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50,000 Voices Can’t Be Wrong, But Courts Might Be: How Chevron’s Existence Contributes to Retrenching the Higher Education Act

Twinette L. Johnson

INTRODUCTION

In the Hans Christian Andersen fairy tale, The Emperor’s New Clothes, a young boy exposes an Emperor who, while clearly naked, parades around as if he is wearing a magical garment of silk and spun gold. The Emperor, who was known to spend more time choosing his clothes than attending to state affairs, was persuaded by clever robbers, masquerading as garment weavers, to purchase their magical cloth and weaving services. The robbers told the Emperor that those who are unfit for their office or unwise will be unable to see the magical cloth.

All the people of the Emperor’s Kingdom and particularly those in the Big Town heard about the magical cloth and the great expense the King was incurring to have it weaved into a garment. They were especially intrigued by its purported ability to separate the wise from the unwise. The Emperor himself became anxious about the garment the cloth was being used to weave and wanted to know of its progress. Not wanting to look at it himself, the Emperor sent his advisors to assess the “weavers” progress. One by one, the advisors, who were unable to see the garment, reported that it was magnificent, wonderful, and beautiful. Hearing these reports, the Emperor decided to survey the garment. While the Emperor admitted only to himself that he could not see the clothes, he allowed himself to be “dressed” in them and paraded around, in front of all his subjects, as if he could. Better that than to admit he could not see the clothes and be thought “unfit for his office” or “unwise.”

Those in the Emperor’s court, including his attendants, could not see the garments either, but they pretended they did lest they be thought unfit for office or

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1 Assistant Professor of Law and Director of Academic Success Programs, Southern Illinois University School of Law. I would like to thank Professor Scott Bauries and other members of the Association of American Law Schools (“AALS”) Section on Education Law for selecting me to present this paper as a work in progress on the Section’s 2015 conference panel entitled The Higher Education Act at 50. I would also like to thank my fellow panelists, Professors Michael Olivas and Philip Schrag, for influencing this piece through their presentations. Thanks to the audience participants for their feedback, particularly Professors Eloise Pasachoff and John Rumel for their thoughtful questions and comments. I am grateful to Professor Patricia McCubbin for her helpful guidance as I developed this topic and Professor Steve Macias for his insightful comments on various drafts of this paper. Thanks to Dr. Kenneth Warren for inspiring this paper through his teachings. Thanks also to my research assistants Thomas Laye and Jenna Tucker for their dedicated and thorough research support.

2 HANS CHRISTIAN ANDERSON, THE EMPEROR’S NEW CLOTHES (1837).
unwise. The people in the Big Town went along with it as well and why wouldn’t they? After all, they did not want to be thought of as fools. This went on for a while as the Emperor paraded about, until one child, while watching the Emperor, yelled out, “But the Emperor has nothing on at all!!”³ The child’s father acknowledged his child’s statement and that statement was “whispered from one to another until all knew and they cried out altogether, ‘But he has nothing on at all!!’”⁴ At that point, the Emperor realized the people were speaking the truth. But the Emperor did not admit his folly. He didn’t even run off in shame. Instead, the Emperor continued, believing that “the procession has started and it must go on . . .”⁵ The tale ends by saying the Emperor’s attendants “. . . held their heads higher than ever and took greater trouble to pretend to hold up the train which wasn’t there at all.”⁶

And so it goes with the deference scheme employed by courts with respect to administrative agency action. While this deferential scheme is not exactly fool’s gold, in the world of judicial review of administrative decision making, interpretations, and rulemaking, it can sometimes be a cloak that obscures actual deliberation on salient issues presented by agency action. Removal of this resistance cloak to deliberation, whether due to actual application of Chevron or confusion as to when to apply it, is crucial to the survival of the undergirding policy of super statutes.⁷ Super statutes entrench within society an expectation of a certain right not granted under the Constitution.⁸ These entrenched statutes thus work to fill these constitutional gaps but also to fulfill the proverbial contract made between the people and legislators in promoting, codifying, and reauthorizing a right that citizens deem essential to their personal and societal wellbeing.⁹ The Higher Education Act of 1965¹⁰ (the “Act” or “HEA”) is one such act. Promulgated in 1965 after an acknowledgement that wide spread post-secondary education access was crucial to personal, societal, and economic survival, the Act sought to elevate post-secondary education as the means by which citizens could lift themselves and remain out of poverty.¹¹

The Act, entrenched over the course of its existence, has maintained its policy

³ Id. at 41.
⁴ Id. at 43.
⁵ Id. at 44.
⁶ Id.
⁷ See WILLIAM N. ESKRIDGE & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 121 (2010) (stating that super statutes represent "statutory constitutionalism ... that [has grown] out of ... social movement demands that government create affirmative programs to regulate private as well as public institutions and behaviors"); Twinette L. Johnson, Going Back to the Drawing Board: Re-entrenching the Higher Education Act to Restore Its Historical Policy of Access, 45 U. TOL. L. REV. 543, 547 (2014) (stating that statutes become entrenched and achieve "super" status "as society comes to expect and rely on the rights provided by them").
⁸ ESKRIDGE & FEREJOHN, supra note 7, at 121.
⁹ Id. at 6.
of widespread access, but has become stymied in its approach. Plagued by increasing financial aid costs, financial aid abuses in the private higher education sector, and a push for financial belt tightening in tough economic times, Congress and the Department of Education ("DOE") have twisted access into a preservation of financial resources mantra and turned the historical access policy away from creating new pathways to access. The legislation that proliferates today touts maintenance of the Act’s historical access policy through laborious accountability standards tied to a post-secondary institution’s eligibility to receive HEA Title IV financial aid.12

William Eskridge and John Ferejohn offer a model that positions the normative debate as an essential element of statutory entrenchment. After a statute is promulgated in response to an issue in society, the statute is tested in the courts.13 The new norm that comes out of that first stage is then implemented administratively and by the courts with feedback from Congress.14 There are then attempts to narrow the statute which are met by the legislature capitulating to these attempts by creating special interest exceptions.15 The court then follows suit by narrowly construing the statute and the agency then promulgates regulations with the regulated group or the special interest in mind.16 The public responds to this attempted narrowing and stakeholders express their outrage to engage the public more so in the cause.17 Institutional opposition is fortified and politicians see an opportunity to garner support for one side or the other in election battles.18 The government then responds to this public debate by either reaffirming or modifying the core principal of the statute.19 The cycle then continues.20

This article focuses on the normative debate aspect of the entrenchment model—that aspect of entrenchment that takes its cue from the public in responding to the narrowing of a statute. If the entrenched statute’s goal is to

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14 Id.

15 Id.

16 Id.

17 Id. at 1271.

18 Id.

19 Id.

20 Id.
dismantle undesirable traditions for new norms, then the normative debate represents the public's declaration of what the norm should be and the resultant entrenched statute represents the protection of that norm over time.\textsuperscript{21}

In the 1960s, at the inception of the HEA, the public spoke loudly (through advocacy and demonstrations) about what it desired from the government so that it might better participate in society.\textsuperscript{22} The government heard and enacted ground breaking welfare legislation in many areas impacting citizens' daily lives and their ability to survive and prosper, including education.\textsuperscript{23} New generations of those who were helped by the HEA at its inception – the economically and socially underrepresented – are victims of poor performing elementary schools and secondary schools and unrealized post-secondary educational access promises.\textsuperscript{24} Today, the public continues to speak out about these deficiencies which permeate the education sector.

But is anyone listening? The people call for elementary and secondary schools which prepare students for meaningful post-secondary opportunities and the workforce. They get busing, voucher systems, and selective charter school constructs that help some but exclude too many to be considered responsive to the education needs of the people.\textsuperscript{25} The people call for access to post-secondary opportunities that will allow them to fully function in society. They get a for-profit school industry that victimizes the very people the HEA was devised to empower.\textsuperscript{26} These initiatives, which have fallen short of their promised goals, pave the way for the same government officials who championed their creation to declare them

\textsuperscript{21} See ESKRIDGE & FEREJOHN, supra note 7, at 189 ("The key to establishing a permanent new federal program is building political . . . support to ensure that the interests [of the program's proponents] . . . are hard-wired . . . into the program.").

\textsuperscript{22} Johnson, supra note 7, at 557-58; see JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945-1974, at 637-77 (1996) for a discussion of advocacy efforts during the 1960s.

\textsuperscript{23} See ROBERT DALLEK, FLAWED GIANT: LYNDON JOHNSON AND HIS TIMES, 1961-1973, at 79 (1998) (welfare legislation included many acts that are entrenched today including the Civil Rights Act, the Equal Employment Act, and the Elementary and Secondary Education Act); Johnson, supra note 7, at 552.

\textsuperscript{24} See generally Johnson, supra note 7, at 545 (stating that Title IV of the HEA was meant to provide "a pathway for many students to attend a post-secondary institution, particularly those who are socially and economically underrepresented").


\textsuperscript{26} For a discussion of the inherent conflict in mixing the higher education provision with profit, see Osamudia R. James, Predatory Ed: The Conflict Between the Public Good and For-Profit Higher Education, 38 J.C. & U.L. 45 (2011). James cites studies which demonstrate that for-profit institutions derive the majority of their revenue from student tuition, id. at 88, thus making "student acquisition and retention" and not "improving education" through instruction and support services their primary focus. Id.
threats to fiscal viability.\textsuperscript{27} When the people go back to their representatives calling for change and improvement, the government shrouds these calls in "words, figures and numerical data" that at best confuses and at worst obfuscates the real issue as one of financial accountability instead of meaningful post-secondary access.\textsuperscript{28} The result has been legislation such as the No Child Left Behind Act of 2001\textsuperscript{29} and the Higher Education Opportunity Act\textsuperscript{30} which reauthorized the HEA in 2008. These acts focus more on reporting and accountability than on encouraging and enabling educators and other stakeholders to achieve widespread access through new programs and incentives.

Given the current state, the judiciary must assume a greater role in the normative debate by noting all aspects of what that process generates. Eskridge and Ferejohn posit that statutory constitutionalism moves should be publicly justified and debated through agency rulemaking and through formal congressional action.\textsuperscript{31} They argue further that judges should be skeptical of and not defer to agency action, which forces a collision between "super statutory evolution" and "other fundamental norms, unless Congress, after deliberation and public feedback has authorized such . . . [action]."\textsuperscript{32}

But, extolling this reliance on Congress as the sole check on the very agencies it forms, authorizes, and guides through legislation as the bedrock of judicial interpretative deference is misplaced. While Congress is accountable to the voting public, it is this accountability that distorts Congress' role as ultimate overseer of agency action. Because politicians seek re-election and have their own agendas in office, they are prone to obfuscation regarding the issues.\textsuperscript{33} Thus, Congress alone cannot ensure the people's will because the method by which one achieves congressional office and carries on the business of that office often involves forming and driving public opinion.

