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WHEN A DELEGATION IS NOT A DELEGATION: USING LEGISLATIVE MEANING TO DEFINE STATUTORY GAPS

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It is often said that when Congress specifically delegates to an administrative agency the responsibility for prescribing standards to implement statutory language, a reviewing court must accord "legislative effect" to the standards promulgated by the agency.[1] It is also generally understood that when Congress expresses a specific intent as to the meaning of statutory language, courts must give effect to that intent, notwithstanding a contrary interpretation by the agency.[2] At first glance, these seemingly noncontroversial propositions appear wholly compatible. If Congress has delegated the responsibility for prescribing standards to an agency, Congress has not conveyed a specific intent as to the meaning of those standards. If

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1. Supreme Court cases giving legislative effect to agency regulations include: Atkins v. Rivera, 477 U.S. 154, 162 (1986); United States v. Morton, 467 U.S. 822, 834 (1984); Herweg v. Ray, 455 U.S. 265, 274-75 (1982); Schweiker v. Gray Panthers, 453 U.S. 34, 44 (1981); Batterton v. Francis, 432 U.S. 416, 424-26 (1977). In each of these cases, an agency exercised rulemaking power pursuant to a *specific* delegation in its enabling statute. Professor Kenneth Culp Davis argues that the same standard should apply even when the delegation occurs by implication of an agency's *general* rulemaking power. *See generally* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:10, at 53-54 (2d ed. 1979) (arguing that any rule properly issued under delegated power is a legislative rule entitled to substantial deference). This Article agrees that the manner in which rulemaking is delegated should not significantly alter the intensity of the judicial review of an agency's rule. *See generally infra* notes 104-29 and accompanying text (arguing that courts should not accord greater deference to agency rules issued pursuant to a specific delegation than to rules promulgated under a general delegation). This Article, however, rejects the application of the legislative effect standard, in any rulemaking context, when it prevents a court from employing the traditional tools of statutory interpretation to determine whether an agency's construction of a statute is consistent with ascertainable legislative meaning.

2. *See, e.g.*, Bethesda Hosp. Ass'n v. Bowen, 485 U.S. 399, 404 (1988) (finding that an agency's "strained interpretation" of a statutory provision was "inconsistent with the express language of the statute" and thus invalid); Chevron U.S.A., Inc. v. NRDC, 467 U.S. 838, 843 n.9 (1984) (asserting that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent"); SEC v. Sloan, 436 U.S. 103, 118 (1978) (court should invalidate agency constructions that are inconsistent with a statutory mandate).

Congress has conveyed a specific intent as to the meaning of statutory language, Congress has not delegated to the agency the responsibility for the prescription of the statute.[3]

This analysis, however, overlooks the dynamics of the unique legislative partnership between Congress and administrative agencies. Congress routinely delegates rulemaking power to agencies, thereby inviting agencies to act in a legislative capacity and to promulgate standards when implementing a statutory scheme. Despite this delegation, Congress may still have staked out a substantial claim to lawmaking control over the standards the agency will establish through rulemaking. Congress may invite the agency to complete the legislative puzzle, but it may also specifically indicate what puzzle pieces the agency cannot use and maybe some, or even many, of the pieces the agency must use.[4] If Congress seeks to direct an agency's hand, the gap left for agency discretion is defined by discernible legislative meaning, not by the scope of the agency's rulemaking power.[5]

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3. These propositions could also be viewed as compatible to the extent that according legislative effect to an agency regulation does not preclude judicial consideration of legislative meaning in the review of the agency's implementation of a statutory provision. The Supreme Court has suggested that agency regulations issued pursuant to a specific delegation are given controlling weight unless they are " 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " Batterton v. Francis, 432 U.S. 416, 426 (1977) (quoting 5 U.S.C. § 706(2)(A) (1988)). While this formulation conceivably allows for some consideration of legislative intent, *see, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983) (an agency rule is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider"), it presumably would not countenance a thorough search for legislative meaning in a statutory enactment subject to agency construction. *See* 2 K. DAVIS, *supra* note 1, § 7:13, at 59 (arguing that a court is not free to invalidate an agency rule issued pursuant to delegated power merely because the court disagrees with the "content" of the rule). In practice, presumptively giving legislative effect to an agency regulation, particularly when the congressional intent is not apparent on the face of the statute, creates a substantial danger that a specific legislative meaning will be unenforced in the administrative context. *See infra* notes 113-17 and accompanying text (discussing circumstances in which rules inconsistent with a specific meaning are at risk of being sustained if accorded legislative effect).

4. This metaphor borrows heavily from Professor Henry P. Monaghan's illuminating explication of the respective roles of court and agency in the application of statutory enactments. *See infra* note 106 and accompanying text (quoting Monaghan, Marbury *and the Administrative State,* 83 COLUM. L. REV. 1, 27 (1983)).

5. This Article uses the term "legislative meaning" to refer to the congressional intent surrounding the meaning of statutory language. This intent as to the meaning of a statute is to be distinguished from Congress' "interpretive intent" concerning the standards used in determining a statute's meaning. *See* Diver, *Statutory Interpretation in the Administrative State,* 133 U. PA. L. REV. 549, 570 (1985) (arguing that courts must follow the legislature's interpretive intent as much as the legislature's "substantive intent" in determining whether to defer to an agency's interpretation of a statute); Farina, *Statutory Interpretation and the Balance of Power in the Administrative State,* 89 COLUM. L. REV. 452, 468 n.65 (1989) (noting that "interpretive intent" refers to "Congress's intent not as to what the statute means, but as to the process by

This Article examines how traditional principles of statutory interpretation interact with congressional delegation of rulemaking authority to administrative agencies. It focuses specifically on a line of Supreme Court decisions that only partially succeeds in reconciling this interaction. This Article points out that when Congress instructs an agency to exercise its rulemaking powers under a specific statutory standard, the Supreme Court has clung to a fiction of statutory construction. If applied aggressively, this canon of statutory construction would severely restrict the ability of the judiciary to constrain agency decisionmaking within delegated authority.[6] This Article concludes by examining the issue of rulemaking delegations from the perspective of the legislative draftsman, suggesting that the use of this fiction, in particular, presents the draftsman with the dilemma of how to control the manner of agency decisionmaking without unintentionally bestowing legislative effect on the product of the agency's rulemaking.

I. DELEGATIONS WITHIN DELEGATIONS: STATUTORY INTERPRETATION IN THE MODERN ADMINISTRATIVE STATE

A. Background

The notion that Congress can delegate *lawmaking* authority to the other branches of government did not originate with the creation of administrative agencies.[7] Well before the full-scale erection of the modern administrative

which that meaning is to be ascertained"). For this Article's view of how these two competing expressions of congressional intent should be resolved in the context of rulemaking delegations, see *infra* notes 104-22 and accompanying text (arguing that a specific rulemaking delegation does not provide a sufficiently strong "interpretive intent" of judicial deference to permit a court to ignore a discernible "substantive intent" that conflicts with the agency's construction).

6. *See infra* notes 40-66 and accompanying text (analyzing the Court's view that a specific rulemaking delegation indicates Congress' intent that a court defer to the agency's construction of the statutory provision).

