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Chevron's Pure Questions: Searching for Meaning in Ambiguity

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Chevron's Pure Questions: Searching for Meaning in Ambiguity

The danger of Chevron is that it invites courts to ignore the fact that Congress decided some things because it did not decide everything.

—Michael Herz[1]

Since implied congressional intent is the basis for the Chevron doctrine, courts cannot simply presume that Congress intends all unclear statutes to signal deference to agencies. Instead, courts must make some inquiry into whether that rationale remains true under the particular circumstances. This Note contends, then, that the Chevron framework, from the outset, asks the wrong question. Instead of inquiring whether the statute is clear, courts should determine whether Congress intended courts to defer to an agency on the question of statutory interpretation. Instinctively deferring to an agency in the face of every ambiguity undermines congressional intent. While implied congressional intent is difficult to definitively ascertain in any particular circumstance, courts should nonetheless determine whether the question is one on which Congress is likely to wish courts to defer. The Note continues that, in attempting to approximate congressional intent regarding deference, the Chevron doctrine could significantly improve how effectively the doctrine shadows congressional intent by distinguishing between two types of statutory uncertainty, vagueness and ambiguity, two concepts courts have thus far conflated. When a court is faced with a lexical or syntactic ambiguity, the court should not defer to the agency. Courts should embrace their responsibility as experts in interpreting the law because when a provision is ambiguous rather than vague, Congress would prefer courts to follow the best reading of the words it enacted rather than following an agency's permissible construction.

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1. Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. AM. U. 187, 220 (1992).

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INTRODUCTION

Ever since the Supreme Court's decision in *Chevron v. Natural Resource Defense Council*, a bedrock principle in administrative law has been that courts must defer to an agency's reasonable interpretation of an ambiguous statute.[2] This deference doctrine has enormous consequences for the administrative state because courts decide whether *Chevron* applies to a particular case, and, if deference is due, the agency wins a significant amount of the time.[3] A recent

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

3. Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 6 (2017) ("[A]gencies won significantly more in the circuit courts when *Chevron* deference applied, at least when the court expressly considered whether to apply *Chevron*. Indeed, there was nearly a twenty-five percentage-point difference in agency-win rates with *Chevron* deference (77.4%) than without (53.6%)."). Significantly, while Chevron deference is

study shows that agencies prevail in 77.4% of cases in which the court applies *Chevron*, compared to 38.5% of cases in which the court reviews the agency's interpretation *de novo*.[4] This strongly suggests that whether *Chevron* applies to a particular agency interpretation is one of the most decisive aspects of a court's determination when an agency's statutory construction is at issue.

Considering that the *Chevron* determination acts as the dispositive issue in many cases, the U.S. Supreme Court has a charge to ensure the doctrine proves well founded. The Court has rested the deference doctrine on legislative intent—the assumption that Congress intends to delegate primary interpretive authority to agencies when it leaves an aspect of the statute ambiguous. Accordingly, if congressional intent forms *Chevron*'s basis, the Supreme Court should ensure the doctrine truly approximates when Congress intends agencies to be the all-but-final arbiter.

Given the significance of the *Chevron* determination and the reality that administrative agencies leverage *Chevron* when interpreting statutory texts, the proper application (and even legitimacy) of the doctrine prompts strong feelings.[5] Scholars continually debate whether courts should continue to defer to agencies in this manner. One side argues that statutes delegating authority to federal agencies "are different from the rest" and agencies' statutory constructions deserve deference.[6] These scholars contend that courts interpreting regulatory statutes in the same way

sporadically applied in the Supreme Court, the doctrine in the circuit courts is different. Professors Barnett and Walker show that circuit courts apply the doctrine more often than the Supreme Court and uphold agency action under *de novo* review only 38.5% of the time rather than the Supreme Court's 66.0%. *Id*.; *cf*. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1124–25 (2008).

4. Barnett & Walker, *supra* note 3.

5. As one scholar has put it, *Chevron* has been debated so extensively that, "[a]lthough the Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* is nearly eighteen years old—an age at which most humans are reaching adulthood and most judicial doctrines are becoming settled—*Chevron* is in the throes of a prolonged, difficult, and confused adolescence." Russell L. Weaver, *The Emperor Has No Clothes:* Christensen, Mead *and Dual Deference Standards*, 54 ADMIN. L. REV. 173, 173 (2002) (footnote omitted).

6. *See, e.g.*, Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 550 (2009) [hereinafter Bressman, Chevron*'s Mistake*] (arguing that *Chevron* needs reform but deference to administrative agencies is proper).

they do other statutes would be tantamount to creating federal common law. Alternatively, critics of *Chevron* quote Chief Justice Marshall's admonition that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[7] Separation-of-powers concerns arise when courts abnegate their interpretive responsibility, allowing agencies to interpret and enforce statutes with only inconsequential judicial oversight.[8]

Both sides correctly identify the issues, but each overstates its case. Under certain circumstances, a court purporting to interpret an unclear statute would be doing little more than picking the best policy and dressing it up as statutory interpretation. But there are other cases in which a court should not defer even though the current *Chevron* doctrine demands deference. In circumstances in which a court can interpret a statutory text in an objective manner, the court is in the best position to act as the primary interpreter of the text. This aspect of the Note, at least, is not novel—though it is controversial and not well settled.

For instance, since the *Chevron* opinion in 1984, the Court has cut back on the number of situations in which *Chevron* applies, concluding that Congress cannot possibly intend agencies to resolve all ambiguities. In *United States v. Mead Corp.*, the Court found that *Chevron* deference attaches only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law" (i.e., when the agency used sufficiently formal

7. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see, e.g.*, Weaver, *supra* note 5, at 180 (explaining the common critique that "*Marbury* and the APA are important because they recognize that our governmental system involves checks and balances, and part of that 'checking' function involves judicial review of administrative interpretations").

8. Then-Judge Gorsuch succinctly and persuasively explained the common separation of powers problems inherent in the *Chevron* Doctrine:

> What would happen, for example, if the political majorities who run the legislative and executive branches could decide cases and controversies over past facts? They might be tempted to bend existing laws, to reinterpret and apply them retroactively in novel ways and without advance notice. Effectively leaving parties who cannot alter their past conduct to the mercy of majoritarian politics and risking the possibility that unpopular groups might be singled out for this sort of mistreatment—and raising along the way, too, grave due process (fair notice) and equal protection problems.

Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

procedures to warrant deference).[9] In another line of cases, the Court has held that Congress cannot have intended agencies to decide a question of "deep economic and political significance that is central to th[e] statutory scheme."[10] Given these exceptions, might there be additional circumstances currently covered by *Chevron* in which Congress does not intend to grant primary interpretive authority to an agency?

The *Mead* opinion took a critical step forward in acknowledging that Congress does not always intend courts to defer to agencies. And the Court pivoted the analysis, at least initially, to whether there is evidence that Congress indeed intended deference. The opinion does not go far enough, however, because if an agency can clear the procedural hurdle, then the Court applies *Chevron* as usual.[11] Yet there are cases where the statute is genuinely ambiguous—meaning that more than one plausible interpretation exists—but where Congress likely meant for only one of those meanings to operate. In other words, there are statutes that have one correct interpretation.

The Supreme Court encountered just such a situation only a few years after issuing the *Chevron* opinion.[12] In *Immigration & Naturalization Service v. Cardoza-Fonseca*, the Court grappled with the interpretation of two provisions allowing refugees to seek asylum in the United States.[13] Although the textual language was unclear, Justice Stevens, also the author of *Chevron*, refused to defer to the

9. United States v. Mead Corp., 533 U.S. 218, 226–27, 230 (2001) (contending that Congress only intends administrative deference when agencies promulgate regulations with the effect of law, and "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force").

10. King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (internal quotation marks omitted); *see also* Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 20 (2010) ("In a series of recent cases, the Supreme Court and various courts of appeals have declined to afford deference to agency interpretations when an agency's proposed interpretation relies on an insufficiently definite statutory provision in order to greatly increase the agency's power—even in situations that would seem to suggest statutory ambiguity and would thus warrant *Chevron* deference.").

11. Bressman, Chevron*'s Mistake*, *supra* note 6, at 563 (contending that "[b]ecause *Mead* gives way to *Chevron* in routine cases, it does not go far enough to alter the standard search for statutory meaning").

12. *See* Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421 (1987).

13. *Id.*

agency's interpretation because the question was "a pure question of statutory construction for the courts to decide."[14] According to the majority, *Cardoza-Fonseca* was an instance in which Congress intended one specific answer, and thus the Court impliedly created an exception to *Chevron* for "pure question[s] of statutory construction."[15]

Justice Scalia wrote an animated concurrence, contending that *Chevron* deference applied.[16] Justice Scalia lost the battle, but he ultimately won the war: the Supreme Court's burgeoning exception to *Chevron* died before it could fully develop.[17] One probable reason why the "pure questions" doctrine never took hold is that the Court never "define[d] precisely what a 'pure question' is."[18]

While I do not presume to know exactly what Justice Stevens had in mind when he authored *Cardoza-Fonseca*,[19] this Note attempts to lay out a method by which courts can determine if the statutory provision has a specific meaning and determine if Congress likely intended a court to defer. The Note attempts to clarify the "pure questions" exception to *Chevron* by illustrating and defending two closely related circumstances when courts should not defer to an agency because the issue is one of pure statutory interpretation. Courts should distinguish between different types of textual uncertainty because not all unclear statutes suffer from the same malady. Specifically, courts should not defer when confronted with an issue of lexical or syntactic ambiguity. Courts should hesitate before deferring in the face of lexical or syntactic ambiguity because, though the statute may be unclear and the answer difficult to determine, the linguistic properties of the words indicate that Congress likely had one meaning in mind. Alternatively, courts ought to defer when the statute is vague—when attempting to

14. *Id.* at 446.

15. *Id.*

16. *Id.* at 453–55 (Scalia, J., concurring).

17. *See* Herz, *supra* note 1, at 222.

18. *Id.*

19. Indeed, my proposed examples of pure questions of statutory interpretation differ greatly from the question presented in *Cardoza-Fonseca*. Justice Stevens likely thought of the exception as one in which congressional intent signaled that only one answer was possible while my proposed exception relies on textual clues to determine whether only one answer is possible.

"interpret" the statute amounts to no more than the creation of federal common law.

The first instance of pure statutory construction occurs when a court confronts lexical ambiguity. Lexical ambiguity arises when it is unclear which of two or more meanings applies to the situation.[20] An often-used example is the word *bank*,[21] which has two noticeably distinct senses: one referring to a financial institution and the other referring to a riverbank.[22] When a person says, "I'm headed to the bank," the phrase could lead to two completely different understandings depending on if the individual has a paddle or a cashier's check in hand.

A more conceptually difficult example is the multi-sense meaning of *door*.[23] Used one way the word refers to a physical object, usually wooden and rectangular, that a person can knock on or open. Another way English speakers use *door* refers to the space between the doorframe where people or objects may move.[24] We occasionally use *doorway* to refer to this second meaning. When a person says, "Guess who just knocked on the door?" or "Guess who just walked through the door?" that person is actually expressing two distinct senses of the same word. But, as used in these two example questions, people rarely recognize the distinction. This, therefore, is an example of a possible lexical ambiguity in which the distinction between the senses is finely grained[25] and is the type of statutory

20. Justice Scalia defines this as "[a]n uncertainty of meaning based not on the scope of a word or phrase but on a semantic dichotomy that gives rise to any of two or more quite different but almost equally plausible interpretations." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 425 (2012); *cf.* VICTORIA FROMKIN ET AL., AN INTRODUCTION TO LANGUAGE 550 (8th ed. 2007) (defining lexical ambiguity as "[m]ultiple meanings of sentences due to words that have multiple meanings").

