 553 (2009).

proposed regulation.[110] Moreover, there must be certain correspondence between the proposed and final rules to be able to articulate a debate in good faith.[111] These jurisprudential requisites are completed with the agency's obligation of attaching an "initial regulatory flexibility analysis" to the proposed rule, where the agency must describe the reasons for the adoption of the rule, particularly setting forth the effects of the proposed norm on small entities.[112] In short, this first phase adds more teeth to the transparency requirement.

After the proposed rule has been published, the comments phase is opened. As set forth by the earliest scholarship, the definition of interested party for participation in this phase is extremely broad, so that any citizen is authorized to present comments and, thus, have the status of interested party.[113] The notice and comment procedure allows all citizens, after obtaining suitable information, to express their interests, viewpoints and to present the alternatives that they deem suitable to the initial agency position.

The most relevant aspect, however, is the analysis phase of the comments by the agency and the final publication of the rule. According to Section 553 of the APA, the agency only has "to consider" comments made by interested parties, which are not binding. The final judgment of assessing interests remains, therefore, in agency hands. In this point, the reasonableness requirement of the *Chevron* framework and, above all, the hard look doctrine, obligate the agency to thoroughly consider all arguments and alternatives adduced in the comments phase before the final publication of the rule.[114] Finally, the agency's obligation according to the APA of attaching a "concise general statement of their basis and purpose" has not been taken by courts as a simple formal requirement: the agency must take it seriously.[115] The agency's obligation of formulating a

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110 *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir, 1973); *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240 (2nd Cir. 1977); *Lloyd Noland Hospital and Clinic v. Heckler*, 762 F.2d 1561, 1565 (11th Cir. 1985).

111 *Kollet v. Harris*, 619 F.2d 134, 144 (1st Cir. 1980); *Appalachian Power Company v. Environmental Protection Agency*, 579 F.2d 846, 851 n.6 (4th Cir. 1978).

112 5 U.S.C. § 603 (2009).

113 STEPHEN G. BREYER AND RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 563 (1985).

114 For a broad categorization of the hard look doctrine, *see* Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, SUP. CT. REV. 177, 181-182 (1983) (establishing four requisites in order to satisfy the hard look doctrine: agencies must give detailed explanations, must justify departures from past practices, must allow effective participation in the regulatory process and must give consideration to possible alternative measures).

115 *Automative Parts and Accessories v. Boyd*, 407 F.2d. 330, 338 (D.C. Cir. 1968); *Kennet Copper Corporation v. Environmental Protection Agency*, 462 F.2d. 846 (D.C. Cir. 1972); *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d. 795 (D.C. Cir. 1983).

"final regulatory flexibility analysis" has strengthened this jurisprudential requisite.[116]

The notice and comment procedure shaped by both the legislator and courts clearly includes all the requirements necessary to assure that agency action has been subjected to an intense citizen scrutiny. In *Mead*, however, the Supreme Court also determined that *Chevron* deference is applicable when agency statutory interpretation is the result of a judicial procedural model. *Chevron* specifically dealt with formal adjudication and, obviously, formal rulemaking must also be considered a procedure whose result is meritorious of *Chevron* deference. From the standpoint of procedural values and the procedural angle of democracy, however, these two procedures have some drawbacks.

It is not necessary to dwell on the details of formal rulemaking. Since *United States v. Florida East Coast Railway Co.*,[117] in words of James T. O'Reilly, this procedure can be considered "obsolete," with its usage not demanded by legislature since 1966.[118]The formal adjudication procedure is still a relevant mechanism that is based on a judicial procedural model. Independent agencies have traditionally used this procedure to make policies on a case-by-case basis.[119] Either it is because a statute requires independent agencies to use formal adjudication or because it leaves a wide margin of freedom to choose the suitable procedure, the independent agency can interpret a statute in the framework of a judicial procedure, that is, through the formal adjudication procedure.

Some scholars, like Sager, have pointed out that the deliberative model of democracy is reflected in judicial procedures. To Sager, democracy in its "deliberative" face requires that all rights and interests of parties are dealt with by their merits in equal conditions. This deliberative side of democracy would be adequately protected by a judicial procedure before a judicial body. I will try to argue later that the deliberative theory can be suitably articulated in an institutional model such as independent agencies, which are similar to judicial bodies in their organizational structure. It does not seem, however, that judicial procedures in the heart of administrative agencies are adequate for articulating statutory interpretations with the aim of resolving statutory ambiguities.

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116 5 U.S.C. § 604 (2009).

117 410 U.S. 224 (1973).

118 JAMES T. O'REILLY, ADMINISTRATIVE RULEMAKING: STRUCTURING, OPPOSING AND DEFENDING FEDERAL AGENCY REGULATIONS 158 (1983).

119 STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN AND ADRIAN VERMEULE, ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXTS, AND CASES 498 (6th ed. 2006).