7. In this Article, "lawmaking" refers to the creative process by which *both* courts and agencies assign meaning to statutory provisions subject to their application or administration. Under this conception, Congress delegates lawmaking power to courts or agencies anytime the legislation fails to articulate a legislative meaning that can be ascertained—with some degree of certainty—from the statutory enactment in question. *See generally* Luneburg, *Nonoriginalist Interpretation A Comment on Federal Question Jurisdiction and* Merrell Dow Pharmaceuticals Inc. v. Thompson, 48 U. PITT. L. REV. 757, 758 n.7 (1987) (" 'judicial lawmaking' refer[s] to the results of statutory analyses that are not firmly rooted in the original intent of the legislature which enacted the statute but, for example, in the court's sense of the current social, political and legal landscape"). In contrast, rulemaking is the process by which agencies enact statements of "general or particular applicability and future effect" in their administration of statutory law. 5 U.S.C. § 551(4) (1988). Rulemaking typically will involve a creative component, but its exercise will often be constrained by a specific legislative meaning that narrows the agency's lawmaking authority. This Article argues that the scope of the implied *lawmaking* delegation, not the rulemaking delegation, should determine the degree of deference to agency action.

state, commentators recognized that legislatures implicitly delegated lawmaking authority whenever they enacted statutory provisions without conveying an ascertainable legislative meaning.[8] Indeed, the perceived inability or unwillingness of legislators to make clear the manner in which courts were to apply statutes led some early commentators to conclude that judges, acting in their "interpretative" capacities, were the primary, if not exclusive, lawmakers.[9] John Chipman Gray, one of the leading proponents of that view, argued that statutes were "at the mercy of courts," because courts have "the last say as to what is and what is not Law in a community."[10] According to Professor Gray, legislators frequently formed no "real intention" concerning a statute's application, leaving the judiciary free to legislate with virtually unlimited discretion.[11]

Not all commentators have viewed the courts' lawmaking role from the broad perspective of realists like Gray.[12] Still, it is widely recognized that because legislators can hardly be expected to illuminate every conceivable facet of a statute's application, courts will be compelled, at some point, to fill in the gaps in legislative meaning by assigning their own meaning to the statutory language—in effect, by lawmaking.[13] Judge Benjamin Cardozo ob-

8. *See generally* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113-41 (1921) (describing the view that judges act as legislators when filling gaps in statutes, constitutions, and the common law).

9. In contrast, the Supreme Court strained hard, even when addressing an executive branch action, to avoid the implication that the application of statutes to individual cases involved the exercise of lawmaking responsibility. *See, e.g.*, Field v. Clark, 143 U.S. 649, 692-93 (1892) (ruling that the President was merely the "agent" of Congress in exercising largely discretionary statutory authority to impose retaliatory tariffs).

10. J. GRAY, THE NATURE AND SOURCES OF THE LAW 171-72, 181 (2d ed. 1921).

11. *Id.* at 173. Gray conceded that there were limits on the judiciary's "power of interpretation," but argued that these limits were too "undefined" to constrain judicial lawmaking. *Id.* at 125. Thus, statutes are merely one source of law; "*all* the Law is judge-made law." *Id.* (emphasis added).

12. Gray and his contemporaries in the "Progressive" movement of statutory interpretation believed in the "unitary nature of common law elaboration and statutory interpretation." Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 823 (1985). Gray, in particular, rejected the view that "the function of the judge [should] be deemed only that of attempting to reproduce in his own mind the thought of the lawgiver." J. GRAY, *supra* note 10, at 171. *Contra* Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) (positing model of "imaginative reconstruction" under which a judge is to place herself in the minds of the enacting legislators). Gray argued that unless "compelled by the precise words of a statute," the judge was not required to "follow . . . the notions of the community" in deciding specific cases. J. GRAY, *supra* note 10, at 288.

13. The lawmaking role of courts has been recognized even under essentially intentionalist models of statutory interpretation. *E.g.*, R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 238-61 (1975). For the intentionalist, judicial lawmaking is derived, if possible, from the general purpose of the statute as originally enacted. Alternatively, commen-

served that, within the confines of the open spaces left by the governing law, judicial choice "moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made."[14]

On the other hand, the general reluctance of the courts to embrace openly their lawmaking role in applying statutes is well-documented.[15] Even where the statutory language is steeped in generalities, and the legislative history is murky, courts have justified a particular holding by manufacturing a specific legislative intent based on a substantial, but unstated, creative component.[16] The lack of candor in the courts' approach to statutory interpretation has induced the expected reaction from disgruntled scholars, who have assailed the complex array of fictitious devices invoked by courts in lieu of standards that give visible effect to the true dynamics of interpretative decisionmaking.[17]

Achieving candor indeed has been one of the primary themes of the voluminous scholarly writing on statutory interpretation.[18] Another theme has been how to reconcile the recognition that courts can wield substantial lawmaking power with the constitutional principle of separation of powers,

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tators have argued, under a variety of conceptions, that courts should be free to update statutes in light of modern understandings and values, at least where no specific legislative meaning otherwise controls. *See, e.g.*, Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 46-61 (1988) (describing "nautical" approach to statutory interpretation). Under this view, the lawmaking function is exercised without reference to the historical context of the original enactment. *See generally* Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1498-1501 (1987) (defending the "majority view" that judges possess limited lawmaking power not tied rigidly to original legislative intent).

14. B. CARDOZO, *supra* note 8, at 115.

15. *See, e.g.*, G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (observing that courts have not "own[ed] up" to their creative role in the application of statutes).

16. For a recent criticism of the Supreme Court's use of a contrived historical intent as camouflage for a "result-oriented" interpretation of a statute, see Eskridge, *supra* note 13, at 1484-86 (advocating that instead of relying on an "indeterminate" historical context, a court should determine what interpretation is most consistent with the provision in question "as it has evolved over time").

17. *See, e.g.*, Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930). In his critique of the judicial approach to statutory interpretation, Professor Radin illuminated the prevailing tension between the scholarly search for candor in statutory interpretation and the judiciary's reliance on what Radin characterized as "the cardboard structures of technical devices." *Id.* at 885. Radin was particularly critical of the judiciary's reliance on the " 'golden rule' " that intent governs the meaning of a statute, arguing that legislative intent was "undiscoverable in any real sense" and "irrelevant if it were discovered." *Id.* at 870, 872. *See generally* Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 731-32 (1987) (describing the tension between the judge's role and "the principles of candor that are thought so indispensable to the scholar's function").

18. *See, e.g.*, Luneburg, *supra* note 7, at 758 (noting that "[s]ince lawmaking may form a significant element in statutory interpretation, candor by the courts in what they are doing would seem to be clearly called for").

which most commentators regard as requiring that the legislative branch be supreme in the formulation of public policy.[19] Presumably, if a court can derive a specific legislative intent from a statutory enactment, then the court should give effect to that intent, notwithstanding its own views on wise public policy.[20] On the other hand, purporting to find a specific legislative intent where none exists hardly serves to further legislative supremacy and invariably breeds confusion and suspicion regarding the role of the courts in the interpretative process.

The academic yearning for both candor and legitimacy in statutory interpretation is well represented in the writings of Professor Reed Dickerson. Professor Dickerson, a strong proponent of legislative supremacy in lawmaking, has argued that courts must differentiate when dealing with statutes between the ascertainment of meaning (the cognitive function) and the assignment of meaning (the creative function).[21] On the one hand, the "constitutional mandate" of legislative supremacy requires that cognition precede creation and that a court exhaust all methods of discerning legislative meaning before the court adds its own lawmaking to a statute.[22] On the other hand, when a court cannot "confidently" ascertain a controlling legislative meaning, and must thereby enter the generative domain of lawmaking to decide a case, it serves no useful purpose for the court to pretend that the meaning assigned to the statutory provision was the specific meaning intended by the enacting legislature.[23]

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19. *See* Aleinikoff, *supra* note 13, at 22-32 (discussing how traditional approaches to statutory interpretation seek to preserve legislative supremacy).