21. *See, e.g.*, Brendan S. Gillon, *Ambiguity, Generality, and Indeterminacy: Tests and Definitions*, 85 SYNTHESE 391, 404 (1990); ADAM SENNET, *AMBIGUITY*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring 2016 ed.), https://plato.stanford. edu/archives/spr2016/entries/ambiguity/.

22. *See* Gillon, *supra* note 21, at 404 (noting that "the lexical ambiguity of words such as 'bank' cannot be ignored").

23. JEAN AITCHISON, WORDS IN THE MIND: AN INTRODUCTION TO THE MENTAL LEXICON 175 (Wiley-Blackwell, 4th ed. 2012) (1987).

24. *Id.* (noting that "[t]his has been called *complementary ambiguity*, since *door* refers to different aspects of the same object").

25. *Id.* Professor Aitchison explains that words "multiply, like ever-splitting amoebas, as new meanings creep in alongside older ones. 'Meanings expand their range

question that might come before a court. The word has two distinct meanings, but those meanings are so closely related that they are often conflated—though only one sense operates in any given context.

The second instance of pure statutory construction involves syntactic (or structural) ambiguity. This type of ambiguity arises when the structure of the sentence creates uncertainty regarding its meaning, leading to questions about the relationship between particular words or clauses.[26] One example of syntactic ambiguity is found in the sentence, "The boy saw the man with a telescope."[27] It is unclear from the sentence structure alone whether the boy or the man held the telescope.[28] The structure of the sentence calls into question the relationship between the clauses and creates uncertainty in the overall interpretation.[29]

Lexical and syntactic ambiguity are distinct from and should be contrasted with vagueness, with vague provisions receiving administrative deference. The most well-known example of vagueness comes from H.L.A. Hart's hypothetical statute that prohibits taking "a vehicle into the public park."[30] Professor Hart inquired whether the statute should be interpreted to include bicycles, toy automobiles, or airplanes.[31] The question is not which of the two meanings of vehicles applies in this circumstance; rather, the issue is whether a particular object falls within the definition of "vehicle."[32] In other words, this hypothetical would require the court to determine the core characteristics of a vehicle, as the word is

through the development of various polysemies . . . these polysemies may be regarded as quite fine-grained.'" *Id.* (quoting PAUL J. HOPPER & ELIZABETH C. TRAUGOTT, GRAMMATICALIZATION 100 (1993)).

26. FROMKIN ET AL., *supra* note 20, at 561. "Structural ambiguity: The phenomenon in which the same sequence of words has two or more meanings that is accounted for by different phrase structure analysis." *Id.*

27. *See id.* at 176–77.

28. *Id.*

29. *Id.*

30. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

31. *Id.* Professor Hart remarks that "[p]lainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about airplanes? Are these, as we say, to be called 'vehicles' for the purpose of the rule or not?" *Id.*

32. *Id.*

used in the statute, and to determine whether a particular object shares enough of those characteristics to be considered a vehicle. These types of decisions should receive administrative deference because determining, for instance, whether "vehicle" includes a stationary World War II memorial with a military truck set on a pedestal[33] has an air of policymaking.

While this Note's narrow objective is to specifically identify lexical and syntactic ambiguity as examples of pure questions, more broadly the Note attempts to demonstrate that *Chevron* step one asks the wrong question. Instead of inquiring whether the statute is clear, courts should ask whether the text suggests that Congress intended the provision to have a specific meaning. When courts inquire only into whether the statute is clear, they ignore the fact that many statutory provisions have actual meaning but, for whatever reason—likely that the members of Congress did not catch the ambiguity—the provision is susceptible to multiple interpretations. To instinctively defer to an agency in the face of every ambiguity undermines congressional intent, the foundation upon which *Chevron* sits.[34]

This Note proceeds in three parts. After describing the *Chevron* framework, Part I explains why the doctrine needs a broader exception than provided for in *Mead*. Because *Chevron* bases its legitimacy on implied congressional intent, the Court has created a legal fiction both by holding that Congress intends courts to defer whenever there is an unclear statute and by failing to make any inquiry into whether Congress truly intends deference under the circumstances. Part II lays out a method by which courts can more closely shadow likely congressional intent regarding when courts should defer to administrative agencies. It does so by distinguishing between two types of statutory uncertainty—ambiguity and vagueness. In Part III, the Note makes the case for why the distinction between ambiguous and vague statutory provisions makes

33. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 663 (1958) (engaging in Professor Hart's hypothetical by proposing a difficult case, that of a military truck on a pedestal).

34. This assumes that Congress does not wish each and every unclear statutory provision to signal administrative deference. This assumption is explored in detail in the following Part.

sense; specifically, neither the congressional-intent theory nor alternative theories such as agency expertise or political accountability justify deferring to administrative agencies when the statutory provision is lexically or syntactically ambiguous.

I. WHY AN EXCEPTION TO THE *CHEVRON* FRAMEWORK IS NECESSARY

The *Chevron* analytical framework is fairly straightforward, even if courts often struggle to apply it consistently.[35] *Chevron*'s theoretical foundation, however, is less apparent. Scholars have struggled to come to a consensus regarding the judiciary's basis for administrative deference, and many scholars have labeled the prevailing rationale—implied congressional intent—a legal fiction.[36] Indeed, accepting the rationale of implied congressional intent, which the Court did in *Mead*, creates problems for *Chevron*'s coherency since Congress does not intend courts to defer in every instance. The Court came close to recognizing this incoherency in *Mead*. And its future decisions should more broadly consider whether Congress actually intends to delegate to agencies primary interpretive authority with every unclear statutory provision.

This Part addresses why, for the *Chevron* doctrine to prove coherent, it is necessary for courts to ask the broader question of when Congress genuinely intends for agencies to resolve ambiguities and then for courts to formulate exceptions to administrative deference that would help courts to defer only in those circumstances. This Part argues that courts should acknowledge that *Chevron* is based on a legal fiction, that courts should defer to agencies only under circumstances that reflect when Congress actually intends deference, and, thus, that a broader exception than *Mead* is necessary.

35. Eskridge & Baer, *supra* note 3, at 1124–25 (showing that the Supreme Court applies *Chevron* only a quarter of the time where it would seem to apply).

36. *See, e.g.*, David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 203 (2001) (labeling the conclusions drawn about congressional intent "fraudulent"); Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1285 (2008); Mark Seidenfeld, Chevron*'s Foundation*, 86 NOTRE DAME L. REV. 273, 311 (2011) (noting that the *Chevron* fiction is "unsupportable").

A. Current Chevron *Doctrine*

The *Chevron* decision significantly altered administrative law, but in 1984 there was no hint that the case would become a landmark decision.[37] Only six Justices participated in the case and none dissented.[38] Additionally, in the year following the *Chevron* decision, the Court decided nineteen cases in which the *Chevron* framework should have applied. Yet the Court cited the opinion only once.[39] As one scholar has remarked, "Justice Stevens' opinion contained several features that can only be described as 'revolutionary,' even if no revolution was intended at the time."[40] Although it is difficult to pinpoint exactly when *Chevron* achieved canonical status, it first gained importance in the lower courts, and the Supreme Court cited it rarely until Justice Antonin Scalia joined the Court in 1986.[41]

The *Chevron* litigation arose out of the Reagan administration's deregulatory agenda.[42] The Clean Air Act mandates that states establish a program to regulate "major stationary sources" of air pollution, but the Act does not define the term.[43] The Environmental Protection Agency (EPA), reversing course, redefined the term to refer to a permit owner's entire facility rather than a single polluting source.[44] This policy, known as the "bubble concept,"[45] reduced the costs of complying with the EPA's emissions standards because, if a stationary source referred to an entire facility,

37. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 976 (1992) [hereinafter Merrill, *Judicial Deference*] ("In time . . . lower courts, agencies, and commentators all came to regard the analysis of the deference question set forth in *Chevron* as fundamentally different from that of the previous era. Justice Stevens' opinion contained several features that can only be described as 'revolutionary' . . . .").

38. *Id.* at 975–76.

39. *Id.*

40. *Id.*; Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 284 (1986) (noting that "[t]his revolutionary effect is not apparent from a quick examination of the opinion itself").

41. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 838 (2001).

42. Merrill, *Judicial Deference*, *supra* note 37, at 975 ("[T]he disputed issue could be seen as part of the general deregulatory thrust of the early Reagan Administration.").

43. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 841 (1984).

44. *Id.* at 862 (explaining that the EPA's new interpretation of "stationary source" proved a "sharp break with prior interpretations of the Act").

45. *Id.* at 841–42.

pollution could surge in parts of the facility as long as the increase was offset by a decrease within the "bubble."

The *Chevron* opinion upheld the EPA's new definition because "Congress did not actually have an intent regarding the applicability of the bubble concept."[46] The Court also devised a novel framework under which courts should analyze similar questions. The Court held that courts defer to an agency interpretation unless "the issue is suitable for independent judicial resolution."[47] Independent judicial analysis had been the default rule,[48] but the *Chevron* Court reversed the presumption in favor of deference, permitting independent judgment only when the statute is unambiguous. The Court appeared to jettison the factors courts traditionally relied upon to determine whether the case warranted deference[49] and instituted a procedural framework that, at least facially, is straightforward.

Traditionally, the *Chevron* analysis consists of two distinct steps. The first step requires the court to determine "whether Congress has directly spoken to the precise question at issue"[50]—whether the statutory language is sufficiently clear that only one plausible interpretation exists. If the court determines that the statute is ambiguous, the court continues to step two. The second step instructs the court to determine whether the agency's interpretation is "permissible"—giving broad discretion to the agency to interpret the statute according to its understanding of congressional intent, unless the agency's interpretation moves into the realm of unreasonableness.[51]

A court's responsibility is to determine if the statute is unambiguous because, if so, congressional intent is clear. *Chevron* expressly declares that "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give

46. *Id.* at 845.

47. Merrill, *Judicial Deference, supra* note 37, at 977.

48. *Id.*

49. For example, Justice Scalia argued that under *Chevron*, "there is no longer any justification for giving 'special' deference to 'long-standing and consistent' agency interpretations of law." Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989).

50. *Chevron*, 467 U.S. at 842.

51. *See id.* at 843.

effect to the unambiguously expressed intent of Congress."[52] *Chevron* step one is, thus, an all-or-nothing decision whereby the court decides whether the statute is clear,[53] reasoning that if the statute is unclear, Congress would wish the court to grant deference to the agency's interpretation of the specific statutory provision.

Courts generally determine whether the statute is ambiguous by "employing traditional tools of statutory construction."[54] The Supreme Court has sanctioned the use of "the statute's text, its context, the structure of the statutory scheme, and canons of textual construction" to determine whether a statute is clear at *Chevron* step one.[55] The Court has also accepted evidence of "statutory purposes, including those revealed in part by legislative and regulatory history," to make a similar determination.[56] If a court cannot deduce the clear meaning of the statutory provision, it proceeds to *Chevron* step two.

