based on distinctions that would be immaterial at trial would doubtlessly engender nothing but confusion among both litigants and courts. A collective comparison system, by contrast, would establish a single clear probability threshold — very nearly the same burden that the plaintiff bears at trial.

While the collective comparison system would be simpler to apply and would avoid many of the difficulties of the individual comparison system, the majority's opinion does not allow one to conclude with certainty which system it wanted to adopt. If the Court wanted the plaintiff's inference to be compared against the combined competing inferences that would not allow recovery, then it chose a needlessly complicated way of doing so, both in its formulation and in the inclusion of an ill-defined "cogency" analysis. If the majority wanted the plaintiff's inference to be compared against others in the case individually, then it failed to specify how probable the plaintiff's inference must be and to acknowledge the difficult line-drawing problems of such a system. Because of the inherent interpretational difficulties of the majority's test, it seems unlikely that *Tellabs* will achieve its goal of providing a uniform and workable construction of the PSLRA's "strong inference" language.

G. Review of Administrative Action

1. Chevron *Deference.* — Administrative law scholars have cause to rejoice after the Supreme Court's decision last Term in *Zuni Public School District No. 89 v. Department of Education*,[1] for they have a new wrinkle in the *Chevron*[2] doctrine from which to produce voluminous commentary. The *Zuni* Court turned a routine statutory interpretation case into a *Chevron* mess by inverting the traditional *Chevron* analysis: the Court looked first to congressional intent and the policies embedded in the statute, and only second to the existence of textual ambiguity. The Court was at pains to confirm two important principles of administrative law: that nondelegation (or, in this case, reverse nondelegation) concerns are indeed part of the *Chevron* analysis; and that administrative agencies are today's common law courts, vested with the authority to bend statutory text to fit policy objectives.

The federal Impact Aid statute[3] provides federal assistance to public school districts where a federal presence burdens the district's abil-

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ences against scienter should be split. Thus, a plaintiff who argued that the facts established either intentionality or recklessness might also see those inferences individually weighed against the defendant's inferences.

[1] 127 S. Ct. 1534 (2007).

[2] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

[3] 20 U.S.C. §§ 7701–7714 (2000 & Supp. IV 2004).

ity to finance public education.[4] Such a burden might be present, for example, when the federal government — which is exempt from local property taxes — owns a significant amount of land in the district.[5] Typically, a state cannot reduce its funding to the school districts that receive federal impact aid,[6] but a state may do so pursuant to a plan that equalizes the state's per-pupil public education expenditures.[7] The Secretary of Education must verify that the plan would in fact equalize expenditures, and the statute provides a formula for making this determination.[8] The formula instructs the Secretary to compare the per-pupil expenditures of the districts with the highest and lowest per-pupil expenditures: if the difference in expenditures between the districts is no more than twenty-five percent of the lowest per-pupil expenditure, the plan equalizes expenditures.[9]

The statute contains an exception, however: the "disregard" instruction. The instruction orders the Secretary to "disregard [school districts] with per-pupil expenditures . . . above the 95th percentile or below the 5th percentile of such expenditures . . . in the State."[10] But since 1976, pursuant to a regulation under an older version of the Impact Aid statute that allowed the Secretary to define the term "equalize expenditures,"[11] the Secretary had determined whether a state had an expenditure-equalizing plan by creating a list of all students in the state, ranking them by the amount of educational expenditures on each, and comparing the per-pupil expenditures of the school district that had the student at the fifth percentile and the school district that had the student at the ninety-fifth percentile.[12]

Employing the 1976 methodology, the Secretary had determined that New Mexico had a plan that equalized expenditures for fiscal year 2000, leaving the state "free to offset federal impact aid to individual districts by reducing state aid to those districts."[13] Two of the districts that stood to lose state funding, including Zuni, sued the Secretary. They claimed that the "disregard" instruction's plain meaning required the Secretary to determine the fifth and ninety-fifth percentile cutoffs without regard to the number of students in each district, instead

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4 *See id.* § 7701.

5 *Zuni*, 127 S. Ct. at 1538.

6 *See* 20 U.S.C. § 7709(a).

7 *See id.* § 7709(b)(1).

8 *See id.* § 7709(b)(2).

9 *See id.* § 7709(b)(2)(A).