20. *But see* Blatt, *supra* note 12, at 802-05 (describing the historical origin of the doctrine of equitable construction, under which courts may give effect to the equity of a statute notwithstanding a discernible legislative meaning to the contrary).

21. R. DICKERSON, *supra* note 13, at 7, 13-21. Professor Dickerson is careful to note that the "supremacy of the legislature in formulating social policy" is not challenged by the view, which he accepts, "that within circumscribed areas the courts, too, make law." *Id.* at 9.

22. *Id.* at 19-21. Professor Dickerson, responding to Professor Radin's criticism of the intentionalist approach, argues that courts should seek to ascertain the intent manifested by the statute and its context, not the actual intent of the legislators. While the manifest intent may not match the subjective intent of the enacting legislature, there is "no practical alternative to assuming that the manifest intent is the actual intent, until new appropriate evidence is available or the legislature enacts a corrective amendment." *Id.* at 85.

23. *Id.* at 222. Professor Dickerson identifies several situations in which lawmaking is exercised by courts, only one of which is characterized as an actual delegation of legislative power. *Id.* at 238-39 (lawmaking is "akin to 'delegated legislation' " when "the statutory mandate is so general that the court is impliedly invited, and indeed compelled, to supplement it with more specific rules"). For simplicity, this Article assumes that a "delegation" of lawmaking power occurs whenever Congress has failed to evince a clearly discernible legislative meaning that controls the case at hand.

B. The Administrative Agency as Interpretative Actor

In principle, the concerns that have prompted commentators to seek candor and legitimacy in the statutory interpretations of courts should apply with equal force to the interpretations of administrative agencies. The United States Supreme Court has repeatedly emphasized that agencies, like courts, must maintain strict fidelity to congressional intent.[24] Agencies have no independent policymaking powers that permit them to ignore the expressed will of Congress, nor can agencies be influenced by their own views of public policy when *ascertaining* the legislative meaning assigned by Congress.[25] Agencies are part of a political branch of government, which might be justification for preferring their lawmaking to a court's,[26] but agencies can no more legitimately turn to lawmaking in lieu of discerning legislative intent than can their interpretative counterparts in the judiciary.

Even if courts and agencies are equally subordinate to the legislative branch in their exercise of lawmaking powers, some differences exist in the manner in which agencies carry out those powers. Agencies are generally empowered to provide meaning to a statute in the course of case-by-case adjudication. In this regard, the agency acts in the capacity of a court. An agency, however, may also have the power to issue interpretative rulings or promulgate regulations that affect a broad class of interests subject to governmental regulation.[27] In the latter context, the agency truly acts in a legis-

24. *See, e.g.*, NLRB v. United Food & Commercial Workers Union, Local 23, 484 U.S. 112, 123 (1987) (stating that when a court is able "to determine congressional intent using 'traditional tools of statutory construction' . . . that interpretation must be given effect, and the regulations at issue must be fully consistent with it"); Chevron U.S.A., Inc. v. NRDC, 467 U.S. 838, 842-43 (1984) (asserting that "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress").

25. Thus, a reviewing court's *inquiry into congressional intent* is conducted without deference to the agency. "In conducting this inquiry, [the court is] 'not required to grant any particular deference to the agency's parsing of statutory language or its interpretation of legislative history.' " Washington Hosp. Center v. Bowen, 795 F.2d 139, 143 (D.C. Cir. 1986) (quoting Rettig v. Pension Benefit Guar. Corp., 744 F.2d 133, 141 (D.C. Cir. 1984)).

26. *See Chevron U.S.A.*, 467 U.S. at 865 (noting that while courts cannot "reconcile competing political interests . . . on the basis of the judges' personal policy preferences, . . . an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments"); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part, dissenting in part) (stating that "[a]s long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration") (footnote omitted).

27. In some circumstances, it may not be clear whether Congress has delegated substantive rulemaking power to an agency in the agency's enabling statute. Generally, courts have liberally construed agency enabling statutes to find substantive rulemaking authority. *See, e.g.*, E.I. Du Pont de Nemours & Co. v. Train, 430 U.S. 112, 126-33 (1977) (liberally construing

lative capacity possessing the affirmative power to proscribe conduct prospectively divorced from the limits of individual adjudications.[28] To the extent that they possess rulemaking authority, agencies, unlike courts, can affirmatively set the agenda for their own action. As executive actors, agencies enjoy substantial discretion in their enforcement of the statutes they administer.[29]

Because agencies are not bound by the constraints of passive decisionmaking, they often act in a legislative capacity when implementing and administering the statutory schemes Congress entrusts to them. Congress creates agencies and endows them with rulemaking powers precisely to enable them to build upon the legislative infrastructure Congress erected. Congress cannot be expected to provide every detail for the myriad federal programs that it has created over the years. Therefore, Congress equips agencies with rulemaking powers to complete the legislative task.

The delegation of legislative rulemaking to agencies can arise in two ways.[30] Congress can delegate rulemaking by expressly directing or authorizing an agency to prescribe legislative standards. Thus, Congress, in "free-

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agency's enabling statute to find that agency could set administrative limitations by regulation); *In re* Permanent Surface Mining Regulation Litig., 653 F.2d 514, 522-24 (D.C. Cir.) (en banc) (interpreting agency's authority to " 'publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of [the enabling statute]' " as conferring "substantive authority"), *cert. denied, sub. nom.* Peabody Coal Co. v. Watt, 454 U.S. 822 (1981).

28. *See* ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 14 (1947) (describing rulemaking as "agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations").

29. *See generally* 2 K. DAVIS, *supra* note 1, § 9:1, at 216-220 (discussing the broad agency discretion not to enforce statutory provisions).

30. As Professor Davis has observed, all agencies have the "intrinsic" power to issue interpretative rules in the sense that agencies must resolve "questions the statute does not answer" and must provide instruction to program administrators. *Id.* § 7:11, at 55; K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:8, at 173 (Supp. 1982). "Legislative" or "substantive" rulemaking, which involves the power to promulgate rules with the "force of law," can arise only by congressional delegation. 2 K. DAVIS, *supra* note 1, § 7:8, at 36-37 (describing a legislative rule as "the product of an exercise of delegated legislative power to make law through rules"). Although Professor Davis apparently would give legislative effect to any regulation properly promulgated under a statutory delegation of rulemaking, this Article asserts that even rules issued under a "substantive" delegation of rulemaking authority cannot be upheld if they are inconsistent with a clearly discernible legislative meaning evinced by Congress. The Supreme Court's decision in *Chevron* lends support to this assertion. *See infra* notes 77-80 and accompanying text (discussing the Supreme Court's view that a regulation promulgated under a general delegation is not presumptively accorded "legislative effect"); *see also Permanent Surface Mining*, 653 F.2d at 523 (even though an agency has statutory authority to promulgate regulations with "substantive authority," the regulations cannot be "inconsistent with the Act").

standing" legislative language,[31] can tell an agency to issue regulations to implement specific provisions. Often, Congress will signal this intent through the "amendatory" language by affixing the words "as determined in accordance with standards prescribed by the Secretary," or similar language, to a specific statutory provision.[32] Congress can also delegate rulemaking by assigning general rulemaking power to an agency for the implementation of a statutory program. Depending on the wording of the general rulemaking grant, the agency's rulemaking authority may extend to the implementation of a specific provision in its enabling statute even though there is no direct legislative signal to that effect.[33]

Within this administrative framework of rulemaking delegations, Congress often will leave statutory gaps for an agency to fill. Inside these gaps, the agency should be free to carry out its implementing role without intensive judicial oversight. The key question is how this area of agency discretion is to be determined.[34] If the area of discretion is viewed as coterminous with the scope of the agency's rulemaking delegation ("rulemaking gap"),

31. This Article uses the term "freestanding" to refer to legislative language that is not included in the amendments made by a public law to an underlying statute. Typically, a freestanding delegation of rulemaking will require or authorize an agency head to issue regulations implementing the amendments made by a particular section or subsection of a bill. The freestanding delegation will not appear in the text of the compilation of the statute being amended because the delegation is not included in the statutory amendment itself.

