

the statute's language suggests it was highly motivated to revive the delegation doctrine and rein in the highly textualist *Chevron* test — there was no circuit split or important unresolved question of federal law or policy to otherwise explain the grant of certiorari.⁸⁴

Given the misgivings of Justices Kennedy and Alito, courts should be cautious about relying on *Zuni*. *Zuni* allows a court to proceed under the old, purposive *Chevron*, meaning that Step One would involve divining congressional intent using textual and extratextual tools. In cases in which the statute's text conflicts with clear policy and history, *Zuni* would allow a court to find Congress's intent ambiguous and to proceed to Step Two, under which a court could use a combination of technical statutory language (and corresponding agency technical expertise), established history of the agency construing that language, and statutory policy to find that Congress sought to delegate expansive "common law" interpretive power to the agency. In such a case, even a countertextual interpretation might be permissible if it is more consistent with the statute's purpose and history than a faithful textual reading would be. The conclusion that the agency has an expansive mandate to interpret the statute would obviate the fear that "agency policy concerns . . . shap[e] the judicial interpretation of statutes,"⁸⁵ for agency policy concerns would only shape the *agency's* interpretation of the statute, and the court, in deferring to the agency, would not have to interpret the statute's text at all.

2. *Deference to Agency Interpretation of Conflicting Statutes.* — In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,¹ the Supreme Court emphasized that "[t]he responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest are not judicial ones."² After concluding that Congress implicitly delegates policymaking authority to agencies when it enacts ambiguous statutes, the *Chevron* Court set out its now-iconic two-step approach to considering agencies' interpretations of ambiguous statutory provisions.³ While *ambiguous* statutes — the result of Congress's inability or unwillingness to legislate in painstaking detail — are an obvious byproduct of the modern administrative state, *directly conflicting* statutes are another unavoidable result of the extensive administrative system. Last Term, in *National Ass'n*

⁸⁴ See Petition for Writ of Certiorari at 8–9, *Zuni*, 127 S. Ct. 1534 (No. 05-1508), 2006 WL 1491269 (all but conceding that the Court's only interest in granting certiorari would be to correct the decision below).

⁸⁵ *Zuni*, 127 S. Ct. at 1551 (Kennedy, J., concurring).

¹ 467 U.S. 837 (1984).

² *Id.* at 866. In so noting, the Court quoted from another leading twentieth-century case, *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (known as the "snail darter case"): "Our Constitution vests such responsibilities in the political branches." *Id.* at 195.

³ See *Chevron*, 467 U.S. at 842–44.

of *Home Builders v. Defenders of Wildlife*,⁴ the Supreme Court applied the *Chevron* doctrine in the second situation — when two congressional mandates impose contradictory requirements on a federal agency. The Court deferred to the implementing agencies' interpretation of the Endangered Species Act⁵ (ESA) and thus held that the ESA's consultation requirement did not apply to mandatory action taken by the Environmental Protection Agency (EPA) pursuant to the Clean Water Act⁶ (CWA). The Court also held that the EPA's inconsistent statements did not render its ultimate decision "arbitrary and capricious." By applying the *Chevron* and arbitrary and capricious tests in a manner strongly deferential to agencies, the Court reaffirmed its commitment to judicial restraint in overseeing administrative actions.

In February 2002, Arizona applied to the EPA for authorization to administer the state's National Pollution Discharge Elimination System permitting program.⁷ Following the procedure set out in section 7(a)(2) of the ESA,⁸ the EPA initiated consultation with the Fish and Wildlife Service (FWS) to determine whether transfer of the permitting authority would adversely impact any protected wildlife species.⁹ The regional FWS office concluded that the transfer would not directly jeopardize protected species, but expressed concern that Arizona authorities would not consider possible impacts on protected species when making their licensing decisions; if so, the transfer of licensing authority to Arizona could indirectly affect some protected species.¹⁰ The EPA declined to consider such indirect consequences for two reasons. First, the EPA claimed that the causal link between the grant of permitting authority and any impact upon endangered species was too attenuated.¹¹ Second, the EPA asserted that the agency did not have authority to disapprove the transfer for this reason because impact on protected species was not among the nine criteria specified by the CWA as the prerequisites for transferring permitting authority to a state.¹² In resolving the disagreement between the regional FWS office and the EPA, the national FWS office concluded that any impact traceable to the state's lax oversight was a consequence of Congress's

⁴ 127 S. Ct. 2518 (2007).