Step two ensures that a "court does not simply impose its own construction on" an ambiguous statute, "as would be necessary in the absence of an administrative interpretation."[57] The court's responsibility shifts from finding the best meaning to ensuring that the agency's interpretation is "permissible." One scholar has conceptualized the "permissible" meaning of the statute as a "space" within which the agency may operate.[58] Unclear terms may have a variety of permissible meanings, and the agency is authorized to

52. *Id*. at 842–43.

53. Merrill, *Judicial Deference, supra* note 37, at 977 ("*Chevron* transformed a regime that allowed courts to give agencies deference along a sliding scale into a regime with an on/off switch.").

54. *Chevron*, 467 U.S. at 843 n.9.

55. City of Arlington v. FCC, 569 U.S. 290, 309 (2013).

56. *Id*. at 309–10; *see also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143–47 (2000).

57. *Chevron*, 467 U.S. at 843; *see also id*. at 844 (footnote omitted) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations . . . .").

58. Peter L. Strauss, *"Deference" is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight*,*"* 112 COLUM. L. REV. 1143 (2012). *Chevron* grants to an agency an "area within which [the] administrative agency has been statutorily empowered to act in a manner that creates legal obligations or constraints—that is, its [delegated or] allocated authority." *Id*.

choose any meaning that is within this space, bounded only by the reasonable confines of the disputed term.[59]

The second step is more than perfunctory, as the court takes a closer look than simply asking whether the interpretation "would flunk the laugh test at the Kennedy School of Public Policy."[60] Yet, when a court reaches step two, it rarely overturns an agency interpretation as impermissible.[61] Although courts do not simply rubber-stamp any interpretation the agency concocts, the *Chevron* opinion strongly suggests that courts are not "supervisors of agencies" but are closer to "a check or bulwark against abuses of agency power."[62] Thus, if a statute is truly unclear, the court will give significant deference to the agency's interpretation and will second guess the agency only when the court encounters an untenable interpretation.

Thus, the *Chevron* framework, without proper exceptions, has enormous consequence for statutes with lexical or syntactic ambiguity because the provision might be difficult to decipher, leading the court to declare the provision ambiguous. The court would then switch from attempting to find the best meaning of the provision to assuring itself that the agency's interpretation is reasonable. This creates issues for lexically and syntactically ambiguous statutes because linguistically such statutes have only one possible answer, but a court might be forced to accept a plausible yet incorrect agency construction.[63]

59. *See id*.

60. Erika Jones et al., *Developments in Judicial Review with Emphasis on the Concepts of Standing and Deference to the Agency*, 4 ADMIN. L.J. 113, 124 (1990) (comments of the Hon. Judge Stephen F. Williams) (remarking that the view of *Chevron* step two as merely an exercise in determining whether the agency interpretation passes the laugh test is "a gross overreading of *Chevron*").

61. Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 96 (1994).

62. Starr, *supra* note 40, at 300–01 ("Although the Court has not completely embraced the pure checking and balancing paradigm as a normative description of the court-agency relationship, and probably never will, *Chevron* strongly suggests that courts should see themselves not as supervisors of agencies, but more as a check or bulwark against abuses of agency power.").

63. *See infra* Section III.B.

B. Chevron*'s Foundation*

Any theory that purports to create an exception to *Chevron* must square with the rationale behind the doctrine itself. If the exception does not further the *Chevron* doctrine, either the exception is unwarranted or the entire doctrine is amiss. Since this Note contends that *Chevron* deference has its place, provided the appropriate exceptions apply, the concept that courts should not defer in the face of lexical or syntactic ambiguity must also conform to the Court's rationale for creating administrative deference in the first instance.

This task is not entirely straightforward, however. Scholars debate what doctrine or principle grants the Court authority to depart from Chief Justice Marshall's admonition that the authority falls to the judiciary "to say what the law is."[64] For instance, most scholars admit that the Administrative Procedures Act (APA) offers no support for *Chevron* deference.[65] The APA specifies that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[66] Additionally, the statute provides that "[t]he reviewing court shall . . . set aside agency action . . . not in accordance with law."[67]

With no support from the APA, the *Chevron* opinion advanced several non-statutory theories about the policy basis of administrative deference.[68] First, Justice Stevens argued that Congress likely intended to delegate certain questions to administrative agencies

64. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

65. *See, e.g.*, Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 788–94 (2010) (explaining that the APA includes provisions that "seem to be relatively clear statements by Congress intended to assign resolution of legal issues to reviewing courts, not to administrative agencies"); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 189–211 (1998) (arguing that "[t]he legislative history of the APA leaves no doubt that Congress thought the . . . [statute] 'require[d] courts to determine independently all relevant questions of law, including the interpretation of constitutional or statutory provisions'"); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 196 (2006) (contending that the APA "seems to suggest that ambiguities must be resolved by courts and hence that the *Chevron* framework is wrong").

66. 5 U.S.C. § 706 (2012).

67. *Id.*

68. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

because "the regulatory scheme is technical or complex" or because "Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency."[69] Second, agencies have the necessary expertise to decide difficult policy questions that courts cannot since "[j]udges are not experts in the field."[70] Third, administrative agencies are more politically accountable than courts and, thus, in the face of ambiguous statutory text, agencies ought to be the institution establishing policy. The opinion reasoned that "[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices."[71]

Beyond these theories, scholars have advanced other arguments that have received varying degrees of acknowledgment from courts. For instance, Peter Strauss contended that *Chevron* is the Court's method of ensuring national uniformity in federal administrative law.[72] Because the Supreme Court may review only a small percentage of circuit decisions, the *Chevron* doctrine allows for greater national uniformity, counteracting "the balkanization of federal law."[73] By granting agencies broad deference, the *Chevron* doctrine reduces the likelihood of circuit splits that could shroud the administrative state in uncertainty.[74] Cass Sunstein has justified deference by emphasizing the executive's need to react "promptly and decisively" in the face of change.[75] Professors Goldsmith and Manning argue that agencies, being executive branch departments, have independent constitutional authority to fill statutory gaps.[76]

69. *Id*.

70. *Id*.

71. *Id*.

72. Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987) [hereinafter Strauss, *One Hundred Fifty Cases*]; *see also id*. at 1112 ("Varying instructions from different courts of appeals not only interfere with the instruction to achieve uniformity, but also make it more difficult for the agency to manage its own resources . . . .").

73. Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2588 (2006) [hereinafter Sunstein, *Beyond* Marbury].

74. Strauss, *One Hundred Fifty Cases*, *supra* note 72, at 1112.

75. Sunstein, *Beyond* Marbury, *supra* note 73, at 2587.

76. Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2297–302 (2006).

They urge that "the executive branch presumptively may fill in the legislative details unless Congress specifies otherwise."[77]

Despite the proliferation of scholarly theories, the Supreme Court has rested its recent decisions on implied congressional intent as *Chevron*'s foundation.[78] In *Mead*, the Court made clear that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency."[79] Gone were the references to agency expertise and greater democratic accountability, and absent were any other scholarly theories about how the *Chevron* doctrine may be defended on alternative grounds.[80]

Joining the reasoning in *Mead*, scholars too have generally endorsed implied congressional intent as the basis for *Chevron*.[81] Two prominent scholars have remarked that the congressional-intent theory proves the most persuasive because it "can solve the puzzles about why *Chevron* deference is mandatory, and why it supersedes the APA . . . . Deference is mandatory because Congress has commanded it."[82] Accordingly, implied congressional intent is the only theory that seems to fully encompass *Chevron*'s reasoning.

Moreover, scholars have argued that the implied-intent theory represents how Congress acts. Professor Bressman notes that Congress absolutely intends to delegate interpretive authority, at least under certain circumstances.[83] Her work attempts to rebut the critics' charge "that Congress does not think about delegation of

77. *Id*. at 2298.

78. United States v. Mead Corp., 533 U.S. 218, 218 (2001).

79. *Id*. at 226; *see also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996) (noting that *Chevron* depends on the "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency").

80. *See Mead Corp.*, 533 U.S. at 226.

81. Sunstein, *Beyond* Marbury, *supra* note 73, at 2589 ("[A] consensus has developed on an important proposition, one that now provides the foundation for *Chevron* itself: The executive's law-interpreting power turns on congressional will."); *see* Merrill & Hickman, *supra* note 41, at 863–73.

82. Merrill & Hickman, *supra* note 41, at 870.

83. Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2009 (2011).

interpretive authority at all or in the way the Court imagines."[84] She writes that an inquiry into how Congress behaves provides legitimate reasons "to believe that the basic presumption of congressional delegation is well grounded" and "to assume that an express delegation of regulatory authority generally carries an implied delegation of interpretive authority."[85]

Additional scholarship shows that Congress does intend to delegate, at least for certain situations. Professors Epstein and O'Halloran, for instance, found that Congress delegated more policymaking when statutes were complex.[86] They argued that Congress counts on 535 members and their staff to understand policy concerns and to recommend potential legislative solutions, whereas the executive branch "is filled (or can be filled) with policy experts who can run tests and experiments, gather data, and otherwise determine the wisest course of policy."[87]

Since the Supreme Court has generally relied on congressional intent and has based its opinions on this theory, this Note assumes that *Chevron* is based on the notion that Congress intends for agencies to interpret ambiguous statutory provisions. Despite the existence of alternative theories, the Court seems interested only in congressional intent and is most likely amenable to restricting the doctrine based on arguments that Congress does not intend all ambiguities to license agencies to base their policies solely on plausible readings of statutory provisions.

Yet, accepting that *Chevron* is based on implied congressional intent also illustrates the necessity of creating exceptions to the doctrine that permit courts to reject deference in instances where Congress does not intend deference. For instance, not all commentators are prepared to assume that Congress intends judicial deference as *Chevron* commands. Some scholars contend that justifying broad agency deference on an implied congressional intent

84. *Id.* at 2011.

85. *Id.*

86. David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 967 (1999).

87. *Id.*

is more than a legal fiction—it is a farce.[88] Professors Barron and Kagan contend that "[i]t is far more likely that Congress, unless confronting a serious problem in the exercise of some interpretive authority, simply fails to think about this allocation of power between judges and agencies."[89] Other critics argue that Congress has never enacted a general deference statute, and as Professor Merrill points out, Congress's general "practice of enacting specific delegations of interpretative authority suggests that Congress understands that no such general authority exists."[90] Professor Farina also takes issue with implicit congressional intent as a justification for deference because Congress uses similarly expansive language in statutory schemes wholly "committed to judicial oversight," and this "would seem to undermine any notion of some generic legislative disinclination to trust courts with interpreting broad statutory mandates."[91]

Indeed, Judge Henry Edwards wrote that simply assuming "that silence or ambiguity confers that kind of interpretative authority on the agency is unacceptable, for it assumes the very point in issue and thus 'fails to distinguish between statutory ambiguities on the one hand and legislative delegations of law-interpreting power to agencies on the other.'"[92] Presuming that Congress implicitly delegates interpretive authority to agencies without evidence of such intent, indeed, with evidence to the contrary, does little to support the *Chevron* doctrine.

88. *See, e.g.*, Barron & Kagan, *supra* note 36, at 203 (labeling the conclusions drawn about congressional intent "fraudulent"); Criddle, *supra* note 36, at 1285; Seidenfeld, *supra* note 36, at 311 (noting that the *Chevron* fiction is "unsupportable").