32. This Article uses the term "amendatory" to refer to legislative language that is included *within* the amendments made by a public law to an underlying statute. An amendatory delegation becomes a part of the statute being amended and will appear in the text of any compilation of that statute. For a discussion of the possible significance of distinguishing between freestanding and amendatory delegations in legislative drafting, see *infra* notes 141-46 and accompanying text (suggesting that the use of freestanding delegations may avoid application of the deferential standard of review that the Supreme Court has accorded to a certain type of amendatory delegation).

33. *See* cases cited *supra* note 27 (general delegation held to trigger rulemaking authority). The terms used in this Article to describe the types of rulemaking delegations, general and specific, differ from the terminology employed by the Supreme Court. This Article uses the term "specific delegation" to refer to what the Court has characterized as an "express" delegation. *See* Batterton v. Francis, 432 U.S. 416, 425 (1977). The Article refers to delegations as general and specific, rather than express and implied, to avoid confusion with the Supreme Court's recognition of explicit and implicit *statutory gaps* of substantial agency discretion. *See infra* note 77 and accompanying text (discussing the Supreme Court's juxtaposition, in *Chevron U.S.A., Inc. v. NRDC,* of explicit gaps created by rulemaking delegation and implicit gaps created by lawmaking delegation). In any event, the express and implied terminology does not accurately distinguish between types of delegations because even general delegations are expressly made. *See, e.g.,* Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers, 861 F.2d 1124, 1141 (9th Cir. 1988) (Hug, J., dissenting) (noting that a general delegation is really an *"express"* delegation of authority "to develop the specifics of general legislation") (emphasis in original).

34. The term "discretion" as used in this Article does not carry the same meaning as used in section 701 of the Administrative Procedure Act. *See* 5 U.S.C. § 701 (1988).

the agency's implementation of a statute, which could include a substantial interpretative component, would be largely immune from judicial scrutiny. If, instead, the area of discretion is defined in terms of the legislative meaning conveyed through the enactment of substantive provisions ("lawmaking gap"), the agency would be forced to adhere to congressional intent in accordance with the judicial model of implied lawmaking discussed above. Under this approach, there would be, in many cases, an implied delegation of lawmaking authority (the degree of deference) that is narrower than the agency's delegated rulemaking authority.

There are cases, including Supreme Court decisions, that provide support for determining statutory gaps based on an agency's rulemaking authority.[35] Under the rulemaking gap theory, regulations issued pursuant to a statutory delegation are entitled to "legislative effect" or "controlling weight" because they complete the legislative scheme left unfinished by Congress.[36] In countless other cases, however, courts have engaged in a searching examination of statutory context and legislative history to find that an agency regulation issued under the auspices of a rulemaking delegation conflicts with congressional intent and is, therefore, invalid.[37] In these cases, courts do not hold

35. *See, e.g.*, United States v. Mersky, 361 U.S. 431, 437-38 (1960) ("regulations, called for by the statute itself, have the force of law" in that "neither the statute nor the regulations are complete without the other"); Atchison, T. & S.F. Ry. v. Scarlett, 300 U.S. 471, 474 (1937) (regulation issued "in pursuance of constitutional authority . . . has the same force as though prescribed in terms by the statute"); American Tel. & Tel. Co. v. United States, 299 U.S. 232, 236-37 (1936) (when Congress grants an agency discretionary authority to prescribe rules, a court may not "substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers"). *See generally* Saunders, *Interpretative Rules with Legislative Effect: An Analysis and a Proposal for Public Participation*, 198 DUKE L.J. 346, 353-54 (1986) (arguing that these cases support the view that agency interpretations made under rulemaking authority "have legislative effect").

36. *See infra* notes 41-66 and accompanying text (discussing cases according legislative effect to regulations issued under specific rulemaking delegations); *see also* Telecommunications Research & Action Center v. FCC, 801 F.2d 501, 514 (D.C. Cir. 1986) (Bork, J.) (because the agency was charged with "prescrib[ing] appropriate rules and regulations to carry out" statutory provisions, the agency's construction of the statute was entitled to deference absent compelling reasons to hold otherwise).

37. In several recent cases, the Supreme Court has invalidated regulations that were deemed inconsistent with a specific congressional intent derived from the language, context, and legislative history of a statute. *See, e.g.*, NLRB v. United Food & Commercial Workers Union, Local 23, 484 U.S. 112, 123-24 (1987); INS v. Cardoza-Fonseca, 480 U.S. 421, 427-43 (1987); Board of Governors v. Dimension Fin. Corp., 474 U.S. 361, 369-73 (1986). An older line of cases invokes a similar analysis. *See, e.g.*, FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981) (citing long line of Supreme Court cases in asserting that a reviewing court "must reject administrative constructions of the statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement").

the rulemaking delegation to require any more deference to the agency's interpretation than would otherwise be supplied.[38]

In recent years, the Supreme Court has trod a path into the middle of this interpretative quagmire. The Court has flirted with the approach of delineating agency discretion on the basis of rulemaking gaps,[39] while continuing to press for strict adherence to congressional intent in reviewing agency interpretations.[40] These Supreme Court cases, viewed together, appear to indicate that the *manner* in which Congress delegates rulemaking authority results in different standards of judicial deference. In effect, the lawmaking gap analysis will apply where the delegation is general; the rulemaking gap approach will apply where it is specific.

C. Batterton v. Francis: *The Rulemaking Gap Approach*

The linchpin of the United States Supreme Court's decisions where rulemaking meets lawmaking is *Batterton v. Francis*.[41] *Batterton* involved a challenge to a regulation that defined the term "unemployment" in determining eligibility under the Aid to Families with Dependent Children (AFDC) program.[42] The Secretary of Health, Education, and Welfare issued the regulation pursuant to a specific delegation contained in the text of the AFDC statute. Specifically, the statute defined a " 'dependent child' "

38. Even when rulemaking is not involved, the Supreme Court has invoked deference to an agency's construction of a statutory scheme it is charged with administering. *See, e.g.*, NLRB v. Hearst Publications, Inc., 322 U.S. 111, 131 (1944) (agency's application of a broad statutory term under the program administered by the agency is entitled to deference if there is "reasonable basis in record" to support it). In *Chevron*, the Supreme Court announced a standard that "*always*" applies "[w]hen a court reviews an agency's construction of the statute which it administers." 467 U.S. at 842 (emphasis added). As the United States Court of Appeals for the District of Columbia Circuit recently observed, the *Chevron* decision "make[s] clear that [its] approach applies equally to agency rulemaking and to agency adjudication." Midtech Paper Corp. v. United States, 857 F.2d 1487, 1497 (D.C. Cir. 1988). While there still may be some questions concerning the application of *Chevron* in different "interpretive formats," *see* Anthony, *Which Agency Interpretations Should Get Judicial Deference?—A Preliminary Inquiry*, 40 ADMIN. L. REV. 121, 137 (1988) (suggesting that *Chevron* should not apply "to interpretations set forth in formats that do not carry the force of law"), the Court appears to have rejected the argument, *as a general matter*, that an agency construction deserves more deference solely because the construction followed a rulemaking. *See infra* notes 77-80 and accompanying text (describing how the Court in *Chevron* rejected approach of according legislative effect to any regulation issued under a statutory rulemaking delegation).