10 *Id.* § 7709(b)(2)(B)(i). Congress put this language into the statute in 1994. *See* Zuni Pub. Sch. Dist. No. 89 v. U.S. Dep't of Educ., 393 F.3d 1158, 1164 (10th Cir. 2004).

11 *See* 20 U.S.C. § 240(d)(2)(B) (1976).

12 *See Zuni*, 127 S. Ct. at 1539 (citing 34 C.F.R. pt. 222, subpt. K, app. § 1 (2006)).

13 *Id.* at 1540.

basing this calculation only on the number of school districts in the state.[14]

The administrative law judge who first heard the complaint rejected Zuni's challenge, as did the Secretary.[15] The Tenth Circuit affirmed the Secretary's determination after conducting the standard *Chevron* analysis.[16]

The Supreme Court affirmed. Writing for the majority, Justice Breyer[17] took the unusual step of beginning his analysis by considering the Impact Aid statute's purpose and background,[18] reversing the normal order of the *Chevron* analysis. The Court justified looking at policy and history before text by pointing to "the technical nature of the language in question,"[19] claiming that the inversion would elucidate the analysis. The same "technical nature," the Court said, suggested that the matter at issue was the kind of "specialized interstitial matter" that Congress commonly delegates to agencies to resolve.[20] The Court noted that the statutory language at issue in *Zuni* originated with the Secretary, and when Congress adopted it without comment, nobody expressed the view that the statute's language precluded the Secretary's methodology.[21] Finally, the Court found that the Secretary's methodology furthered the statute's equalization policy better than Zuni's methodology did.[22]

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[14] *See id.* To see how these methods differ, consider a state with 100 school districts. Zuni's methodology would disregard the four school districts at each end of the per-pupil expenditure spectrum, and compare the fifth district with the ninety-fifth. This computation would ignore how many students were in each district, so the disregarded districts might account for more or less than ten percent of the state's student population. Indeed, in the instant case, Zuni's methodology would have disregarded less than two percent of New Mexico's students. *Id.*

[15] *Id.*

[16] *See* Zuni Pub. Sch. Dist. No. 89 v. U.S. Dep't of Educ., 393 F.3d 1158, 1162–68 (10th Cir. 2004), *aff'd by an equally divided court*, 437 F.3d 1289 (10th Cir. 2006) (en banc) (per curiam). In *Chevron* Step One, the court must determine whether the statute that an agency is charged to implement is ambiguous, for "[i]f the intent of Congress is clear . . . the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). More recent cases applying *Chevron* dictate that a court must find a *textual* ambiguity or enforce the statute as written. *See Zuni*, 127 S. Ct. at 1543 ("[I]f the intent of Congress is clear and unambiguously expressed by the statutory language at issue, that would be the end of our analysis."); Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 357–58 (1994) (concluding that, by 1992, the "textualist revolution" was ascendant in *Chevron* doctrine). If the text is ambiguous, the reviewing court moves to Step Two: determining if the agency's construction of the statute is reasonable in light of the statute's policy and history. *See Chevron*, 467 U.S. at 843, 865.

[17] Justices Stevens, Kennedy, Ginsburg, and Alito joined Justice Breyer.

[18] *See Zuni*, 127 S. Ct. at 1541.

[19] *Id.*

[20] *Id.* (citing United States v. Mead Corp., 533 U.S. 218, 234 (2001); MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 (1994)).

[21] *See id.*

[22] *See id.*

Turning to the statute's "literal language," the Court first stated the familiar *Chevron* holding that clear congressional intent embodied in unambiguous language ends the statutory construction analysis.[23] Yet the Court found ambiguity in the "technical" term "percentile."[24] After consulting four technical dictionaries defining "percentile,"[25] the Court determined that the statute required the Secretary to create a distribution of values of a population and to rank such values according to a certain characteristic.[26] The statute was clear that the characteristic in question was per-pupil expenditures, the Court found, but the statute did not clearly specify which population was to be distributed.[27] The population could be the set of school districts, as Zuni contended, or it could be the set of students, as the Secretary contended.[28] The Court buttressed its ambiguity determination by citing other statutes in which Congress had been more precise as to how percentiles were to be calculated.[29] It further reasoned that statutory context could imply ambiguity.[30] "Context here tells us that the instruction to identify school districts with 'per-pupil expenditures' above the 95th percentile 'of such expenditures' is . . . ambiguous," the Court wrote, "because both students and school districts are of concern to the statute."[31] Finally, the Court "dr[e]w reassurance" from the fact that no statistician had, in the briefs, told the Court that its reading of the statute was wrong.[32]

