

University of the District of Columbia School of Law

## Digital Commons @ UDC Law

---

Journal Articles

Publications

---

2019

### In the Room Where It Happens: Including the "Public's Will" in Judicial Review of Agency Action

Twinette L. Johnson

Follow this and additional works at: [https://digitalcommons.law.udc.edu/fac\\_journal\\_articles](https://digitalcommons.law.udc.edu/fac_journal_articles)



Part of the [Courts Commons](#), and the [Education Law Commons](#)

---

December 2019

## In the Room Where it Happens: Including the “Public’s Will” in Judicial Review of Agency Action

Twinette L. Johnson  
*University of District of Columbia*

Follow this and additional works at: <https://scholarworks.uark.edu/alr>



Part of the [Educational Assessment, Evaluation, and Research Commons](#), [Education Law Commons](#), [Higher Education Commons](#), and the [Secondary Education Commons](#)

---

### Recommended Citation

Twinette L. Johnson, *In the Room Where it Happens: Including the “Public’s Will” in Judicial Review of Agency Action*, 72 Ark. L. Rev. 469 (2019).

Available at: <https://scholarworks.uark.edu/alr/vol72/iss2/7>

This Article is brought to you for free and open access by ScholarWorks@UARK. It has been accepted for inclusion in Arkansas Law Review by an authorized editor of ScholarWorks@UARK. For more information, please contact [ccmiddle@uark.edu](mailto:ccmiddle@uark.edu).

# **In the Room Where it Happens: Including the “Public’s Will” in Judicial Review of Agency Action**

by Twinette L. Johnson\*

## **INTRODUCTION**

In the popular Broadway musical play *Hamilton*, there is a scene where Aaron Burr learns he was not privy to a dinner conversation that transpired amongst Alexander Hamilton, Thomas Jefferson, and James Madison.<sup>1</sup> During this dinner, the three (Madison, Jefferson, and Hamilton) agreed on a compromise that would make what is now Washington, D.C., the nation’s capital, and which would allow the federal government to tax the states.<sup>2</sup> When Burr hears of this compromise, he knows he has been left out of the conversation on these matters.<sup>3</sup> To lament being left out, Burr begins to sing a song decrying not just his absence from “the room where it happens,”<sup>4</sup> but also alluding to the fact that no one really knows what happens in the room.<sup>5</sup> Burr says, “No one really knows how the game is played[,] [t]he art of the trade, [h]ow the

---

\* Professor of Law and Director of Academic Success Programs, University of the District of Columbia David A. Clarke School of Law. I would like to thank the editors of the Arkansas Law Review for inviting me to their Symposium, *Hiding in Plain Sight: What Education Reform Needs*, my fellow symposium participants for their attentive ears and thoughtful comments, and the symposium attendees for their helpful questions and reactions to my presentation on this topic; my fellow panelists at the Association of American Law Schools Discussion Panel entitled *The Role of Law in Educational (In)Equality* for allowing me the opportunity to present and discuss the ideas associated with this article; and my research assistant, Kwebena Owusu-Koduah for his assistance in conducting the research for this essay.

1. See Lin-Manuel Miranda, *In the Room Where it Happens*, in *Hamilton: An American Musical* (Atlantic Recording Corp. 2015).

2. *Id.*

3. *Id.*

4. *Id.*

5. See *id.*

sausage gets made[,] [w]e just assume that it happens[,] [b]ut no one else is in[,] the room where it happens.”<sup>6</sup>

In the context of higher education reform, the people need to be in the important rooms where the decisions are being made. One such room is the courtroom. This essay elaborates on this premise, previously written about in an article I wrote entitled, *50,000 Voices Can't Be Wrong, But Courts Might Be: How Chevron's Existence Contributes to Retrenching the Higher Education Act*.<sup>7</sup> That article was the second in a series of three articles on the retrenchment of the Higher Education Act of 1965 (“HEA”) using the William Eskridge and John Ferejohn statutory entrenchment model.<sup>8</sup> It argues that *Chevron's*<sup>9</sup> deference to agency action works to undermine the historical policy of the HEA because it prevents courts from considering the people’s will when reviewing agency action.<sup>10</sup> To support the inclusion of the people’s will, the article critiques the standard mechanisms for ensuring the people’s participation and collaboration in agency decision and rule-making.<sup>11</sup> This essay continues to urge a rethinking of deference schemes as applied to agency decision-making and rule promulgation when an entrenched super statute like the HEA is at issue.<sup>12</sup> But, it does so through the lens of historic and current judicial philosophies regarding a court’s role in shaping the law. Using

---

6. Miranda, *supra* note 2.

7. Twinette L. Johnson, *50,000 Voices Can't Be Wrong, But Courts Might Be: How Chevron's Existence Contributes to Retrenching the Higher Education Act*, 103 KY. L.J. 605, 606 (2014-15) [hereinafter Johnson, *Voices*].

8. Other articles in the series are Twinette L. Johnson, *Going Back to the Drawing Board: Re-Entrenching the Higher Education Act to Restore Its Historical Policy of Access*, 45 TOL. L. REV. 545, 549–50 (2014) [hereinafter Johnson, *Going Back to the Drawing Board*] (describing the historical policy of the Higher Education Act and arguing that political machinations are obfuscating the real issues associated with higher education reform) and Twinette L. Johnson, *Reimagining Accountability: A Move Toward Re-Entrenching the Higher Education Act*, 28 U. FLA. J. L. PUB. POL'Y 35, 42–43 (2017) [hereinafter Johnson, *Reimagining Accountability*] (arguing for a move from pure accountability assessment schemes to a combination of accountability and performance-based assessment to preserve the policy of wide-spread access associated with the Higher Education Act). These articles will be referenced for background information.

9. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

10. Johnson, *Voices*, *supra* note 8, at 610.

11. *See id.* at 624–33 for a discussion on why participation and collaboration by the people in the administrative rule-making process does not preclude a separate assessment of the people’s will when reviewing agency action.

12. *See id.* at 611.

jurisprudence as the context, this essay attempts to justify including the people's will at all levels of judicial review of agency action.

Thus, to create a place for the people's will in the courtroom, two things must happen. First, judicial deference to agency decision-making and rule promulgation must be reimagined and re-conceptualized such that courts seek out and take notice of the sociological impact of agency action.<sup>13</sup> Second, the measure of sociological impact must be treated as more than mere opinion, but rather as reliable statements of the people's will that courts consider when reviewing agency action.<sup>14</sup>

Judicial deference to agency action must be reimagined and reconceptualized where agency action directly impacts provisions that have become engrained in societal expectation and necessary for societal well-being. One such societal provision is the opportunity to attain a post-secondary credential. The HEA<sup>15</sup> was promulgated with just that in mind.<sup>16</sup> The HEA's undergirding policy supports wide-spread access to higher education such that the people have the opportunity to earn a credential that will assist them in becoming fully functioning members of society.<sup>17</sup> It is thus necessary to consider whether deference is appropriate when courts review Department of Education ("DOE") action that impacts society in ways that do not align with the legislation's policy.