39. *See infra* notes 41-66 and accompanying text (discussing Supreme Court cases holding that regulations issued under specific rulemaking delegation are entitled to legislative effect).

40. *See infra* notes 68-102 and accompanying text (discussing Supreme Court cases requiring a reviewing court to invalidate an agency construction that is inconsistent with a legislative intent clearly discernible from the context and legislative history of a statute).

41. 432 U.S. 416 (1977).

42. The AFDC program is part A of title IV of the Social Security Act, codified at 42 U.S.C. §§ 601-617 (1988).

under the program as having been " 'deprived of parental support or care by reason of the unemployment (*as determined in accordance with standards prescribed by the Secretary*) of his father.' "[43] A group of plaintiffs claimed that the regulation was inconsistent with congressional intent, and, thus, invalid, because the regulation permitted states to exclude individuals from the program based on the reason for a father's unemployment.[44]

In rejecting the plaintiffs' argument, the Court focused on the nature of the rulemaking delegation. Stressing that Congress had specifically delegated to the Secretary the authority to set standards for determining what constitutes "unemployment," the Court observed:

> In a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts regulations with legislative effect. A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner.[45]

Based on this analysis, the Court determined that the Secretary's regulation defining "unemployment" could be set aside only if the Secretary "exceeded his statutory authority or if the regulation was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' "[46] The Court *then* engaged in a halfhearted examination of the statutory language and legislative history.[47] Not surprisingly, given the deferential lens through which the Court conducted its review of the pertinent legislative materials,

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43. 432 U.S. at 418 n.2 (emphasis added) (quoting 42 U.S.C. § 607(a) (1988)). Thus, the statute contained a specific "amendatory" rulemaking delegation. *See supra* notes 31-32 and accompanying text (describing specific freestanding and amendatory delegations).

44. 432 U.S. at 417-18 n.1.

45. *Id.* at 425 (citation omitted).

46. *Id.* at 426 (quoting 5 U.S.C. §§ 706(2)(A),(C) (1988)). The quoted formulation of the standard of review, appropriated from a pertinent section of the Administrative Procedure Act (APA), Pub. L. No. 79-404, § 10(e), 60 Stat. 243, 243-44 (1946), generally signals broad deference to any reasonable agency construction of the statute. *See generally* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, A GUIDE TO FEDERAL AGENCY RULEMAKING 220-21 (1983) (the standard of review tests the "substantive reasonableness of the rule").

47. The structure of the Court's opinion reveals the crucial distinction between the analysis employed in *Batterton* and the standard enunciated in *Chevron U.S.A., Inc. v. NRDC.* In *Batterton,* the Court reviewed the relevant legislative sources *after* it had given legislative effect to the agency's construction. Under the *Chevron* approach, the reviewing court defers to the agency's construction only when there is no clearly expressed congressional intent to the contrary. Accordingly, the court gives legislative effect to an agency's construction, if at all, as *the result of* the court's independent analysis of the statute, the statute's context, and the relevant legislative history. *See infra* notes 83-92 and accompanying text (discussing proper interpretation of *Chevron*).

the Court concluded that the Secretary's regulation was "reasonable" and, thus, valid.[48]

Significantly, the Court distinguished its approach in *Batterton* from that taken in a previous case involving a challenge to the Social Security Board's interpretation of the term "wages" under title II of the Social Security Act.[49] In *Social Security Board v. Nierotko,* the Court held that the Board's interpretation of "wages," which excluded back pay, conflicted with the meaning intended by Congress. The Court noted that Congress had not "delegated [power] to the Social Security Board to determine what compensation paid by employers to employees should be treated as wages."[50] In contrast, allegedly because of Congress' specific delegation of rulemaking, the *Batterton* Court viewed the agency's interpretation with substantial deference. Whereas Congress' use of a "well understood word — 'wages'," in the Social Security Act imposed meaningful constraints on the range of the agency's interpretative choices,[51] Congress' use of the word "unemployment" was accorded no such limiting effect.[52]

The *Batterton* Court suggested two bases for its apparent view that the scope of the agency's rulemaking responsibility defined the area of agency discretion. First, the Court intimated that by specifically delegating rulemaking authority to define the statutory term "unemployed," Congress had signified its interpretive intent that the agency's views on legislative meaning take precedence over the judiciary's.[53] Thus, notwithstanding any countervailing interpretation that could be derived from application of the traditional tools of ascertaining legislative meaning, the agency's construction of the term was to be given legislative effect.[54] Under this rulemaking gap approach, the specific delegation of rulemaking to the agency served as

48. 432 U.S. at 431-32.

49. Social Sec. Bd. v. Nierotko, 327 U.S. 358 (1946).

50. *Id.* at 369. The decisions of both the Social Security Board and the Bureau of Internal Revenue expressed the view that back pay was not included within the statutory definition of "wages." Both agencies were "charged with the administration of the Social Security Act." *Id.* at 366-67. In addition, these agencies had general rulemaking authority, but had not exercised this authority with respect to the back pay question. *Id.* at 366 n.17. The Court conceded that the "expert judgment" of the two administrative bodies was entitled to "great weight," but asserted that "[a]n agency may not finally decide the limits of its statutory power." *Id.* at 368-69.

51. *Id.* at 369.

52. *Batterton,* 432 U.S. at 427-28.

53. Although the Court did not use the interpretive intent terminology, *see supra* note 5 for a discussion of the distinction between Congress' interpretive intent and its intent as to the meaning of a statute, the Court construed the specific rulemaking delegation to mean that Congress had "entrust[ed] to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term." *Id.* at 425.

54. *Id.* at 429.

an "intention override." Having supposedly given broad discretion to the agency to formulate legislative standards, Congress cannot be held to have reached any specific intent as to the content of those standards, at least not an intent that a reviewing court could enforce.