The judiciary, then, must acknowledge this by considering evidence of the people's will.\textsuperscript{34} The judiciary is empowered by its very branch to do so because its power is "the power of public opinion."\textsuperscript{35} It thus maintains its credibility "by

\textsuperscript{27} See Paul Pierson, The New Politics of the Welfare State, 48 WORLD POL. 143, 147 (1996) (describing "retrenchment advocates" attempts to obfuscate the issues by making them hard for voters to detect or by hiding those responsible for initially proposing the policy subject to retrenchment).

\textsuperscript{28} Jill Koyama & Brian Kania, When Transparency Obscures: The Political Spectacle of Accountability, J. FOR CRITICAL EDUC. POL’Y STUD., Feb. 2014, at 143, 147.


\textsuperscript{31} ESKRIDGE & FEREJOHN, supra note 7, at 289.

\textsuperscript{32} Id.

\textsuperscript{33} See Pierson, supra note 27, at 147 (as politicians work to retrench welfare benefits, they assay politically crucial groups by promising to compensate those constituents for those lost benefits through new reforms).

\textsuperscript{34} See NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION 29-52 (2004) which describes social movements, interest group participation, litigation efforts, and law reviews and other journals as methods by which the people express their will.

steering a course which fits within . . . [the bounds] of public opinion.”36 The judiciary is impartial enough to be removed from forming or driving public opinion and succumbing to interest group pressure, but accountable enough to ensure that agency action remain compatible with the people’s expectation of rights granted by super statutes such as the HEA.37

But, through its use of Chevron deference, the judiciary has abdicated its role in the normative debate associated with the HEA’s entrenchment.38 Eskridge and Ferejohn note that judicial review is not always the most effective institutional response to administrative constitutionalism gone wrong, but judges do provide a backstop for aggressive interpretations that go beyond legislative authorizations, betray super statutory purposes, or fall athwart of larger normative commitments.39 However, the courts’ ability to be the “backstop” is compromised in areas where the court uses the Chevron doctrine as a cloak of deference or excuse to be complicit in Congress’ unwillingness to develop the law in a way that meets citizens’ true needs.

This is particularly troublesome when looking at the post-secondary education landscape regulated by the HEA. Although the Chevron deference scheme has expanded and narrowed over the years with respect to judicial review of agency action,40 it still remains available as a ready excuse for the lack of court involvement in the normative debate. This is so because it does not consider the people’s will in determining whether an agency has acted within permissible limits of a super statute. This threatens the entrenchment of the HEA and the policy supporting it because it creates a roadblock, which prevents the people from being heard on the issues. This article does not argue that the doctrine is detrimental to the Act’s entrenchment simply because of win and loss ratios. Rather, the Chevron doctrine works to retrench the statute because issues, which come about in response to some tension in the deliberative process and which citizens seek guidance on, are decided without full review of how the DOE’s action will impact the people.41 The judiciary then, by invoking Chevron, does not hear the people on issues, does not offer substantive guidance as to how the Act (the codification of the people’s right claiming activity)42 should operate, and thereby, instantly abdicates its role in the normative debate.

36 DEVINS & FISHER, supra note 34, at 31.
39 ESKRIDGE & FEREJOHN, supra note 7, at 24. Further, “judicial review might be the only mechanism available for jump-starting institutions of public deliberation that are broken.” Id. at 23.
40 J. Lyn Entrikin Goering, Tailoring Deference to Variety with a Wink and a Nod to Chevron: The Roberts Court and the Amorphous Doctrine of Judicial Review of Agency Interpretations of Law, 36 J. LEGIS. 18, 19-20 (2010).
41 See Thomas Merrill, Judicial Deference to Executive Precedent, 101 YALE L. J. 969, 997 (1992) (explaining, in the context of executive precedent, how Chevron “weakens the primary check on agency abuses without any alternative”).
42 Johnson, supra note 7, at 547.
This article will explore the judiciary's role in the normative debate generally and as it relates to the HEA. It will also explore courts' use of the *Chevron* doctrine and its impact on courts' participation in the normative debate. To that end, Part I will describe the normative debate role within Eskridge's and Ferejohn's super statute entrenchment model. In the context of higher education, this part will also describe the people who participate in that debate and the ways in which that participation impacts it. This will lay the foundation for understanding how the normative debate has enabled the HEA's entrenchment and elevation to super status. Additionally, defining the people, what they say, and how they say it, will firmly establish the critical role the people play in influencing the evolution of a super statute. Part II will address the court's role. This part will explore courts' use of *Chevron*. It will demonstrate how the application and very existence of *Chevron* deference impedes the debate regarding post-secondary access. Part III will argue that the judiciary must include the people's will amongst its interpretive sources when reviewing agency action regarding super statutes such as the HEA. In this part, I join the chorus of scholars who have "shouted out" about the ineffectiveness and inconsistency of *Chevron*. Setting this discussion, in the context of the HEA, will prove that *Chevron* deference must be reimagined and readjusted lest the historic legislative enactment, which sought to provide post-secondary access to those most underserved, be retrenched.

I. BIG TOWN SPEAK: ACKNOWLEDGING THE ROLE AND POWER OF THE NORMATIVE DEBATE IN INFLUENCING SUPER STATUTE INTERPRETATION

The normative debate is the "ongoing deliberative process by which small "c" constitutional norms and institutions become entrenched in . . . [the] polity.\(^4\) According to Eskridge and Ferejohn, this process of "[d]eliberation should be complicated, polycentric, experimental, forward-looking . . . [and] problem solving."\(^4\) The process is an interactive one by which the accountable organs of governance decide what to do.\(^5\) "[T]he primary actors" (meaning those who can actually affect these "rights" through legislative authorization and reauthorization) are "legislators, executive officials and administrators . . . ."\(^6\) However, "the ultimate . . . political agency is found in [the] . . . [p]eople acting through regular elections and the associated devices of political parties, . . . political associations . . . and popular social movements."\(^7\)

A. The Great Debate

One of the hallmarks of statutory entrenchment deliberation is that it is not

\(^{43}\) ESKRIDGE & FEREJOHN, supra note 7, at 13.
\(^{44}\) Id. at 21.
\(^{45}\) Id. at 15.
\(^{46}\) Id. at 15.
\(^{47}\) Id.
front loaded like big “C” Constitutional deliberation. Article V of the U.S. Constitution requires a deliberative process to ensure wide support for proposed Constitutional change. It requires that both Congress and three-quarters of the state legislature agree to Constitutional amendments. The purpose of the Constitution is to entrench certain institutions and rights against any easy change. This form of “right creation” is albatross-like and inefficient in its response to the public’s urgent demand for recognition and practical application of a right deemed central to preservation, sustenance, and improvement of Americans. An issue then arises as to the best institutional means to make entrenched and oft general goals of the Constitution practical and real for the people. In other words, how can the people gain more immediate access to these critical rights and still be ensured that they are products of creation and maintenance systems that truly capture and represent the people’s will? This paves the way for super statutes.

Elevating a statute to a super statute through entrenchment is not only about status, but also about function. The deliberative process informs the practical application of the statute as much as it entrenches the statute. The entrenched statute thus enjoys super statute status because of the ongoing debate. This is not the Article V Constitutional amendment process that is front loaded and requires legislators to commit to a norm before they know whether it works substantively and institutionally. This deliberation influences and shapes specific solutions and over the course of the deliberation, as the statute expands and contracts to meet the people’s needs, a norm arises and plants itself amongst those rights citizens deem important and necessary for functioning in society. Thus, regarding the HEA, the point made is not to dissuade change. The debate is needed to make those changes that would help the people of today achieve the same goal the people achieved when the Act was first enacted. In the HEA’s case, that is wide-spread access to post-secondary education opportunities. That is the role of an entrenched statute – to preserve over time the right embodied in the statute. That embodiment proves that the right is not one which the proponents of the statute believe would wear out over time or become unfashionable. Rather, the right is

48 See id. at 16.
49 Id.
50 Id.
52 Id. at 399 (comparing changing the Constitution to “running the gauntlet of Article V”).
53 Id. at 408.
54 See ESKRIDGE & FEREJOHN, supra note 7, at 17 (describing the efficacy of using the super statutory model to change “fundamental institutional structures and normative commitments”).
55 ESKRIDGE & FEREJOHN, supra note 7, at 16.
56 But cf’Young, supra note 51, at 405 (arguing that statutes do not have to be deemed “super” to denote a constitutive function and “that decoupling entrenchment and constitutive functions eliminates . . . [a need for] a precise rule . . . for extra canonical norms”).
57 ESKRIDGE & FEREJOHN, supra note 7, at 16.
58 Johnson, supra note 7, at 549.
59 Id.
60 See id. at 558 (describing President Lyndon Johnson’s desire to establish the HEA as a legislative
something that would be an indelible mark on the American people and should be preserved throughout time. The normative debate then seeks only to determine the new ways in which the right would be conferred to Americans as society changes. Thus, the right does not change — only the means by which it is delivered to the people.61

What Americans rely on today is a working constitution that addresses its needs and desires. That transpires through statutory constitutionalism in the form of entrenched statutes. These statutes are thus more than Constitutional gap fillers and are in fact transformative.62 The deliberation process affords this with regard to super statute development because it "occurs over time in a series of episodes rather than one big Constitutional poll."63 Eskridge and Ferejohn posit that "preferences as to fundamental (constitutional) norms are endogenous."64 They are a product of a powerful deliberation and feedback loop where the deliberating actors (using their various forms of pressure and compromising according to their various forms of accountability) address and advocate for reaffirming the statute.65 This constant maintenance of the statute, through the normative debate process (which includes the people's will), is what eventually entrenches a statute and with regard to the HEA, is what has sustained it from its enactment in 1965 to now.66

B. The People's "Speak"

The dialogic nature of the normative debate process features diverse participants who are open to different viewpoints.67 "Congress, the White House, government agencies, interest groups, the general public, and states . . ." all play a role.68 The players address issues in a complicated interplay that involves agencies providing information about an issue while legislators balance incommensurable values and create compromises as well as new governmental structures and programs to deal with the matter.69 The judiciary participates by fitting and sometimes evaluating those legislative directives and agency rules in light of the nation's larger body of law.70

The people speak on a problem in various ways — from participation in elections act that would be "an entrenching and enduring guide" for providing higher education access).61 See id. at 559 (describing the HEA as "that legislation that would again and again reinforce the power of education to set the country on the path to addressing systemic inequities amongst citizens").62 ESKRIDGE & FEREJOHN, supra note 7, at 6.
63 Id. at 17.
64 Id. at 189.
65 See id. at 23, 189-190.
66 See ESKRIDGE & FEREJOHN, supra note 7, at 28 (describing how the deliberative process entrenches a societal normal by creating network effects that build "consensus around the rule, suggesting reasons why various groups will benefit from it, and associating even perceived rule violation with bad consequences").
67 ESKRIDGE & FEREJOHN, supra note 7, at 15.
68 DEVINS & FISHER, supra note 34, at 29.
69 ESKRIDGE & FEREJOHN, supra note 7, at 15.
70 Id.
and political parties to involvement in interest groups and social movements. This participation can be the direct result of many things including elite stimulus, political interest, civic duty, political association, rational thought, and political factors to name a few. This participation thus generates a “speak” composed of a body of preferences, desires, and beliefs on a given problem that represents the collective will of the people. “The Constitution’s framers recognized that public opinion would shape constitutional discourse . . . and that ... [the] written constitution could never trump the will of the people.” Laws thus are based on the people’s will and must keep up with shifts that are endemic of the times. The “speak” then, as it represents the people’s will with respect to a desired norm, should thus be considered by a court when determining if an agency has acted in accordance with the statute and its underlying policy. The very existence of *Chevron* creates the possibility that the people’s will could be discarded and assumes a system completely intact as to the representation of that will without any need for check by the courts. The study of legislation, whether it is prompted by a direct claim about a statute’s meaning or allowance or a claim regarding the power of an agency, must begin with the study of the social condition. This, “[w]hen the Court ...” does engage in interpretive exercises, it should have “...plenty of company.”