Courts often employ deference schemes when considering agency action. The policy behind taking such an approach is

---

13. *See id.* at 609–10.

14. *Contra* Tracey E. Robinson, *By Popular Demand? The Supreme Court's Use of Public Opinion Polls in Atkins v. Virginia*, 14 *GEO. MASON C.R. L.J.* 107, 134–35 (2004) (describing polls as unreliable in measuring public opinion due to inconsistent use and questionable scientific methods).

15. Higher Education Act of 1965, 20 U.S.C. §1001 (2016).

16. Erica R. Dines, *The Higher Education Act of 1965*, *THE THIN TWEED LINE*, (Mar. 17, 2012), <http://humanstudy.org/category/higher-education-law/>; *see* Johnson, *Going Back to the Drawing Board*, *supra* note 9, at 552 (stating that the HEA "sought to bridge the economic gap for citizens stuck in a revolving cycle and hereditary legacy of poverty by providing the means to pursue higher education").

17. Dines, *supra* note 17 (stating that "[t]he HEA was an important piece of legislation which, by providing financial assistance to under-privileged individuals, increased the opportunity for previously unattainable education, leading to the betterment of society").

generally rooted in two main premises. One premise is that Congress, in creating the agency and enacting the law the agency is to administer, has the ultimate authority to determine the nature and extent of an agency's action.<sup>18</sup> Congress, however, cedes much of the day-to-day administration of the law to the agency.<sup>19</sup> This transfer of authority confirms the second premise, that the agency has the superior expertise to administer the law through its decisions and promulgations.<sup>20</sup> With these two foundational premises at work, courts then review agency action using deference schemes best encapsulated in the *Chevron* case.<sup>21</sup> Generally, *Chevron* deference operates on the predetermined belief that as long as the agency is operating under the general statutory guidelines set by Congress in the enacting legislation and according to its expertise, agency action should receive deference.<sup>22</sup> While seemingly logical in theory, in practice, *Chevron* deference creates a "mechanical jurisprudence,"<sup>23</sup> and a move away from the "study of the sociological factors that underlie law."<sup>24</sup> In accepting deference

---

18. See McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J. OF L., ECON., & ORGS., 180, 184 (1999) (stating that delegating to agencies allows Congress to write simpler statutes).

19. Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 256 (1986).

20. See McNollgast, *supra* note 19, at 184. However, that delegation creates both agency and political drift. Agency drift can occur when the agency acts outside its statutory agenda and is out of control. *Id.* Political drift can occur when elected officials can influence the agency to adopt policies not in line with the policy agreement of the enacting parties. *Id.*

21. See generally *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

22. See *id.* at 842–43. The *Chevron* doctrine encompasses two steps. *Id.* First the courts determine whether Congress has, through its statute's language, spoken clearly regarding the agency action at issue. *Id.* at 842. Only if Congressional intent is unclear is there a need to move on to the second step, which determines whether the agency action is based on a permissible construction of the statute under which it gets its power. *Id.* at 842–43. If Congressional language is silent or ambiguous with respect to the issue, the court will defer to the agency's interpretation if it is reasonable analysis. *Id.*

23. Roger A. Fairfax, Jr., *Wielding the Double-edged Sword: Charles Hamilton Houston and Judicial Activism in the Age of Legal Realism*, 14 HARV. BLACKLETTER L.J. 17, 28 (1998) (a tribute to Charles Hamilton Houston) (describing "mechanical jurisprudence" as a "mode of legal thought canonized by Classical Legal Thinkers . . ."). Fairfax also credits Roscoe Pound for authoring the phrase. *Id.* at 28–29 (citing Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605 (1908)).

24. See *id.* at 29 (recognizing the sociological school of jurisprudence's approach to making the law as one that "should not be derived through supposed universal and

to agency decision-making and rule promulgation as it currently stands, the judiciary has in essence divested itself from a critical role: to facilitate the discussion and normative debate necessary to ensure that laws ensconcing little “r” rights (such as education) not guaranteed by the constitution, but codified and sustained over time, continue to serve the purpose for which they were originally enacted.<sup>25</sup>

The administration of education at post-secondary levels is an essential pathway to full and meaningful participation in society.<sup>26</sup> However, education and the way it is provided in the United States has long been under attack. Ideals associated with education as the great equalizer are not being realized as society’s composition and needs change. A growing immigrant population, as well as a minority population, that are perpetually underrepresented in almost all facets of society signal clearly that the ideals associated with education have not been realized.<sup>27</sup> In fact, long established policy towards creating educational opportunities to those historically denied educational access are being retrenched.<sup>28</sup> Education, conceived almost as a public good, is being economized through

---

axiomatic first principles, but rather through a study of the sociological factors that underlie the law”).

25. Johnson, *Reimagining Accountability*, *supra* note 9, at 44 (describing “a super statute as recognize[ing] a right, not granted by the Constitution, but claimed by citizens as necessary and vital to fully functioning in society). Further, “[s]uper legislative enactments [such as the HEA] . . . become entrenched as citizens reclaim the rights granted by those enactments over and over again by pushing [] lawmakers to revisit [them] as the public’s needs shift and adjust over time.” *Id.*

26. Dines, *supra* note 17.

27. See Jeanne Batalova and Elijah Alperin, *Immigrants in the U.S. States with the Fastest-Growing Foreign-Born Populations*, MIGRATION POLICY INSTITUTE: MIGRATION INFORMATION SOURCE (July 10, 2018), <https://www.migrationpolicy.org/article/immigrants-us-states-fastest-growing-foreign-born-populations> <https://perma.cc/D4UY-DBGX> (“[T]he Census Bureau projects that net international migration will be the main driver behind U.S. population growth between 2027 and 2038.”); see generally *More Hispanics Are Going to College and Graduating, But Disparity Persists*, PBS NEWS HOUR (May 14, 2018, 4:53 PM) [hereinafter, PBS NEWS], <https://www.pbs.org/newshour/education/more-hispanics-are-going-to-college-and-graduating-but-disparity-persists> [<https://perma.cc/3PR3-YDDX>] (explaining that while there has been an increase in the Hispanic college population, there remains a divide between White and Hispanic students in term of six and for year graduation rates which leave many Hispanics in lower paying jobs).