Justice Scalia acerbically disagreed.[33] Recalling *Church of the Holy Trinity v. United States*[34] — in which the Court held that an act within a statute's text but not within the statute's intent was not within the statute[35] — Justice Scalia proclaimed: "[T]oday *Church of*

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[23] *See id.* at 1543.

[24] *Id.*

[25] The Court consulted an economics dictionary, a mathematics dictionary, a science dictionary, and a medical dictionary. *See id.* at 1544. It also consulted *Webster's*. *See id.* at 1543.

[26] *See id.* at 1543–44.

[27] *See id.* at 1544.

[28] *See id.* at 1544–45.

[29] *See id.* at 1545.

[30] *Id.* at 1545–46 (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000); Brown v. Gardner, 513 U.S. 115, 118 (1994)).

[31] *Id.* at 1546.

[32] *Id.* This curious choice of words suggests that Justice Breyer was aware of a survey of statisticians that concluded that Zuni's interpretation of the Impact Aid statute was correct. *See* Joseph L. Gastwirth, *A 60 Million Dollar Statistical Issue Arising in the Interpretation and Calculation of a Measure of Relative Disparity*, 5 LAW, PROBABILITY, & RISK 33, 39, 44–45 (2007). This study is easily found on Westlaw by checking the citing references to the Tenth Circuit opinion.

[33] Justice Scalia was joined by Chief Justice Roberts and Justice Thomas and in part by Justice Souter.

[34] 143 U.S. 457 (1892).

[35] *Id.* at 472.

the Holy Trinity arises, Phoenix-like, from the ashes. The Court's contrary assertions aside, today's decision is nothing other than the elevation of judge-supposed legislative intent over clear statutory text."[36]

The dissent reached this conclusion by imputing many subterfuges to the majority. First, Justice Scalia argued the majority's inversion of *Chevron* — putting policy before text — was doctrinally dubious because consideration of the text first is a well-settled and formulaic part of the *Chevron* analysis.[37] Second, the majority's protestations regarding the "technical" nature of the statute were suspicious because the Court regularly confronts technical statutory language.[38] Finally, the majority's "repeated apologies for inexperience in statistics[] and its endless recitation of technical mathematical definitions of the word 'percentile'" were a mere "smokescreen" for the "sheer applesauce" of the interpretation of "population" as regarding anything but school districts.[39] "This case is not a scary math problem," chided Justice Scalia.[40]

The dissent also took issue with the majority's appeal to statutory context. According to Justice Scalia, context suggested that the relevant population was school districts, not students, because the statute regulates school districts.[41] Thus, the dissent argued, the majority's allowance for ambiguity where a regulated entity contained subunits that were intended to be the beneficiaries of the regulation was "simply irrational" and would make many statutes ambiguous.[42]

Justice Scalia explained why he believed that "the core of the [majority] opinion" was the judgment that, as a policy matter, the Secretary's methodology was preferable to the statute's methodology.[43] Only "the return of that miraculous redeemer of lost causes, *Church of the Holy Trinity*," allowed the Court to enact its policy preference.[44] Justice Scalia opined that ignoring statutory text in favor of legislative "intent" was an invitation to judicial despotism:

> Why should we suppose that in matters more likely to arouse the judicial libido — voting rights, antidiscrimination laws, or environmental protection, to name only a few — a judge in the School of Textual Subversion

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[36] *Zuni*, 127 S. Ct. at 1551 (Scalia, J., dissenting).

[37] *See id.*

[38] *Id.* at 1552 (citing as examples the Internal Revenue Code, the Employee Retirement Income Security Act of 1974, and the Clean Air Act).

[39] *Id.* at 1553–54.

[40] *Id.* at 1553.

[41] *See id.* at 1555.

[42] *Id.*

[43] *Id.* at 1558.

[44] *Id.* at 1555.