Political accountability and the political role of administrative agencies are reasons, as we have seen, to prefer them for the resolution of ambiguities. Using *Chevron* terminology, such ambiguities can only be fulfilled through value judgments or a kind of decision that should necessarily balance all the conflicting interests at stake. In its "deliberative" or procedural aspect, political accountability is achieved with the articulation of administrative procedures that guarantee citizen participation in decision making and the analysis of all the relevant interests and criteria at stake. But judicial-type procedures used as method for rulemaking restrict public participation and make difficult *a posteriori* oversight of agency's statutory interpretation.

Formal adjudication procedures tend to restrict citizen participation and, thus, limit the opportunities to contribute to agency statutory interpretations. Indeed, in formal adjudication procedures, only the parties that are directly affected can participate in the proceedings, eliminating a citizen intervention phase similar to the notice and comments procedure. The information, alternatives and arguments that the administrative agency may receive are circumscribed to the parties in the process. In short, the possibility of the agency to take into account and integrate all political, economic and social questions in its decision is seriously compromised by judicial-type procedures.

The opacity of the formal adjudication procedure, pointed out some time ago by David Shapiro, is surely seen as one of the characteristics that distort the values of democratic responsiveness of administrative agencies.[120] The policy-making procedure on a case-by-case basis, whose meaning is often only accessible to lawyers and experts, distances administrative agencies from public opinion. Control of policy making by administrative agencies, that is, their value judgments and the balance of all interests and rights affected, is obstructed because the citizenry has not participated in the drawing up of said policies and because it is difficult for them to identify and follow case-by-case proceedings.

In *National Petroleum Refiner Association v. Federal Trade Commission*,[121] the judiciary also sustained this negative characterization of the rulemaking through formal adjudication procedures from a democratic standpoint. In this case, the court remarked the advantages of rulemaking compared to adjudication and confirmed the greater democratic value of the former because it "opens up the process of agency policy innovation to a broad range of criticism, advice and data that is ordinarily less likely to be forthcoming in adjudication."[122] Congress, echoing scholarship

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120 David Shapiro, *The Choice of Rulemaking and Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

121 482 F.2d 672 (D.C. Cir. 1973).

122 *Id.* at 681.

criticisms and jurisprudential positions, has restricted rulemaking of administrative agencies through formal adjudication since the 70s.[123]

In sum, statutory interpretations carried out by administrative agencies through formal adjudication procedures do not comply with procedural requirements required by both pluralist and deliberative models of democracy. Citizens' participation is clearly restricted and their ability to oversight a *posteriori* the administrative action is compromised. Taking up Sager's argument again, for the deliberative model of democracy, the decision maker can perfectly be a non-elected body like a judge or a body with decreased electoral legitimization (independent agencies). Moreover, this institutional non-electoral configuration satisfies other aspects of the deliberative model such as the need to take each argument into consideration on its own merits and to carry out an ethical discourse to find the most suitable policy. But in order to maintain the democratic responsiveness of these types of organizations that, for one reason or another, have decreased their political responsibility electorally speaking, the procedural democratic model requires procedures that guarantee the largest possible citizen participation in decision making. On the contrary, the formal adjudication procedure, which is judicial in nature, considerably limits it.

In this regard, the judicial deference that *Mead* sets forth for agency statutory interpretation, fruit of a formal adjudication procedure, cannot be connected to democratic procedural values. The ideal operational mode of an agency according to a democratic procedural model would be to fill statutory gaps with rules that are framed through notice and comment procedures. After the gap is resolved, these rules could be applied case-by-case via the formal adjudication procedure. Thus, formal adjudication must be restricted to the application of policies already created by the agency through notice and comment procedures, and not configured as a policymaking procedure on its own.

3.3. Dialogue among institutions

The procedural guarantees articulated by statutory law -well supported and improved by a demanding jurisprudence- both for executive and independent agencies, permit the assumption that agency statutory interpretation will contain inputs from public participation and will be the result of a "serious public debate." The role of the arguments of other bodies (especially the President and Congress), however, is missing from this equation. For democratic procedural models and, in particular for the deliberative model, how the decision maker is organized turns out to be essential to guarantee the adequate protection of its discursive process that leads to a "correct" or a "good" result. For instance, direct and strong political control of a body outside the agency can distort the agency's deliberative process as a decision maker and can also denaturalize the result that emerge from public participation.

The institutional guarantees of independent agencies resemble the judicial model, allowing the agency some capacity to resist external influences from other constitutional bodies when interpreting statutes and making decisions. This resistance capacity allows the independent

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123 JUAN JOSÉ LAVILLA, LA PARTICIPACIÓN PÚBLICA EN EL PROCEDIMIENTO DE ELABORACIÓN DE LOS REGLAMENTOS EN LOS ESTADOS UNIDOS DE AMÉRICA 53 (1991).

agency to consider, without undue pressures, all the arguments carefully and by its own merits. The judicial features of independent agencies fit well with deliberative democracy models that request a certain isolation of the decision maker in order to make "good" policies. I will explore, however, a set of mechanisms and tools that permit a degree of influence of the President and Congress that is absent in the case of judicial power. But this influence would be merely that –influence- and not direct supervision or control like in the case of executive agencies. The final objective is to shape an agency that, besides gathering the arguments and interests of citizen participation, is also sensitive to arguments made by the President and Congress. In this way, these arguments are integrated as another element in the "serious public debate."