28. See Johnson, *Going Back to the Drawing Board*, *supra* note 9, at 562–75, for a discussion on the retrenchment of the HEA.

commodification and marketization.<sup>29</sup> This has led to an increase in oversight which has simultaneously caused a decrease in quality.<sup>30</sup> These happenings are proof that the democratic process (touting participation and collaboration in making and administering the law) does not work as it should when groups affected are subject to prejudice.<sup>31</sup> In such instances, the court must step in to ensure that the democratic process works as it should.<sup>32</sup> Thus, courts should play a critical role in ensuring that the education provision and the historical policy undergirding it are not lost through political machinations and reform proxies that obfuscate the real issues affecting them.<sup>33</sup>

Additionally, views of sociological impact regarding agency action as ranking inferior to interpretations of congressional intent and agency expertise must be rethought. At the turn of the century and during the rise of the industrial complex, the courts and the nation at large were in a contentious debate about the role of the judiciary in making law.<sup>34</sup> This time was marked by a seminal case – *Lochner v. New York*<sup>35</sup> where the United States Supreme Court famously struck down legislation that would limit employees' work hours.<sup>36</sup> While the principles supporting the disposition of the *Lochner* case were eventually overturned,<sup>37</sup> the case stands as an

---

29. See generally Osamudia R. James, *Predatory Ed: The Conflict Between Public Good and For-Profit Higher Education*, 38 J.C. & U.L. 45 (2011), for a discussion on the difficulty in administering the education provision when it is conflated with market-based distribution.

30. See generally Johnson, *Reimagining Accountability*, *supra* note 9, for a critique of the impact of numbers-based accountability assessment schemes in determining whether schools are meeting their obligations in providing meaningful access to higher education opportunities.

31. David A. Strauss, *Is Carolene Products Obsolete?*, 2010 U. ILL. L. REV. 1251, 1257–58 (2010); see also Johnson, *Voices*, *supra* note 8, at 624–33, for a critique of the participation and collaboration aspects of rulemaking.

32. See Strauss, *supra* note 32, at 1258.

33. *Id.* at 1257.

34. Barry Friedman, *THE WILL OF THE PEOPLE* 167 (2009) (describing the turn of the century as a period of “popular clamor about judicial review”).

35. 198 U.S. 45 (1905).

36. *Id.* at 64 (rejecting a New York law imposing limits on workplace hours based on freedom of contract).

37. *West Coast Hotel v. Parrish*, 300 U.S. 379, 380 (1937). In *West Coast*, the Supreme Court upheld a Washington state law requiring minimum wages for women as not violating the Fourteenth Amendment of the Constitution. *Id.* at 392. The Court rejected the

example of the judicial philosophy that guided courts' review of the social legislation of the time – a philosophy rooted in promoting the interest of wealthy owners of industry and not those who were being exploited by it.<sup>38</sup> Professor Barry Friedman describes the era as one in which “the courts used the Constitution as a basis for invalidating laws enacted by popular legislative bodies . . . [in] hundreds and hundreds of adjudicated disputes in the state and federal courts.”<sup>39</sup>

The people's rejection of the *Lochner* era approach to judicial review has had stymying effects on judges' ability to look outside the language of the law when reviewing agency action. During the *Lochner* era, judges routinely struck down social legislation that would assist the working class in establishing suitable working conditions.<sup>40</sup> This legislation, enacted by elected lawmakers, was routinely considered unconstitutional and thus rejected by the judiciary.<sup>41</sup> This essay does not suggest a return to the *Lochner* era when judges used constitutional originalism as a proxy for striking legislation that did not align with their own personal and economic self-interests.<sup>42</sup> Rather, this essay suggests that the judicial activism of the *Lochner* era be rethought to form a new judicial philosophy – one that combines courts' willingness to look outside of the law when reviewing agency action and to

---

argument that the state law was unconstitutional because it was rooted in freedom of all parties to contract. *Id.* at 392. The Court stated that there was no “absolute and uncontrollable liberty” recognized by the Constitution. *Id.* The Court explained that “the liberty safeguarded is the liberty in social organization which requires the protection of law against the evils which menace the health, safety, morals[,] and welfare of the people.” *Id.* at 391; see Alex McBride, *Supreme Court History: Capitalism and Conflict*, THIRTEEN MEDIA WITH IMPACT (Dec. 2006), [https://www.thirteen.org/wnet/supremecourt/capitalism/landmark\\_westcoast.html](https://www.thirteen.org/wnet/supremecourt/capitalism/landmark_westcoast.html) [https://perma.cc/D3RD-Y6HB] (describing *West Coast* as ending *Lochner* era jurisprudence, as well as describing other landmark cases of the era).

38. Fairfax, *supra* note 24, at 32; (stating that judges, during the turn of the century industrial revolution period, routinely struck down progressive legislation favoring the lower and working classes).

39. Friedman, *supra* note 35, at 173 (comparing other periods of judiciary controversy as being evidenced by “one or a handful of cases provoking heated debate” and the *Lochner* era as involving “hundreds and hundreds” of such cases).

40. *Id.* at 167–68.

41. Fairfax, *supra* note 24, at 32.

42. *Id.*

recognize and search out sociological impact when doing so.<sup>43</sup> This will not result in a return to the *Lochner* era judicial activism of the industrial revolution, but will be more akin to the “social engineering” advanced by Charles Hamilton Houston.<sup>44</sup> Houston described social engineering as using the law and “whatever science demonstrates . . . both to foster and to order social change for a more humane society.”<sup>45</sup> This jurisprudence takes into account the people and their will – the social and economic norms that encompass the people’s preferences for, beliefs on, and desires for access to those things that would make them better societal members.<sup>46</sup>

This essay will discuss the importance of courts’ considering the people’s will when reviewing agency decision-making and rule promulgation. In doing so, Part I will explore the reason for including the people’s will in judicial decision-making. The goal of this section is to position the people’s will as an integral part of judicial review of agency action. This section will also reinforce the importance of the people’s will in maintaining entrenched super statutes, such as the HEA, which seek to preserve, over time, rights deemed essential to societal well-being. Part II will discuss what should comprise the people’s will. The purpose of this section is to recognize and legitimate the vast information regarding the people’s preferences, beliefs, and desires generated by a social movement and its participants in terms of defining the people’s will. Part III of this essay will generally explore how existing legal constructs might be expanded to allow the people’s will into the courtroom in a meaningful and sustained way. The goal of this section is to consider ways in which the people’s will can be elevated from opinion to information deemed critical when reviewing agency decision-making’s and rule promulgation’s impact on society.

---

43. *Id.* at 26 (quoting Charles Hamilton Houston’s jurisprudential philosophy of using the courts to socially engineer change); “The best way to . . . involve the court in interpretive exercises beyond purely language and dictionary battles is to create a deference exception for entrenched super statutes.” Johnson, *Voices*, *supra* note 8, at 634 (citing Robert Choo, *Judicial Review of Negotiated Rulemaking: Should Chevron Deference Apply?*, 52 RUTGERS L. REV. 1069, 1083 (2000)).