1. The People Speak Through Their Electing Power.—“[C]onstitutional democracy . . . demands leaders ... chosen by majorities and ... subject[ed] to specific normative guidance [from those majorities] as to which norms and rights are constitutionally sacred . . . .” But that democratic constitutionalism construct is threatened by political machinations that cast into doubt reliance on the election process to demonstrate the people’s will. While political leaders also participate in the normative debate, in attempting to retrench welfare reforms, that participation can operate to obfuscate the people’s true desires by reframing or reformulating the people’s “speak” into an election winning cause. This article does not argue that

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72 DEVINS & FISHER, supra note 34, at 30.
73 Id. at 29 (citing BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (1949) in which Justice Cardozo stated that “the great tides and currents which engulf the rest of men do not turn aside in their course and pass ... judges by”).
74 TOCQUEVILLE, supra note 35, at 57.
75 DEVINS & FISHER, supra note 34, at 29.
76 ESKRIDGE & FEREJOHN, supra note 7, at 2 (“[D]emocratic constitutionalism requires ... popular choice of political leaders, a normative hierarchy embodying substantive rights, and institutions and procedures for enforcing the hierarchy and at least some of the rights.”).
77 Overreliance on majority-vote constructs ignore the true makeup of society and the problems that may impact minorities and others who may not have the platform to make themselves heard on the issues. See GOLDSTEIN, supra note 71, at 4, 18-20, for a discussion of the various things that impact the people’s ability to participate, including what the author refers to as “elite stimulus.”
78 See generally Pierson, supra note 27, at 145 (describing retrenchment of welfare reform as “a delicate effort either to transform programmatic change into an electorally attractive proposition, or at the least, to minimize the political costs involved”).
the election process is unworthy of determining and representing what the people want. In fact, a statute's entrenchment is a response to the government's own electorate.\textsuperscript{79} Elections offer citizens the opportunity to assess the social condition, demand changes, and to hear from politicians how those demands might be met. But this very aspect of the process leaves the people and their will open to manipulation. That the elected officials are enacting legislation that addresses a certain problem does not always mean that the problem is one the people (not just the voting majority) are in most need of solving.

In the higher education sector, increasing higher education costs continue to be a great source of debate and concern amongst the people and their political representatives alike.\textsuperscript{80} The people want higher education access for themselves and their children and the government wants to monitor and, in some cases, limit the role it plays in providing that access.\textsuperscript{81} These are not new concerns.\textsuperscript{82} In 1968, Myron Brenton wrote, in the New York Times Magazine, that comfortable, middle-class families were writing their Congressmen with their concern about how they would send their children to college.\textsuperscript{83} A significant increase in the number of students desiring to attend college and changes in socio-economic conditions during that time caused a shift in attitudes regarding higher education.\textsuperscript{84} Whereas in the past, a high school diploma would credential a citizen enough to earn a comfortable living,\textsuperscript{85} by this time, the bachelor's degree had become almost "an indispensable requirement for even moderate success in job or career."\textsuperscript{86} This social condition made higher education seem less like "a privilege and more like a right" that citizens expected access to in reaching their full potential.\textsuperscript{87} Even though higher education was becoming more of an expected right, the historically disadvantaged were not enrolled in large numbers despite scholarships and

\textsuperscript{79} But cf. Christopher Serkin, Public Entrenchment through Private Law: Binding Local Governments, 78 U. CHI. L. REV. 879, 881 (2011) (arguing against entrenchment of ordinary statutes because doing so actually impedes the government’s ability to be democratically responsive to its electorate).

\textsuperscript{80} See ST. JOHN, supra note 12, for a discussion of how concerns regarding higher education costs and the responsibility for meeting them, across political and socioeconomic strata, have impacted laws, regulations, and the entire financing system regarding higher education.

\textsuperscript{81} See ST. JOHN, supra note 12, at 1, 4 (describing the shift in federal student aid from a primarily government funded grant system to a complicated loan system which requires students and their families to shoulder the majority of education costs). For a detailed discussion of the policy shift regarding financial aid, see ST. JOHN, supra note 12, at 100-27.

\textsuperscript{82} Id.

\textsuperscript{83} Myron Brenton, The Higher Cost of Higher Education, N.Y. TIMES, Apr. 21, 1968, § 6 (Magazine), at 32.

\textsuperscript{84} Id.


\textsuperscript{86} Brenton, supra note 83; see also Thomas Brock, Young Adults and Higher Education: Barriers and Breakthroughs to Success, TRANSITION TO ADULTHOOD, Spring 2010, at 109, 110-11, http://futureofchildren.org/futureofchildren/publications/docs/20_01_06.pdf.

\textsuperscript{87} Brenton, supra note 83.
programs designed to help them. African-Americans, for example, accounted for only 4.6 percent of enrolled college students. In fact, while middle class parents complained about increasing costs and their inability to secure adequate aid to send their children to college, low income families struggled also in securing aid for their children. This strong focus on fiscal shortfalls by both families and higher education institutions set a course for a shift in the method by which legislators (elected officials) approached upholding the wide spread access policy under the HEA. While the Act’s earlier reauthorizations continued to expand access through grants and pre-college encouragement programs, by the late 70s and through the 80s, student loans became the key method by which access was expanded. Politicians played on the people’s fear of losing financial aid or having it run out and were able to turn the focus from costly creation of new programs for access to protection of existing federal funds. This was evidenced by the decrease in grant programs and increase in loan programs.

Today, similar claims are made with respect to the government’s ever growing financial aid burden. The for-profit higher education sector is often trotted out as an example of abuse and mismanagement of the federal financial aid funds it has access to. Reports of increased loan debt load, significant loan defaults, and lack of gainful employment opportunities for students at these institutions serve as potent evidence that the sector deserves the criticism and additional regulation it is subjected to. Many for-profit institutions act so egregiously that the sector has become the “poster child” for Title IV federal financial aid funds abuse. Given this, the people can’t help but champion campaigning politicians who promise to rid the sector of the bad actors thus saving the people’s tax dollars. The politicians’ “shift in goals and context [thus] creates new politics” which provides a path for escaping blame. In the process, the politicians create new platforms that seemingly speak to the problems but in reality obfuscate the true issues by focusing

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88 Id.
89 Id.
90 Id.
91 See ST. JOHN, supra note 12, at 101 (Politicians attack higher education institutions calling them inefficient, expensive, and abusive of federal financial aid funds). St. John argues that politicians use “spin control” on these issues to influence “the popular press and public attitudes about higher education finance.” Id. This spin control contributed to obfuscation regarding the erosion in federal grants and the new emphasis on loans. Id.; see Johnson, supra note 7, at 562-566 for a discussion of student loan expansion over the course of later HEA reauthorizations.
92 See generally ESKRIDGE & FEREJOHN, supra note 7, at 189-92 (discussing the tactics used to encourage the public to change its approach to social security and the resultant difficulty in establishing the change amongst citizens).
93 Johnson, supra note 7, at 563-64.
94 Serna, supra note 12, at 70.
96 Id.
97 Pierson, supra note 27, at 147.
on ones that would entice a majority to vote in their favor during elections.\textsuperscript{98} The people thus get voluminous accountability standards that seek to tamp out the fund-abusing behavior, but get little in the way of new programming that would allow citizens increased access to reputable higher education institutions.\textsuperscript{99}

For instance, in 2011, the DOE began making rules "that would define gainful employment and... limit the amount of debt students enrolled in for-profit or vocational schools could incur...."\textsuperscript{100} The rules largely employ economic measures to determine whether a for-profit school's students have exceeded the allowable debt level.\textsuperscript{101} Reports of federal student loans used to pay exorbitant tuition expenses at for-profit institutions\textsuperscript{102} as well as reports that students from these schools cannot secure jobs adequate to repay their school debt\textsuperscript{103} (while true) serve

\textsuperscript{98} See id.

\textsuperscript{99} But see Fred M. Hechinger, Taking the Politics Out of 'Open Access,' N.Y. TIMES, Mar. 15, 1970, at E13 in which Hechinger suggested an open college admissions system to address the education needs of disadvantaged youth who might not be academically prepared for traditional schools. The proposed system did not grant students their choice of schools, but did entitle them to attend at least some post-secondary institution. Id. Hechinger's proposal demonstrated a concern about meeting disadvantaged students' higher education needs and perhaps foreshadowed for-profits' expanded entry into the higher education sector to meet those needs. See generally James Coleman and Richard Vedder, For-Profit Education in the United States: A Primer 5, Center for College Affordability and Production, http://files.eric.ed.gov/fulltext/ED536281.pdf (noting the circumstances surrounding the 1972 HEA reauthorization which broadened for-profit institutions' access to federal financial aid funds).

Almost forty-five years later, in 2015, President Obama proposed a similar access granting idea by specifically recasting the community college system (and not the for-profit industry) as the vehicle for spreading post-secondary access. Kyla Calvert, Obama: Community College Should be as Free and Universal in America as High School, PBS NEWS HOUR, January 20, 2015. President Obama's plan would elevate access to college as a societal norm in the same way high school had been elevated in the 1920s. See CERVANTES ET AL, supra note 85, at 18; cf. Judith Scott-Clayton & Thomas Bailey, The Problem with Obama's "Free Community College" Proposal, TIME (Jan. 20, 2015), http://time.com/money/3674033/obama-free-college-plan-problems/#money/3674033/obama-free-college-plan-problems/, January 20, 2015 (criticizing the plan for not addressing broader barriers to access and not providing resources to improve community colleges so they can meet the quality standards set by the plan).