The question is not about isolating independent agencies from politics. Randolph May defines independent agencies as an institutional model that is isolated from politics and, therefore, separated from the two political branches with the aim of assuring policy making based only on expertise. The ideas of the *New Deal* and the creation of many of the independent agencies under the ideas of the Progressive Era would support May's claim.[124]

The institutional model of independent agency, however, is a phenomenon prior to the *New Deal*. The Interstate Commerce Commission (ICC), created in 1887, is considered the first independent agency in the American legal system. Peter Woll has pointed out the uncertainty of the reasons that led Congress to create the ICC.[125] The argument of leaving highly-technical matters in the hands of a specialized agency was undoubtedly present in the debate for the creation of ICC. Woll argued that "at the time the ICC was created it was not generally expected to become an independent force in the exercise of legislative or judicial functions."[126] The political debates about the creation of the ICC demonstrate that one of the main reasons for its creation was to prevent partisanship or, better said, to avoid "political favoritism." Isolating the ICC from presidential power would accomplish the goal of separating the institution from partisan politics, considering the President as the leader of a party.[127] The ICC neither was conceived as an institution separated from politics with a capital P nor as an "impartial" entity. Conversely, ICC was a "partisan body" whose goal was to defend the opposed interests to the railroad companies. The ICC had a clear political motivation.

Even in scholarly works developed during and after the *New Deal*, one of the main characteristics of the independent agency -secure tenure- was understood as a mechanism to prevent political

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124 May, *supra* note 9, at 445-446.

125 PETER WOLL, AMERICAN BUREAUCRACY 44 (1977).

126 *Id.* at 45.

127 *Id.* at 45.

control of independent agencies by a single political party "in an effort to bring a larger measure of unity and coherence into the whole governmental establishment."[128] In the Report that arose from the Hoover Commission that was created to analyze the progress of the regulatory state, there is a reference to "the number of members and their security of tenure" as one of the most important characteristics of independent agencies in order to prevent "partisan control or favoritism."[129] Moreover, the document makes a positive assessment over the performance of the independent agency model in the following terms: "the independent commissions have largely achieved freedom from direct partisan influence in the administration of their statutes. With few exceptions, the actions of the commission appear to be above suspicion of favoritism or partiality."[130]

These concerns about preventing partisanship were already visible in the works of one of the most influential authors in the 20s and 30s, Carl Schmitt. To this German author, neutrality was not related to technical neutrality, his thought was focused on a concept of neutrality to prevent partisan struggles, confrontation, and to obtain stable, unified and national politics.[131]

More recently, Shapiro has emphasized the essential connection between the independent agency model and the attempt to prevent control of its decisions by a single party. Both secure tenure and the composition of independent agencies -multi-headed and often with the impossibility established by statute that the majority of its members belong to the same political party- follow this objective. The aim is to prevent control of a single political party, assure the plurality of commissioners and, therefore, prevent the unilateral imposition of one of the political parties. Formulas for the appointment of the heads of independent agencies, to be brief, assure the presence of democrats and republicans at all times.[132] The intention is, thus, not to separate independent agencies from politics. The process of appointing commissioners confirms this impression, as their appointment is similar to the appointment process of any presidential cabinet officer.[133] This political nature of independent agencies is also made clear in the fact that President appoints the Chair of each Commission and this Chair acts "at the will of the

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128 WALTON H. HAMILTON, THE POLITICS OF INDUSTRY 49-50 (1957).

129 Task Force Report on Regulatory Commissions, Appendix N of the Hoover Commission Report. USA Commission on Organization of the Executive Branch of the Government. Superintendent Documents. Washington 25, D.C. 19 (1949).

130 *Id.* at 20.

131 CARL SCHMITT, LA DEFENSA DE LA CONSTITUCIÓN 178-182 (1983) (translation supplied).

132 MARTIN SHAPIRO, INDEPENDENT AGENCIES: US AND EU 11 (1996).

133 *Id.*

President."[134]

Although I argue that the independent agency's model does not seek to separate the administration from politics, this statement is not incompatible with the fact that, given the singular characteristics of independent agencies, there is a special relation with the two political branches. This relationship is different than those of executive agencies. Indeed, institutional guarantees of independent agencies permit a certain capacity for resisting influence from the two political branches. In terms of the classic concept of "dialogue" among institutions,[135] both the President and Congress are capable of influencing and expressing their arguments and positions to the independent agency. At the same time, the independence status of independent agencies permits some capacity for their acceptance or rejection. The terms of this dialogue vary depending on whether the interlocutor of independent agency is the President or Congress.

Besides the power to appoint commissioners with the consent of the Senate, the President can influence independent agencies through two mechanisms: Executive Orders and participation in rulemaking procedures. In both cases, the political power and the persuasive capacity of the President count during dialogue with independent agencies.