As additional support for a deferential approach to the Secretary's regulation, the Court invoked the distinction between legislative and interpretative rules.[55] The Court emphasized that legislative rules, which are " 'issued by an agency pursuant to statutory authority,' " have the " 'force and effect of law.' "[56] In contrast, only "[v]arying degrees of deference" are accorded interpretative rules, "based on such factors as the timing and consistency of the agency's position, and the nature of its expertise."[57] Because the agency had properly promulgated its regulation pursuant to a specific delegation in the AFDC statute, the regulation constituted a legislative rule that was entitled to substantial deference by the Court.[58]

Neither of the bases asserted by the Court to support its decision in *Batterton* can be characterized as novel. The legislative-interpretative rule distinction is well established, if not clearly defined.[59] Further, the notion that a rulemaking delegation signals heightened deference to an agency's distillation of legislative meaning is not without historical support.[60] Nevertheless, the Court's explication of these principles, particularly its reliance on the specific nature of the rulemaking delegation, did chart new ground.[61] A lit-

55. The distinction between legislative and interpretative rules is suggested by 5 U.S.C. § 553 (1988), which requires "[g]eneral notice of proposed rule making" in the Federal Register for any "substantive rule," and exempts from the notice requirement "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." *Id.* §§ 553(b), (b)(A), (d). While the APA does not apply this distinction when reviewing agency decisions, Professor Davis, in particular, has argued, partially on the basis of the legislative history of the APA, that "the scope of review of interpretative rules is greater than for legislative rules." 2 K. DAVIS, *supra* note 1, § 7:8, at 37. Professor Davis would accord legislative effect to legislative rules. Although some modern case law supports distinguishing between legislative and interpretative rules in reviewing an administrative construction, the distinction has not had the influence that Professor Davis strains to demonstrate in his treatise. *See infra* notes 122-26 and accompanying text (arguing that the distinction does not provide persuasive support for the *Batterton* legislative effect standard).

56. 432 U.S. at 425 (quoting U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947)).

57. *Id.*

58. *Id.*

59. *See, e.g.*, Arrow Air, Inc. v. Dole, 784 F.2d 1118, 1122-23 (D.C. Cir. 1986) (setting forth five factors "applicable in determining whether a given rule is substantive or interpretative").

60. *See supra* note 35 (citing older Supreme Court cases that provide support for the rulemaking gap approach).

61. While previous Supreme Court cases suggested a basis for according legislative effect to rules issued under delegated authority, the *Batterton* Court's formulation of a standard of

eral reading of the Court's opinion indicates that the search for specific legislative meaning, previously pivotal to preserving legislative supremacy in public policymaking, is to be abandoned whenever Congress delegates rulemaking power to an agency. The scope of the rulemaking delegation, not the legislative meaning, determined the breadth of the statutory gap inside which the agency can act with substantial, albeit not unlimited, discretion.

In post-*Batterton* cases, the Court reiterated its position that a regulation issued pursuant to a specific delegation is entitled to legislative effect.[62] In *Schweiker v. Gray Panthers*,[63] for example, the Court again faced statutory language that provided for the establishment of an eligibility requirement, under the federal Medicaid program, "in accordance with standards prescribed by the Secretary."[64] The Court, quoting from *Batterton*, emphasized that Congress had entrusted the agency with " 'primary responsibility for interpreting the statutory term.' "[65] While the Court was not to "abdicate review in these circumstances," the Court's task was the "limited one of ensuring that the Secretary did not " 'exceed his statutory authority.' "[66]

D. Chevron, U.S.A., Inc. v. NRDC: *The Lawmaking Gap Approach*

The Court's emerging views on specific rulemaking delegations raised an obvious question: Should the same standard of judicial deference apply to regulations promulgated under general rulemaking authority? As discussed above, even when an agency is not directed to prescribe legislative standards, general rulemaking powers, by implication, may authorize the agency to exercise rulemaking in implementing a statutory provision.[67] The question then arises whether the rulemaking gap approach should apply in that cir-

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review, purportedly based on the distinction between specific and general rulemaking delegations, was at least novel. *But see* 2 K. DAVIS, *supra* note 1, § 7:8, at 41 (arguing that *Batterton* "makes no new law" but simply confirms "that the old law continues").

62. *See supra* note 1 (citing post-*Batterton* Supreme Court cases according legislative effect to agency regulations issued pursuant to specific rulemaking delegations). *See also* INS v. Chadha, 462 U.S. 919, 986 (1983) (White, J., dissenting) (noting that "[w]hen agencies are authorized to prescribe law through substantive rulemaking, the administrator's regulation is not only due deference, but is accorded 'legislative effect' ") (quoted in Bowsher v. Synar, 478 U.S. 714, 752 (1986) (Stevens, J., concurring)).

63. 453 U.S. 34 (1981).

64. *Id.* at 44. Thus, as in *Batterton*, the rulemaking delegation was set forth in the body of the statute itself, rather than in freestanding legislative language. *See supra* notes 31-32 and accompanying text (distinguishing between freestanding and amendatory statutory language).

65. 453 U.S. at 44 (quoting 42 U.S.C. § 1396(a)(17)(B) (1988)).

66. *Id.*

67. *See supra* note 33 and accompanying text.

cumstance. If so, on what basis? If not, what approach should apply and what justification exists for distinguishing between the two situations?

The United States Supreme Court addressed these questions in the well-known case of *Chevron, U.S.A., Inc. v. NRDC.*[68] *Chevron* involved a challenge to a regulation promulgated by the Environmental Protection Agency (EPA) that adopted a plant wide definition of the term "stationary source" as used in the Clean Air Act.[69] Congress did not specifically instruct the EPA to issue the regulation, but the EPA's enabling statute included a grant of general rulemaking power.[70] The NRDC claimed that the agency's construction of the statute was invalid, and the United States Court of Appeals for the District of Columbia Circuit agreed.[71]

The Supreme Court rejected this claim, finding that the agency's interpretation represented a "reasonable accommodation of manifestly competing interests."[72] The Court enunciated a two-step process for reviewing an agency's "construction of a statutory scheme [that the agency] is entrusted to administer."[73] According to the Court, the first question is "*always*" whether Congress "has directly spoken to the precise question at issue. If

68. 467 U.S. 837 (1984). In Rowan Companies, Inc. v. United States, 452 U.S. 247 (1981), the Court suggested that less deference should be given to an agency regulation issued under general rulemaking authority because the judiciary can "measure" the agency's interpretation "against a specific provision in the [statute]." *Id.* at 253. Significantly, the Court in *Chevron* did not rely on any distinction between specific and general rulemaking delegations as the basis for the standard enunciated in the decision. *See infra* notes 79-80 and accompanying text (discussing *Chevron*). For a discussion of the validity of the distinction suggested by the Court in the *Rowan* case, see *infra* notes 105-12 and accompanying text (arguing that no valid basis exists for according more deference to regulations issued under specific rulemaking authority).

69. 42 U.S.C. § 7401 (1982). The challenged regulation, which implemented provisions of the Clean Air Act Amendments of 1977, permitted states (charged with administering the Clean Air Act provisions) "to adopt a plantwide definition of the term 'stationary source.' " *Chevron,* 467 U.S. at 840. The issue in *Chevron* involved whether the agency's decision "to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble' " was based on a permissible construction of that statutory term. *Id.*

70. The EPA issued the regulation pursuant to the authority granted by Section 301(a) of the Clean Air Act (42 U.S.C. § 7401(a)(1) (1982)). *See* 46 Fed. Reg. 16,282 (1981) (citing Section 301(a) as authority for proposed regulation). Section 301(a) provides that "[t]he Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under [the Act]."

71. The court of appeals found that neither the statutory language nor the legislative history of the Act "squarely addressed" the precise question at issue. NRDC v. Gorsuch, 685 F.2d 718, 723 (D.C. Cir. 1982) (quoted in *Chevron,* 467 U.S. at 841). The court based its decision to invalidate the regulation on its understanding of the main purpose of the federal program: to improve air quality. 685 F.2d at 726 & n.39 (cited in 467 U.S. at 841).

72. 467 U.S. at 865.