Hechinger's open college admissions system and Obama's free access to community college plan seem to implicate the for-profit sector in providing or hinder access, respectively.

\textsuperscript{100} Serna, supra note 12, at 69-70.

\textsuperscript{101} Id. at 70-71.


\textsuperscript{103} See, e.g., Press Release, Ctr. for Responsible Lending, For-Profit Colleges Leave African-American and Latino Students with Poor Educational Outcomes, Unmanageable Debt (Oct. 3, 2014), http://www.responsiblelending.org/media-center/press-releases/archives/For-profit-colleges-leave-African-American-and-Latino-students-with-poor-educational-outcomes-unmanageable-debt.html (stating that students of color enroll in for-profit institutions at higher rates than other students and are more likely to borrow, and borrow more, for their education than their peers at public and private institutions).

According to a statement made by Education Secretary Arne Duncan, in 2008, the loan default rate for students graduating from for-profit institutions rose from 11 to 11.6 percent while public and private institutions' loan default rates rose from 5.9 to 6 and 3.7 to 4, respectively. Press Release, U.S. Dept of Educ., Student Loan Default Rates Increase (Sept. 13, 2010), http://www.ed.gov/news/press-releases/student-loan-default-rates-increase-0. Even though student loan default rates are lower for the
as the perfect platform for politicians seeking to scale back government spending on financial aid. According to Gabriel Serna, “much of the language in the [gainful employment] rule is aimed at defining gainful employment by operationalizing the problem as an issue with ‘tax payer burden’ in terms of default.” This purely economic approach misses important aspects of what normally contributes to student loan defaults amongst the typical for-profit institution student. Students’ individual circumstances such as their existing socio-economic condition may influence their ability to manage funds and inadequate preparation at the elementary and secondary level may impact a student’s ability to access or complete post-secondary education. Politicians thus shift the discussion from wide spread education access to fiscal responsibility while simultaneously securing for themselves votes from those who have been convinced that such action will save access. In shifting the discussion from access to fund protection, politicians have, with the same narrow stroke, confused, obfuscated, and marginalized important societal issues in place of “election worthy” issues and have made the students most needing protection even more susceptible to the unscrupulous tactics employed by some for profit schools.

2. The People Speak Through Participation in Interest Groups and Social Movements.—The very process of statutory entrenchment transforms the nature of interest groups and social movements. As statutes mature through the entrenchment process, social programs develop new bases of organized support.

first time in several years, there remains a large percentage of for-profit college graduates who defaulted. See Allie Bidwell, Student Loan Default Rate Drops 7 Percent in One Year, U.S. NEWS (Sept. 24, 2014, 11:00 AM), http://www.usnews.com/news/articles/2014/09/24/student-loan-default-rate-decreases-but-some-question-federal-free-passes. Between 2011 and 2013, 44 percent of the students who defaulted on their student loans were from for-profit colleges even though for-profit colleges only enroll 22 percent of all college students. Id.

Serna, supra note 12, at 76 (arguing that framing gainful employment policy as a consumer protection issue incorrectly focuses on student loan default metrics instead of societal issues most likely correlated with higher levels of debt burden and default).

Id.

See e.g. ESKRIDGE & FEREJOHN, supra note 7, at 203 (describing conservatives’ attempts to weaken the public’s certainty that they were entitled to social security benefits “while simultaneously increasing their certainty in and exposure to the alternative”).

Goldstein describes grass roots lobbying as “[t]he identification, recruitment, and mobilization of constituent-based political strength capable of influencing political decisions.” Id. Although lobbyists participate in the speak by generating information that can influence law and therefore the interpretation of it, lobbyists also work to “signal legislators on the electoral consequences of their actions and provide information to constituents that may reframe an issue or . . . change mass opinion.” Id. at 4. This does not operate then as a scheme to capture people’s will, but to manipulate public opinion to achieve certain electoral results potentially through obfuscation or other means. See David Halperin, The Perfect Lobby: How One Industry Captured Washington, D.C., The Nation, http://www.thenation.com/article/179161/perfect-lobby-how-one-industry-captured-washington-dc (discussing the impact of lobbying on the growth of the for-profit higher education sector).

Pierson, supra note 27, at 147.

See id. at 151.
Groups mobilize and form to establish the importance of statutorily codifying a right or to defend against an existing statute’s retrenchment.111 “Public attitudes and preferences are often funneled through individuals and groups that press their constitutional agendas on Congress, the executive branch, and the courts.”112

One such group, the National Association for the Advancement of Colored People, created a Legal Defense and Educational Fund to systematize litigation as a tool to gain important rights for African Americans.113 In conjunction with the fund, Charles Houston, then Dean of Howard Law School, sought to build a social movement that would marry “the emerging black insurgency with civil rights litigation” in attacking segregation.114 He wanted to take advantage of any judicial activism and connect formally and strategically the legal struggle with the burgeoning Black Freedom Struggle.115

In the landmark school desegregation case, Brown v. Board of Education,116 the legal team for the plaintiffs, arguing against school segregation, introduced as evidence psychological studies showing the impact of segregation on children.117 The goal in using the studies was to emphasize that separate but equal did not ameliorate or avoid the psychological damage to children, during their formative years, caused by segregation.118 Segregation was not just about separation but also about “the perpetuation of subordination” and stereotypical beliefs about the “intellectual inferiority of Afr[ican] Americans.”119 The team introduced a well-known study conducted by Kenneth and Mamie Clark.120 The study “examined the psychological ... [impact] of segregated and racially mixed schools

111 See e.g. DEVINS & FISHER, supra note 34, at 34 – 35 (describing various interest groups such as the American Civil Liberties Union which has used its influence to “expand constitutional guarantees” on many issues including rights for gays and lesbians).
112 DEVINS & FISHER, supra note 34, at 34 (describing how the National Consumers’ League advocated for reforms that would normalize protections for factory workers through legislation and the courts and how “the American Liberty League was organized by conservative businessman to challenge” those reforms).
113 DEVINS & FISHER, supra note 34, at 35.
115 Id. In the latter part of the 60s and throughout the 70s, spurred on by the gains made during President Johnson’s Great Society efforts, more people began to coalesce around people of shared interests and formed groups to advocate for their rights. JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945-1974 638-641 (1996). These groups often turned to litigation to advance their rights. Id. This litigation approach was adopted by other groups (such as environmental and women’s groups) as they sought to advance their social policy objectives. DEVINS & FISHER, supra note 34, at 35.
116 347 U.S. 483 (1954). Brown is a United States Supreme Court case that consolidated three school desegregation cases on direct appeal to the Supreme Court from their respective district courts. The three consolidated cases were Briggs v. Elliott, 103 F. Supp. 920 (S.D. South Carolina 1952), Davis v. City Bd. of Prince Edward Cnty. Va., 103 F. Supp. 337 (E.D. Va. 1952), and Brown et al. v. Board of Ed. of Topeka, 98 F. Supp. 797 (D. Kan. 1955).
118 Id. at 123.
119 Id.
120 Id. at 124.
on black children." 121 Children (ranging in ages from three to seven) were shown four dolls - two where brown and two were white. 122 The children were asked to identify the race of each doll and then were asked to respond to a series of commands regarding the dolls. 123 They were asked to choose the doll they wanted to play with. 124 They were also asked to identify the nice doll, the bad doll, and the doll that was a nice color. 125 The study indicated that the black children picked the white dolls when asked what doll they would like to play with, what doll was nice, and what doll had a nice color. 126 They only picked the black doll with regularity when asked to identify the bad doll. 127 "The Clarks concluded that the studies indicated self-rejection, one of the negative effects of racism on children at the early stages of their development." 128 The team wanted "the judges to grapple with ... [this] reality of segregation" and thought the expert testimony on the matter would force the judges to decide whether they would continue on in "spurious rationalizations" of segregation or "enforce the Fourteenth Amendment" in the way that it was meant to be enforced - to ensure true equality. 129

Though Brown did not question agency action and a court's willingness to defer to it per se, it does highlight the perils of not considering the social condition and the public opinion which accompanies it when deciding an issue. Even though the plaintiffs' lawyers presented hours of testimony on compelling information regarding the effects of segregation on black children, the lower court's opinion did not address these concerns. 130 In its majority opinion, the lower court noted that the issues raised by the studies were ones of legislative policy that the court could not interfere with. 131 The Court ruled that segregation was the law and that Plessy v. Ferguson 132 had made it permissible. 133 The court's only action was to rule that black students were entitled to equal education facilities - not integrated. 134

Integration was not ordered until the United States Supreme Court ruling in Brown which held, in the face of Plessy, that "separate educational facilities were inherently unequal." 135 In making the decision that segregating students based solely on race deprives minority children of equal education opportunities, the court relied heavily on the history of the separate but equal doctrine - from Plessy through later education cases such as Sweatt v. Painter, et al., 136 and McLaurin v.

121 Id.
122 Id.
123 Id.
124 Id.
125 Id.
126 Id.
127 Id.
128 Id. at 125.
129 Id.
130 Id. at 126-27
131 Id. at 127.
132 163 U.S. 537, 550-52 (holding that separate but equal facilities were legal).
133 COTTRIEL, ET AL., supra note 117, at 127.
134 Id.
135 Id. at 150 (citing Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954)).
Oklahoma State Regents for Higher Education,\textsuperscript{137} which declared separate but equal higher education systems unconstitutional under the Equal Protection clause of the Fourteenth Amendment.\textsuperscript{138} The Supreme Court also relied heavily on the Clark study in ruling that separate but equal creates within children “a feeling of inferiority as to their status in the community that may affect their hearts and minds in ways unlikely to ever be undone.”\textsuperscript{139} Separate but equal may have been the law of the land and courts may have determined that policy regarding segregation was the province of the legislature, but the Supreme Court in Brown could not ignore the social condition, the people’s will regarding it, and the role the law should play in seeing that will realized.\textsuperscript{140}

According to Tocqueville,

>[the s]ocial condition is commonly the result of circumstances, sometimes of laws, oftener still of these two causes united; but when once established, it may justly be considered as itself the source of almost all the laws, the usages, and the ideas which regulate the conduct of nations: whatever it does not produce, it modifies.\textsuperscript{141}

Interest groups also advance their agendas by publicizing “their findings and conclusions about important public matters … in articles, books, … commission

\textsuperscript{137} See generally 339 U.S. 637 (1950).
\textsuperscript{138} COTTROL, ET AL., supra note 117, at 149-50.
\textsuperscript{139} Id. at 127 (citing Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954)).
\textsuperscript{140} The Court noted that it could not turn back the clock when the Fourteenth Amendment was adopted or to when Plessey was decided. Brown v. Bd. of Educ., 347 U.S. 483, 491 (1954). The Court said that it “must consider public education in the light of its full development and its present place in American life throughout the nation.” Id.