The applicability of Executive Orders with regard to independent agencies it is at least uncertain. One aspect, however, is clear: independent agencies have been excluded from the sphere of application of the most important Executive Orders since the Reagan Era, especially from those that articulate a presidential oversight with respect to the rulemaking power through the Office of Management and Budget (OMB). Executive Order 12,291 (President Reagan), which established criteria to be followed by administrative agencies in their decision making processes, specifically excluded independent agencies.[136] Subsequently, President Reagan created the OMB as a supervisory entity of executive branch regulatory policies through Executive Order 12,498, establishing the obligation of agencies that fell under the scope of application of Executive Order 12,291 to annually submit their regulatory plans for consideration by the OMB. Independent agencies once again stood outside its scope of application.[137] This exclusion of independent agencies from Executive Orders that have modified the regulatory framework created by

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134 *Id.* at 9.

135 An influential articulation of that concept was launched by Peter W. Hogg and Allison A. Bushell in *The Charter Dialogue Between Courts and Legislatures (Or Perhaps The Charter of Rights Isn't Such a Bad Thing After All)*, 35 OSGOODE HALL L.J. 75 (1997) (regarding the interaction between the legislative and judicial branches in relation to judicial review on constitutional issues).

136 Exec. Order No. 12,291, 46 Fed. Reg. 13,193. § 1(d) (1981).

137 Exec. Order No. 12, 498, 50 Fed. Reg. 1036. § 1 (1985).

President Reagan has been a constant.[138]

Despite the non-binding status of Executive Orders for independent agencies, they finally accepted their application voluntarily. Betancor has explained brilliantly among Spanish scholarship this point: George H.W. Bush, Vice-President at that moment, sent a letter dated March 25, 1981, to all independent agencies to request their voluntary compliance with Executive Order 12,291. Seven agencies responded affirmatively to the letter: the Civil Aeronautics Board, the Federal Emergency Management Agency, the Federal Energy Regulatory Commission, the Federal Home Loan Bank Board, the Federal Mine Safety and Health Review Commission, the Interstate Commerce Commission and the Securities and Exchange Commission.[139] Peter L. Strauss has argued that independent agencies understood the need to be subject to the general political parameters of the President in order to avoid partial and unconnected policies.[140]

The submission of strategic plans and annual performance plans and reports to the OMB is another example of independent agencies' collaboration with the President. The strategic plan is a document whose aim is to determine the agency's goals and objectives for a five-year period.[141] The annual performance plan describes the agency's goals, objectives, and mechanisms to reach them, for each year.[142] The Government Performance Results Act of 1993 excluded independent agencies from the obligation to submit these documents to the OMB.[143] Nonetheless and as a general rule, independent agencies have decided to comply with these requirements.[144]

The President's capacity to influence the actions of independent agencies is not exhausted by

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138 President Clinton approved Exec. Order No. 12,866, 50 Fed. Reg. 51,735 (1993) (strengthening the power of OMB in reviewing the regulatory actions of administrative agencies and imposing the obligation of each agency to designate a "Regulatory Policy Officer", but expressly excluding independent agencies from its application in § 3(12)(b). President Bush maintained the exclusion in the amendments of Exec. Order No. 12,866 through Exec. Order No. 13,258, 67 Fed. Reg. 9,383 (2002) and Exec. Order No. 13,422, 72 Fed Reg. 2,763 (2007). The latter Exec. Order configures the Regulatory Policy Officer as a presidential Appointee.

139 *See*, ANDRÉS BETANCOR RODRÍGUEZ, LAS ADMNISTRACIONES INDEPENDIENTES: UN RETO PARA EL ESTADO SOCIAL Y DEMOCRÁTICO DE DERECHO 49 (1994).

140 Peter L. Strauss, *The place of agencies in government: separation of powers and the fourth branch*, 84 COLUM. L. REV. 573, 592 (1984).

141 5 U.S.C. § 306 (2009).

142 31 U.S.C. § 1115 (2009).

143 Both articles 5 U.S.C. § 306 (2009) and 31 U.S.C. § 1115 (2009) refer to the concept of "agency" established in article 5 U.S.C. § 105 (2007), that does not include independent agencies.

144 This is the case, among others, of FERC, FTC, FCC and SEC.

Executive Orders. *Sierra Club v. Costle*[145] left the door open, some time ago, to the President's and other executive officers' participation in notice and comment proceedings. The case referred to relations between the President and the EPA, an executive agency. In this regard, "the court recognize[d] the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with the Administration policy."[146] The Supreme Court allowed the holding of meetings, oral communications and contacts among the President, his staff, and the agency during the comments phase of the proposed rule.[147]

While *Sierra Club* only refers to the relations between the President and executive agencies, it is plausible to extrapolate its conclusions for independent agencies. In its jurisprudence on the independent status of these entities, the Supreme Court has never clearly and convincingly established a limitation of the power of presidential oversight over these agencies.[148] Since *Myers v. United States*,[149] one can undoubtedly confirm that in functions of adjudication, presidential directive power is prohibited. *Portland Audubon Society v. Endangered Species Committee*[150] reaffirmed that the President cannot intervene when the agency acts through formal adjudication procedures. With respect to notice and comment procedures, however, President's intervention also seems plausible in the case of independent agencies. *Sierra Club* allows non-directive intervention or, in other words, intervention that allows the President's arguments to be brought forth for the subsequent free evaluation of the independent agency.