> would not find it convenient (yea, *righteous!*) to assume that Congress *must* have meant, not what it said, but what he knows to be best?[45]

Taking the majority to task for interpreting the sounds of silence in the legislative history, the dissent argued that such silence could only mean "that Congress had nothing further to say, its statutory text doing all of the talking."[46] Requiring Congress to add some legislative history to explain an amendment before the Court would interpret the amendment as expressing Congress's will was unreasonable; the case simply could not turn "on whether a freshman Congressman from New Mexico gave a floor speech that only late-night C-SPAN junkies would witness."[47] Finally, Justice Scalia quipped that "countertextual legislative intent" judges somehow always conclude that legislative intent accords with their policy preferences.[48]

Justice Stevens, concurring, emphasized that the intent of Congress controls in questions of statutory interpretation, and the Court's determination of congressional intent was "patently correct."[49] He politely suggested that the case was too trivial to sustain Justice Scalia's accusations of policy-driven decisionmaking.[50]

Justice Kennedy, joined by Justice Alito, also concurred. He agreed that the statute was ambiguous and hence that the Court should defer to the Secretary of Education's construction.[51] Yet Justice Kennedy suggested that Justice Breyer's inversion of the *Chevron* analysis had failed "to set a good example" for the lower courts.[52] "Were the inversion to become systemic, it would create the impression that agency policy concerns . . . are shaping the judicial interpretation of statutes," he cautioned.[53] Seeking to contain the impact of Justice Breyer's example, Justice Kennedy suggested that the inverted *Chevron* analysis was a "matter[] of exposition"[54] and not of doctrine.

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[45] *Id.* at 1556.

[46] *Id.* at 1558.

[47] *Id.*

[48] *Id.*

[49] *Id.* at 1550 (Stevens, J., concurring).

[50] *See id.* ("[This] is a case in which I cannot imagine anyone accusing any Member of the Court of voting one way or the other because of that Justice's own policy preferences."). A recent empirical study of liberal Justices' use of legislative history debunks Justice Scalia's claim that the use of legislative intent is a "smokescreen" for enacting liberal policy preferences. *See* James J. Brudney, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect* 27 (Ohio St. U. Moritz College of Law Pub. Law & Legal Theory Working Paper Series, No. 95, 2007), *available at* http://ssrn.com/abstract=1008330. Indeed, the study found that *Justice Scalia* was partisan with respect to legislative history, attacking liberal Justices' use of it but giving a free pass to his conservative brethren when they cite to it. *See id.* at 62–63.

[51] *Zuni*, 127 S. Ct. at 1551 (Kennedy, J., concurring).

[52] *Id.*

[53] *Id.*

[54] *Id.*

Justice Souter dissented. Although he agreed that Congress had probably intended the statute to authorize the Secretary of Education's methodology, he found the statutory language "unambiguous and inapt to authorize that methodology," and therefore joined the part of Justice Scalia's dissent concluding as much.[55]

The Court's insistent examination of congressional intent and policy before the text of the statute strongly suggests that the Secretary's construction of the statute was impermissible under *Chevron*'s textualist progeny.[56] For if the text of the statute permitted the Secretary's methodology, why did the Court feel a need to justify its decision foremost with policy and purpose, rather than engaging in the standard *Chevron* analysis? That something suspicious was going on was made evident by the simple fact that *Zuni* was a *Chevron* case at all: the Court could have ratified the Secretary's methodology as a mere interpretation of the Impact Aid statute rather than an exercise in setting policy.

Although the distinction between when agencies interpret statutes and when they make policy via rulemaking is blurry,[57] the Secretary's methodology in this case is better characterized as mere interpretation. An agency interprets a statute when it notifies the public of what the statute itself requires, whereas it makes policy when it fills a gap in the statute with a regulation.[58] In *Zuni*, there was no such gap because the 1994 Impact Aid statute contained an explicit provision — the "disregard" instruction — for how the Secretary was to determine whether states had equalized funding. Indeed, the Secretary argued that the statute had always empowered her to use her methodology;[59] she "merely state[d] the agency's view of what the statute already require[d]," a hallmark of interpretation.[60] Thus, *Chevron* deference was unnecessary from the beginning, and the Court could have affirmed the Secretary's construction of the "disregard" instruction with *Skidmore v. Swift & Co.*[61] Under *Skidmore*, rather than straining to find ambiguity in the meaning of "percentile," the Court could have

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[55] *Id.* at 1559 (Souter, J., dissenting).