89. Barron & Kagan, *supra* note 36, at 216.

90. Merrill, *Judicial Deference*, *supra* note 37, at 995.

91. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 471 (1989). Professor Farina writes that "[t]he classic example of a broad mandate committed to judicial elaboration and enforcement is the Sherman Act's prohibition of '[e]very contract, combination . . . , or conspiracy, in restraint of trade' and of activities that 'monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States.'" *Id.* at 471 n.77 (all but first alteration in original) (citing 15 U.S.C. §§ 1–2 (1982)).

92. CSX Transp. v. United States, 867 F.2d 1439, 1445 (D.C. Cir. 1989) (Edwards, J., dissenting) (quoting Clark M. Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron*'s Step Two*, 2 ADMIN. L.J. 255, 261 (1988)).

Moreover, current scholarship also proves that Congress does not always intend to grant agencies primary interpretive authority in the face of ambiguity. Professors Gluck and Bressman recently conducted a survey of 137 congressional drafters about doctrines of statutory interpretation.[93] They conclude that "although ambiguity sometimes signals intent to delegate, often it does not."[94] Moreover, these drafters were chiefly referring to purposeful ambiguity in statutes, not to when "neither side realized the ambiguity that they were creating."[95] While an across-the-board presumption of congressional intent to delegate this authority could potentially be justified if Congress intended agencies to always act as the primary interpreters, unintentional ambiguity is the least likely type of ambiguity to have an attaching congressional intent. Thus, when the ambiguity went unrecognized until an agency began promulgating regulations, the fiction that Congress implied a delegated interpretive authority proves the weakest. And, Gluck and Bressman's study demonstrates that legislative drafters believe Congress does not always intend an agency's interpretation to predominate—even when Congress passes a statute with a manifest ambiguity.[96]

Thus, it speaks to reason that if there are circumstances in which Congress does not intend courts to defer to administrative agencies, courts should pay close attention to signals regarding when deference is warranted. As such, courts should not merely determine whether the statute is clear. Instead, they should inquire further and develop doctrines that seek to determine when Congress intends

93. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013). Professors Gluck and Bressman surveyed 137 "congressional staffers drawn from both parties, both chambers of Congress, and spanning multiple committees—on topics ranging from their knowledge and use of the canons of interpretations, to legislative history, the administrative law deference doctrines, the legislative process, and the courts-Congress relationship." *Id*. at 902.

94. *Id*. at 996.

95. Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 872 (2014) ("Avoidable unintentional ambiguity results from a lack of attention to detail or a lack of time or resources to resolve ambiguity. One of the most prominent examples of an avoidably, but unintentionally, vague statute is the Alien Contract Labor Law that was the focus of the seminal *Holy Trinity* Supreme Court case.").

96. Gluck & Bressman, *supra* note 93, at 996.

deference and when the judiciary should wield its full reviewing authority. The distinction advocated here is for courts to withhold deference for pure questions of statutory construction—when the disputed provision comprises a lexical or syntactic ambiguity.

C. Chevron*'s Legal Fiction*

A general scholarly consensus has developed, endorsed most prominently by the Supreme Court in *Mead*, that "[t]he executive's law-interpreting power turns on congressional will."[97] This has certain implications for when courts should defer to administrative agencies. As one scholar has remarked, "The conclusion that *Chevron* rests on an implied delegation from Congress also has important implications for *Chevron*'s domain: it means that Congress has ultimate authority over the scope of the *Chevron* doctrine and that courts should attend carefully to the signals Congress sends about its interpretative wishes."[98] Courts should defer to agency interpretations of statutes only when Congress has expressly or impliedly conveyed a desire for such a result.

Yet, any theory based on implied congressional intent is necessarily based on a legal fiction.[99] This is so because of the difficulty, if not impossibility, of determining in specific circumstances when Congress expresses an "implied" desire to delegate primary interpretive authority to agencies. As Professors

97. Sunstein, *Beyond* Marbury, *supra* note 73, at 2589; *see* Merrill & Hickman, *supra* note 41, at 863–73.

98. Merrill & Hickman, *supra* note 41, at 836. Professors Merrill and Hickman argue that the Court has recognized to a certain degree that *Chevron* deference is not always appropriate, and this is why the Court has retained *Skidmore* deference.

> Recognizing *Skidmore* as the default alternative to *Chevron* gives courts three choices rather than two in reviewing agency interpretations of statutes. Instead of *Chevron* deference and no deference, we have *Chevron* deference, *Skidmore* deference, and no deference. This larger menu of options allows *Chevron* to be given a relatively narrow domain, one that hopefully captures those circumstances in which deference is most appropriate.

Id. at 863.

99. Sunstein, *Beyond* Marbury, *supra* note 73, at 2590 ("But as Justices Breyer and Scalia have independently emphasized, this is a legal fiction; usually the legislature has not expressly conferred that power at all. The view that the executive may 'say what the law is' results not from any reading of statutory text, but from a heavily pragmatic construction, by courts, of (nonexistent) congressional instructions." (internal citations omitted)).

Barron and Kagan insist, "Given the difficulty of determining actual congressional intent, some version of constructive—or perhaps more frankly said, fictional—intent must operate in judicial efforts to delineate the scope of *Chevron*."[100]

The fact that *Chevron*, as it now stands, is built upon a type of legal fiction is not its fatal flaw, however. The current doctrine's greatest weakness is that it proves more contradictory in nature than a simple legal fiction. It fundamentally misrepresents the analysis courts actually engage in when confronted with an agency action. If the doctrine is genuinely based on congressional intent to delegate, then courts should attempt to determine whether Congress actually intended to delegate. Yet, these questions do not enter into the *Chevron* analysis.[101] *Chevron* instructs courts to focus on whether the text is clear and, if not, to presume congressional intent to delegate regardless of any other factors.[102] As Professor Bressman notes, *Chevron* recognizes that Congress may impliedly delegate interpretive authority to agencies. "But rather than implementing these insights as part of the doctrinal analysis, *Chevron* reverts to the . . . search [for] meaning."[103]

Thus, *Chevron* correctly notes that Congress may at times intend for agencies to authoritatively interpret its statutes, but the doctrine does not take into account circumstances under which Congress likely intends otherwise. It creates a legal fiction that every ambiguous administrative provision gives the agency primary interpretive authority. If ambiguous statutes do not always signal congressional intent to defer—as this Note contends—courts should give special attention to determining when Congress expects the judiciary to perform a probing review of agency action.

Ultimately, *Chevron*'s legal fiction fails to accomplish its purported aim—to approximate congressional intent. And to the extent the doctrine does not shadow congressional intent, it is disingenuous, "a kind of diversion, allowing judges to exercise

100. Barron & Kagan, *supra* note 36, at 203.

101. Bressman, Chevron*'s Mistake*, *supra* note 6, at 553–54.

102. *Id.* at 553 ("*Chevron* recognizes such 'delegating' factors; its mistake is failing to make those factors central to its doctrinal inquiry. The factors operate only as justifications for agency delegation, not as guides for determining the existence of that delegation.").

103. *Id.* at 553–54.

significant discretion in determining statutory meaning while attributing their discretionary choices to Congress."[104]

But not all implied congressional intent theories inevitably suffer from a similar flaw. While congressional intent is difficult to determine, especially implied intent, this does not necessarily suggest that courts cannot create a legal fiction that more closely aligns with congressional behavior and intent. Part of any such doctrine must include courts' assessing whether Congress intended administrative deference under the specific circumstances. In other words, few circumstances will present themselves in which courts can definitively say that Congress disfavored deference under the specific statute, but courts can provide rules that create exceptions to *Chevron* under circumstances in which Congress is least likely to favor administrative deference.

In this regard, *Mead* is a step in the right direction. While *Chevron* partially bases its justification on congressional intent, an examination of likely congressional intent is absent from the Court's analysis. Conversely, *Mead* makes legislative intent its central, threshold inquiry.[105] *Mead* involved the issue of whether a United States Customs Service ruling letter deserved *Chevron* deference.[106] U.S. Customs issues between 10,000 and 15,000 of these letters annually from forty-six separate offices, and letters are issued and modified without notice-and-comment procedures.[107] The Court withheld *Chevron* deference, reasoning that "there [is] no indication that Congress intended such a ruling to carry the force of law."[108] *Mead* asserts that Congress does not intend to delegate interpretive

104. Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 619 (2002) ("This raises significant questions about institutional accountability for legislative law, for it allows judges to use the soothing rhetoric of the standard judicial story to distance themselves from their own interpretive creations.").

105. United States v. Mead Corp., 533 U.S. 218, 218 (2001) ("We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.").

106. *Id.* at 221.

107. *Id.* at 223, 233 ("[A]ny suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is simply self-refuting.").

108. *Id.* at 221.

authority to executive agencies unless the agency has engaged in sufficiently formal procedures, "such as notice-and-comment rulemaking or formal adjudication."[109]

Though *Mead* makes its central inquiry whether Congress actually intended to delegate, the case proves too little to correct *Chevron*'s error. As Professor Bressman argues, "the *Mead* opinion does not carry the procedural consideration through to its proper conclusion."[110] The opinion focuses on the procedure the agency undertook to issue the rule, and if it passes the *Mead* inquiry, the Court applies *Chevron* as usual without undertaking any inquiry into other factors, such as whether Congress was likely to have intended deference under the particular circumstances.[111] "Because *Mead* gives way to *Chevron* in routine cases, it does not go far enough to alter the standard search for statutory meaning."[112]

D. Recent Scholarship on Remedying the Chevron *Fiction*

Shortly after the Supreme Court decided *Chevron*, scholars began either defending *Chevron*'s premise or suggesting ways the doctrine should be changed to remedy its apparent legal fiction. Recent scholarship has largely followed similar lines. But these solutions fall short.

Professor Bressman, for instance, has called for courts to inquire whether the statute falls into one of three categories and to weigh several factors in determining whether Congress likely intended to delegate interpretive authority to an agency.[113] In other words, like this Note's proposal, Bressman's focus is in finding whether Congress actually intended to delegate rather than assuming such intent by virtue of ambiguity. To do this, she identifies three signals that suggest congressional intent to delegate.

First, Congress is more likely to delegate primary interpretive authority to agencies, and thus courts should defer, when the issue is

109. Bressman, Chevron's *Mistake*, *supra* note 6, at 561–62.
110. *Id.* at 563.
111. *Id.*
112. *Id.*
113. *Id.* at 552–53.

complex.[114] These statutes would include technical issues "requiring both time and expertise. If the statutory provision later to be interpreted concerns a technical matter, requiring the acquisition or assessment of specialized information, it is likely the sort of subject that generalist staffers or legislators are unwilling or unable to handle, even with the benefit of outside consultants."[115]

Second, courts should defer to agency interpretations when the issue is one where Congress wished to "short-circuit extended legislative battles over contentious issues."[116] "A contentious issue is one subject to active debate between legislative coalitions, the resolution of which in the statute for either side might derail the law's passage."[117] As such, Congress likely delegated broad issues to an agency's discretion when the issue was so contentious that neither side could muster a majority.[118]

Third, Congress is likely to delegate primary interpretive authority when there are adequate procedures in place to "ensure that subsequent agency interpretations will roughly track legislative preferences. It can use procedures for that purpose or rely on positions that the agency has maintained before or taken during the course of legislative drafting."[119]

Consistent with her critiques of *Chevron*'s failures, Professor Bressman stresses that courts should not focus on a search for specific meaning using any of the traditional tools of statutory interpretation.[120] According to Bressman, political scientists and legal scholars have shown that often Congress does not intend a single meaning.[121] She argues that textualism "seems to transform statutory interpretation into a kind of exercise in judicial ingenuity. The textualist judge treats questions of interpretation like a puzzle to

114. *Id.*
115. *Id.* at 576–77.
116. *Id.* at 578.
117. *Id.* at 578–79.
118. *Id.*
119. *Id.* at 583.
120. *Id.* at 559–67.
121. *Id.*

which it is assumed *there is one right answer*."[122] She continues that "intentionalism and purposivism are still vulnerable to judicial craft because they also ask courts to construct a meaning for statutory text on the assumption that *the text has one right answer*."[123] If Congress did not intend only one particular meaning, then *Chevron*'s laser focus on the search for a text's meaning does nothing to help determine whether Congress meant to delegate primary interpretive authority to agencies.