⁵ 16 U.S.C. §§ 1531–1544 (2000 & Supp. IV 2004).

⁶ 33 U.S.C. §§ 1251–1387 (2000).

⁷ *Home Builders*, 127 S. Ct. at 2526.

⁸ See 16 U.S.C. § 1536(a)(2) (2000).

⁹ *Home Builders*, 127 S. Ct. at 2526–27.

¹⁰ *Id.* at 2527.

¹¹ *Id.*

¹² *Id.*

decision to give permitting authority to the states rather than of the EPA's transfer decision.¹³

The Ninth Circuit vacated the transfer decision, holding that the EPA's approval of the transfer was arbitrary and capricious because the EPA had held contradictory positions regarding its obligations under section 7(a)(2).¹⁴ The EPA had stated in its preliminary review of the transfer decision and in the Federal Register that section 7(a)(2)'s no-jeopardy requirement applied to the transfer decision, but had later changed its position.¹⁵ Judge Thompson dissented, arguing that because a federal regulation specified that section 7(a)(2) applied to discretionary actions and because the transfer decision was nondiscretionary, the transfer application was not subject to section 7(a)(2).¹⁶

The Supreme Court reversed and remanded. Writing for the Court, Justice Alito¹⁷ first noted that once the Ninth Circuit found the EPA's action to be arbitrary and capricious, it should have remanded to the agency for clarification of its reasons for interpreting the statute as it had rather than imposing the court's own construction.¹⁸ In "jump[ing] ahead to resolve the merits of the dispute," the Ninth Circuit had "deprived the agency of its usual administrative avenue for explaining and reconciling" the seeming contradictions that sometimes arise during the lengthy administrative decisionmaking process.¹⁹ The Court then concluded that the EPA's action was not arbitrary and capricious.²⁰ Responding to the argument that the EPA's position with respect to the ESA had been internally inconsistent, the majority noted that an agency is fully entitled to change its mind.²¹ The Court also explained that the EPA's inconsistency was not the type of error — if it had been an error at all — that would have required a remand since it

¹³ *Id.* The FWS also concluded that the EPA's continuing oversight of the Arizona permitting process would be sufficient to address the local FWS office's concerns. *Id.*

¹⁴ *Defenders of Wildlife v. U.S. EPA*, 420 F.3d 946, 959 (9th Cir. 2005).

¹⁵ *Id.* at 959–60.

¹⁶ *Id.* at 979–81 (Thompson, J., dissenting). The Ninth Circuit denied rehearing en banc. *Defenders of Wildlife v. U.S. EPA*, 450 F.3d 394 (2006).

¹⁷ Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas joined Justice Alito's opinion.

¹⁸ *Home Builders*, 127 S. Ct. at 2529 (citing *Gonzales v. Thomas*, 126 S. Ct. 1613 (2006) (per curiam)).

¹⁹ *Id.* at 2529.

²⁰ *Id.*

²¹ *Id.* at 2530. Because the Administrative Procedure Act empowers federal courts to review only *final* agency actions, the fact that an agency expresses one view at first but ultimately takes a different position does not render its action arbitrary and capricious. *Id.*; see 5 U.S.C. §§ 704, 706(2)(A) (2000).

would not have altered the outcome.²² In so noting, the Court embraced a harmless error rule for hard look review.²³

The Court next turned to the principal statutory question at hand, “a question that require[d] [the Court] to mediate a clash of seemingly categorical — and, at first glance, irreconcilable — legislative commands.”²⁴ Section 402(b) of the CWA provides that the EPA “shall” approve a state’s application for transfer of permitting authority unless it concludes that the state does not have sufficient authority to perform the nine functions identified in the statute.²⁵ Emphasizing that the “statutory language is mandatory and the list exclusive,” the Court concluded that once the nine criteria were satisfied, the EPA was required to approve the transfer.²⁶ The language in section 7(a)(2) of the ESA, however, is “similarly imperative,”²⁷ requiring every federal agency to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize” endangered species, threatened species, or their habitats.²⁸ Thus, the CWA and the ESA appeared to impose absolute, but conflicting, requirements.