44. Fairfax, *supra* note 24, at 26.

45. *Id.*

46. Johnson, *Voices*, *supra* note 8, at 614.

## I. WHY INCLUDE THE PEOPLE'S WILL IN THE COURTROOM?

That the people's will be considered is important when reviewing agency action under a statute such as the HEA. The HEA was promulgated in 1965 after research and study confirmed that access to post-secondary education was crucial to personal, societal, and economic survival.<sup>47</sup> “[T]he Act sought to elevate post-secondary education as the means by which citizens could lift themselves up from and remain out of poverty.”<sup>48</sup> The key to understanding the historical policy behind the Act is recognizing how it came about: through activism.<sup>49</sup> With regard to education, the people, through their lived experiences and the capture of those experiences in data and studies, set out to demand access to that which would assist them in fully realizing their potential as full members of society.<sup>50</sup> Armed with this information, the people advocated, through demonstrations, protests, writings and other mediums, for access to a post-secondary credential that would ensure meaningful participation and thus existence in society.<sup>51</sup> In response, Congress enacted ground-breaking education legislation addressing education, at all levels, including post-secondary access.<sup>52</sup>

The way in which the HEA came about, as well as its continued existence since its inception, positions it as more than

---

47. Johnson, *Going Back to the Drawing Board*, *supra* note 9, at 576.

48. Johnson, *Voices*, *supra* note 8, at 606.

49. See Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 881 (2013) (describing social movements, in the context of creating constitutional law, as “influenc[ing] public opinion in their favor [and] changing the culture with which constitutional law interacts”); see generally David Cole, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* (2016), for a historical description of important legal changes and arguing that they occurred because of a systemic citizen activist approach to changing the hearts of and minds of society who thus demanded that the change be reflected in the law.

50. Dines, *supra* note 17.

51. See Johnson, *Going Back to the Drawing Board*, *supra* note 9 at 546–58, for a discussion on the social advocacy associated with the HEA.

52. *Id.* at 608 (citing Robert Dallek, *FLAWED GIANT: LYNDON JOHNSON AND HIS TIMES, 1961-1973*, 79 (1998)).

an ordinary statute, but a super statute.<sup>53</sup> It is one of those statutes that can be labeled “super” using William Eskridge and John Ferejohn’s entrenchment model.<sup>54</sup> Under this model, Eskridge and Ferejohn posit that super statutes represent a “statutory constitutionalism . . . [that has grown] out of social movement demands that government . . . regulate private as well as public institutions.”<sup>55</sup> Statutes such as the HEA thus operate more like constitutional gap fillers entrenching within society an expectation of a certain right to and supplying a provision for higher education that is not granted under the Constitution.<sup>56</sup> The statute thus becomes entrenched and achieves “super” status as society continues to advocate for it by highlighting how the statute provides benefits and rights society has come to rely on.<sup>57</sup> It is this advocacy, by the public, that brings about the statute’s existence and that sustains it over time.<sup>58</sup> The Eskridge and Ferejohn entrenchment model encompasses this advocacy as part of the normative debate that all stakeholders (the people, the legislature, and the judiciary) participate in as the statute develops into one that represents the will the people.<sup>59</sup> When the judicial review process does not recognize the people’s societal and economic goals as part of its understanding of the law’s purpose, it stymies the normative debate process and potentially produces results that are out of line with the people’s will. The people’s activism provides both the foundation and continuing purpose for super statutes such as the HEA. Thus, this activism cannot be eschewed by the courts when stakeholders seek the court’s guidance in determining whether subsequent laws are in alignment.

---

53. Johnson, *Voices*, *supra* note 8, at 612–13 (statutes become “super” through the entrenchment process as the statute changes, through the normative debate process, to meet the needs of the people).

54. Johnson, *Going Back to the Drawing Board*, *supra* note 9, at 550–51 (citing William N. Eskridge & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1217 (2001)).

55. WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF NEW STATUTES: THE NEW AMERICAN CONSTITUTION 121 (2010).

56. Johnson, *supra* note 8, at 606.

57. Johnson, *Going Back to the Drawing Board*, *supra* note 9, at 547.

58. *Id.*

59. Johnson, *Voices*, *supra* note 8, at 606 (citing ESKRIDGE & FEREJOHN, *supra* note 57, at 121).

### **A. Deference Creates a Barrier to Including the People’s Will in the Judiciary’s Review of Agency Action**

The historical policy undergirding the HEA (wide-spread post-secondary access to traditionally underrepresented people) cannot be achieved without reimagining the process of reviewing, monitoring, and even sheparding laws designed to provide rights that are pivotal in equipping an ever-changing public with what it needs to participate fully in society.<sup>60</sup> As long as the undergirding policy is intact that the people have meaningful opportunity to attain a post-secondary credential that will make them better able to function in society review of agency action regarding that policy must consider the social and economic norms of the people.<sup>61</sup>

In a failed attempt to reform the *Lochner* judiciary which frequently struck down progressive social legislation meant to help the poor and working classes during the Industrial Revolution, President Theodore Roosevelt criticized the Court describing it as “a power which may give one man or three men or five men the right to nullify the wishes of the enormous majority of their ninety million fellow-citizens.”<sup>62</sup> While President Roosevelt’s motives may have been slightly different from those expressed here, the “concern” for the power of the judiciary and how it is used is consistent. The power of the court is not in nullification or “mechanical jurisprudence” that works to meet the needs of political constituents instead of the needs of the people.<sup>63</sup> Rather, it is the power the judiciary has as full participants in the democratic process of shaping the law for the good of the people.<sup>64</sup> This is not a move toward the judicial activism of the past where jurists sought to review and interpret the law with their own social and economic realities at the forefront, but rather judicial social activism in the same vein as

---

60. Dines, *supra* note 17.

61. See Freidman, *supra* note 35, at 167 (describing the sentiment of the President and Progressives, who decried much of courts actions in rejecting legislation meant to defend the working class against being victimized by “corporate corruption of politics and the social injustices that were the product of America’s industrial revolution”).

62. *Id.*

63. Fairfax, *supra* note 24, at 29.

64. *Id.* at 28–29.