Consequently, if Congress had no particular intent regarding the issue before the court—the argument goes—the court should stop looking for it. This lack of intent could occur because Congress could not reach a consensus and therefore inserted vague language for agencies to flesh out.[124] It could also occur because the subject area was overly technical, so Congress gave agencies sweeping discretion to transform statutory guidelines into policy outcomes.[125]

Bressman's arguments for how the Court should address *Chevron*'s errors are incomplete, and to the extent they are incomplete, they are unpersuasive for at least three reasons. First, the notion that Congress always wishes to delegate interpretive authority to an agency when the subject matter is technical or when Congress inserts unclear language to break a legislative logjam remains as much a legal fiction as the one *Chevron* promotes.

Always delegating to agencies when issues are either technical or require compromise between legislative factions creates the same type of legal fiction decried in *Chevron*; namely, the doctrine purports to but does not actually correlate with legislative expectations. For instance, in Bressman's later work with Professor Gluck, legislative drafters reported that they try to write clear statutes when they have a singular meaning in mind and when they do not want agencies to diverge from that meaning.[126] "The

122. *Id.* at 564 (emphasis added) (quoting Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 372 (1994)).

123. *Id.* (emphasis added).

124. *Id.* at 553 (Congress "likely delegates to avoid contentious issues and obtain consensus on legislation").

125. *Id.* (Congress "likely delegates to avoid complex issues, which conserves legislative resources and capitalizes on agency expertise").

126. Gluck & Bressman, *supra* note 93, at 996.

presumption is broad deference, so we try to be clear when we want otherwise."[127] Thus, if a court finds that the text is clear but nonetheless defers to the agency because the statutory material is complex and technical, the court would subvert congressional intent.

Second, even when Congress may not have intended one aspect of a particular provision to carry a singular meaning, it does not follow that Congress did not intend to convey a singular meaning in other provisions or the statute as a whole. For instance, Congress may draw up a statute with technical portions but provide other provisions that dictate the limits of how an agency may interpret and implement those technical provisions. In this way, Professor Bressman's argument would lead courts to repeat *Chevron*'s failures, for, as one scholar has remarked, "The danger of *Chevron* is that it invites courts to ignore the fact that Congress decided some things because it did not decide everything."[128]

And, even if the issue before Congress was contentious and included "active debate between legislative coalitions"—which courts could determine only by "look[ing] to the surrounding circumstances"—it does not follow that the disagreement resulted in ambiguous language, with "each side decid[ing] to take their chances with the scheme devised by the agency."[129] The result could have just as plausibly been a horse-trading compromise, resulting in each side receiving certain specific, advantageous components of the whole. If an agency interpreted the statute as only one legislative coalition wished, courts would again subvert congressional intent by allowing one coalition to have its cake and eat it too.

Courts should therefore consider more than complexity and the circumstances surrounding the statute's passage when determining if an agency's interpretation warrants deference. This is especially so since Bressman has noted that under her approach, a court would infrequently "conclude that a regulatory issue is not so complex as to suggest delegation."[130] But despite a statute's complexity, Congress is capable of creating provisions with specific and singular meaning.

127. *Id.*
128. Herz, *supra* note 1, at 220.
129. Bressman, Chevron*'s Mistake*, *supra* note 6, at 578–79 (emphasis omitted).
130. *Id.* at 577.

Congress may, and likely does, tend to grant agencies more authority in technical statutes to interpret provisions and to fill in the details of certain complex policy issues. This does not mean that the entire statute lacks for specific meaning. Thus, the fact that a particular provision brims with complexity does not alone give reason to delegate. There must be further textual clues that Congress likely gave an agency interpretive authority over a particular issue.

Third, the text of some statutes may bear only one meaning, regardless of Congress's possible intentions to muddle the issue. While the legal fiction that Professor Bressman proposes may correctly predict that Congress is more likely to delegate under certain circumstances, her solution is at least incomplete and thus inadequate to approximate when Congress is likely to intend to delegate primary interpretive authority to an agency.

Thus, the *Chevron* doctrine rests on a legal fiction that courts and scholars have failed to remedy. Granted, Congress probably intends administrative deference in a wide array of statutory provisions. It is likely that Congress often means to grant agencies broad authority to do as they see best, within vaguely delineated guidelines. But often a statutory text results in ambiguity, and there is no evidence that Congress meant the ambiguity as any type of signal. More likely, the ambiguity was unintentional. In these circumstances, courts should distinguish between two concepts—ambiguity and vagueness—concepts that courts have often conflated.

II. DISTINGUISHING BETWEEN TYPES OF STATUTORY UNCERTAINTY

When a court determines that a statutory provision is unclear, the *Chevron* doctrine insists on deference to the agency's interpretation, if the interpretation is reasonable. But not every unclear statute suffers from the same malady. Yet, when reviewing agency interpretations of statutes, courts treat different types of uncertainty in statutory language as if they were equivalent. The *Chevron* opinion lumps all uncertainty into two categories: either the statute is silent on the issue or the text is ambiguous. If the provision falls into either of these categories, the question becomes "whether

the agency's answer is based on a permissible construction of the statute."[131] The Supreme Court consistently identifies all types of unclear statutory language as "ambiguous."[132] And, likely because the Supreme Court has never differentiated between ambiguity and vagueness, lower courts have also failed to do so.

The problem, ironically, is that the word *ambiguous* is itself lexically ambiguous—that is, *ambiguous* has multiple meanings. Courts have used the term to refer to all uncertainty in written text, and thus when the Supreme Court directs lower courts to defer to agencies in the face of ambiguity, that includes all instances in which the meaning is unclear—in essence, whenever the question of statutory interpretation is difficult. But this Note uses the words ambiguity and ambiguous more technically and encourages courts to distinguish between different types of textual uncertainty.

Consider the distinctness of two conceptually different cases that have come before the Court in the recent past. Most recently, the Court decided *City of Arlington v. FCC*, which involved the proper interpretation of a Communications Act provision requiring governments to act on applications "within a *reasonable period of time* after the request is duly filed."[133] While the question before the Supreme Court implicated subtler questions of jurisdiction, the Court held that it owed deference to the FCC's interpretation of the provision since the agency determined that a reasonable time meant ninety days.[134] Justice Scalia reasoned that the decision rested on a presumed congressional intent; "namely, 'that Congress, when it left ambiguity in a statute' administered by an agency, 'understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'"[135] The Court thought it

131. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

132. *See, e.g.*, City of Arlington v. FCC, 569 U.S. 290, 310 (2013) (describing a vague statutory language as "open ended—*i.e.* 'ambiguous'").

133. *Id.* at 290 (emphasis added) (citing 47 U.S.C. § 332(c)(7)(B)(ii) (2012)).

134. *Id.*

135. *Id.* at 296 (quoting Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 740–41 (1996)).

proper to let the agency determine what time period fell under the term *reasonable*.[136]

Alternatively, in *General Dynamics Land Systems, Inc. v. Cline*, the Court was called on to determine the correct interpretation of the term *age* in the Age Discrimination in Employment Act (ADEA).[137] The Court acknowledged that the ADEA "forbids discriminatory preference for the young over the old" but needed to decide "whether it prohibits favoring the old over the young."[138] In *General Dynamics*, a group of workers claimed "reverse age discrimination" before the Equal Employment Opportunity Commission (EEOC), and the agency agreed that the clause "because of [an] individual's age" also included favoring the old over the young.[139] This case was a pure question of statutory interpretation, distinguishing between two plausible meanings of *age*—one denoting old age and the alternative suggesting chronological age.

Despite the difference between the provisions in the two cases, the Court analyzed the two under the same framework: the principles set out in *Chevron*.[140] In the first instance, it is farcical that the Court could determine the singular meaning of a "reasonable period of time," and therefore it is sensible to defer to an agency's interpretation of the statute. By contrast, it is highly unlikely that Congress delegated to the EEOC the responsibility of determining whether the ADEA prohibited only traditional age discrimination (favoring the young over the old) or whether it prohibited all age discrimination. This is partly because the word *age*, while having two distinct senses, is capable of one singular meaning depending on the context. Congress could not have meant *old age* and *chronological age* concurrently, and therefore the provision had only one correct interpretation. The Court was essentially deciding which of the two meanings of *door* or *bank* Congress intended.

136. *Id.*

137. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004).

138. *Id.* at 584.

139. *Id.* at 585 (citing 29 U.S.C. § 623(a)(1) (2012)).

140. *Id.* While it is true that the Court in *General Dynamics* did not ultimately apply *Chevron* because it found the statutory text to be clear, the Court nonetheless analyzed the cases under the *Chevron* two-step framework—rejecting *Chevron* deference at step one.

The Court would have been justified in rejecting *Chevron* deference in *General Dynamics* on the ground that the clause "because of [an] individual's age,"[141] though lexically ambiguous, has only a single meaning. It is simply impossible for the provision to protect *only* the old from discrimination while simultaneously protecting anyone regardless of age.

Courts should distinguish between these two types of statutory uncertainty because failing to do so perpetuates the notion that *Chevron* rests upon a misguided fiction. Indeed, Congress does not always intend to delegate primary interpretive authority to agencies when the text is unclear. To more clearly understand when Congress is likely to delegate this authority to agencies and when it is less likely, it is helpful to understand the distinction between ambiguity and vagueness and the facets of each.

A. Vagueness

When the Court in *Chevron* described the statutory language as "ambiguous," it should have characterized the lack of clarity as vagueness. But the Court's incorrect description of the statutory terms does not come as a surprise because the two terms are often conflated and most people likely think first of vague terms when hearing that a statute is "ambiguous." When a statutory provision is ambiguous, a disputed word or phrase has multiple distinct definitions (lexical ambiguity), or the structure of the sentence leaves the reader unclear as to how to interpret the provision (syntactic ambiguity).

In contrast, a vague statute is one in which the issue is whether the actions of one party fall within the meaning of a particular term.[142] Some vague words, for instance deictic words,[143] offer little specificity and change their significance depending on the circumstance. What is "tall" in one circumstance may be quite

141. 29 U.S.C. § 623(a)(1).

142. Merriam-Webster's Online Dictionary defines the term as "not having a precise meaning" and "not sharply outlined." *Vague*, MERRIAM-WEBSTER.COM, https://www. merriam-webster.com/dictionary/vague (last visited Nov. 6, 2017).