As an initial matter, the Court rejected the Ninth Circuit’s conclusion that the ESA required the EPA to consider jeopardy to endangered species when making CWA transfer decisions.²⁹ Reading the ESA to apply to all agency actions, the Court reasoned, would have entailed the addition of a tenth criterion — consideration of the transfer’s impact on protected species — to the exclusive list of issues the EPA had to consider before approving a transfer.³⁰ Thus, applying the ESA’s no-jeopardy requirement to the transfer decision would effectively have repealed, at least in part, section 402(b) of the CWA by nullifying the nine-factor list’s exclusivity³¹ — thus running afoul of the strong presumption against implied repeals.³² The majority also noted that the Ninth Circuit’s interpretation would impliedly repeal many

²² *Home Builders*, 127 S. Ct. at 2530.

²³ In hard look review, the court asks whether “the agency [has] examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

²⁴ *Home Builders*, 127 S. Ct. at 2531.

²⁵ See 33 U.S.C. § 1342(b) (2000).

²⁶ *Home Builders*, 127 S. Ct. at 2531.

²⁷ *Id.* at 2532.

²⁸ 16 U.S.C. § 1536(a)(2) (2000).

²⁹ *Home Builders*, 127 S. Ct. at 2533.

³⁰ See *id.* at 2532 (quoting *Defenders of Wildlife v. U.S. EPA*, 450 F.3d 394, 404 n.2 (2006) (Berzon, J., concurring in denial of rehearing en banc)).

³¹ *Id.* at 2533.

³² See *id.* at 2532 (citing cases emphasizing the presumption against implied repeals).

additional federal statutes because section 7(a)(2) of the ESA applied to all federal agencies.³³

After rejecting the Ninth Circuit's interpretation, the Court considered an interpretation of section 7(a)(2) embodied in a regulation promulgated by FWS and the National Marine Fisheries Service, the two federal agencies charged with implementing the ESA.³⁴ This regulation, 50 C.F.R. § 402.03, provides that "[s]ection 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control."³⁵ The Court interpreted this regulation to mean that section 7(a)(2) applied *only* to discretionary agency action; the no-jeopardy requirement therefore would not apply to the EPA's mandatory decision under section 402(b) of the CWA.³⁶

The Court then applied *Chevron* to determine whether to defer to the agencies' interpretation of section 7(a)(2). Under *Chevron*, a court asks first whether Congress directly addressed the question at hand (Step One), and second, if Congress "did not actually have an intent" regarding the issue, whether the agency's interpretation was reasonable (Step Two).³⁷ In its Step One analysis, the majority concluded that section 7(a)(2) of the ESA was ambiguous in context even though it seemed clear when examined alone.³⁸ The Court emphasized that at Step One, a court must consider statutory context as well as relevant canons of statutory interpretation, including the canon against implied repeals.³⁹ Because a literal reading of section 7(a)(2) would have impliedly repealed many federal statutory provisions, including section 402(b) of the CWA, section 7(a)(2) was ambiguous: the statutory language did "not itself provide clear guidance as to which command must give way."⁴⁰ In its Step Two analysis, the Court concluded that the agencies' interpretation was reasonable in light of both the statute's language and the "overall statutory scheme," because it harmonized the two statutes without "overrid[ing] express statutory mandates."⁴¹ The majority further explained that the agencies that

³³ *Id.*; see also Reply Brief for the Petitioner at 1, *EPA v. Defenders of Wildlife*, 127 S. Ct. 2518 (No. 06-549), 2006 WL 3877330 (stating that the Ninth Circuit's holding was of "government-wide significance").

³⁴ *Home Builders*, 127 S. Ct. at 2533.

³⁵ 50 C.F.R. § 402.03 (2006).

³⁶ *Home Builders*, 127 S. Ct. at 2536.

³⁷ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

³⁸ See *Home Builders*, 127 S. Ct. at 2534.

³⁹ See *id.*

⁴⁰ *Id.*

⁴¹ *Id.* The majority further noted that the Court's recent decision in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), supported its conclusion that the interpretation was reasonable. See *Home Builders*, 127 S. Ct. at 2535 ("[T]he basic principle announced in *Public Citizen* — that an agency cannot be considered the legal 'cause' of an action that it has no statu-

administered section 7(a)(2) and promulgated 50 C.F.R. § 402.03 had — like the EPA — interpreted the regulation to mean that the ESA provision applied *only* to discretionary federal actions.⁴² Deferring to the agencies' interpretation of their own regulation and to the regulation itself as an interpretation of the ESA,⁴³ the Court accepted the agencies' conclusion that the ESA's no-jeopardy requirement did not apply to transfer decisions under section 402(b) of the CWA.