In short, the President has a series of tools -appointment power, Executive Orders and participation in the notice and comment rulemaking procedure- that allows him to influence, but not control, decision making of independent agencies. This is his capacity to interact in the institutional dialogue. In this dialogue, the President does not hold any voting right or possibility to *a posteriori* revoke any decision made by independent agencies. From a deliberative democracy standpoint, this solution is correct. Statutory interpretations arising from notice and comment rulemaking procedures are a result, in principle, that emerges from public participation and from the discursive analysis of the decision maker, in this case the independent agency. The President can contribute with arguments to the public debate, but his vetoes capacity is undesirable because while he definitely possesses electoral democratic legitimacy, he does not conduct

145 657 F.2d 298 (D.C. Cir. 1981).

146 *Id.* at 400-408.

147 *Id.* at 404-408.

148 SHAPIRO, INDEPENDENT AGENCIES: US AND EU, *supra* note 132, at 9.

149 272 U.S. 52, 135 (1926).

150 984 F.2d 1543 (9th Cir. 1993).

decision-making subjected to procedural safeguards. In short, a product that is the fruit of the deliberative process, such as the agency, which is subject to notice and comment rulemaking procedures, cannot be replaced by another product, that of unilateral veto by the President, that does not contain the minimal procedural guarantees required by deliberative democracy.

The dialogue between independent agencies and Congress is substantially different. The Congressional Review Act of 1996 introduced Congress' power of reviewing and revoking rules issued by administrative agencies before they can take effect.[151] This statute included independent agencies within its scope of application.[152] Congress, unlike the President, does hold an authentic vetoing right for the actions of independent agencies. This important congressional power is founded, once again, in deliberative arguments. In this case, the replacement of results takes place between bodies of a deliberative nature and, undoubtedly, by a body, Congress, that possesses greater credentials of political and electoral responsibility.

The relationship with Congress, therefore, is much closer to the dialogue concept utilized by Hogg and Bushell.[153] In this case, the initiative to act is placed in the independent agency, which formulates the rule and forces Congress to respond if it believes that the interests that the statute outlines are not being pursued. The independent agency has to weigh the possibility of congressional revocation and must therefore analyze political support of its proposal in both houses. But the independent agency may also reach the conclusion that its rule, broadly supported by strong public participation, should equally be considered and subjected to public debate: with its initiative power, it can submit the proposal for debate and thus compel Congress to take a position.

Beyond its veto power, Congress has a wide range of instruments for influencing agencies decision making. Bernard Rosen has described this set of instruments in detail.[154] Through Committees and Subcommittees processes, Congress can deploy permanent control over administrative activity. The House Committee on Oversight and Government Reform and the Senate Committee on Homeland Security and Governmental Affairs have great relevance, as they are committees devoted almost exclusively to tasks of controlling administrative activity. The power to initiate investigations and to summon administrative agencies through hearings allows Congress to find out about the performance of the agencies' activities in depth. The goal of the General Accounting Office (GAO) that was created in 1921 is to audit the financial activities of

151 5 U.S.C. §§ 801-802 (2009).

152 5 U.S.C. § 804 (2009).

153 *See supra* note 135.

154 BERNARD ROSEN, HOLDING GOVERNMENT BUREAUCRACIES ACCOUNTABLE 63-88 (3rd ed., 1998).

administrative agencies as an entity to assist Congress in this task. Furthermore, Congress has the last word about financing of administrative agencies through the appropriations process, a powerful weapon for influencing independent agencies. Finally, in many cases, the statutes creating and regulating independent agencies and the sectorial statutes that these institutions administer impose duties of informing Congress through the submission of reports.[155]

One could argue that the relations described among independent agencies, the President and Congress are simply the fruit of a theoretical model and do not resemble reality. While this criticism has to be taken into account seriously, positive political theories, an influent school of thought in American administrative law, have carried out important empirical studies that show the influential capacity of the President and Congress in independent agencies and that these institutions are therefore not isolated from politics. For instance, Terry M. Moe analyzed decisions made by the FTC, the NLRB and the SEC and concluded that the policies of these three independent agencies changed along with different presidential administrations.[156] Later, the same author determined that NLRB decisions were strongly influenced by the President, Congress and courts.[157] With respect to FTC, Barry R. Weingast and Mark. J. Moran found that there was a close correlation between congressional committee preferences and policy changes made by independent agencies.[158] William E. Kovacic also argued that FTC executed antitrust policies that were consistent with policies of congressional committees.[159] More empirical studies are definitely needed to detail relations among the different institutions in the constitutional scheme. As some authors in the area of political positive studies have noted, it is essential to introduce in the study of these interactions and relations between institutions the role of the courts.[160] Nonetheless, the influential capacity of the President and Congress in the rulemaking procedure seems clear, as well as in the interpretation of statutes and decision making of the independent agencies.