The death penalty debate serves as another example of how public opinion swayed the judiciary in declaring a moratorium on the practice. See DEVINS & FISHER, supra note 34, at 30-32 for a discussion of the Supreme Court’s treatment of death penalty cases from 1972 through 1997 where the Court reversed the death penalty in Texas and Georgia declaring it cruel and unusual due to the “erratic nature” of the penalty’s application and held that “cruel and unusual punishment requires a flexible analysis … [recognizing] that as public opinion changes, the validity of the penalty would have to be re-examined.” In 1997, the Court found it unconstitutional to execute the mentally retarded and to have judges instead of juries impose the death penalty. Id. The Court did not look to the text of the Constitution, the framers’ intent, or its own precedent in reaching its decision, but relied on a “national consensus” that had developed against such executions. Id. Even though the states reinstated the death penalty with changes that addressed the Court’s concerns after the moratorium, id., reports today indicate that the death penalty imposition continues to decline with “[j]ust three states — Texas, Missouri and Florida — account[ing] for … [eighty] percent of the total [executions].” Mark Sherman, New Death Sentences, Executions Continued to Drop in 2014, http://bigstory.ap.org/article/3a37a15f20e44b2f95662f8c58a2c307/executions-new-death-sentences-continue-fall (2014). While polls tend to show that Americans still favor the death penalty, concerns over executing innocent people, botched executions, and arbitrary death sentences have put executions on hold in many states. Michael Walsh, New Death Sentences, Executions Continued to Drop in 2014, Report Says, http://news.yahoo.com/new-death-sentences-executions-continued-to-drop-in-2014-report-says-214248073.html (2014).

The movement to abolish slavery also found its roots in public advocacy. DEVINS & FISHER, supra note 34, at 32 (noting that “[t]he essential antislavery documents were private writings and speeches, not court decisions or legislative statutes”).

\textsuperscript{141} TOCQUEVILLE, supra note 35, at 57.
In supporting the use of such material in making judicial determinations, Justice Brandeis stated that a judicial opinion derives authority, just as law derives its existence, from all facts of life.144 “A . . . judge is free to draw upon these facts wherever he can find them, if only they are helpful.”145

The people then, and their “speak,” cannot be fully represented on the face of laws and regulations nor captured by the legislative process which brings them into existence. Rather, the dynamic nature of the deliberative process (from which the people’s speak emanates) in creating and entrenching the super statute, is part and parcel of the law and any agency regulations, rules, and decisions derived from it. As such, that speak must be part of the court’s analysis when rights conferred by a super statute are implicated.

II. THE EMPEROR AND HIS CLOTHES: THE INSTITUTIONAL CLOAK OF DEFERENCE

While Chevron “encapsulates the relationship between the courts, the agencies, and Congress in administering and interpreting statutes,”146 it relies too heavily on the assumption that Congress fully represents the people’s will. The ultimate effect is that Chevron deference allows courts to leave the people’s will out of its analysis and deprives the people of an opportunity to be heard regarding agency decisions and regulations. The very existence of parties in litigation suggests that some aspect of the normative debate has malfunctioned. According to Eskridge and Ferejohn, “judicial review might be the only mechanism available for jump-starting institutions of public deliberation that are broken.”147

The Chevron doctrine encompasses two steps in determining whether agencies have tread too far in their actions according to the statutes under which they operate. That two-step process requires that the court first determine whether Congress has, through the statute’s language, spoken clearly with regard to the agency action at issue.148 If Congress’ intent is clear, there is no need to move on to the second step, which determines whether the agency’s action is based on a permissible construction of the statute under which it gets its power.149 The result

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142 DEVINS & FISHER, supra note 34, at 35.
143 Id. at 36 (discussing the proliferation of amicus filings by interests groups in Supreme Court cases).
144 Id.
145 Id.; William H. Taft, Criticisms of the Federal Judiciary, 29 Am. L. Rev. 641, 643 (1895) (“In so far as fear of public comment does not affect the courage of a judge but only spurs him on to search his conscience and to reach the result which approves itself to his inmost heart, such comment serves useful purpose.”); but cf. DEVINS & FISHER, supra note 34, at 35 (explaining Congressman Wright Patman’s admonition against relying on articles, books, and reports declaring judicial use of such material improper because the studies contained within such reports are not objective and are set for the express purpose of skewing the court’s judgment to the their particular viewpoint).
147 ESKRIDGE & FEREJOHN, supra note 7, at 23.
149 Id. at 842–43.
of this is that deference to agency action and interpretation under the statute becomes the default and independent judgment is reserved for special occasions narrowly defined and inconsistently applied.  

Prior to *Chevron*, courts employed a multiple factors test in determining whether to defer to agency statutory interpretation. These factors operated under a sliding scale and while there were decisions made at the polar extremes during this time — where agency view was completely ignored or completely dispositive,

the Court might embrace a particular interpretation (1) because it was supported by the language of the text, (2) because it was consistent with the legislative history, and (3) because it was the longstanding construction of the administrative agency.

Under this scheme, independent judicial judgment was the default rule — not deference. "Deference to agency interpretation was appropriate only if a court could identify some factor or factors that would supply an affirmative justification for giving special weight to agency views."  

While the *Chevron* scheme seemed to offer a way to provide guidance where there was seemingly none before, it actually made deference an all or nothing proposition thus eliminating the sliding scale factor analysis of the past. In *Chevron*, Justice Stevens wrote that Congress is the ultimate lawmaking authority of the land. If Congress has spoken clearly on an issue, then the court, as well as the agency, must give effect to that intent. Under this democratic theory, Justice Stevens reasoned that if the statutory language is unclear, the gap filler in determining its meaning should be the agency, which derives its power directly from Congress. The agency, if it is in fact operating in a permissible way, represents the people's will because the agency is created by Congress and Congress

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150 See Merrill, supra note 41, at 977; see also Abigail R. Moncrief, Reincarnating the "Major Questions" Exception to *Chevron* Deference as a Doctrine of Non-Interference (Or Why Massachusetts v. EPA Got it Wrong), 60 Admin. L. Rev. 594, 596 (2008) (arguing that the "major questions" exception, which allows courts to bypass *Chevron* deference to agency action involving major economic and political questions, should be reincarnated and reconceptualized after the Court did not invoke it when faced with a major issue in Massachusetts v. EPA, 549 U.S. 497 (2007); but cf. King v. Burwell, 576 U.S. ___ at 8 (2015) where the Court essentially resurrects the major questions exception by refusing to apply *Chevron* deference calling the matter an *extraordinary* one that gives "reason to hesitate before concluding that Congress" meant for the agency to resolve any ambiguity in the statute. (emphasis added)

151 *Id.* at 972.

152 *Id.* at 972.

153 *Id.*

154 *Id.* at 977.


156 *Id.* at 843; Merrill, supra note 41, at 978.
is elected by the people. This accountability syllogism thus serves as the justification for applying *Chevron* deference to agency action. However, this positions Congress and agency appointees as the ultimate interpreters thus trapping a statute's development in a web of analysis and review that never captures the people's will beyond what can be measured from electoral participation and rule promulgation procedures.\(^{159}\) Thus, an over-reliance on Congress and agencies to represent the people's will could in fact block it from reaching the court and, with respect to the HEA, result in decisions that retrench the underlying policy of the statute.

**A. Participation**

Section 1098a(a)(1) of the United States Code requires that the DOE obtain public involvement in the development of proposed regulations to implement programs under Title IV of the HEA prior to publishing.\(^{160}\) Arguably, this mandate is satisfied during the administrative process through the negotiated rulemaking mechanism that accompanies promulgation of an agency regulation.\(^{161}\) Negotiated rulemaking supplements the notice and comment feature of agency rulemaking.\(^{162}\) It brings together various stakeholders representing constituencies that would be impacted by the proposed regulation.\(^{163}\) The negotiated rulemaking committee meets publicly to assess the data, laws, and policies related to the proposed regulation in an effort to reach consensus.\(^{164}\) If the committee reaches consensus, the agency adopts the consensus rule as its proposed rule and then proceeds to the notice and comment portion of the process.\(^{165}\)

Negotiated rulemaking was introduced as a way to remedy the time and expense associated with agency rule promulgation.\(^{166}\) Those favoring it highlighted the fact that the negotiation process would take place before an agency issued a proposed regulation and thus the fights that often ensued after publishing notice of the rule would be eliminated.\(^{167}\) In fact, proponents of negotiated rulemaking not only favored it because it would make the rulemaking process go more smoothly by eliminating controversy and fights, but in doing so, it would also ward off judicial review challenges.\(^{168}\) Once promulgated, the regulation would be less likely to

\(^{159}\) *See generally* DEVINS & FISHER, *supra* note 34, at 40 (describing Congress' role as ultimate interpreter as the result of increased need for constitutional interpretation and "the Supreme Court's willingness to defer to elected government" on interpretation matters).


\(^{162}\) Id. at 1256.


\(^{164}\) Id. at 33; Coglianese, *supra* note 161, at 1257.

\(^{165}\) Id. at 1256

\(^{166}\) Id. at 1256, 1262.

\(^{167}\) Id. at 1262-63.
generate subsequent conflict and litigation if developed through a process that sought consensus of the affected parties at the outset. However, this reliance on consensus and collaboration at the rulemaking level to represent the people's will is misplaced. It assumes those chosen to participate in the negotiated rulemaking process truly represent the people and ignores the reality that participation in that process or in any arena can be thwarted by socio-economic status and elite stimulus.

In June of 2010, the DOE Secretary published a notice of proposed rulemaking. The Secretary noted that the purpose of the regulations would be to strengthen and improve the administration of programs authorized to receive federal funds under the HEA.

After the regulations were eventually published, the Association of Private Sector Colleges and Universities ("APSCU") responded by filing suit against the DOE alleging, among other things, that the rulemaking process was procedurally flawed regarding some of the regulations published. The DOE conducted a series of public hearings and three negotiated rulemaking sessions. It chose non-federal negotiator representatives from each group involved in the student financial assistance programs authorized by Title IV of the HEA.