Charles Hamilton Houston's social engineering jurisprudence that requires knowledge of the realities of human social life.<sup>65</sup>

Although courts have recognized sociological impact in many high-profile cases, the initial concern remains.<sup>66</sup> Are the people (their preferences, beliefs, and desires), in the rooms where these decisions are happening? When courts rely on *Chevron* deference when reviewing and interpreting agency action with respect to the HEA, is the people's will left out?<sup>67</sup> *Chevron* reduces interpretation to dictionary battles in many instances and sets a standard that favors agency action presenting an almost insurmountable burden to those who would challenge.<sup>68</sup>

Even though members of society who have been historically underrepresented in post-secondary institutions are attending college in record numbers, they are still unable to achieve the same level of employment and thus pay as their white counterparts.<sup>69</sup> Deference should not hide this critical information. When agencies act and stakeholders appear in courts to address agency action, courts should recognize that the very presence of the parties before a decision-making tribunal signals a possible breakdown in the administration and/or operation of the law. While this essay does not argue for a particular outcome in these instances, it does argue for a particular approach: one that considers how the law in question affects the very people it was designed to serve.

Under the *Chevron* deference construct, the people's will is too easily discarded. *Chevron* deference is premised, in part, on the belief that the agency has superior expertise on the given issue.<sup>70</sup> When this belief is coupled with a legislative interpretive scheme that is essentially limited to text of the statute, courts create a powerful impediment to including the people's will in its review of agency decision-making and rule

---

65. *Id.*

66. See Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, SUFFOLK U. L. REV. 27, 27-28 (2005), for a list of famous social movements that changed constitutional law.

67. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

68. Choo, *supra* note 44, at 1083.

69. PBS NEWS, *supra* note 28.

70. Johnson, *Voices*, *supra* note 8, at 635; McNollgast, *supra* note 19, at 184.

promulgation.<sup>71</sup> This approach ultimately leaves the people out of the courtroom as the judiciary uses *Chevron* deference to rubber stamp what the agency does instead of looking at agency action through the lens of the people's needs.

### **B. Judges Must Become More “Active” in Incorporating the People’s Will in its Review of Agency Action**

By the turn of the century, the United States had entered its Industrial Revolution.<sup>72</sup> Cities were bursting with new industry rooted in mass production of goods.<sup>73</sup> As the public's appetite grew for these mass-produced goods, so too did the industrial complex which would provide them.<sup>74</sup> Large factories and the mass production machines they housed became the *de rigeur* business model in major cities.<sup>75</sup> What also became common were the many workers needed to operate these factory machines many of whom were immigrants.<sup>76</sup> While these immigrants came to America looking for an opportunity to better themselves and become full members of American society, they were met with long hours, dangerous working conditions, child labor exploitation, and inadequate pay in the work place.<sup>77</sup>

Progressive politicians enacted legislation that would address and ease these workplace issues.<sup>78</sup> Even though this legislation was seen as representing the people's will since the people elected these politicians, courts routinely rejected it. Courts rejected this social legislation that was meant to level the position of the workers with that of the corporate elite who owned the factories.<sup>79</sup> The people elected members of the Progressive Party with the expectation that their elected officials

---

71. McNollgast, *supra* note 19, at 184.

72. See Myron Marty, *Twentieth Century: Society in the United States*, SCHOLASTIC, <https://www.scholastic.com/teachers/articles/teaching-content/twentieth-century-society-united-states/> [<https://perma.cc/X9T2-4GDN>] (last visited Mar. 14, 2019).

73. *See id.*

74. *See id.*

75. *See id.*

76. Friedman, *supra* note 35, at 168–69

77. *Id.* at 169.

78. *Id.* at 170.

79. *Id.* at 173.

would enact legislation that would protect them from the workplace ills that proliferated in the industrial complex.<sup>80</sup> The courts, however, repeatedly rejected the progressive social legislation that addressed wages, hours, working conditions, and other work place associated issues, citing their interpretation of the Constitution as support.<sup>81</sup> The people became increasingly frustrated with the judiciary's approach to reviewing laws they saw as essential to their health and economic well-being.<sup>82</sup> What was supposed to be review was essentially nullification which systematically "trump[ed] the will of the majority."<sup>83</sup> This period of judicial activism became known as the *Lochner* era.<sup>84</sup> It was named after *Lochner v. New York*,<sup>85</sup> a case in which the United States Supreme Court struck a state law that would have limited the number of hours employees could work in a day.<sup>86</sup> In *Lochner*, the Court held that the statute limiting work hours was unconstitutional as it violated the Fourteenth Amendment, according to the Court's interpretation.<sup>87</sup> The Court, based on its interpretation of the freedom of parties to contract, said that the state law impinged on that freedom by interfering with what should essentially be an agreement between employer and employee.<sup>88</sup> The Court held the such an infringement violated the Due Process Clause of the Fourteenth Amendment.<sup>89</sup> *Lochner* represented a jurisprudence where judges were active in imposing their opinion based on their own ideals and constituency under the guise of constitutional originalism.<sup>90</sup>

Dissatisfied with the judicial activist approach, political figures, members of the legal academy, and even members of

---

80. *See id.* at 170 (describing the various laws enacted to protect workers and ensure their wellbeing, including laws regarding income tax, child labor protection, and work place safety, hours, and conditions).

81. *See* Friedman, *supra* note 35 at 171.

82. *See id.* at 169, 177.

83. *See id.* at 168.

84. *See id.* at 167.

85. *Lochner v. New York*, 198 U.S. 45.

86. *Id.*

87. *Id.* at 53.

88. *Id.* at 57-58.

89. *Id.* at 53.

90. Corey Rayburn Yung, *Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts*, 105 NW. U. L. REV., 1, 12 (2011).

the judiciary stood up against the *Lochner* era judges and their consistent rejection of any legislation set to help the poor and working class.<sup>91</sup> The *Lochner* era judicial decisions also sparked new social movements and invigorated existing ones in the fight against these types of rulings.<sup>92</sup> The *Lochner* era rulings thus gave rise to Legal Realism as a jurisprudence.<sup>93</sup> Legal Realism was built on a foundation of viewing the law and the legislature enacting it as the supreme source of law.<sup>94</sup> William Eskridge described Legal Realism as a movement which had pioneers “not just of the Harvard and Princeton trained intellectuals, but . . . also lawyers and leaders of social movements whose members’ interests were not represented” in the original constitutional interpretive jurisprudence perpetuated by the *Lochner* era courts.<sup>95</sup> Legal Realism was thus born out of grassroots advocacy aimed at stopping courts from nullifying the people’s will by rejecting popular social legislation of the time.<sup>96</sup>

While conceived to preserve progressive legislative enactments geared toward assisting the people, Legal Realism took a subversive turn as courts took a hands-off approach in the form of deference. What was meant to be an end to judicial activism translated, over time, into a mechanical approach to judicial review.<sup>97</sup> Courts, in an effort to completely exclude their opinion, did not disturb legislation at all.<sup>98</sup> This translated into a rigid deference that courts favored the legislature with.