In sum, the institutional nature of independent agencies, halfway between political and judicial

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155 *See supra* note 105.

156 Terry M. Moe, *Regulatory performance and presidential administration*, 26 AM. J. POL. SCI. 197 (1982).

157 Terry M. Moe, *Control and feedback in economic regulation: the case of the NLRB*, 79 AM. POL. SCI. REV. 1094 (1985).

158 Barry R. Weingast & Mark J. Moran, *Bureaucratic discretion or congressional control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983).

159 William E. Kovacic, *The Federal Trade Commission and congressional oversight of antitrust enforcement: a historical perspective*, *in* PUBLIC CHOICE AND REGULATION (Mackay, Miller & Yandle, eds. 1987).

160 Jacobi Tonja, *The impact of political positive theory on old questions of constitutional law and the separation of powers*, 100 NW. U.L. REV. 259 (2006).

institutions, allows them to be sensitive or permeable to other constitutional bodies and, in turn, to possess some guarantees that allow them to defend their own positions. Appointment powers, Executive Orders, and participation in rulemaking procedures open the door to presidential influence. The impossibility of free removal of the commissioners, however, reduces his directive power and forces him to exercise persuasion. With regards to Congress, its influential capacity is greater, even being able to revoke rules made by independent agencies, although the initiative capacity ("striking the first blow") of independent agencies cannot be disregarded. Relations between independent agencies, the President and Congress, in terms used by Sager when speaking of the relationship between judges and political parties in constitutional adjudication, seem more of a "partnership" and not a mere "agent" relation, that is, independent agencies "are not . . . instruction-taker[s]", they are "partners" or "collaborators" of the President and Congress in the task of interpreting and applying statutes.[161] Moreover, the independent agencies' resistance capacity will not only come from its institutional nature, but also from its actions over time, which can confer it with what some authors have termed a "legitimization policy."[162] Their independence status can increase by the quality of their reasoning that is accredited over time, their interaction, proximity and connection to the regulated sectors and, finally, their daily contact with reality and their capacity to generate consensuses in drawing up the proposed rule.

Moreover, the characterization of the independent agency model and theories of judicial deference defended in this paper can add some arguments in the old debate about the risk of capture of the regulators.[163] It is not the scope of this paper to analyze in detail this issue. It will be enough to say that the features of independent agencies described in this paper – their political nature, their porosity and capacity of resistance at the same time to Presidential and Congressional arguments and its decision making processes based on public participation and deliberation- are intended to avoid the undue pressure of one powerful actor or group of interest. The institutional design of independent agencies provides some tools to avoid the risk of capture. Judicial deference theories like *Chevron*, based on democratic rationales, focus its scope of review precisely in the respect of the rules of the game that guarantee that a true equal participation and deliberation take place. This scope of review includes, without any doubt, the fact that the deliberation process has been distorted by one powerful actor. At the same time, judicial deference theories avoid the capture of the regulator by another powerful actor: the courts themselves.

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161 Sager, *supra* note 69, at 15.

162 S. Hubac & E. Pieser, *Les autorités face aux pouvoirs*, *in* LES AUTORITÉS ADMINISTRATIVES INDÉPENDANTES 117 (Colliar & Timsit, eds., 1988).

163 Bernstein pointed out this risk in his important work in 1955: MARVER H. BERNSTEIN REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955). Later, the public choice literature has developed in detail this issue. *See*, for all, Laffont, J. J., & Tirole, J. *The politics of government decision making. A theory of regulatory capture*, QUATERLY JOURNAL OF ECONOMICS 106(4) 1089-1127 (1991) and Levine, M. E., & Forrence, J. L. *Regulatory capture, public interest, and the public agenda. Toward a synthesis,* 6 JOURNAL OF LAW ECONOMICS & ORGANIZATION 167-198 (1990).

3.4. Expertise and the institutional design of independent agencies

Deliberative models of policymaking do not exclude expertise from the decision-making procedure. Independently of its position or relevance in the overall debate, its presence is considered a positive factor.[164] In judicial deference theories in United States, the presence or not of expertise in an agency's statutory interpretation has always been a decisive factor to determine the adequate judicial attitude towards administrative action. Before *Chevron*, an agency statutory interpretation that was the result of agency expertise qualified for the application of the persuasive *Skidmore* deference. After *Chevron*, when a court decides that the *Chevron* framework is not applicable, an agency statutory interpretation is still characterized as persuasive when is based on expertise criteria. As also seen, since *Barnhart* the Supreme Court, applying the secondary role of expertise in *Chevron*, seems to advise that expertise is an indicator for the reconstruction of the legislator's intention about whether it wanted to delegate statutory power of interpretation in favor of the agency when the matter is interstitial.

Having remarked the importance of expertise, both for the deliberative model of policymaking and for judicial deference theories, I will briefly detail some thoughts about the independent agency model and its capacity, as an institution, to guarantee actions based on expertise. I am now interested in how as an administrative organization the independent agency can generate decisions based on expertise.