Justice Stevens dissented.⁴⁴ He declared that it is the courts' duty, to the extent possible, to give full effect to all statutes.⁴⁵ Therefore, the majority's acceptance of the agencies' interpretation, which limited section 7(a)(2)'s reach, was improper.⁴⁶ He asserted that the majority's reading was "fundamentally inconsistent with the ESA,"⁴⁷ because the Court had held in *Tennessee Valley Authority v. Hill*⁴⁸ that section 7 of the ESA "admits of no exception."⁴⁹ Because *Hill* did not contemplate an exception for mandatory actions, no such exception could exist.⁵⁰ Justice Stevens next questioned the majority's reliance on the regulation applying section 7(a)(2) to discretionary activities. He observed that because the regulation did not include the word "only," it did not limit section 7(a)(2)'s reach to discretionary actions alone.⁵¹ Finally, Justice Stevens asserted that even if the proper interpretation of section 7(a)(2) was that it applied only to discretionary actions, it would nonetheless apply to the transfer decision under the CWA because, in determining whether the nine criteria were satisfied, EPA officials had to exercise some judgment.⁵² He also described two ways of interpreting the CWA and ESA that, in his view, would give full effect to both

tory discretion *not* to take — supports the reasonableness of the FWS's interpretation of section 7(a)(2) as reaching only discretionary agency actions.").

⁴² *Home Builders*, 127 S. Ct. at 2537.

⁴³ *Id.* at 2538.

⁴⁴ Justices Souter, Ginsburg, and Breyer joined Justice Stevens's dissent.

⁴⁵ *Home Builders*, 127 S. Ct. at 2538 (Stevens, J., dissenting).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ 437 U.S. 153 (1978).

⁴⁹ *Home Builders*, 127 S. Ct. at 2539 (Stevens, J., dissenting) (quoting *Hill*, 437 U.S. at 173) (internal quotation marks omitted); see also *id.* at 2539 n.1 (noting that the ESA's no-jeopardy requirement applies to agencies' granting of licenses and permits).

⁵⁰ *Id.* at 2539–41. The majority responded to this argument by pointing out that 50 C.F.R. § 402.03 came after *Hill*, and that because the activities at issue in *Hill* were discretionary, the Court had no occasion in that case to consider whether the ESA's no-jeopardy requirement applied to mandatory actions. *Id.* at 2536–37 (majority opinion).

⁵¹ *Id.* at 2542 (Stevens, J., dissenting). In response to this argument, the majority commented that "[o]n the dissent's reading, section 402.03's reference to 'discretionary' federal involvement is mere surplusage," which would violate the Court's presumption against reading a text in a way that renders part of it redundant. *Id.* at 2536 (majority opinion).

⁵² *Id.* at 2548 (Stevens, J., dissenting). Justice Stevens also emphasized that the EPA is not charged with administering the statute. *Id.* at 2544.

without making one take precedence over the other.⁵³ Justice Stevens concluded that he would have held the EPA's interpretation to be arbitrary and capricious.⁵⁴

Justice Breyer, who joined Justice Stevens's dissent, also filed a separate dissenting opinion. After reserving judgment as to whether section 7(a)(2) covered every agency action,⁵⁵ he argued that section 402(b) of the CWA did not preclude application of the ESA to the EPA's action, explaining that even grants of discretionary power sometimes carry implicit limits.⁵⁶ Justice Breyer also argued that because the CWA and ESA shared a common purpose — preserving the state of the natural environment — the ESA should have applied to agency actions taken pursuant to the CWA.⁵⁷

The different approaches of the majority and the dissent in *Home Builders* reflect a disagreement about the judiciary's role when two federal statutes seemingly require an agency to take contradictory actions. While the majority and the dissent agreed that section 7(a)(2) of the ESA and section 402(b) of the CWA involved “conflicting shalls,”⁵⁸ they differed as to who should resolve that conflict. The majority viewed its role as that of a mediator,⁵⁹ facilitating the agencies' reasonable reconciliation of the apparent contradiction, while the dissent viewed the judiciary as the proper institution to harmonize the provisions.⁶⁰

The *Home Builders* Court reaffirmed the notion — solidified in *Chevron* — that agencies are the primary arbiters of policy when Congress fails to clarify how it would make a particular policy choice.⁶¹ Courts have been chastised for making policy choices but disguising

⁵³ *Id.* at 2544–48. First, the EPA could follow the consultation process set up by the ESA and ultimately seek an exemption from the appropriate congressional committee if a transfer of authority would jeopardize certain species. *Id.* at 2544–47. Alternatively, the EPA could, through its continuing oversight of the permitting program even after the authority was transferred, ensure that the permitting was not jeopardizing any listed species. *Id.* at 2547–48.