The APSCU argued that the negotiated rulemaking sessions were not conducted properly and were abandoned too soon after consensus was not reached initially. The APSCU did acknowledge that the sessions properly focused on the issues that significantly impact for-profit schools. However, the APSCU claimed that the negotiators participating in the negotiated rulemaking sessions did not adequately represent for-profit schools as there was only one representative from the sector on the negotiating team. When sector representatives requested more representation, the necessary consensus for approving that request was not achieved. The APSCU argued that the rulemaking process was further flawed because the DOE undermined the process by advancing proposals that would never be agreeable to certain negotiators and thus a failure to reach consensus was a

169 Id.
170 But see Michael Hers, Some Thoughts on Judicial Review and Collaborative Governance, 2009 J. DISP. RESOL. 361, 368-69 (stating that negotiated rulemaking proponents trust the process because it mimics some elements of popular decision making values found in the legislative process and thus its outcomes are often deemed "right" and appropriate for highly deferential judicial review).
171 See GOLDSTEIN, supra note 71, at 4, 21 (arguing that political leaders drive who participates and that invitations to participate are socially structured and political).
173 Id.
176 Id.
177 Id. at 12-13.
178 Id. at 12.
179 Id.
180 Id.
natural result. After consensus was not reached initially, the DOE did not begin additional negotiated rulemaking sessions, but rather moved on to the notice-and-commenting procedures before eventually issuing proposed regulations. The court did not address the full breath of the APSCU's arguments regarding the negotiated rulemaking process. It did, however, strike a portion of one regulation because the DOE failed to properly notify and provide an opportunity to comment on a rule change regarding that regulation.

While the APSCU arguably has more resources and connections than the average citizen in ensuring its participation in negotiated rulemaking, its arguments reveal the inherent problems in using the results of such processes as a proxy for the people's will. These problems are magnified when considering the average citizen as negotiated rulemaking incorrectly assumes notice of opportunities to participate actually reaches the people and that they are "elitely stimulated" enough to search for them when they do not. In terms of being a reliable source of and guiding the agency as to the people's will, this is the essential drawback of negotiated rulemaking. Like the legislative process, negotiated rulemaking is prone to defects in purporting to represent the people's will and thus the outcomes from it should face strenuous judicial review.

B. Collaboration

Processes such as negotiated rulemaking promote and highlight collaboration and not the deliberation necessary to keep entrenched statutes and their underlying policies afloat. Arguments in favor of collaboration suggest that legislation is legitimated by the legislators' democratic mandate. Courts should thus review collaborative governance as an extension of legislation and accept the outcome of such processes as long as they can determine they were bona fide. But what makes them bona fide leaves a big question.

Collaboration suggests compromise in that all sides get some portion of what they desire. This compromise leads to confusion about the people's will regarding maintenance of an entrenched super statute. If one side determines that the statute can be used to suggest fiscal austerity (protection of federal financial aid funds) and the other side determines that the statute can be used for social justice (education access), then how the statute is managed depends on what side is in control. The

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181 Id. at 13.
182 Id. at 13-14.
184 See GOLDSTEIN, supra note 71, at 4, 18, 21 (describing participation as structured and highlighting findings which prove that socio-economic status and elite stimulus drive who participates).
185 Here, supra note 170, at 365-67.
186 See id. at 368.
187 See id. at 365-66.
188 See id.
189 See Motor Veh. Mfrs. Ass'n v. State Farm Ins., 463 U.S. 29, 59 (1983) (Justice Rehnquist, in a dissent, stated that an agency may adjust its programs to be in line with the philosophy of a new administration within the bounds set by Congress). Justice Rehnquist found no trouble with an agency's
people speak and thus express their will by voting for who should have that control, but political elections are not about the people’s will as much as they are about constructing issues in a way that would allow the people to vote for a particular side.\textsuperscript{190} What’s more, this varied issue approach promoted by compromise actually can confuse the people’s will even more and provide a ready opportunity for politicians to obfuscate the real issues in place of those more fashionable or palatable for election purposes. Therefore, collaboration does not necessarily represent the people’s will as much as it represents political maneuvering at best and obfuscation at worst.\textsuperscript{191}

Collaboration is thus not the key to legitimizing agency decisions.\textsuperscript{192} Deliberation is. Normative debate deliberation narrows and expands the statute that governs agency action while it takes into account the people’s will. The very nature of deliberation under the normative debate construct suggests compromise and the need for consensus. But, in the normative debate context, deliberation has a real time quality. Within this scheme, the statute and its application is tested and then narrowed or constructed according to what those tests reveal about the people’s will. This constant revisiting of the statute is set apart from collaboration, which is often a “one shot” deal. Deliberation, on the other hand, engages the people in shaping and molding the statute as the people’s needs change. The functional entrenchment of the HEA, through its multiple reauthorizations since 1965, serve as an example of how deliberation rises above collaboration and consensus and actually transforms an ordinary statute into a super statute.\textsuperscript{193} Thus, the judiciary must consider more than whether the people met and agreed. The judiciary must also consider what the people say through their social movements, interest group participation, and publications about the right provided and protected by the super statute. This is what must influence the court’s review of agency action with regard to super statutes.

\textsuperscript{190} See GOLDSTEIN, supra note 71, at 21 (“Issues alone do not mobilize citizens to political activity. Political leaders recruit citizens to political activity for political reasons.”).

\textsuperscript{191} See Kevin D. Vinson & E. Wayne Ross, What We Can Know and When We Can Know It, Z MAGAZINE (Mar. 1, 2001), https://zcomm.org/zmagazine/what-we-can-know-and-when-we-can-know-it-by-kevin-d-vinson/ (stating that education policy is being crafted in a milieu of standards achieved by a consensus of liberal and conservative players).

\textsuperscript{192} See I.N.S. v. Chadha, 462 U.S. 919, 945 ("[T]hat a ... procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it ...." "Convenience and efficiency are not the primary objectives — or the hallmarks — of democratic government....").

\textsuperscript{193} See ESKRIDGE & PEREJOHN, supra note 7, at 17-18 (stating that the "central procedural feature of constitutional entrenchment is repeated legislative refinement and reaffirmation of the institutions over ... time 
...").
C. Reasoned Analysis

As noted above, in January of 2011, the APSCU filed suit against the DOE.\(^ {194} \) In this same lawsuit, the APSCU argued that the DOE's regulations regarding compensation and recruitment, misrepresentation of institutional information, and state authorization were arbitrary and capricious.\(^ {195} \)

The APSCU argued that the compensation regulations were arbitrary and capricious because they directly contradicted regulatory history, increased regulatory uncertainty, were not supported by reasoned explanation for their implementation, were not supported by required economic analysis, and did not consider less harmful regulatory alternatives.\(^ {196} \) Congress amended the HEA in 1992 to prohibit educational institutions qualifying under Title IV "from providing "any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid."\(^ {197} \) According to the APSCU, this provision was confusing to implement amongst all the stakeholders (DOE, for-profit institutions, traditional public and private institutions, etc.).\(^ {198} \) This led to the clarifying regulations which, according to the APSCU, provided interpretive guidance and bright-line rules that were easy for parities to understand and allowed the DOE and the courts to easily pinpoint improper compensation schemes.\(^ {199} \)

The APSCU argued that, in promulgating the 2010 regulations, the DOE ignored past regulatory confusion, repealed the clarifying regulations, and replaced them with the compensation regulations, which extended the statutory compensation restriction beyond its congressionally defined scope.\(^ {200} \) The compensation regulations, argued the APSCU, were inconsistent with the HEA because they extended to employees not covered by the statutory terms, including college presidents and other administrative officials.\(^ {201} \) The APSCU argued further that the compensation regulations provided no guidance as to how to safely, and without regulatory risk, compensate employees engaged in recruiting, admissions, financial aid counseling, and supervision of those areas.\(^ {202} \) The APSCU also argued that the DOE offered no reasoned explanation for replacing the clarifying regulations with the compensation regulations.\(^ {203} \)

The HEA prohibits institutions receiving Title IV funds from engaging in "substantial misrepresentations" regarding the educational programs, financial

\(^ {194} \) Complaint, supra note 174.
\(^ {195} \) Id. at 37.
\(^ {196} \) Id.
\(^ {197} \) Id. at 15 (quoting 20 U.S.C. § 1094(a) (20) (2012)).
\(^ {198} \) See id. at 16-17.
\(^ {199} \) Id. at 16–18.
\(^ {200} \) Id. at 18–19.
\(^ {201} \) Id. at 21 (stating, that "the actions of a college president could potentially come within the HEA's prohibition on the payment of incentive compensation" (quoting Program Integrity Issues, 75 Fed. Reg. 66,832, 66,874 (Oct. 29, 2010) (to be codified in scattered parts of 34 C.F.R.)).
\(^ {202} \) Id. at 22.
\(^ {203} \) Id. at 23.
charges, or the employability of graduates.\textsuperscript{204} The APSCU argued that the misrepresentation regulations were too broad in referring to all institutional statements and not just statements made pertaining to the institution’s educational programs, its financial charges, or the employability of its graduates.\textsuperscript{205} The regulations were also overly broad in defining misrepresentation.\textsuperscript{206} The APSCU argued that this broadening was capricious in that it denoted as misleading not only false statements, but also any statement that has the likelihood or tendency to confuse regardless of the speaker’s intentions.\textsuperscript{207} If schools are found to have made such statements, their eligibility under Title IV of the HEA to receive federal financial aid funds could be jeopardized.\textsuperscript{208} The APSCU argued that the misrepresentation regulations were arbitrary and capricious in that they did not provide reasoned explanation as to why institutions should not be afforded due process if they violate these regulations.\textsuperscript{209}

Finally, the APSCU argued that the state authorization regulations were arbitrary and capricious because they did not identify any tangible harm to be averted or benefit to be gained by their implementation, were not the product of reasoned analysis, provided no safety net for schools which were found to not be in compliance, and did not consider the impact of the regulations on schools offering distance or online education.\textsuperscript{210}

The HEA requires that an institution of higher education be legally authorized within each state to provide a program of education beyond secondary education.\textsuperscript{211} The APSCU argued that, prior to the 2010 state authorization regulations, the DOE did not define nor provide any guidance as to how states could specifically authorize an institution to provide a program beyond secondary education.\textsuperscript{212} Under the state authorization regulations, states would have to establish a scheme for authorizing schools receiving Title IV HEA funds and to provide, within those schemes, a mechanism by which complaints concerning schools could be reviewed and applicable regulations could be enforced.\textsuperscript{213} Schools would have to be authorized expressly by name to provide post-secondary education and not deemed simply an entity doing business within a state.\textsuperscript{214} According to the APSCU, such

\begin{itemize}
\item \textsuperscript{204} Complaint, supra note 174, at 26 (citing 20 U.S.C. § 1094(c) (3) (A) (2012)).
\item \textsuperscript{205} Id. at 27.
\item \textsuperscript{206} Id. The APSCU also argued that the HEA requires that punishable misrepresentations be substantial. Id. at 28. The regulations define a "substantial misrepresentation" as "[a]ny misrepresentation on which the person to whom it was made could reasonably be expected to rely, or has reasonably relied, to that person’s detriment." Id. (alteration in original) (citation omitted). Thus, argued the APSCU, an institution could lose its Title IV eligibility if, in the view of the DOE or a court, the statement has a tendency to confuse or even if the statement is true and the statement was never relied on. Id.
\item \textsuperscript{207} Id. at 2, 28.
\item \textsuperscript{208} Id. at 26 (citing 34 C.F.R. § 668.71(a) (2011)).
\item \textsuperscript{209} Id. at 37.
\item \textsuperscript{210} Id. at 28.
\item \textsuperscript{211} Id. at 31 (citing 20 U.S.C. § 1001(a)(2) (2012)).
\item \textsuperscript{212} Id. at 31-32.
\item \textsuperscript{213} Id. at 32.
\item \textsuperscript{214} Id. The APSCU notes that "[s]tates may exempt certain types of accredited schools and schools
requirements would impose great and unnecessary burdens on institutions offering online and innovative distance learning programs.215