Martin Shapiro has defended that the independent agency model is an organizational method that suitably integrates expertise criteria in formulating policy making. Expertise is assured by the technocratic staff of the independent agency, while agency heads or commissioners, with political profiles and responsibility, are in charge of controlling the position of technical criteria in the overall debate. Independent agencies represent "the best of both worlds: expert analysis by the commissions' technocratic staff with sufficient oversight by politically-appointed commissioners to ensure that the experts are 'on tap but not on top."[165] Shapiro's understanding of the integration of expertise criteria at the staff level, and not at the directive level, is completely coherent with the definition of independent agencies as institutions not separated from politics and actually moved by political criteria. Moreover, administrative procedures can improve the quality of the rule, in this case, allowing the stakeholders to bring their experts during the proceedings.

In both cases, adding expertise criteria to the final decision from agencies' expert non-directive

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164 *See supra* note 76.

165 SHAPIRO, INDEPENDENT AGENCIES: US AND EU, *supra* note 132, at 12.

staff or from external experts, the presence of expertise is not determined by the institutional nature of the independent agency. Indeed, the technical staff and the administrative procedure that allows the integration of external experts in the debate are features that are also present in executive agencies. The independent agency model, therefore, does not contribute anything original to this issue.

Politically-neutralizing tendencies of foreign administrative law systems have called for the institutionalization of technical criteria in the decision making in independent agencies.[166] Without forgetting the relevance of politics in decision making, that is, the need to make value or balancing judgments, independent agencies heads or commissioners must have, on their own, extensive technical knowledge of the sector in which they operate. There are two institutional measures proposed to accomplish this goal.

One institutional proposal is to strength the role of the legislative branch in verifying the professional and technical training of the heads or commissioners appointed by the executive. Without discussing the political stance of the nominees, inevitable in any case, they must accredit solid knowledge of the sector in which they will be making decisions. The *Nolan Report*, brought before the British Parliament on May 16, 1995 and elaborated to confront the crisis of confidence in the British institutional administration (the so-called *Quangos*), is a paradigmatic document in this question. In the consent's momentum, the legislative branch should verify that the selection of candidates has been done according to their professional skills and knowledge. In short, the candidates must be appointed through a system where the criteria of merit and appropriateness for the position are prevalent.[167] In the United States, Bernard Rosen has stressed that during the second term of office of President Nixon, fruit of the heated debate between the two parties, the Senate adopted a certain tendency to toughen its "consent" process for the candidates nominated by the President for independent agencies.[168] The Senate's objective, derived from statements from senators of the time, was to assure that the nominees were sensitive to congressional interests, rather than strictly having optimal levels of qualifications and training. This 'toughening up' of the consent phase for independent agencies, however, did not last long. Starting in 1977, there was a return to what Bernard Rosen calls the traditional "clear disqualification test: that is, give consent to the nominee that meets a few statutory requirements,

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166 These politically-neutralizing tendencies in Europe have their roots in the "bureaucratic ideal" of Max Weber. Mechanisms such as the articulation of selection processes of civil servants based on merits and capacities, the specialization of the administration or the professionalization of the top civil servants with management and leadership duties, were all of them essential ingredients to build a rational and efficient public administration. See MAX WEBER, ECONOMY AND SOCIETY. AN OUTLINE OF INTERPRETIVE SOCIOLOGY 956-1004 (edition prepared by Guenther Roth and Claus Wittich, University of California Press, 1978).

167 *Nolan Report*, 70-90.

168 Rosen, *supra* note 154, at 78.

remedies any potential conflict of interest and has no problem as to honesty."[169]

Another institutional proposal is to include the requisite for technical training of the position of commissioner or head in the statute regulating independent agencies. In the context of the American legal system, professional and technical training and extensive experience are not included among the "statutory requirements" for nominating the commissioners or heads of the main independent agencies. According to this proposal, the government appointment power would be limited by statute: although it would continue to have the ability to appoint candidates with a specific political profile, these candidates would also have to possess technical knowledge of the sector in question. This measure has been used by several foreign jurisdictions, Spain being a good example. All the statutes regulating Spanish independent agencies contain statutory provisions that require technical training and expertise of the relevant sector to the candidates to be appointed as commissioners. For instance, with regard to the Comisión Nacional de la Energía (National Energy Commission), commissioners must possess "recognized technical and professional competence,"[170] for the Comisión del Mercado de las Telecomunicaciones (Telecommunications Market Commission), board members must be selected from among people with "recognized professional competence related to the telecommunications sector and market regulation,"[171] and, in reference to the Banco de España (Bank of Spain), the Director must be "among those who are Spanish and have recognized competence in monetary and banking issues."[172]

These two proposals –toughening congressional oversight to verify the candidates' prior technical training and enacting statutory provisions requiring such prior training for all candidates– allow the presence of expertise at the directive level of independent agencies. Unlike executive agencies, which only integrate expertise through the technical training of its non-directive staff and external expertise inputs from administrative procedures, independent agencies would be different due to the fact that their heads or commissioners also would have a high level of technical qualifications. The American independent agency model, however, does not add this element as an institutional guarantee. The presence of expertise at the directive level is contingent, that is, it can be present or not, but is not assured by statute or by the exigent "consent" of the Senate. In other words, expertise at the directive level is not institutionally guaranteed in American independent agency model.