---

91. Friedman, *supra* note 35, at 188-91; *but see id.* at 168 (stating that because opinion polling barely existed at the time, it is impossible to know whether *Lochner* era decisions truly trumped the people’s will).

92. Friedman, *supra* note 35, at 191.

93. *Id.*; Fairfax, *supra* note 24, at 30.

94. Fairfax, *supra* note 24, at 32 (stating that Legal Realism placed “. . . the legislature and administrative agencies . . . [and] not the courts . . . [as] the rightful social and economic policy makers”).

95. William Eskridge, *Some Effects of the Identity-Based Social Movements on the Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2355 (2002).

96. Fairfax, *supra* note 24, at 31 (Legal Realism was the result of “law professors, judges, and attorneys” simultaneously taking an interest in jurisprudence and seeking more humane conditions for society).

97. *See id.*, *supra* note 24, at 32; *see generally* McNollgast, *supra* note 19, at 193 (describing the departure from substantial judicial involvement regarding review of legislation and increased reliance on the law-making body as a move to prevent political drift).

98. *See* Fairfax, *supra* note 24, at 32.

And that favor, over time, has extended to agency decision and rule-making in the form of *Chevron* deference.

This approach is inappropriate in situations where the issues are based on a legislative enactment that operates to provide rights that the public has come to rely on to fully function in society. Today, the operating law associated with entrenched super statutory enactments, often comes in the form of agency decisions and rules.<sup>99</sup> These decisions and rule promulgations, undertaken to administer the statute on a day to day basis, must also be reviewed by the judiciary with the people's will in mind. Yet, *Chevron* deference has the effect of blocking the people's will in much the same way that *Lochner*-era courts blocked popular legislation under the guise of constitutional interpretation.<sup>100</sup> *Lochner* judges summarily struck down social legislation based on constitutional interpretations favoring freedom of contract.<sup>101</sup> Judges invoking *Chevron* deference rubber stamp agency action based on congressional supremacy and agency expertise.<sup>102</sup> Both approaches ignore the people's will in the review process. Legal Realism closed the door to the judicial activism of the *Lochner* era. But, in doing so, it also closed the door to any active participation by judiciary. *Chevron* has only compounded this by supporting the position that judges should not play a role in shaping and guiding the law. This approach must change. The judiciary must instead be an integral participant in the process of judicial review as it “. . . respond[s] to and advance[s] changes emanating from outside the courts. . . .”<sup>103</sup>

Some would argue that the people are represented in agency action through their electing power and ability to participate in agency negotiated rule-making and notice and comment aspects of rule promulgation. However, these seemingly democratic means of including the people are threatened by political machinations that obfuscate the real

---

99. Morrison, *supra* note 20, at 256.

100. See generally *id.* at 261 (stating that while the Administrative and Procedural Act's purpose “. . . was to protect regulated parties from precipitous agency action . . . [,]” there was little to no concern regarding “the intended beneficiaries . . .” of the regulation).

101. *Lochner*, 198 U.S. at 53.

102. See McNollgast, *supra* note 19, at 184.

103. NeJaime, *supra* note 50, at 882-83 (“constitutional change is a bottom-up process in which courts are not leading, but instead are responding to external changes.”).

issues to manipulate the public.<sup>104</sup> “Elections offer citizens the opportunity to assess [conditions], demand changes, and to hear from politicians how those demands might be met.”<sup>105</sup> But there are always serious questions as to whether all demographics can participate or are “elitely stimulated” enough to know about opportunities for participation.<sup>106</sup>

Judges are not meant to insert their own opinions and yet they cannot be automatons in reviewing agency action. Instead, they must be active in considering the times, the people who live in the times, and the effect that agency decisions and rules will have on the people’s ability to fully function in society.<sup>107</sup>

## II. CAPTURING THE PEOPLE’S WILL?

The “people’s will” refers to social and economic norms that encompass the people’s preferences for assistance in achieving certain goals, beliefs on a given problem or issue, and desires for access to those things that would make them better societal members.<sup>108</sup> The people’s will can be captured through any number of devices, including the history related to how the statute at issue came about and what policy emerged to support and sustain it.<sup>109</sup> The people’s will can also be captured through data collection, polls and surveys, and sociological impact studies.<sup>110</sup>

---

104. Strauss, *supra* note 32, at 1258 (stating that there are groups that are not able to play their proper role in the democratic process and when this happens, courts have a role to play because the self-correcting democratic processes – such as freedom of contract, elections, other participatory and collaborative mechanisms – will be nullified leaving only the court to make the democratic process work).

105. Johnson, *Voices*, *supra* note 8, at 615. See *id.* at 614-18 for a discussion of the issues related with solely relying on elections and the administrative process as an indication that the law reflects the people’s will.

106. *Id.* at 626.

107. See Friedman, *supra* note 35, at 187 (describing the public’s lack of faith in the law as judges routinely interpreted the Constitution as mandating that they strike down legislation that reflected the will of the people).

108. Johnson, *Voices*, *supra* note 8, at 614.

109. *Id.* at 618-20, 622.

110. *Id.* at 618-19.

### A. Social Movement History Should Be Included as Part of a Court's Interpretive Instrumentalities When Reviewing Agency Action

Social movement history would explain why the law was originally enacted in terms of what societal needs it attempted to meet. It would simultaneously prioritize the impetus for creating the law and serve as an overarching mission statement or goal in reviewing the administration of the law over time. Understanding and evidencing the public's support for a statute and its undergirding purpose is a crucial aspect of judicial review of agency action regarding an entrenched super statute.<sup>111</sup>

In the Eskridge and Ferejohn super statutory entrenchment model, a statute gains its super status and becomes entrenched because the statute has expanded and contracted over time to meet the needs of the people through the normative debate process that includes all stakeholders.<sup>112</sup> "Claims . . . thought unthinkable become reasonable . . . because of the ways . . . social movement activism shapes popular and elite understandings of the [people and what they value]."<sup>113</sup>

The women's suffragist movement serves as an example of how a social movement, particularly one resulting in super statutory enactment that becomes entrenched over time (such as the HEA), can influence law making.<sup>114</sup> The central focus of the women's suffragist movement, developed over time, was to

---

111. See Michael L. Wells, *Sociological Legitimacy in Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011, 1030-31 (2007) (stating that the National Association for the Advancement of Colored People's approach to end segregation through litigation emphasized its rank of sociological legitimacy over moral legitimacy). *Id.* ([N]o matter how strong one's moral and legal arguments, without sufficient public support, an effort to vindicate them might nonetheless fail."); NeJaime, *supra* note 50, at 882 (stating that ". . . new constitutional meaning becomes authoritative not because a court decided so independently, but because social movements have persuaded political forces, opinion leaders, the public, and judges that a new position is reasonable and, in fact, correct").