[56] *See supra* note 16.

[57] *See* Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. AM. U. 187, 190 (1992).

[58] *See id.* at 191–92; *see also* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

[59] *See* Brief for the Federal Respondent at 36, *Zuni*, 127 S. Ct. 1534 (No. 05-1508), 2006 WL 3742248.

[60] Herz, *supra* note 57, at 191–92; *see also* United States v. Mead Corp., 533 U.S. 218, 227–28 (2001) (holding that an agency's construction of a statute is entitled to *Chevron* deference if and only if Congress has expressly or implicitly delegated authority to the agency to "address[] ambiguity in the statute or fill[] a space in the enacted law").

[61] 323 U.S. 134 (1944); *see also Mead*, 533 U.S. at 234 ("*Chevron* did nothing to eliminate *Skidmore*'s holding . . . .").

concluded that statutory policy, legislative history, and agency practice suggested that the Secretary's methodology was permissible.[62] *Skidmore* deference seems particularly apt if one agrees with the Court that the Secretary was interpreting the "technical" word "percentile," because the agency's "specialized experience" with this technical language counsels deference to the agency.[63]

The Court ignored *Skidmore* and instead analyzed *Zuni* under *Chevron* because it was motivated by what may be termed the reverse nondelegation concern. In *Zuni*, the Court was so convinced that Congress had delegated to the Secretary the authority to determine where public education funding was equalized that it was willing to overlook the fact that the statute's plain language foreclosed the Secretary's interpretation of the Impact Aid statute. Nondelegation concerns have long been recognized to influence (albeit silently) the *Chevron* analysis.[64] For example, when the Court ruled that the FDA's construction of its organic statute to encompass tobacco was impermissible,[65] the Court relied heavily on its conclusion that labeling tobacco a drug would compel the FDA to ban the marketing of tobacco, a power that Congress clearly did not intend to delegate to the FDA.[66] *Zuni* was simply the inverse case.

This reasoning is not novel, but it has gone unused since *Chevron*'s early years. For example, in *Commodity Futures Trading Commission (CFTC) v. Schor*,[67] the Court considered whether the CFTC could hear state common law counterclaims in its administrative proceedings. The CFTC's organic statute, the Commodity Exchange Act[68] (CEA), allowed "disgruntled customers of professional commodity brokers [to] seek redress for the brokers' violations of the Act or CFTC regulations."[69] Although the CEA was silent as to whether the CFTC had the authority to hear related state common law counterclaims in such proceedings, the CFTC issued a regulation interpreting the CEA to allow the Commission to do just that.[70] In upholding the CFTC's regulation, the Court relied heavily on legislative history that Congress

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[62] *See Skidmore*, 323 U.S. at 140 (holding that an agency interpretation is entitled to deference in proportion to "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade").

[63] *Cf. id.* at 139 (deferring to the agency's statutory interpretation because of its "specialized experience" in administering the statute).

[64] *See* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 237.

[65] *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 126 (2000).

[66] *See id.* at 137.

[67] 478 U.S. 833 (1986).

[68] 7 U.S.C. §§ 1–25 (2000 & Supp. IV 2004).

[69] *Schor*, 478 U.S. at 836.

[70] *See id.* at 837.

intended to grant the CFTC the power to adjudicate all counterclaims arising out of a disputed futures transaction and reasoned that a failure to allow the CFTC to do so would defeat the purpose of the CEA, which was to create an efficient forum in which to resolve all futures disputes.[71] In other words, the Court's recognition of Congress's expansive delegation of authority to the CFTC allowed the Court to construe statutory silence as ambiguous enough to uphold the CFTC's assertion of jurisdiction over state common law counterclaims.