⁵⁴ *Id.* at 2550–51.

⁵⁵ *Id.* (contemplating that the no-jeopardy requirement might not apply to some Internal Revenue Service actions).

⁵⁶ *Id.* In this case, the limit would be the point at which the EPA's transfer decision jeopardized a protected species.

⁵⁷ *Id.* at 2553.

⁵⁸ *Id.* at 2538 (Stevens, J., dissenting).

⁵⁹ *See id.* at 2531 (majority opinion).

⁶⁰ *See id.* at 2538 (Stevens, J., dissenting); *see also id.* at 2541 (emphasizing that the Court was to give full effect to both statutes).

⁶¹ *See* Cass R. Sunstein, *Beyond Marbury: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580 (2006); Emerson H. Tiller, *Controlling Policy by Controlling Process: Judicial Influence on Regulatory Decision Making*, 14 J.L. ECON. & ORG. 114, 117–18 (1998). The meaning of ambiguity in the *Chevron* context has been debated in the literature. *See, e.g.*, Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2091–93 (1990); Note, “How Clear is Clear” in *Chevron's Step One?*, 118 HARV. L. REV. 1687 (2005).

them as legal choices either by finding that ambiguous statutes are “clear” under *Chevron* Step One⁶² or by applying hard look review too rigorously in order to overturn agency decisions.⁶³ *Home Builders* signals the Court’s frustration with such tactics as well as its desire to enforce more strongly *Chevron*’s allocation of interpretive authority. First, the *Home Builders* decision reaffirms the primacy of agencies in interpreting ambiguous statutes by expanding the scope of *Chevron* Step One. It does so by recognizing that an ambiguity exists, for purposes of Step One, when two statutes require a federal agency to take contradictory actions, and by reinforcing the notion that the overall statutory scheme is a proper consideration within Step One. Second, by confirming that (at least nonprejudicial) internal inconsistencies will not necessarily render an agency action arbitrary and capricious, the Court decreased the number of agency actions that courts will overturn under hard look review. This holding also enhances agencies’ ability effectively to make the policy choices properly within their domain.

Under *Chevron*, agencies have primary interpretive authority in resolving ambiguities in statutory schemes. Likewise, under *Home Builders*, agencies now have primary interpretive authority in reconciling seemingly conflicting statutory mandates. By characterizing the conflict created by the contradictory “shalls” of the ESA and the CWA as a “fundamental ambiguity,”⁶⁴ the Court recognized that conflicting statutes and ambiguous statutes are two sides of the same coin and should be treated alike.⁶⁵ Statutory ambiguities, which arise out of

⁶² See, e.g., Richard J. Pierce, Jr., *The Supreme Court’s New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 750 (1995). Professor Pierce also argues that lower courts have been employing a weak version of *Chevron* deference. *Id.* at 762. Courts have been accused of inventing ambiguities to trigger deference as well. See, e.g., *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 988 (1986) (Stevens, J., dissenting); *Abbott Labs. v. Young*, 920 F.2d 984, 994–95 (D.C. Cir. 1990) (Edwards, J., dissenting); see also Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006) (finding that judges’ political convictions shape their application of *Chevron*).

⁶³ Cf. *Arent v. Shalala*, 70 F.3d 610, 619 (D.C. Cir. 1995) (Wald, J., concurring) (arguing that the majority should have applied *Chevron* rather than hard look).

⁶⁴ *Home Builders*, 127 S. Ct. at 2534.