112. Johnson, *Voices*, *supra* note 8, at 612-13 (citing Eskridge and Ferejohn, *supra* note 56, at 13 (stating that statutes are entrenched in terms of accepted norms and practices and because the entrenchment represents . . . "a popular consensus that the norm or practice is a good thing to believe or do").

113. NeJaime, *supra* note 50, at 883.

114. See Eskridge, *supra* note 97, 2355-56 for a description of the women's suffragist movement which was devoted to securing a Constitutional amendment that would allow women to vote.

secure an amendment to the Constitution which would guarantee the right to vote for women.<sup>115</sup> This essay focuses on the inclusion of social movement history in the judicial review process when agency action relating to an entrenched super statutory enactment is at issue. While different, a comparison of the two – social movements aimed at constitutional amendment and social movements aimed at encouraging Congress to enact and maintain legislation – is instructive. Professor Jack Balkin illustrates this by offering an interesting syllogism regarding how social movements impact the law.<sup>116</sup> He describes the suffragist movement as a four-step progression in securing the woman’s right to vote:

(1) Women were citizens. (2) Citizens enjoyed the privileges and immunities of citizenship, guaranteed by Article IV and the Fourteenth Amendment. The privileges and immunities of citizenship were national in character and paramount over state authority to the contrary. (3) The right to vote was one of those privileges and immunities because without it the United States would not be a country dedicated to popular sovereignty and governed by its citizens. Therefore (4) women had the right to vote.<sup>117</sup>

Using Professor Balkin’s syllogism as an example, a similar syllogism can be used to summarize the progression of the social movement supporting wide-spread access to higher education and how it resulted in the HEA’s enactment: (1) All people deserve to participate fully and meaningfully in democratic society;<sup>118</sup> (2) This participation requires leveling the field for those who have been unable to fully participate in society due to their social and economic status;<sup>119</sup> (3) Post-

115. See Balkin, *supra* note 67, at 38-49 for a detailed discussion of the movement associated with securing the right to vote for women.

116. *Id.* at 42.

117. *Id.*

118. Johnson, *Going Back to the Drawing Board*, *supra* note 9, at 546, 550. This ideal has been one espoused not only by social movements, but also by politicians over time. “If we would prevent the growth of class distinctions and would constantly refresh our leadership with the ideals of our people . . . [t]he full opportunity of every boy and girl to rise through the selective process of education can alone secure to us this leadership.” President Herbert Hoover, Inaugural Address (Mar. 24, 1929), *available at* [http://www.hooverpresidentialfoundation.org/inaugural\\_address.php](http://www.hooverpresidentialfoundation.org/inaugural_address.php) [<https://perma.cc/V7P9-ALJL>].

119. Johnson, *Going Back to the Drawing Board*, *supra* note 9, at 554.

secondary education has proven to be a path suited for that purpose.<sup>120</sup> In fact, over time, the need for a post-secondary credential has become significantly pronounced as wage gaps continue to expand between the historically underrepresented (minority and economically poor) and their historically represented counterparts (majority and wealthy);<sup>121</sup> (4) Therefore, post-secondary education access should be available on a wide-spread basis so that all may have the opportunity to obtain a post-secondary credential to assist them in becoming fully participating members of society.<sup>122</sup>

The history of a social movement's progression is a rich source of information. It chronicles how the social movement formed, how it informed the polity, and the way it advocated for enactment of a law that would address a social ill. Given this, courts must consider the social movement history that played a significant part in not just enacting the statute, but in setting the policy which would sustain it.<sup>123</sup>

### **B. The People's Will Can Also Be Captured through Independent Data Collection and Research Devices to Assess Public Need and Public Preference in Providing that Need**

The people's will can also be captured through a variety of independent data collection devices such as polls, surveys, and social science studies that can shed light on the sociological impact of agency action. For instance, data regarding high school graduation rates and post-secondary matriculation could be recognized in determining whether agency action, with regard to the HEA, is thwarting or promoting opportunity to

---

120. *Id.* at 546.

121. *Id.* at 549 (citing Marilyn S. Thompson et al., *Understanding the Differences in Postsecondary Educational Attainment: A comparison of Predictive Measures for Black and White Students*, 75 J. NEGRO EDUC. 546, 546 (2006)).

122. Compare Johnson, *Going Back to the Drawing Board*, *supra* note 9, at 546, 550 with Balkin, *supra* note 67, at 42.

123. See Balkin, *supra* note 67, at 27-28 for a list of famous social movements that changed constitutional law; *but see* Balkin, *supra* note 67, at 27 ("Social movements may protest long and loud for recognition of their constitutional claims, but judges are not supposed to heed them. Rather, they are supposed to follow the law, as best they can determine what the law is.").

attend and graduate from a post-secondary institution.<sup>124</sup> Data capturing post-secondary attrition and graduation rates along social and economic strata could also provide a lens by which the judiciary might review agency action.<sup>125</sup> Courts could also recognize polls and surveys which capture parents' and students' attitudes about the value of post-secondary education.<sup>126</sup> This would be helpful for the judiciary in developing a broader view of a rule, how it works, and how it should work according to the people's will.<sup>127</sup> Courts could recognize job placement and earnings studies that track the earning potential of people with a post-secondary credential compared to those without.<sup>128</sup> Focused social science research can also provide information on the impact of existing rules and thus project future impact based on continuing with a rule or implementing a rule change.<sup>129</sup> This information creates a broader context for the court and creates for it an opportunity to juxtapose the rule's purported impact with the actual impact it has or could have on the people it was created to serve.

As courts, particularly lower courts, recognize and even seek this information, decisions where courts have considered the sociological impact of a statute become precedent and thus form part of the narrative that all stakeholders use to "explain

124. Such information may be found on a United States government education website containing databases featuring information on high school matriculation, attrition, and graduation. See *Data Tools*, THE NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/datatools/> [<https://perma.cc/HW56-WCLE>]. See also *Parents Attitudes on the Quality of Education in the United States*, NORC CTR. FOR PUB. AFF. RES. (2013), <http://www.apnorc.org/projects/Pages/parents-attitudes-on-the-quality-of-education-in-the-united-states.aspx> [<https://perma.cc/GR5S-HCRW>], for an example of additional data regarding parents' attitudes on the quality of elementary and secondary education in the United States.

125. See *Data Tools*, *supra* note 125.

126. *Id.*

127. See John Immerwahr, *Public Attitudes on Higher Education: A Trend Analysis, 1993 to 2003*, PUB. AGENDA (2004), <https://www.publicagenda.org/pages/public-attitudes-higher-education> [<https://perma.cc/4CRW-6E35>], for an example of a survey analyzing the value parents place on higher education, their concerns about it, their beliefs about how social class and access impact the ability to obtain a post-secondary credential, etc.