143. Examples of deictic words are *this*, *that*, *me*, and *here*, which change their significance depending on the context, such as the location or identify of the speaker.

different depending on the referent, whether the person is a child or a basketball player. An extremely tall child would be categorized as tiny for an NBA player. A "reasonable" time to wait would change significantly depending if the person were in a doctor's office waiting room, measured in minutes or hours, or expecting a package to arrive after an online order, measured in days or weeks. It is not that words like *tall* and *reasonable* do not convey meaning. Each certainly expresses a concrete idea, but that idea often conveys a range whose exact boundaries are blurred. These examples are clearly vague, and it is highly likely that courts would defer to agencies on these types of questions even in the absence of a formal *Chevron* doctrine.

Other types of vague terms are not so obviously indefinite, but the same principle applies. When a court must determine whether a particular object is excluded from the park as a "vehicle," there are an innumerable number of objects that are obviously not vehicles. That is, the word *vehicle* is not completely indefinite: it conveys a relatively bounded meaning. But there are dozens of modes of transportation that might or might not be "vehicles" as expressed in the statute, depending on how broadly the court construes the term. To construe a vague term like *vehicle*, the court would be required to determine the core characteristics of a vehicle and to determine whether the alleged object shares enough of those characteristics to be considered a vehicle. This is a significantly different analysis from determining which of two distinct senses of *bank* operates in a specific statutory provision.

Vague terms are "united as non-distinguished subcases of a single, more general meaning."[144] In other words, the term is characterized by the existence of borderline cases that do not clearly fall into the definition. As an illustration, the colors red and orange have recognized significance, meaning each has a core color. Nearly everyone would agree that a carrot is orange and a ripe strawberry is red. However, there are an infinite number of shades between these two colors. Since the line between where red ends and orange begins is fuzzy, likely evincing many opinions, these colors are vague. This is not to say that red and orange are meaningless terms or that no color

144. David Tuggy, *Ambiguity, Polysemy, and Vagueness*, 4 COGNITIVE LINGUISTICS 273, 273 (1993).

shade fits nicely within one categorization. But because there are clearly borderline cases, the color concepts themselves are somewhat vague.

A recent, fairly run-of-the-mill case illustrates a vague term. In *Decker v. Northwest Environmental Defense Center*, the Court had to determine whether stormwater runoff from logging roads was "associated with industrial activity."[145] The Clean Water Act (CWA) requires potential polluters to secure permits before "pollutants are discharged into waters of the United States."[146] The CWA makes an exception for "discharges composed entirely of stormwater"[147] unless the pollutant is "associated with industrial activity."[148]

While *industrial activity* is far from the vaguest term courts encounter, it remains true that the term is unclear. The manner in which the term is used has one general meaning, with both parties conceding that industrial activity relates to manufacturing or a similar activity. But there exist fringe cases in which one understanding of *industrial activity* might include logging activity and another understanding might exclude it. In such cases, the correct interpretation is more a matter of policymaking than textual interpretation. The surrounding text or other provisions might give more context and guidance, but the term itself yields little clarity.

The phrase *industrial activity* is similar to the term *vehicle*, in that it is difficult to definitively say that a bicycle, for example, is a vehicle. Bicycles share many characteristics with automobiles, likely the quintessential vehicle, but they also have many differing characteristics. Similarly, logging shares many characteristics with more quintessential industrial activities, like automobile manufacturing, but it also differs quite significantly. The term *industrial activity*, then, is vague, and the Court was correct in deferring to the agency. Purporting to interpret the term would be little more than judicial policymaking.

145. Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326 (2013).

146. *Id.* at 1331 (citing 40 C.F.R. § 122.27(b)(1) (2012) (substantially similar to the current 2017 version of the regulation)).

147. 33 U.S.C. § 1342(p)(1) (2012).

148. *Id.* § 1342(p)(2)(B).

Another example comes from the *Chevron* opinion itself. The Clean Air Act (CAA) imposes additional requirements on states that have not met the standards set by the EPA.[149] One of these requirements is to establish a permit program regulating "new or modified major stationary sources."[150] The litigation arose over the proper interpretation of the term *stationary source*.[151] One side read the term to refer to each physical structure that emitted pollution, and the other party interpreted it as referring to a "bubble" of several "pollution-emitting devices" within a single industrial plant.[152] The phrase *stationary source*, left undefined by Congress, does not seem to give any guidance on the term. Congress understood that the EPA would likely promulgate regulations about what qualified as a major stationary source of pollution and did not deem it necessary to give clearer instructions.

B. Ambiguity

The two types of ambiguity are lexical and syntactic, and they both share similar properties. Ambiguity generally arises when a word or phrase has two or more plausible meanings and the context does not immediately make clear which meaning is intended. Most words in the English language have more than one meaning,[153] and this creates ambiguity when the writer or speaker is not careful.

1. Lexical ambiguity

Lexical ambiguity is demonstrated by a popular joke:

Tourist: What a lovely color that cow is!
Farmer: It's a Jersey.
Tourist: Oh, I thought it was its skin.[154]

149. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 837 (1984).
150. *Id.*
151. *Id.*
152. *Id.*
153. AITCHISON, *supra* note 23, at 174.
154. *Id.*

The confusion—and humor—is derived from the two distinct meanings of *jersey*. As with *bank*, the word *jersey* has two distinct meanings that may cause confusion—one referencing a sports jersey and one referring to a breed of cow. But just because the word has more than a single sense does not mean that both the tourist and the farmer did not intend to convey a specific meaning. The farmer did not use the term *jersey* to refer to sports apparel just because the word has two plausible meanings. In a similar manner, an agency faced with an analogous question should not receive deference just because the word or phrase it purports to interpret has two plausible meanings.

One way of understanding the issue of lexical ambiguity is to look at the debate among linguists about how word meanings are defined.[155] Some linguists contend that words with numerous meanings have multiple senses.[156] The words are the same, but the word *bank* has two distinct senses, a riverbank and a financial institution. Other linguists counter that these two meanings are actually different words that happen to have the same spelling.[157] This argument is easier to make with very distinct meanings, as with *bank*, and less persuasive with closely related meanings, as with *door*. Yet, one way to conceptualize how courts would identify lexical ambiguity is to view the two senses of *door* as separate words even though English speakers spell the words the same and often do not recognize the distinction until it is brought to their attention.[158]

Consider a difficult case, *Circuit City Stores, Inc. v. Adams*.[159] Saint Clair Adams signed an employment contract with his employer, Circuit City Stores, that required all claims against the company be brought to arbitration.[160] The Federal Arbitration Act directs that these contractual arbitration clauses be enforced unless the contract

155. *See, e.g.*, Gillon, *supra* note 21, at 391–401; Adam Kilgarriff, "*I Don't Believe in Word Senses*," 31 COMPUTERS & HUMAN. 91 (1997).

156. *See* Gillon, *supra* note 21, at 391–401.

157. *See* Kilgarriff, *supra* note 155, at 91.

158. *See* AITCHISON, *supra* note 23, at 253–55.

159. Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

160. *Id.*

is one "of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[161]

The statute is clearly ambiguous because the phrase "foreign or interstate commerce" could have two distinct meanings.[162] The clause could refer only to contracts of employees working in the transportation industry. This specific inclusion of "seamen" and "railroad employees" suggests such an interpretation. However, Congress also may have intended to include—in "any other class of workers"—any employee whose contract Congress could regulate under the Commerce Clause. Given the Supreme Court's nearly boundless reading of the Commerce Clause, an employment contract with Circuit City would undoubtedly qualify. As one scholar has remarked, "Who is right? As a linguistic matter both understandings are plausible because the statute is [lexically] ambiguous."[163]

Congress cannot have written a statute that protects employees solely in the transportation industry and simultaneously protects any worker whose contract could be regulated. The latter category necessarily encompasses the former, thereby rendering void the statute's exclusive function. Congress must have had one of the two meanings in mind. While the *Circuit City* case exemplifies a finer grained ambiguity than *bank*, the same principle holds true. Just as a court deciding between a statute that potentially regulates financial banks or riverbanks, courts should not defer to an administrative agency in cases of lexical ambiguity because the statutory provision permits a singular meaning.

161. *Id.* at 112 (citing 9 U.S.C. § 2 (2000) (substantially similar to the current 2012 version of the statute)).

162. *See* Lawrence M. Solan, *Linguistic Issues in Statutory Interpretation*, *in* THE OXFORD HANDBOOK OF LANGUAGE AND LAW 87 (Peter M. Tiersma & Lawrence M. Solan eds., 2012).

163. *Id.*

2. Syntactic ambiguity

Another type of ambiguity is syntactic or grammatical ambiguity, in which uncertainty arises from the grammatical structure of the sentence. Groucho Marx humorously remarked, "This morning I shot an elephant in my pajamas. How he got in my pajamas I don't know."[164] The first sentence is syntactically ambiguous because, based on the structure of the sentence, it could convey that either Groucho or the elephant wore the pajamas.[165] The most common syntactic ambiguity in statutes occurs when an adjective or adverb appears in a list but the text is unclear whether the descriptor modifies each item in the list or merely the adjacent item.

The classic case of syntactic ambiguity is *Liparota v. United States*.[166] In *Liparota*, the prosecution proved that a man had purchased food stamps from an undercover Department of Agriculture agent for significantly less than face value.[167] The statute the prosecution relied upon read that "whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations" is criminally liable.[168] The government argued that "knowingly" did not modify all parts of the clause, and thus the prosecution had to prove only that the individual knew that he possessed (illegal) food stamps.[169] Alternatively, the defendant pressed for a different reading, arguing that he had to know that possessing unauthorized food stamps was illegal.[170] The grammatical structure of the text creates plausible linguistic interpretations for both sides.

Another example comes from a jury instruction providing that a person may be convicted of conspiracy if the individual "was aware of the common purpose, had knowledge that the conspiracy existed, or was aware of the conspiracy *from its beginning*."[171] The D.C.

164. DEBRA AARONS, JOKES AND THE LINGUISTIC MIND 131 (2012).
165. *Id.*
166. Liparota v. United States, 471 U.S. 419 (1985).
167. *Id.* at 421–23.
168. *Id.* at 420.
169. *Id.* at 423.
170. *Id.*
171. United States v. Gaviria, 116 F.3d 1498, 1509 (D.C. Cir. 1997) (emphasis added).

Circuit found syntactic ambiguity in the instruction because it was not entirely clear whether "from its beginning" modified all three clauses or simply the final one.[172] The structure of the sentence obscured the relationship between the clauses and created uncertainty regarding the correct interpretation.

When either type of ambiguity, lexical and syntactic, occurs in a statute, there exist at least two plausible interpretations. Once a court determines which meaning is correct, however, all other meanings are necessarily deemed incorrect and the analysis is complete. With lexical ambiguity, for instance, a word might have several recognized senses, but each sense has a reasonably bounded meaning. Once the court has disposed of the legal question by determining the correct interpretation, the only remaining issues are questions of fact regarding whether the particular situation falls into the category defined by the word sense.

Thus, not all unclear statutory provisions are cut from the same cloth. Simply because a statute is not straightforward and clear, courts should not automatically assume that Congress left the question open for an agency to determine. Some provisions are tremendously ambiguous, but if a court is merely deciding which of two or more meanings of a word applies, it should not defer. As demonstrated in the following Part, Congress is unlikely to have intended administrative deference when it drafts, often unintentionally, statutes that contain lexical or syntactic ambiguities.