The Court again consulted legislative history and statutory purpose to find a sweeping delegation of authority in *EEOC v. Commercial Office Products Co.*[72] That case involved the time period for filing employment discrimination complaints with the EEOC under Title VII of the Civil Rights Act of 1964.[73] The EEOC's construction of the statute implicated its ability to enter into "workshare" agreements with state and local antidiscrimination agencies; these agreements allowed the various agencies to better coordinate the resolution of complaints.[74] The bulk of Justice Marshall's opinion studied the statute's legislative history and policy, finding that Congress intended to give the EEOC the ability to enter into workshare agreements. At issue was a clear congressional policy of federal-state cooperation,[75] especially to allow states to avoid federal intervention by enforcing Title VII themselves.[76] In light of this clear delegation of authority, the EEOC's construction of Title VII was both permissible and more consistent with the statute's objectives than *Commercial Office*'s opposing construction.[77]

Interestingly, these cases did not apply *Chevron*'s two-step test, and the Court's subsequent heavy use of the modern (textualist) *Chevron* test[78] seemingly abrogated *Schor*. *Zuni* suggests the revival of jurisprudence that bypasses, or at least modifies, the textualist *Chevron* analysis to focus more on statutory purpose and legislative history.[79]

The recognition that agencies have the power to issue regulations to further a statute's purpose and policy but perhaps not entirely consistent with its text is also not a new idea in administrative law. Professor Cass Sunstein has argued that administrative agencies are the common law courts of the present era, tasked with "the adaptation of

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[71] *See id.* at 843–44.

[72] 486 U.S. 107 (1988).

[73] 42 U.S.C. § 2000e-5(e) (2000).

[74] *See Commercial Office*, 486 U.S. at 112.

[75] *See id.* at 118.

[76] *See id.* at 116–18, 120.

[77] *See id.* at 122, 125.

[78] *See supra* note 16.

[79] *Zuni* is not the first case that has contravened the heavily textualist *Chevron* analysis. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 (1994).

legal texts (their enabling statutes) to new circumstances and new social understandings."[80] In *Zuni*, the Secretary of Education concluded that there were no new circumstances to which the revision of the Impact Aid statute was responding, a conclusion that is reasonable considering the Secretary essentially wrote the statute and Congress issued no legislative findings of any changed circumstances. As a common law court, then, the Department of Education's conclusion that its methodology did not need to be updated was unremarkable.

Justice Scalia's complaint that *Church of the Holy Trinity* miraculously saved the Court from actually enforcing the text of the statute is thus misdirected, for it is not the Court that availed itself of that case's ecclesial powers, but the Secretary of Education.[81] The Court merely accepted that Congress delegated to the Secretary the "common law" authority to interpret the Impact Aid statute purposively rather than literally, and the Court tweaked the *Chevron* inquiry appropriately: Rather than asking if the plain text of the statute was ambiguous and if the agency's interpretation was reasonable given the text, the Court seemed to ask if the policy of the statute was ambiguous and if the interpretation was reasonable given the policy. The Court found the policy crystal clear, concluded that the Secretary's interpretation of the statute was the best reading given that policy, and accordingly approved the interpretation, textual difficulties notwithstanding.

Yet for all the groundwork that administrative law scholarship had laid, *Zuni* was a problematic case to revive the reverse nondelegation doctrine in the *Chevron* context and emphasize the "common law" power of administrative agencies. In concluding that congressional intent so clearly indicated an expansive delegation of authority to the Secretary of Education, the Court had to ignore persuasive evidence that Congress in fact intended the opposite. Similar to the present Impact Aid law, the 1974 version of the statute exempted states with plans that equalized expenditures, yet it explicitly left it to the Secretary to define "equalize expenditures."[82] When Congress amended the statute in 1994, it took out this delegation of interpretative power and replaced it with the present "disregard" instruction.[83] There are few clearer examples of Congress rescinding an agency's authority to fill statutory gaps with policy than removing the explicit delegation of policy-making authority. The Court's quick dismissal of this change in

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[80] Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1056–58 (1998).

[81] Justice Kennedy made a similar mistake. *See Zuni*, 127 S. Ct. at 1551 (Kennedy, J., concurring).

[82] Zuni Pub. Sch. Dist. No. 89 v. U.S. Dep't of Educ., 393 F.3d 1158, 1163 (10th Cir. 2004) (quoting 20 U.S.C. § 240(d)(2)(B) (1982)) (internal quotation marks omitted).

[83] *Id.* at 1164 (citing 20 U.S.C. § 7709(b)(2)(B)(i) (2000)).

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*

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[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.