In its analysis of the APSCU's claims, the court set out the various scenarios under which Chevron deference would or would not apply. The court noted that if the Chevron step one search for Congress' unambiguous statutory intent bears no fruit, the court moves on to the second step.216 Chevron's second step requires a court to determine the level of deference to give to the agency's interpretation.217 The court stated that Chevron deference applies to an agency's promulgation of its own interpretation through notice and comment rulemaking.218 The court continued by stating that it must "determine whether ... [the agency's] interpretation is permissible or reasonable, giving controlling weight to the agency's interpretation unless it is arbitrary, capricious, or manifestly contrary to the statute."219

With regard to the compensation regulations, the court held that the DOE supplied reasoned analysis in repealing the clarifying regulations and adopting the compensation regulations.220 The court stated that the DOE, based on its expertise, explained that the safe harbors under the clarifying regulations did "more harm than good" and eliminating them would bring the regulations and conduct in line with the statute.221 The court reasoned that the law does not require the best choice – only a reasonable choice.222 The court also found that the senior management compensation regulations, prohibiting senior level employees engaged in recruiting, admissions, or awarding financial aid from receiving incentive payments, were permissible under the HEA.223 In making this determination, the court looked to the plain meaning of the word "engaged."224 The court held that the "definitions reveal no flaw in the Secretary's regulation" and the HEA does not exempt senior management from such a rule.225 The court held further that the DOE Secretary, in light of broader concerns, did not act arbitrarily or capriciously in promulgating the regulations.226

The court deferred to the DOE's interpretation regarding the misrepresentation regulations' scope.227 The court referenced the DOE's post promulgation Dear Colleague Letter which limited misrepresentation to "statements concerning

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215 See id. at 32.
217 Id.
218 Id.
219 Id.
220 Id. at 122.
221 Id.
222 Id. at 122-23.
223 Id. at 123.
224 Id.
225 Id. at 123.
226 Id. at 124.
227 Id. at 126.
educational programs, financial charges, and employability." The court held that the definitions were specific enough to provide a materiality requirement to the misrepresentation definition and cited the DOE's continued commitment to reasonably consider all the facts and circumstances around any alleged misrepresentation. The court also deferred to the DOE's interpretation regarding the definition of substantial misrepresentation. The court held that the regulations defining substantial misrepresentation were reasonable and that the Secretary did not act arbitrarily or capriciously in promulgating them. The court noted that "since the ...[DOE's] focus is on worthwhile education and the funding and repayment of federal monies, the Court cannot say the Secretary acted unreasonably by omitting an intention to deceive or confuse from its definition of misrepresentation...."

The court declined to address the DOE's authority to promulgate the state authorization regulations. The court did however strike a portion of the statutory authorization regulations because the DOE did not properly conduct notice and comment regarding a change to that particular provision.

Few would question the DOE's ability and mandate to promulgate regulations that foster access to higher education. But, the court's seemingly automatic deference to the DOE's decision to promulgate these precise regulations without studying the people's will to determine if they fall in line with the underlying purpose of the HEA is troubling. The court did take a "hard look" at the regulations in reviewing them for reasonableness. But, this review was not "hard" enough to capture the people's will on the matter as it focused more on language constructs and statutory permissions for DOE action. The court did not fully consider how the regulations might impact people's access to higher education. In today's climate of fiscal austerity and commodified higher education schemes, it is not difficult to find reasonableness in the DOE's regulations. In the APSCU case, the court referenced the access purpose behind the HEA but did not consider what access would mean for today's citizen in light of the promulgated regulations.

228 Id.
229 Id. at 129.
230 Id. at 128.
231 Id.
232 Id. at 128
233 Id. at 133-35.
234 See id. at 113 (citing 20 U.S.C. 1070 (a) (2012))(stating that the purpose of Title IV is to "assist in making available the benefits of post-secondary education to eligible students ... ").
235 In Motor Veh. Mfrs. Ass'n v. State Farm Ins., 463 U.S. 29, 46, 57 (1983), the Court declined to give deference to agency action and held that the National Highway Traffic Administration acted arbitrarily and capriciously in changing motor vehicle safety requirements without providing a reasoned analysis supporting that the change was in the public's best interest. Search for reasoned analysis became known as the hard look approach. Patrick M. Garry, Judicial Review and the 'Hard Look' Doctrine, 7 Nev. L. J. 151, 158 (2006). According to Garry, the hard look approach provides a "substantive check on agency power" ensuring that "agency decisions serve the public interest." Id. at 152-53.
The court did not consider whether the DOE, in an attempt to weed out the bad actors, might have also created an unworkable situation for the good actors (traditional and for-profit institutions alike) who provide meaningful higher education opportunities.238

The APSCU case illustrates the impact of a review scheme that defaults to agency deference. This creates a slope too slippery for ensuring that agency action is in line with the underlying purpose of entrenched super statutes such as the HEA.239 Again, the goal here is not to suggest that every plaintiff complaining about DOE action should win. Rather, this case demonstrates how the deference scheme allows a court to bypass considering the people's will when reviewing agency action, thereby removing itself from accessing and thus participating in the normative debate. Studies, investigations, and reports have shown that the for-profit sector's reliance on financial aid funds leaves many of its students with disproportionately high debt and loan defaults which increase the burden on taxpayers.240 Studies also indicate that the students affected most disproportionately are "African American and Hispanic ... [thereby] furthering the persistent racial divide in higher education."241 The DOE's rules attempt to protect access by addressing for-profit schools' unscrupulous acts. But, the purpose of the HEA is also to foster access -- to provide access to meet the needs of today's student. By not considering the people's speak in judging the reasonableness of the DOE's

89 v. U.S. Department of Education, 56 U. KAN. L. REV. 147, 148 (2007) (criticizing the Supreme Court's application of Chevron to DOE action (that ultimately resulted in compromising the ability of two school districts in New Mexico to address the unique learning needs of Native American students in the districts) as constraining and producing an outcome misaligned with congressional intent).

238 See Thomas L. Harnisch, Changing Dynamics in State Oversight of For-Profit Colleges, American Association of State Colleges and Universities, April 2012 9 http://www.aascu.org/uploadedFiles/AASCU/Content/Root/policyAndAdvocacy/policyPublications/Policy Matters/Changing%20Dynamics%20in%20State%20Oversight%20of%20For-Profit%20Colleges.pdf (stating that the regulations apply to all of American post-secondary education and explaining that large for-profit college networks have the resources to navigate the state authorization web whereas most schools that are non-compliant are public institutions and established private not-for-profit institutions).

239 See Ass'n of Private Sector Cols. & Univs. v. Duncan, 681 F.3d 427, 447-453 (D.C. Cir. 2012) where the court of appeals reversed the lower court's ruling regarding some portions of the regulations calling the court's deference improper in those instances where the DOE failed to provide reasoned analysis or acted outside the permissible bounds of the HEA.

Although the court of appeals seems to force more reasoned analysis in some instances, this may only be one step above the perfunctory explanation originally offered by the DOE. For example, the court of appeals held that DOE failed to provide reasoned analysis in response to comments regarding the incentive pay compensation regulations' impact on minority recruitment. Id. at 449. In response to these concerns, the DOE stated that compensation regulations "... apply to all employees ... engaged in any student recruitment, admission activity, or [financial aid decisions]." Id. The court noted that the DOE's failure to address these concerns or its conclusory approach to them was "fatal to its defense." Id. However, the court mentioned that the DOE's answer fell just short and it would be a simple matter to address these concerns on remand. Id.


241 Center for Responsible Lending, supra note 103; Ansel, supra note 240.
actions, the court, in the APSCU case, missed an opportunity to examine the regulations’ impact on continued higher education access for the very students most susceptible to and affected by the unscrupulous actors. “Judicial review should be deliberation–respecting—which it cannot easily be if judges refuse to consider the deliberative materials.”

III. BUT THE EMPEROR HAS ON NOTHING AT ALL: “DE–CLOAKING” AND DECONSTRUCTING DEFERENCE TO AGENCY ADMINISTRATION OF SUPER STATUTES

The current scheme for reviewing agency action regarding a super statute must be “de-cloaked” and exposed for what it is – a language debate that does not consider the people’s will. While it is true that statutes delegating “authority to administrative agencies are different … as Congress may delegate … not only the authority to implement the statute but, implicitly, the authority to interpret it as well,” this construct ignores that even within this subset of statutes, there are differences. Statutes that agencies are allowed to implement and interpret may also be super statutes entrenching important rights society has come to expect and depend upon. Those statutes cannot be subject to an all or nothing deferential interpretive approach when agency action involving them comes into question.

Because super statutes represent a codification of rights-claiming activity by citizens, courts should consider not just what Congress may have meant by its statutory language but also what the people meant, through the normative debate process in entrenching the statute. To determine whether a super statute clearly allows agency action, courts must consider all that has driven and maintained the statute’s super status—the text, congressional intent, the purpose for which the statute was created, the social condition, and actual existing records of the people’s will. These make up and influence the normative debate and thus the judiciary must consider it.

That courts will engage in judicial review of agency decisions sometimes—or, according to Thomas Merrill, more times than they apply Chevron

242 ESKRIDGE & FEREJOHN, supra note 7, at 266.
245 See Johnson, supra note 7, at 547 (noting that super statutes represent rights-claiming advocacy from citizens where citizens “pressure politicians to provide something they expect and deem essential”).
246 See ESKRIDGE & FEREJOHN, supra note 7, at 293 (“Judges … ought to hew closely to the text and give it stingy readings for ordinary statutes, but for super statutes judges ought to be attentive to small ‘c’ constitutional purpose, as well as competing constitutional norms.”).
247 See Johnson, supra note 7, at 547.
248 See ESKRIDGE & FEREJOHN, supra note 7, at 292–93; DEVINS & FISHER, supra note 34, at 35 (stating that interest groups publish “articles, books, and commission reports” to “publicize their findings about important matters”).
deference—offers little solace. The reality is that the existence of this deference, along with potential judicial activism amongst the courts, leaves challengers in a bit of limbo regarding what kind of deference will be afforded to agency decisions.\(^{250}\)

The best way to simultaneously end this confusion and to involve the court in interpretative exercises beyond purely language and dictionary battles\(^{251}\) is to create a deference exception for entrenched super statutes. This approach would recognize the importance of super statutes and solidify them as legislation that codifies and protects a right that Congress could not have meant to leave solely to the discretion of an agency.\(^{252}\) To accomplish this, the judiciary could use a major questions exception to the *Chevron* deference approach.\(^{253}\) The major questions exception adds an additional step to the *Chevron* construct—a pre-beginning step—by considering whether the agency action in question deserves deference.\(^{254}\) This "step zero" approach serves as an "initial inquiry into whether *Chevron* [deference] applies at all."\(^{255}\) This question is only answered affirmatively if the agency action involves or implicates "major" economic or political questions—that those that Congress could not have meant to leave solely to an agency.