III. JUSTIFYING THE AMBIGUITY EXCEPTION

In distinguishing between ambiguous and vague statutory provisions, courts would not alter their analysis as much as it might seem. This Note encourages courts to determine whether Congress intended a specific meaning for a given provision, which, if so, courts are then obligated to enforce. The change in the *Chevron* doctrine would be in *how* the court determines whether Congress provided an answer to statutory uncertainty: instead of analyzing the clarity of the provision, courts ought to analyze whether the provision, as

172. *Id.* at 1510 (noting that the jurors could have "resolve[d] the syntactic ambiguity in the disputed sentence by concluding that 'in the beginning' modifies only the last and not the first two verb phrases").

written, has one specific meaning or whether Congress merely set out guidelines, even if fairly specific ones. This forms the basis of the distinction between ambiguous and vague provisions, respectively. When a provision has one specific meaning (ambiguity), the court would choose which definition of a multi-sense word applies—that is, it would simply resolve a question of pure statutory construction.

The current *Chevron* doctrine encompasses one part of the analysis: if the provision is clear, the court infers that there is a singular meaning that courts may deduce from the statute's language.[173] But courts are missing a key element: many statutes are genuinely ambiguous but nonetheless capable of no more than one plausible meaning, such as *age discrimination*. This is not to say that the words themselves have only one singular definition (*bank* has at least two), but that the provision cannot bear both meanings simultaneously. A provision relating to banks cannot plausibly simultaneously regulate both financial institutions and waterways. (By contrast, a vague provision relating to vehicles in the park could plausibly regulate both cars and motorcycles.) Courts, as opposed to agencies, ought to be the primary interpreters of these ambiguous provisions.

A. Deference for Ambiguity Does Not Square with Congressional Intent

Courts should not defer when faced with ambiguous provisions because the reasons the Supreme Court has provided for administrative deference do not apply to ambiguous provisions. As already noted, Professors Gluck and Bressman's study concluded that ambiguity in statutes does not automatically indicate Congress's intention to delegate to an agency.[174] Congressional drafters noted that "although ambiguity sometimes signals intent to delegate, often it does not."[175] If the lack of clarity does not *always* signify Congress's objective that agencies assume primary interpretive

173. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

174. Gluck & Bressman, *supra* note 93, at 996; *see also supra* notes 101–03 and accompanying text.

175. Gluck & Bressman, *supra* note 93, at 996.

responsibilities, which imprecise provisions does Congress intend courts to interpret without agency deference?

This Part contends that lexical and syntactic ambiguities are the best candidates for judicial interpretation. Congress is unlikely to intend that primary interpretive authority rests with an agency in the face of lexical or syntactic ambiguity for two reasons. First, statutory ambiguity is often unintentional, and, second, an incorrect decision regarding which definition operates results in a fundamental change to the statute rather than a decision regarding the statute's applicability to the pertinent issue.

Lexical and syntactic ambiguities are most often unintentional. The Gluck and Bressman study confirms that Congress often tries to be clear and specific,[176] but despite its best efforts, ambiguities in statutes remain. This is because ambiguities are sometimes difficult to identify, especially for the one drafting the statute. Since the girl saying, "I saw a man with a telescope" knows she was looking through her own telescope, it is probable she would not recognize the possibility that a listener might think she spotted a man holding his telescope.[177]

Indeed, researchers have concluded that when a person confronts an ambiguous text, with one word or phrase having multiple meanings, the subconscious mind weighs the different meanings and determines the most likely.[178] The brain has the capacity to subconsciously consider multiple meanings without alerting the conscious brain to the fact that an ambiguity exists.[179] In other words, many people who are presented with ambiguous sentences seem to understand the sentence without ever noticing the ambiguity.[180] If native speakers of a language often do not consciously recognize the potential ambiguity in sentences, this

176. *Id.* ("The presumption is broad deference, so we try to be clear when we want otherwise.").

177. *See* FROMKIN ET AL., *supra* note 20, at 176–77. The professors use and diagram the sentence "The boy saw the man with a telescope" and explain that "[i]t is ambiguous because it can mean that the boy saw the man by using a telescope or that the boy saw the man who was holding a telescope. The sentence is structurally ambiguous because it is associated with two different phrase structures, each corresponding to a different meaning." *Id.*

178. AITCHISON, *supra* note 23, at 253–55 (summarizing the results of several studies).

179. *Id.*

180. *Id.*

would not allow congressional drafters to weigh how another person would likely interpret the provision.

It follows that if there is no congressional recognition of an ambiguity, there can be no congressional intent to establish an ambiguity. Unless Congress has a meta-intent that agencies should be the primary interpreters of *all* ambiguities, it cannot possibly intend an unrecognized ambiguity to signal anything to agencies or courts. This is simply because there cannot be intent where there is no recognition. Thus, courts cannot infer that Congress intends all unrecognized ambiguities to signal deference because, as scholars have concluded, Congress does not possess a meta-intent that all ambiguities be resolved at the agency level.[181]

Although Congress likely does not recognize many statutory ambiguities, this does not signal that Congress does not intend to ascribe a specific meaning to the provisions. Ambiguous words or phrases have one singular meaning in the sense that they cannot bear more than one meaning at a time, and therefore members of Congress must have thought the provision meant one of multiple meanings. The provision possessed a finite meaning when drafted, and by not recognizing an alternative interpretation, Congress could not have shown an actual intent for that ambiguity to be resolved by a specific entity—agency or court.[182]

Further, when interpreting lexical and syntactic ambiguities, courts and agencies do more than merely fill in the details. They fundamentally characterize the nature of the statute. It is true that interpreting some—perhaps even the vast majority of—ambiguities will not completely alter the entire statutory scheme, but each ambiguity defines the statute in a manner such that if a court or

181. *See* Gluck & Bressman, *supra* note 93, at 996.

182. The reasoning stands true regardless of whether one believes that the language itself possesses a finite meaning or whether one believes that Congress had a finite meaning in mind when it drafted the statute (in other words, whether one is a textualist or intentionalist). When a statute cannot regulate two situations simultaneously—such as traditional age discrimination or reverse age discrimination—the provision must have one singular meaning. In other words, the textual language must be interpreted in one single manner to be consistent (the statute cannot regulate both), and Congress was highly unlikely to have intended both meanings—each founded in distinct policy considerations—because such a provision would essentially be leaving the statute's most fundamental feature for an agency to determine.

agency interprets it incorrectly, it directly contradicts the meaning the provision originally bore.

For instance, returning to the example of *General Dynamics*, Congress passed the ADEA, which prohibited discrimination "because of [an] individual's age."[183] This statute proved an instance of genuine ambiguity, and both the majority and dissent had convincing arguments regarding which interpretation was proper. Thus, the current *Chevron* doctrine would instruct the court to defer to the EEOC's interpretation. However, it is highly unlikely that members of Congress did not understand whether the statute protected solely against discrimination against the elderly or protected against reverse discrimination. If an agency or court interpreted the ambiguity in a way that Congress did not intend, the result would go beyond simply filling in details—it would directly contradict the statutory meaning.

This analysis does not apply to vague provisions, however, because vague words and phrases, in the strict sense, have indefinite meanings. This leads to less certainty that Congress ever considered the question presented to the court. As with Professor Hart's hypothetical, even if the hypothetical legislative body could agree on a core purpose for prohibiting vehicles in the park, individual members would likely disagree on an exhaustive list of prohibited vehicles. This is also illustrated by *Decker*.[184] *Industrial activity* has a core significance, meaning that members of Congress could surely agree on many activities that would not qualify. But, it is also highly probable that if each member of Congress attempted to provide an exhaustive list of applicable activities, each of the 535 lists would differ, many in significant ways. If Congress paused to consider the term, it would recognize the need for someone down the line to add substance to the concept. Congress would also likely recognize that as new industries emerge with new technologies, some governmental

183. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 586 (2004) (citing 29 U.S.C. § 623(a)(1) (2000) (substantially similar to the current 2012 version of the statute)).

184. Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1326 (2013).

entity will need to determine the statute's applicability to an industry to which Congress could not have had a specific intent.[185]

Consequently, ambiguous provisions are distinct from vague provisions, and congressional intent likely differs with respect to each. Deferring to an agency to interpret a lexically or syntactically ambiguous provision would potentially allow that agency to change the effect of a statute when Congress did not even recognize the existence of an ambiguity in the first instance.

B. Deference for Ambiguity Is Not Supported by Alternative Theories

Congressional intent to delegate primary interpretive authority to agencies for unclear statutes is not the only rationale for administrative deference. Scholars have contended that policy considerations also suggest that courts ought to defer.[186] The most persuasive of these rationales are expertise and accountability. First, agencies have the necessary expertise courts lack to understand how to implement congressional statutes.[187] Second, executive agencies are more politically accountable than unelected, lifetime-tenured judges.[188] For these reasons, scholars contend, courts should defer to agencies when a statute is unclear.[189] As this section argues, agency expertise and accountability do not apply with the same force, and are in fact rather weak justifications, when applied to courts' interpreting lexical and syntactic ambiguities. But before elaborating on this position, it is worth explaining how these two rationales apply with compelling force to interpreting vague provisions.

Chevron deference is appropriate in instances of vagueness because vague terms possess no singular, definite meaning, leaving whichever institution that interprets the statute to act in the role of policymaker. *Chevron* instructs courts, during step one, to use the

185. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 9–10 (1994) ("Over time, the gaps and ambiguities proliferate as society changes, adapts to the statute, and generates new variations on the problem initially targeted by the statute.").

186. *See, e.g.*, William N. Eskridge, Jr., *Expanding* Chevron*'s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 421 (2013) [hereinafter Eskridge, Jr., *Expanding* Chevron*'s Domain*].

187. *Id.* at 423.

188. *Id.*

189. *Id.*

traditional theories of statutory interpretation to determine "[i]f the intent of Congress is clear."[190] This step, in essence, is a search for meaning. Depending on their preferred theory of statutory interpretation, judges approach this step differently. Intentionalist or purposivist judges attempt to find the legislative purpose behind the statute. These judges argue that courts ought to find meaning based on the legislative purpose because "[l]imits on human foresight, imprecision in the tools of linguistic expression, and constraints on legislative resources contribute to the production of generally worded texts that could not possibly capture the variety of situations that lie ahead."[191] Thus, they conclude, since the words do not necessarily guide a judge to the correct answer, a court should resort to interpreting the words in light "of policies that serve some overarching purpose."[192] Despite a court's attempt to find the general—and some would say abstract—purpose, the purposivist remains intent on "construct[ing] a meaning for statutory text on the assumption that the text has one right answer."[193]

Textualist judges approach the problem from a distinct perspective "in part because they hold different pictures about legislative behavior."[194] They believe that ambiguity arises because "legislators cut deals to obtain consensus, and awkward words reflect those deals."[195] Thus, to give effect to those legislative deals, "[m]odern textualists adhere to the ordinary meaning of those words to give effect to whatever deal they may manifest."[196] In doing this, these judges seek to find the statute's one singular meaning, confident that a careful analysis of the text will reveal the correct interpretation.

Chevron, then, is likely the result of the recognition that both these theories of interpretation are not wholly effective in every

190. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

191. John F. Manning, *Competing Presumptions About Statutory Coherence*, 74 FORDHAM L. REV. 2009, 2010 (2006) (describing Justice Stevens's theory of statutory interpretation).