73. *Id.* at 844. The Court's emphasis on the construction having been put forth by the agency entrusted to administer the statutory scheme raises the question of whether the *Chev-*

the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[74] On the other hand, if Congress has not directly addressed the issue, "the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation."[75] Instead, "the question for the court is whether the agency's answer is based on a permissible construction of the statute."[76]

At one point, the *Chevron* Court invoked the *Batterton* line of cases in support of its standard of judicial deference.[77] The Court could have extended the rulemaking gap approach under *Batterton* to general rulemaking delegations. Using this approach, the deferential *Batterton* standard, essen-

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ron test applies in other interpretative contexts. *See supra* note 38 (discussing the scope of the *Chevron* test).

74. 467 U.S. at 842-43.

75. *Id.* at 843.

76. *Id.* Consistent with this standard, the Court emphasized that "[t]he basic legal error of the Court of Appeals was to adopt a static judicial definition of the term 'stationary source' when it had decided that Congress itself had not commanded that definition." *Id.* at 842.

77. The reference to the *Batterton* standard was made in the following passage (perhaps the most oft-quoted portion of the *Chevron* Court's opinion):

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Id. at 843-44 (footnotes omitted). This passage, by its juxtaposition of explicit and implicit rulemaking gaps, might be read as endorsing the two-track standard for reviewing agency constructions, under which legislative effect is given to a regulation issued pursuant to a specific rulemaking delegation without an exacting search for legislative meaning. *See generally* Saunders, *supra* note 35, at 356 (arguing that the "significance of an implicit or explicit gap in a statute was central to the Court's opinion"). On the other hand, the Court's assertion that the judiciary must "always" ask whether Congress has "directly spoken to the precise question at issue" suggests that a court must conduct an active search for legislative meaning, notwithstanding the presence of a specific rulemaking delegation. 467 U.S. at 842. Thus, despite the dictum concerning explicit and implicit rulemaking gaps, *Chevron* can be read as providing for enforcement of specific legislative meaning without regard to the nature of the rulemaking grant under which a challenged regulation is promulgated. *See* Pennsylvania Dep't of Pub. Welfare v. United States Dep't of Health and Human Serv., Medicare & Medicaid Guide (CCH) ¶ 37,544 at 18,868 (M.D. Pa. Sept. 8, 1988) (holding that the question of whether an agency promulgated a regulation under specific or general authorization is relevant only where "the intent of Congress is not clear"); Anthony, *supra* note 38, at 126 (commenting that *Chevron* "sets up a three-stage analysis" under which an inquiry into whether there is a "specific congressional intent" *precedes* consideration of whether the delegation of rulemaking authority is explicit or implicit).

tially, step two of the *Chevron* analysis,[78] would apply *anytime* an agency has appropriately exercised delegated rulemaking power. Clearly, the Court did not adopt this approach; at no point did the Court examine whether the EPA's regulation involved a proper exercise of its general rulemaking authority.[79] *Chevron* makes unmistakably clear that a *general* rulemaking delegation does not connote an interpretative intent to accord legislative effect to an agency rule issued pursuant to the delegation.[80]

In place of the rulemaking gap analysis advanced in *Batterton, Chevron* substitutes a statutory gap analysis under which the zone of deference to an agency's construction is determined by an assessment of legislative meaning. The extent to which *Chevron* permits a court to pry legislative meaning from a statutory enactment when assessing the validity of an agency's construction has been the subject of considerable debate.[81] A plausible argument can be made that *Chevron* severely restricts the court, allowing it to enforce only the most facially evident legislative meaning. Thus, the presence of *any* am-

78. Step two of *Chevron* requires only that the agency's construction be "reasonable." 467 U.S. at 844. This was essentially the standard applied in *Batterton. See supra* note 47 and accompanying text (describing the *Batterton* decision).

79. In contrast to its approach in *Batterton,* the Court did not give legislative effect to the EPA's regulation merely on the ground that the agency issued the regulation under a statutory grant of *rulemaking* authority. *Cf.* Saunders, *supra* note 35, at 357 (interpreting *Chevron* as according "legislative effect" to an agency regulation on the basis of legislative meaning). Nor did the Court attempt to distinguish the *Batterton* standard on the ground that the regulation in *Chevron* had been promulgated under general, rather than specific, rulemaking authority.

80. Another explanation for this aspect of *Chevron* is that the general rulemaking delegation in question did not authorize the promulgation of a substantive or legislative rule. *Cf.* K. DAVIS, *supra* note 30, § 7:8, at 172-75 (using this explanation to fit Supreme Court case law into a "theory" that legislative rules must be accorded legislative effect). The rulemaking delegation involved in *Chevron* is, however, virtually identical to the type of delegation that has been held to confer substantive rulemaking power. *See supra* note 27 and accompanying text (discussing general rule). As Professor Davis has observed, "[a] typical statute which provides in broad terms that an agency has authority to issue regulations to carry out the statute should be interpreted to mean that the agency may issue legislative rules, not merely interpretative rules." K. DAVIS, *supra* note 30, § 7:8, at 175 (Supp. 1982). *Chevron* neither disputes nor endorses that view but adopts a standard under which the point is irrelevant.

81. *Compare* Farina, *supra* note 5, at 460 (describing *Chevron* as excluding from the search for legislative intent "any judicial attempt to translate imperfect legislative expression, extrapolate answers from related statutory provisions or infer congressionally preferred solutions from the statute's animating principles") *with* Starr, *Judicial Review in the Post-*Chevron *Era,* 3 YALE J. ON REG. 283, 299 (1986) (deference required whenever statutory ambiguity exists with respect to the precise question before the court, at least where the statutory scheme is technical or complex and the agency interpreting the statute has some expertise in the area) *and* Saunders, *supra* note 35, at 360 (arguing that "the type of ambiguity or silence" in a statute determines whether deference is accorded agency construction under *Chevron*); *see also* Note, *Coring the Seedless Grape: A Reinterpretation of* Chevron U.S.A., Inc. v. NRDC, 87 COLUM. L. REV. 986, 995-99 (1987) (reading *Chevron* to require examination of "[d]eference factors" even where statutory language is facially ambiguous).

biguity in a statutory enactment would require deference to any one of the reasonable alternative meanings selected by the agency. Under this reading of *Chevron,* a court's inquiry into legislative meaning would be as deferential as the inquiry under the *Batterton* standard, which itself requires a court to invalidate an agency rule that is "manifestly contrary" to the governing statute.[82] Although applied under a different rubric, the *Chevron* test, as so read, would give legislative effect to any reasonable construction of a statutory provision.

While this interpretation of *Chevron* finds support in some of the Court's dicta,[83] there are strong indications that the Court did not intend to relegate legislative meaning to the black hole of agency discretion. The Court emphasized repeatedly that the deference accorded to an agency's construction under step two of the *Chevron* analysis applied only if a specific legislative meaning could not be derived from the congressional enactment. The Court also asserted that the judiciary has the final say on matters of statutory construction "and must reject administrative constructions which are contrary to clear congressional intent."[84] Indeed, the Court engaged in a searching examination of statutory language and legislative history before concluding that Congress had delegated "*policymaking* responsibilities" to the agency.[85] In a key footnote, the Court stated: "If a court, *employing traditional tools of statutory construction,* ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."[86]

This passage, in particular, points to a considerably different reading of *Chevron. Chevron* precludes a court from imposing its own construction on a statute once the court determines that Congress did not express a specific

82. *See* 467 U.S. at 844 (reciting *Batterton* standard).