This exception to *Chevron* deference, with some modification, can be applied to agency action pursuant to an entrenched super statute.\(^{256}\) Instead of beginning

\(^{249}\) See Merrill, supra note 41, at 970; see ESKRIDGE & FERJEHN, supra note 7, at 266 (stating that interpretive semantics allow "activist judges to disrupt" on track "administrative constitutionalism" and "do-nothing' judges to tolerate constitutionalism that is off track, but within the letter of vague statutory directives").

\(^{250}\) See Choo, supra note 243, at 1082, 1084; Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 190 (noting that the judiciary’s move to pre *Chevron* law in its attempt to establish its primacy as well as the addition of several "epicycles to the Chevron framework has led to uncertainty about the appropriate approach").

\(^{251}\) Id. (arguing that Chevron deference has been weakened by judges’ frequent attempts to discern Congress’ intent through “dictionary battles” and the use of more available legislative interpretative resources).

\(^{252}\) See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (stating that, in the context of determining whether Congress meant that the Food and Drug Administration could regulate tobacco products, the court “must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency").

\(^{253}\) See Moncrief, supra note 150, at 596 (describing the major questions exception, which allows courts to bypass *Chevron* deference to agency action involving major economic and political questions, and arguing that it be reincarnated after the Court effectively overruled it by failing to apply it to a major question in Massachusetts v. EPA, 549 U.S. 497 (2007); cf. City of Arlington, Texas v. Federal Communication Commission et al., 133 S. Ct. 1863, 1868 (2013) (stating that the premise that there is a distinction between big important interpretations and run of the mill ones is false as the only question a court faces when confronted with agency interpretation of a statute it administers is always simply whether the agency has stayed within the bounds of statutory authority); but cf. King v. Burwell, 576 U.S._ at 8 (2015) (arguably resurrecting the major questions exception by not applying *Chevron* deference to Internal Revenue Service action regarding the Affordable Care Act).

\(^{254}\) Moncrief, supra note 150, at 597–98.

\(^{255}\) Sunstein, supra note 250, at 191.

\(^{256}\) Moncrief, supra note 150, at 598 (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218 (1994) as examples of the Court denying deference to agency action concerning issues of major "economic and political significance").

\(^{257}\) See generally Moncrief, supra note 150, at 598 (discussing agencies’ non-interference with
by determining whether agency action implicates major economic or political questions, the court would first determine whether the agency is acting pursuant to an entrenched super statute. To do this, the court would consider whether the statute in question codifies a right or collection of rights that society expects and has come to depend on. In doing so, the court would decide whether the statute provides a quasi-constitutional right – one so important and necessary to citizens' pursuit of happiness that agency action which potentially comes into conflict with that right must be reviewed.

The court would then proceed to the next step – determining whether that action invoked major economic or political questions in relation to the super statute that would render deference to agency action inappropriate. In City of Arlington Texas v. Federal Communication Commission et al., the Court noted that Chevron's foundation is greatly supported by the assumption that any ambiguity left by Congress in the enabling legislation is to be resolved first and foremost by the agency. This assumption is rooted in Congress' power to delegate to agencies and the agencies role as expert on the subject matter. But this assumes that Congress alone truly represents the people's will and that agencies have done their due diligence in discovering it. Electoral issue manipulation as well as administrative notice and participation procedures that do not give all the opportunity to participate puts this assumption into question. Thus, elections and administrative processes cannot serve as the sole proxies for the people's will when reviewing agency action pursuant to a super statute. The judiciary must take the matter up anew and consider the impact of the agency action on the people. In doing so, a no-deference standard would be established for agency action involving major economic or political questions regarding rights granted by super statutes.

One criticism of the major questions exception is that there is no clear standard for when to apply it—there is no "mechanism for categorizing future major

Congressional action as a basis for reinstating the exception after Massachusetts v. EPA, 549 U.S. 497 (2007) arguably weakened it by not addressing it when confronted with a question of major economic and political significance).

See Johnson, supra note 7, at 547.

See ESKRIDGE & FEREJOHN, supra note 7, at 283 (“When important normative issues of constitutional or (quasi-constitutional) significance are involved in agency interpretation cases, the justices may talk deference, but they perform their normative role to the hilt.”).

King v. Burwell, 576 U.S. __ at 21 (2015) (Justice Roberts stated that "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter."); see Elmer Elhaug, Symposium: Economics Beats Formalism, Supreme Court of the United States Blog, http://www.scotusblog.com/2015/06/symposium-economics-beats-formalism/ (June 25, 2015)(stating that the King decision confirms Chevron's limits when applied "to questions of deep 'economic and political significance'.")


See David Baake, Obituary: Chevron's Major Questions Exception (August 27, 2013) 3, https://journals.law.harvard.edu/clr/2013/08/27/obituary-chevron-s-major-questions-exception/ (likening the major questions exception to de novo review of agency interpretations with major political or economic significance).
questions cases."

This concern is neutralized when considering entrenched super statutes. Because super statutes, by their nature, represent those rights which have become entrenched in societal expectations through the normative debate process, the court may access that "normative debate record" to determine whether the agency action is pursuant to a super statute that preserves such a right. This includes case precedent, studies on the matter, amicus curiae briefs, publications, and other evidence of the social condition. By accessing these things, the court could take a broad purposive-like look at the statute when addressing agency action.

According to Eskridge and Ferejohn, deliberation is purposive because it considers solutions "to a ... [problem] in light of larger public purposes as well as their capacity to solve ... [them]." Deliberation considers "the costs and benefits ... of different solutions or norms ... and their correctness with the polity's larger commitments." The normative debate then, which represents the people's will, serves as the mechanism for ensuring that a no-deference standard is correctly applied.

As statutes' entrenched status is recognized, precedent will memorialize the designation. This would provide notice to the DOE as to how courts will review its action and prompt it to be more solicitous of a broader study of the people's true opinion on an issue. It would also potentially provide notice to the people that their voices will count. This may impact the people's willingness and opportunities to be heard. Lastly, and most importantly in the context of this article, this scheme enables the judiciary to become part of the normative debate process by accessing and understanding the people's will. Determining whether agency action on an issue should be subject to the no-deference standard will give the court an even more defined role in the normative debate process. In addition, while the scheme would not completely dissolve Chevron deference, it would protect the rights provided by entrenched super statutes from being a victim of its application.

The rights provided by super statutes are too significant for an unpredictable review scheme. Increasingly, in the context of access to higher education, there is less consensus amongst various stakeholders as to how and whether the government should provide and protect that access. While some see the government's support

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264 See Moncrief, supra note 150, at 612.
265 Bressman, supra note 244, at 559 ("[P]urposivists see ... the inevitable difficulty of capturing all the aspects or applications of a policy in a relatively few words"). Bressman describes intentionalist, purposive, and textualist statutory interpretative canonical attempts to reconcile the meaning of Congress' statutory language. Id. at 559–60. According to Bressman, the adopters of the intentionalist and purposive canons use legislative history to recover meaning and look for indications of broader statutory purposes, respectively. Id. at 559. They recognize the difficulty in reconstructing Congress' activities in promulgating the statute and look for objective evidence in determining the meaning of congressional language. Id. at 560. Modern textualists, however, regard the legislative process as chaotic and thus unreliable for the purpose of extracting meaning and thus rely on words' ordinary meaning. Id.
266 ESKRIDGE & FEREJOHN, supra note 7, at 15.
267 Id.
268 See Johnson, supra note 7, at 568 (stating that the lag time between HEA reauthorizations signaled an "inability of congressional members to reach consensus" on the government's role in providing higher education access); see also ST. JOHN, supra note 12, at 1 (arguing that "[t]he shift in the burden for paying for college from the government to the student ... has eroded opportunity for low
of higher education access as a fiscal drain inappropriately shouldered by the government, others see it as an indispensable government provision that must be maintained. The issues before the judiciary regarding higher education access are not only significant because most consider such access essential to personal and societal development. They are also significant because higher education access poses major economic and political questions that obviously cannot be solved by Congress and the DOE alone. One need only review the slow pace at which the HEA has been reauthorized to evidence the consistent and seemingly perpetual inability of legislators to reach an agreement on the administration of the higher education provision.

The judiciary must play its part in recognizing that continued access to higher education ranks, in significance, alongside freedom from cruel and unusual punishment under the death penalty, integrated education systems, and affordable health care—all situations where the Court accessed the people's will and considered the impact laws involving these issues would have on society. The judiciary has a duty in the normative debate process. That duty requires participation in the deliberation by reviewing agency action to determine whether the agency has promulgated or interpreted within the broad purpose of a super statute as established and entrenched by the people through the normative debate process. This is not a duty that can be upheld inconsistently. Thus, judicial review and not deference to agency action should be the norm whenever a super statute is at issue.

CONCLUSION

"Today [education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

While the Brown Court made this statement in the context of elementary and
secondary education, it is still salient when considering the significance of having access to higher education. *Chevron* chips away at this ideal. It allows for retrenchment of a right that has become part of the fabric of society. When considering agency action regarding access-granting programs and systems, the judiciary must stop to consider whether the agency's actions support the people's will and cannot consider that obligation met by virtue of elections and administrative processes. Leaving that critical determination solely to Congress and the DOE is not appropriate. If education is the key to success in life, then courts must review agency action on matters that would impact that. The judiciary must not be like the Emperor and his subjects who continued to parade about ignoring the people's calls. It must hear the people when interpreting statutes. The judiciary must transform its review of agency action into one that considers the normative debate. That does not limit the court to what Congress might have meant in enacting a statute or whether the agency is permissibly interpreting the statute. Rather, it broadens the court's reach to also consider what the people wanted in conceiving the right granted by the statute and what the people have declared as their current needs in maintaining their entrenched super statute. The people have spoken and continue to speak by participating in the normative debate. Now, the court must consistently and systematically hear them and, by doing so, take its rightful place at the normative debate table.