192. *Id.*

193. Bressman, Chevron*'s Mistake*, *supra* note 6, at 564.

194. *Id.* at 559.

195. *Id.* at 560.

196. *Id.*

circumstance. Judge Laurence Silberman once wrote that *Chevron* was created because, even when "one is scrupulously honest in reading a statute thoroughly and looking carefully at its linguistic structure," statutory provisions often are genuinely ambiguous, "giv[ing] room for differing good-faith interpretations."[197] In other words, when a statute does not make clear that Congress intended a specific meaning, *Chevron* should apply to ensure the "avoidance of judicial policy making" because "the executive[] has a greater claim to make policy choices than the judiciary."[198] No judge, no matter how intelligent or ingenious, can find a singular meaning where none exists. To quote Gertrude Stein, no matter how carefully one scrutinizes the text or legislative history of some statutory provisions, "there is no there there."[199]

When judges interpret a vague statute to have a specific meaning when there is none, they are effectively engaging in policymaking. This is clearly inconsistent with the founders' view of the judiciary as the "least dangerous" branch.[200] For this reason, Judge Silberman wrote that the *Chevron* doctrine, in certain circumstances, "more appropriately than any other [doctrine], serves to distinguish those who advocate judicial restraint, who stand, if you will, for a little judiciary, from those who hold a countervailing view."[201]

But these arguments do not apply with equal force to statutory provisions that are either lexically or syntactically ambiguous. Indeed, when a court encounters a genuine ambiguity, no matter how difficult, and that ambiguity has a singular meaning, the judiciary has a greater claim to interpretation than the executive branch. The usual responses of superior agency expertise or greater democratic accountability fall short.

Supported by the *Chevron* opinion itself, scholars have long contended that agencies ought to resolve questions of statutory interpretation because agencies possess "greater 'expertise' than

197. Laurence H. Silberman, Chevron—*The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 826 (1990).

198. *Id.* at 822.

199. GERTRUDE STEIN, EVERYBODY'S AUTOBIOGRAPHY 289 (Vintage Books 1973) (1937).

200. THE FEDERALIST NO. 78, at 433 (Alexander Hamilton) (Glazier & Co. ed., 1826).

201. Silberman, *supra* note 197, at 821–22.

courts in figuring out instrumental applications."[202] One reason that agencies may enjoy more expertise in the subject area than courts is that agencies are specialized.[203] "[A]gency officials spend their time focusing on a particular set of problems, . . . they have thought about them more, they have seen what works and what does not work, and they are sharply aware of the practical trade-offs that are needed given the scarce resources for implementation."[204]

Another rationale for courts to defer to administrative agencies is increased political accountability. As noted, *Chevron* reasoned that "[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices."[205] Indeed, as Judge Easterbrook has observed, there is a difference between Article III judges and agency officers.[206] "The difference is tenure. When judges make policy . . . you can't get rid of them. In a representative democracy, that is a powerful reason not to allow judges to make policy in the first place."[207] He continues that these reasons are "especially true in a nation such as ours whose political system is designed to make it very hard to enact legislation that changes judicial decisions."[208]

These prudential arguments make it apparent that courts need to determine whether the statute has a discernable meaning because agencies should have primary interpretive authority when the statute is vague, so long as that interpretation is permissible. But when the statutory provision contains lexical or syntactic ambiguities, an agency's subject-matter expertise and political accountability are no longer relevant.

While agencies may understand the practical tradeoffs of various alternatives or prove more politically discerning, courts are experts in interpreting the law. Judges have more experience in parsing legal

202. Eskridge, Jr., *Expanding* Chevron*'s Domain*, *supra* note 186, at 421.

203. *Id.*

204. *Id.*

205. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

206. Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1 (2004).

207. *Id.* at 9.

208. *Id.*

texts than do agency officials, as judges perform these functions on a daily basis. District court judges defer to the judgments of juries in fact questions and appellate judges give deference for the same to trial court findings. But neither defers to any other when analyzing questions of law, especially statutory interpretation, because judges are the presumed experts in this field.

Additionally, judges are not under the same political pressures as agency officials and are in a better position to find the correct textual meaning of the statute rather than to use the text as a means to an end. Indeed, as one scholar has noted, many "[s]ensitive questions of agency statutory interpretation" are decided by "political appointees . . . rather than agency specialists."[209] Even when "experts" determine the meaning of a statute, critics have long contended that "'expertise' cannot be exercised objectively and instead simply masks value-laden policy decisions."[210]

Professor Eskridge has also acknowledged that agencies cannot always be counted on to follow the best reading of the text.[211] He has noted that "virtually anyone who has had experience in actual administration agrees that even well-motivated agencies engage in what economists would call 'shirking,' namely, departing from the (majoritarian) agenda set for the agency by Congress."[212] Professor Eskridge has identified two types of "shirking."[213] First, agencies shirk their rule of law duties by "press[ing] statutory policy beyond the established meaning of the statute" because agency officials "get caught up in the normative bounce that comes from aggressively pursuing the agency's mission."[214] Second, an agency shirks its democratic duties by "mak[ing] a major policy move on its own,

209. Criddle, *supra* note 36, at 1287–88.

210. *Id.* at 1287; *see also* Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2135 (2002) ("[T]he legal realists' hope that legal ambiguities could be resolved by objective policy expertise has long ago grown quaint. . . . In practice, it is rare to find a field of social policy where there are not experts on opposing sides of an issue . . . undermining any claim to an objective expert resolution."); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1683–87 (1975).

211. Eskridge, Jr., *Expanding* Chevron*'s Domain*, *supra* note 186, at 433.

212. *Id.*

213. *Id.*

214. *Id.* at 434.

without sufficient mooring in a congressional authorization."[215] In contrast, judges are disinterested and are not charged with furthering any agency's mission; thus, judges are in a better position than are agency officials to find the meaning of an ambiguous statute when the statutory provision has a specific meaning.

Agency policy judgments are not necessarily harmful, especially when exercised in the face of a vague statute, but executive policymaking has no place when Congress has already made the decision. This necessarily negates the democratic accountability rationale because, even setting aside the power-allocating provisions of the Constitution, Congress holds much greater political accountability than do agencies. When a statute has a singular meaning, regardless of whether Congress used ambiguous words or gave the provision an ambiguous construction, Congress has made the decision and agencies must follow. No matter how much more politically accountable agencies are than courts, when Congress regulates a financial bank by using the word *bank*, the agency cannot construe that term to refer to riverbanks, no matter how plausible the interpretation.

In instances of lexical and syntactic ambiguity, the question no longer becomes which institution, agency, or court, has thought more about the policy or practical implications of the statute, as scholars have suggested. Rather, the question becomes which institution is best situated to determine the law, to determine the meaning of provisions that Congress has passed and the president has signed.

Moreover, courts should not defer to agencies' interpretations of lexically and syntactically ambiguous provisions because, under *Chevron*, agencies' interpretations get upheld unless they are unreasonable, even if they are not the best interpretation of the statute. This point is crucial because the *Chevron* doctrine does analytical work only when the court would have ruled against the agency but defers instead. A court would have no need of a deference doctrine if its interpretation is identical to that of the agency. Courts, then, should not defer to agencies when it appears that there is one correct answer because the court, without a

215. *Id.* at 436.

deference doctrine, must pick the best interpretation rather than simply sanction a plausible one. Returning to the example of *General Dynamics*, both interpretations of *age*—old age and chronological age—were plausible, but Congress undoubtedly intended only one of those meanings.[216]

If agencies receive administrative deference for questions such as the one posed in *General Dynamics*, and an agency interprets a provision incorrectly despite the preponderance of evidence pointing toward the opposite answer, then the court would be obligated to side with the agency's incorrect interpretation merely because both interpretations were plausible or permissible. This, however, can be avoided. Requiring courts to determine the meaning of lexical and structural ambiguities would increase the likelihood that statutes will be interpreted as Congress intended.

For vague statutes, on the other hand, agencies are in the best position to formulate policy because they possess superior expertise in formulating policy and are more politically accountable than courts.[217] When the text of the statute has a singular but ambiguous meaning, however, courts are preferable to agencies in determining the correct interpretation because courts possess superior expertise in interpreting texts, and because courts, being disinterested third parties, are less prone to the political pressure to interpret statutes in a plausible but incorrect manner. Moreover, creating a *Chevron* exception for lexical and syntactic ambiguities will empower courts to honor congressional intent by freeing them from the obligation to defer to agencies' plausible though ultimately incorrect interpretations.

I acknowledge that distinguishing statutory provisions on whether they are vague or ambiguous has its downsides. For instance, lower courts might have difficulty in applying the "pure questions" doctrine with complete accuracy, as has occurred with

216. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 581 (2004).

217. This is true unless, of course, Congress or the Constitution requires the judicial branch to determine all questions of statutory interpretation, as has been argued persuasively by many scholars. Yet, as a matter of pure institutional structure, agencies are better equipped to answer policy questions because of their greater expertise and political accountability. This is not true, however, when a court is tasked not with developing policy but determining the policy that Congress has already established.

Mead.[218] But, as one distinguished scholar has noted, "no theory based on legislative intent to delegate will yield a simple rule. Ultimately, simplicity is not the sole benchmark for evaluating any interpretive theory. An acceptable theory should reflect a reasonable balance among the various goals . . . ."[219] In the end, the distinction proposed here may be partially based on a legal fiction that courts may not apply with perfect accuracy and consistency. However, the proposed method will track congressional intent and textual cues more accurately than the legal fiction upon which *Chevron* is currently based—namely, that Congress intends agencies to act as the primary interpretive authority for virtually all unclear statutes.

IV. CONCLUSION

The fact that implied congressional intent is the basis for *Chevron* has significant implications for administrative deference. Namely, courts cannot simply presume that Congress intends any and all unclear statutes to signal deference to administrative agencies.

Instead, courts must make an inquiry into whether that assumption remains true in each particular circumstance. Consequently, the *Chevron* framework, from the outset, asks the wrong question. By requiring courts to care only about whether the statute is clear, as the current *Chevron* doctrine demands, it obligates them to ignore the fact that Congress writes many statutory provisions that have a specific yet ambiguous meaning even though Congress would not likely wish those statutes to be interpreted under the merely permissible construction standard. Thus, instinctively deferring to an agency in the face of every textual uncertainty undermines congressional intent. Instead of inquiring whether the statute is clear, courts should determine whether Congress intended courts to defer to an agency on the question at issue, even if doing so is difficult to definitively ascertain in any particular circumstance.

218. *See* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1446–81 (2005); Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003) (showing the difficulty the D.C. Circuit has had in applying *Mead*).

219. Bressman, Chevron*'s Mistake*, *supra* note 6, at 557.

The *Chevron* doctrine could significantly improve how effectively it shadows Congress's wishes, and it could do so if courts decline to defer to agency interpretations when faced with pure questions of statutory interpretation. Courts can recognize pure questions by distinguishing between two types of statutory uncertainty, vagueness and ambiguity, two concepts the Supreme Court has thus far conflated. When a court is faced with a lexical or syntactic ambiguity—meaning that the court must determine which of two or more meanings of a disputed term or phrase applies—the court should not defer to the agency. Instead, courts should embrace their responsibility as experts in interpreting the law because, when a provision is ambiguous rather than vague, Congress would prefer courts to follow the best reading of the words it enacted rather than following an agency's permissible construction.

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