⁶⁵ The majority appropriately recognized that the conflicting “shalls” at issue in *Home Builders* were irreconcilable and so gave rise to ambiguity. The word “shall” independently signifies the CWA’s categorical nature. See *id.* at 2531 (citing cases supporting the proposition that the word “shall” signifies Congress’s intent to impose nondiscretionary obligations upon agencies). Similarly, the fact that Congress provided a nine-factor test suggests that it wanted the EPA to consider *only* those nine factors. Had the Court accepted Justice Stevens’s approach and characterized the interplay between the ESA and the CWA as anything other than a conflict giving rise to an ambiguity, it is hard to imagine any conflict between statutory directives that could qualify as ambiguous. Accordingly, few agency solutions to the problem created by conflicting “shalls” would be subject to the deferential analysis under Step Two.

vague, broadly worded statutes, are inevitable because Congress simply does not have the expertise or resources to direct every minute detail related to the regulatory state. Yet, just as too little legislation creates interpretive problems for agencies, so does too much legislation. Congress issues so many directives in so many areas over such a long period of time that it inevitably passes statutes that seem to contradict one another. By confirming that *Chevron* applies to situations in which an agency seemingly is required to carry out two contradictory congressional directives, the Court emphasized *Chevron*'s broad reach and reinforced the notion that agencies should have the primary role in resolving uncertainties within the statutes they administer.⁶⁶

Just as the *Home Builders* Court expanded the realm in which *Chevron* Step Two is triggered by treating conflicting statutory mandates as giving rise to ambiguity for purposes of Step One, it also increased the number of agency actions subject to Step Two analysis by confirming that the overall statutory scheme is an important consideration under Step One.⁶⁷ Although the significance of the overall statutory scheme to the Step One analysis was established in *Davis v. Michigan Department of the Treasury*⁶⁸ and reaffirmed in *FDA v. Brown & Williamson Tobacco Corp.*,⁶⁹ that principle is not uniformly heeded. The fact that the *Home Builders* dissent and the Ninth Circuit both failed to mention that reading the ESA as applying to all mandatory actions would impliedly repeal a large number of other federal statutes exemplifies this phenomenon. At the same time, the situation considered in *Home Builders* demonstrates that a statute may seem to have a plain meaning when viewed alone but be properly understood as unclear when considered against the statutory backdrop. Read alone, section 7(a)(2) is perfectly clear: whenever federal agencies act, they must follow the process set out in section 7(a)(2). However, viewed against the backdrop of the many federal statutes requiring agencies to take action *as soon as* certain conditions are met, whether Congress would want the ESA to apply to *every* federal action becomes unclear.

Overlooking or discounting the relevance of the overall statutory scheme at Step One would enable courts to find plain meaning despite

⁶⁶ The elegance and efficiency of the agencies' solution to the conflicting "shall" problem, as compared to Justice Stevens's suggestions, *see supra* note 53, exemplify agencies' ability to craft creative, effective solutions to seemingly intractable problems. Whereas Justice Stevens's suggestions would have required significant bureaucratic effort, the agencies' solution is easy to implement: simply determine whether a federal action is mandatory and, if so, forego consultation.

⁶⁷ *See Home Builders*, 127 S. Ct. at 2534.

⁶⁸ 489 U.S. 803, 809 (1989).

⁶⁹ 529 U.S. 120, 132–33 (2000). Unlike *Home Builders*, *Brown & Williamson* found the relevant statutory provision unambiguous based on the statutory context and therefore did not defer to the agency's reconciliation of competing statutory provisions. *Id.* at 161.

the existence of contradictory provisions and then to impose constructions that defy at least one apparently plain meaning.⁷⁰ In purportedly following a statute's plain meaning, courts can impose their own policy views and thereby disturb the principle embodied in *Chevron* that the agency, and not the court, should resolve statutory ambiguities.⁷¹ By signaling to lower courts that they should not construe Step One too narrowly, the *Home Builders* Court reaffirmed agencies' principal role in resolving policy questions that Congress has left open.⁷²

The Court also increased the number of agency actions to which the courts should defer by holding that (at least nonprejudicial) internal inconsistencies will not always render an agency action arbitrary and capricious. In so holding, the Court emphasized that hard look review should not be overly onerous. The *Home Builders* majority left the principal policymaking decision in the hands of the administrative agency by finding that nonprejudicial inconsistencies would not merit an arbitrary and capricious finding.⁷³ Because it so held, the Court was able to proceed to a *Chevron* analysis and ultimately defer to the agency's interpretation at Step Two. By contrast, the dissent and the Ninth Circuit were able to impose their own interpretations of the ESA on the EPA because they found the EPA's decision to be arbitrary and capricious. Following *Home Builders*, lower courts will likely find that fewer agency judgments fail hard look review and will therefore more often defer to agencies.