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169 *Id.*

170 Art. 4 of the Additional Provision nº 11 of the Oil and Gas Act (34/1998, Oct. 7, 1998) (translation supplied).

171 Art. 48.4 of the General Telecommunications Act (32/2003, Nov. 3, 2003) (translation supplied).

172 Art. 24.1 of the Autonomy of the Bank of Spain (13/1994, June 1, 1994) (translation supplied).

4. Conclusion

The *Chevron* doctrine is based on the premise that in cases of ambiguity in statutory language, the interpreter must carry out value judgments, balancing interests and rights and, in short, formulate policies. It is the legislator's responsibility to decide who must resolve legal ambiguities or, in other words, who must make the decision in a specific case when Congress has not been able to resolve the matter. The legislator has three possible interpreters: executive agencies, independent agencies and the judiciary. The last ground for judicial deference after *Chevron* rests on a decision made by the legislator.

In many cases, however, the legislator does not expressly decide which interpreter it prefers. The task of the courts in these cases consists of determining the best possible reconstruction of the legislator's intention about the interpretive body it preferred to resolve statutory ambiguities. To do so, using the Step Zero trilogy, courts have elaborated a series of criteria for determining, case-by-case, the legislator's intention. Among these criteria, the political accountability rationale, closed related to the principle of separation of powers, has a preeminent position. In a democratic state, value judgments and the balancing of interests and rights, which *Chevron* acknowledges as underlying all ambiguities in a statute, must preferentially be resolved by institutions that are politically accountable and therefore have democratic legitimacy. According to May, the weakness of the independent agency model is its lack of political accountability on account of its weaker link with electoral political bodies. Since *Mead*, however, the political accountability rationale must be understood in procedural terms. It is not so important that the policymaking process leading to the solution of an ambiguity is in the hands of an electorally-responsible institution, but that the process allows for participation by citizens affected and is open to public debate and discussion of all interests and rights affected, which must be considered on their own merits. When a statute has configured a process with these features and has empowered administrative agencies to make use of it, then the best reconstruction with respect to deference is that the legislator preferred the administrative agency over the courts as an interpretive body. Note that this procedure, characterized in the notice and comment rulemaking procedure, is different from judicial procedures which are closed to public participation, being only open to authorized parties. For this reason I argued that administrative agency statutory interpretations that arise from formal adjudication procedures do not merit judicial deference.

I analyzed the independent agency model within this framework that establishes procedural democratic grounds at the center of judicial deference theories. I argued that the intention of the independent agency model is not to separate the institution from politics, but rather to eliminate partisanship or political favoritism. After abandoning faith in the expertise of the *New Deal*, the conceptualization of independent agencies in the United States legal system is as political and not merely a technical institutions. The independent agencies' porosity and sensitivity towards arguments set forth by the President and Congress have been stressed by a large part of American scholarship. Thus, the question of judicial deference towards decisions made by

independent agencies should be measured in the same way that executive agencies are evaluated: articulation of statutory interpretation under the aforementioned procedural guarantees is the determining factor. In short, *Chevron* deference will be applicable to independent agency statutory interpretations carried out by notice and comment rulemaking procedures. In fact, there are good arguments to sustain that there are more and better reasons to defend a judicial deference to independent agency statutory interpretations than to executive agencies. In contrast to executive agencies, I have argued that the institutional nature of independent agencies permits them to establish a more egalitarian dialogue with the President and Congress, strengthening the ability to evaluate all the relevant arguments on their own merits according to the deliberative angle of democracy.

In short, I have asserted that the rationales for theories of judicial deference and the independent agency model after *Chevron* are not linked primarily to expertise, but to democratic grounds like political responsibility, public participation and the role of deliberation in the policymaking process. This does not mean that expertise is not important for questions that concern agency statutory interpretations. The expertise criterion clearly plays a role. First, it is one of the criteria that count for the persuasive *Skidmore* deference when the *Chevron* doctrine does not apply in a given case. Second, it is a valuable criterion to determine the application of the *Chevron* framework in the Step Zero Trilogy (secondary role in the reconstruction of Congress's intent in the question of deference). Third, if as some scholars have concluded, *Massachusetts v. EPA* signals a new trend, the expertise as a secondary rationale would be reinforced against the political accountability or separation of powers rationale in the heart of the *Chevron* doctrine.

I have proposed two mechanisms -stricter Senate's consent and statutory entrenchment- to link expertise with the independent agency model. These two mechanisms can allow the model to survive in a new era of expertise. In the current position of the Supreme Court, however, democratic concerns are prevalent when a court faces the review of a statutory interpretation of an independent agency. Under these democratic concerns, courts have good reasons to defer to statutory interpretations carried out by independent agencies which are political institutions that root its legitimacy from procedural grounds and citizen participation and, at the same time, are capable to consider seriously all the arguments at stake without undue pressures of other constitutional bodies.

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