128. See Thompson, et al., *supra* note 122 for a discussion of a study focused on post-secondary credential earning power, which found that those with a post-secondary credential earned more than those without.

129. See Johnson, *Voices*, *supra* note 8 for examples of courts taking notice of social science studies describing the social impact of a rule based on constitutional principles.

legitimate social change, repudiate past injustices, and justify calls for further development.”<sup>130</sup> Thus, judicial consideration of sociological impact increases the chances that judges will reach results that align with the people’s will. It also ensures that sociological impact becomes an integral and normative part of agency decision-making and rule promulgation.<sup>131</sup>

Using social science to capture sociological impact is not without its critics. Social science research can be both non-existent on an issue and considered inappropriately used when it does exist.<sup>132</sup> Scholars note the lack of social science research may be due to the judiciary using instruments (social science based studies) that are not entirely compatible with the instruments it typically uses to review issues.<sup>133</sup> For instance, social scientists create hypotheses and engage in rigorous data collection and analysis to determine if the hypothesis is true or true or false.<sup>134</sup> “[L]awyers . . . [, on the other hand,] subscribe to the fight theory, which holds that the primary goal is to organize facts in a the manner most beneficial to the client.”<sup>135</sup> Because of this, courts are also accused of failing to use social science information in the way it should be used.<sup>136</sup> Additionally, critics consider social science research unreliable because social scientists can use their knowledge of data gathering and analysis to produce results aligned with their own values while still labeling their work as objective science.<sup>137</sup> But these potential issues should not discount the use of social science by courts. Just as with any other evidentiary offering, the trier of fact can determine accuracy by inquiring about

---

130. NeJaime, *supra* note 50, at 883.

131. *Cf.* Robert T. Teranishi, Carola Suarez-Orozco and Marcelo Suarez-Orozco, *Immigrants in Community Colleges*, 21 *FUTURE OF CHILDREN* 153, 155 (2011) (describing the lack of national database with information on the community college matriculation amongst immigrant students).

132. Michael Rustad and Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 *N.C. L. REV.* 91, 113 (stating that courts “might use more social science information if there were more reliable research”).

133. *Id.*

134. *See id.* at 117-18 (explaining that “[s]ocial science employs an analytical and empirical approach to research problems . . . [with many] . . . goals . . . [including testing] a hypothesis of a causal relationship between variables”).

135. *Id.* at 118.

136. *Id.* at 117.

137. Rustad and Koenig, *supra* note 133, at 116.

research methods. In fact, recognizing this information at the lower court level, instead of introducing it at the final stage of litigation in the highest courts, allows the information to be vetted more thoroughly.<sup>138</sup>

### III. IN THE COURTROOM—WHERE IT HAPPENS

The goal here is to propose methods that would include the people's will in the courtroom in a meaningful and sustained way. While courts sometimes recognize sociological impact, this happens most often when weighty and controversial issues implicating the constitution are involved.<sup>139</sup> “The nation's highest courts have frequently employed judicial notice to ensure that its decisions were connected to the society in which we operate.”<sup>140</sup> But, how does sociological impact address judicial review at lower court levels and when the issue involves little “r” rights not granted by the Constitution, but secured by entrenched super statutes? One of the main purposes behind super statute entrenchment is to meet the current needs of the people without having to engage in the long and protracted battle for a constitutional change.<sup>141</sup> Addressing the social ill plaguing the people through statutory enactment, rather than constitutional change, allows a solution to reach the people more immediately.<sup>142</sup> It also creates a path for the frequent ongoing normative debate that shapes the statute to meet the people's needs.<sup>143</sup> This shaping often involves the courts as the agency administers the statute and as the people engage with it.<sup>144</sup> Thus, the court's role in this process should not be one that ignores all that has transpired in creating and maintaining the

---

138. See generally Dorothy F. Easley, *Judicial Notice on Appeal: A History Lesson in Recent Trends*, 84 FLA. B.J. 45, 45 (2010) (“Social and scientific studies have remained significant to decisions in major constitutional cases to avoid unjust results.”).

139. *Id.*

140. *Id.*

141. See 16 Am. Jur. 2d *Constitutional Law* §89 (stating that “contemporaneous construction is usually applied . . . to constitutions [rather] than to laws . . .” as laws can be changed more immediately through legislative means as compared with constitutional amendment “which cannot be so readily altered”).

142. Eskridge and Ferejohn, *supra* note 56, at 16.

143. Johnson, *Voices*, *supra* note 8, at 612.

144. See *id.*

statute.<sup>145</sup> It should be outward looking in terms of discovering and taking notice of the people's will.

Judicial notice under the Federal Rules of Evidence may provide an avenue for including the people's will in the lower level courts as the judiciary reviews agency action. Federal Rule 201 states that:

The court may judicially notice a fact that is not subject to reasonable dispute because it (b)(1) is generally known within the trial court's territorial jurisdiction; or (b)(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. The court (c)(1) may take judicial notice on its own; or (c)(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.<sup>146</sup>

Judicial notice reduces the burden on judges in finding facts by allowing judges to recognize facts that are common knowledge.<sup>147</sup> While the judiciary has frequently taken notice of social and scientific research, this has happened mostly at the United States Supreme Court level. This practice should be expanded such that courts reviewing agency action, at all levels, can take judicial notice of the sociological impact of an agency's decision or rule. This ensures that the people's voice will be in the courtroom when agency action is under review. It also ensures efficiency in producing court decisions that reflect the people's will. In this way, the relative immediacy that an entrenched super statute provides, in terms of change to address the people's needs, is not lost.<sup>148</sup>

## CONCLUSION

When the DOE acts pursuant to the HEA, the people ought to have a real and influencing opportunity to have their voices heard. They must be, or at least their voices must be, in the room where it happens. That's not just in the voting booth, the offices of negotiated rule-making sessions, or through notice and comment procedures. These devices have their place in the

---

145. *Id.* at 621 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 491 (1954)).

146. FED. R. EVID. 201(b)-(c).

147. Easley, *supra* note 139, at 45.

148. See Eskridge and Ferejohn, *supra* note 56, at 16.

normative debate that shapes a law, but they cannot be the whole of what constitutes the people's will when reviewing agency action for alignment. Courts must hear the people's will through social movement history, research, studies, and other devices. That stakeholders find themselves in court means that normal communication and approaches to problem solving have broken down.<sup>149</sup> It is the courts that, from a position of involvement and not neutrality, are positioned to help the stakeholders find a solution that aligns with the people's will.

---

149. Johnson, *Voices*, *supra* note 8, at 622.