The *Home Builders* position on internal inconsistencies further reinforced agencies' policymaking role by enhancing agencies' ability to

⁷⁰ For arguments in favor of narrowly construing Step One, see, for example, Nicholas S. Zeppos, Comment, *Judicial Review of Agency Action: The Problems of Commitment, Non-Contractibility, and the Proper Incentives*, 44 DUKE L.J. 1133, 1147 (1995) ("The significance of *Chevron* step one would lead the agency to devote more resources to the legalistic analysis that was at the core of *Chevron* step one than to policy expertise or political balancing.").

⁷¹ See Peter M. Shane, *Ambiguity and Policy Making: A Cognitive Approach to Synthesizing Chevron and Mead*, 16 VILL. ENVTL. L.J. 19, 20 (2005). Considering statutory context allows a court to speculate as to congressional intent even when a statute seems to have a plain meaning. Such consideration could enable a court to eschew Congress's meaning in favor of the court's preferred interpretation. However, *Home Builders* does not give courts authority to impose their own interpretations. Rather, *Home Builders* facilitates deference to agency interpretations. This result comports well with the assumption in *Chevron* that statutory ambiguities are implicit delegations of interpretive authority to agencies.

⁷² Similarly, even if the Court deferred to the agency in *Home Builders* because the Justices agreed with the EPA's decision based on their own policy views, the holding in *Home Builders* leaves open the possibility that the EPA could change positions under another administration without fear of judicial intervention.

⁷³ See *Home Builders*, 127 S. Ct. at 2530 (observing that "[i]n administrative law, as in federal civil and criminal litigation, there is a harmless error rule" (quoting *PDK Labs., Inc. v. U.S. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004)) (internal quotation marks omitted)). Similarly, in reprimanding the Ninth Circuit for declining to remand the decision to the agency after finding it arbitrary and capricious, the Court emphasized the importance of retaining the balance of interpretive power set out in *Chevron*. See *id.* at 2529.

perform that role effectively. The Court's holding — that internal inconsistencies do not always render agency action arbitrary and capricious — facilitates a productive deliberative process within agencies. Had the Court held otherwise, the decision could have stifled debates among agency officials. Either agency officials would hesitate to disagree with one another in the first place or they would express disagreement informally.⁷⁴ The former would hamper the agency's ability to make wise decisions (undermining the expertise rationale for deference to agency interpretations), and the latter would minimize agency transparency (mitigating the democracy/accountability rationale for deference). While *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*⁷⁵ made this point on a large scale — accepting shifts in policy views over time so long as they were based upon a “reasoned analysis”⁷⁶ — allowing an agency to be inconsistent as it develops a policy is also important.⁷⁷

By reinforcing agencies' policymaking function and then enhancing agencies' ability to perform that function effectively, *Home Builders* strengthened agencies' position as important interpretive institutions within the regulatory state. The Court's decision reaffirms that *Chevron* is not merely narrowly applicable to statutory ambiguity but, rather, is a basic statement that statutory conflicts without clear solutions present policy, not legal, problems and that agencies are the appropriate institutions to address them.

3. *Limits on Agency Discretion.* — The Bush White House is famous (or infamous) for reshaping the nation's environmental regulations: it has eased pollution regulations for coal-fired power plants;¹ it has sought to undercut smog and soot regulations with the Orwellian-titled “Clear Skies Initiative”;² it has allowed the energy industry to determine environmental policy;³ and it has pressured the Environmental Protection Agency (EPA) to remove global warming from its

⁷⁴ Cf. FED. R. CIV. P. 26(b)(3) (shielding attorney work product from discovery); *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (explaining that without the work product doctrine, “much of what is now put down in writing would remain unwritten” and “[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial”).

⁷⁵ 463 U.S. 29 (1983).

⁷⁶ *Id.* at 42.

⁷⁷ On the value of accepting some agency inconsistency, see generally Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 588–89 (1985).

¹ Michael Janofsky, *Inspector General Says E.P.A. Rule Aids Polluters*, N.Y. TIMES, Oct. 1, 2004, at A12.

² Editorial, *Clear Skies, R.I.P.*, N.Y. TIMES, Mar. 7, 2005, at A16.

³ See Christopher Drew & Richard A. Oppel, Jr., *How Power Lobby Won Battle of Pollution Control at E.P.A.*, N.Y. TIMES, Mar. 6, 2004, at A1 (describing Vice President Cheney's role in changing environmental policy into a pro-energy industry policy).