83. The Court states that a reviewing court must give effect to the "unambiguously expressed intent of Congress" and concludes that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Such dicta (fairly read), however, merely advance the conclusion that where a statute is ambiguous, *i.e.,* specific legislative meaning cannot be derived from a statutory enactment, a reviewing court generally should defer to the agency construction. The decision does not list the steps a court should take before concluding that the statute is ambiguous.

84. *Id.* at 843 n.9.

85. *Id.* at 865 (emphasis added). As one commentator has remarked, "the degree to which the ambiguity present in the statute reflects uncertainty about which of two competing policies is to carry the day" plays "a major role" in the *Chevron* analysis. Saunders, *supra* note 35, at 360. "When Congress is motivated by competing policy concerns in enacting a statute, it is more likely implicitly to delegate authority to interpret the statute and thereby balance the policies than when only one policy dominates and the question is simply how the policy underlying the statute applies to the issue at hand." *Id.* (footnote omitted).

86. 467 U.S. at 843 n.9 (emphasis added).

intent on the matter at issue. The court, however, using the traditional tools of statutory construction and without deferring to the agency, makes that initial determination of whether Congress has spoken on the issue.[87] Accordingly, the mere presence of ambiguity does not invariably require deference to the agency because, in many circumstances, Congress may have reached a specific intent and failed to convey that intent with pristine clarity. The *Chevron* Court did not defer to the EPA's construction of the statute solely because the statute contained an ambiguity as to the meaning of the term "stationary source," but because the ambiguity betrayed a failure on the part of Congress to resolve the competing policy interests at the "level of specificity" required to preclude the EPA from applying its view of the appropriate accommodation of those interests.[88] Because the Court could not coax a discernible legislative meaning from the statutory language, context, or legislative history, it deferred to the meaning assigned by the agency.[89]

In this regard, *Chevron* strongly echoes the judicial model of implied lawmaking delegation advanced by Professor Dickerson, under which courts recognize lawmaking authority only after an exhaustive search of the relevant legislative sources fails to yield a discernible legislative meaning.[90] Under this lawmaking gap approach, translated to the administrative context, the judiciary has the final say on legislative meaning (step one of *Chevron*). The agency, however, given its superior capacity to "resolve competing political interests," becomes the primary player once the focus shifts from ascertaining meaning to assigning it (step two of *Chevron*).[91] In

87. The view that a reviewing court carries out step one of *Chevron,* without deference to the agency's construction, using tools of statutory construction to ferret out legislative meaning, has been consistently asserted by the United States Court of Appeals for the District of Columbia Circuit, the lead court in the application of *Chevron.* A recent example of that court's synthesis of *Chevron* and its progeny is found in *Ohio v. United States Dep't of the Interior,* 880 F.2d 432, 441 (D.C. Cir. 1989).

88. 467 U.S. at 859, 865.

89. *Id.* at 865.

90. *See supra* notes 21-23 and accompanying text (summarizing Professor Dickerson's model). Both the Dickerson model and *Chevron* (properly read) require that a court employ traditional tools of statutory construction to ascertain legislative meaning. Both contemplate, albeit to varying degrees, the recognition of a lawmaking delegation even when one reading of a statute appears to the court to be more natural than another. *Compare* R. DICKERSON, *supra* note 13, at 27 (a court must enforce any legislative meaning that can be ascertained "with reasonable confidence") *with Chevron,* 467 U.S. at 842 (court to give effect to legislative meaning where "the intent of Congress is clear").

91. 467 U.S. at 865. In an article written prior to *Chevron,* Professor Henry Monaghan asserted that "distinctions between 'construction' and 'application' have never been employed to measure what law-declaring authority Congress can confer upon an administrative agency," noting that the "substantive rule-making cases [*Batterton,* et al.] make that plain." Monaghan, Marbury *and the Administrative State,* 83 COLUM. L. REV. 1, 29-30 (1983). To the extent that *Chevron* adopts such a distinction under its two-step format, the case can be viewed as ex-

some circumstances, facial ambiguity or the lack of a discernible legislative meaning in a statutory enactment may indicate that Congress has not "directly spoken to the precise question at issue."[92] Therefore, the facial ambiguity will result in a grant of lawmaking authority to the agency. In other circumstances, facial ambiguity will not result in a lawmaking delegation to the agency and will preclude the judiciary from according deference to the agency's implementation of the statute.

If the Court's adoption of a lawmaking gap approach in *Chevron* was not unequivocal, subsequent cases strongly confirm that *Chevron* can provide for substantial enforcement of legislative meaning in the administrative context. The United States Court of Appeals for the District of Columbia Circuit, in particular, has invoked *Chevron* on several occasions to invalidate an agency construction as being inconsistent with a legislative intent ascertained by the court, despite the presence of facial ambiguity in the statutory enactment.[93] The Supreme Court has also subjected agency interpretations to exacting scrutiny under the *Chevron* standard.[94] In *INS v. Cardoza-Fonseca*,[95] the Court, per Justice Stevens, the author of the *Chevron* opinion, reaffirmed that if, in "[e]mploying traditional tools of statutory construction," a court concludes that Congress reached an intent that conflicts with an agency's construction, the *Chevron* standard requires that the court invalidate that construction.[96] While it is not generally the province of the judiciary "to set forth a detailed description" of how to apply a statutory term, *Chevron* re-

panding the policing authority of the judiciary in reviewing agency action. *But see* Farina, *supra* note 5, at 453-55 (arguing that *Chevron* ends the "judicial vacillation" between the "independent judgment model" and the "deference model" in favor of the latter).

92. 467 U.S. at 842.

93. *See* Ohio v. United States Dep't of the Interior, 880 F.2d 432, 441-59 (D.C. Cir. 1989) (invalidating agency construction of imprecise statutory language); Georgetown Univ. Hosp. v. Bowen, 862 F.2d 323, 326-30 (D.C. Cir. 1988) (reading general statutory term in context of overall statutory scheme to invalidate agency construction); Washington Hosp. Center v. Bowen, 795 F.2d 139, 144-48 (D.C. Cir. 1986) (relying on rule of statutory construction to invalidate agency interpretation); *see also* Bethesda Hosp. Ass'n v. Bowen, 485 U.S. 399, 403-08 (1988) (rejecting agency construction of vague statutory language despite previous approval by several lower courts).

94. The Court has made it clear that the meaning of general statutory language can be ascertained from legislative history and statutory context. *See* NLRB v. United Food & Commercial Workers Union, 484 U.S. 112, 123-24 (1987) (examining "words, structure, and history" of subject Act to determine whether agency regulations were "fully consistent" with congressional intent); INS v. Cardoza-Fonseca, 480 U.S. 421, 427-43 (1987) (probing statutory context and legislative history to arrive at legislative meaning).

95. 480 U.S. 421 (1987).

96. *Id.* at 446-49.

quires that a court strike down an agency interpretation that "Congress did not intend."[97]

In a concurring opinion, Justice Scalia accused the majority of having eviscerated the *Chevron* standard. Specifically, he argued that the majority was wrong to suggest "that courts may substitute their interpretation of a statute for that of an agency whenever, '[e]mploying traditional tools of statutory construction,' they are able to reach a conclusion as to the proper interpretation of a statute."[98] According to Justice Scalia, "this approach would make deference a doctrine of desperation, authorizing courts to defer only if they would otherwise be unable to construe the enactment at issue."[99]

Justice Scalia overstates his case. Even under the most expansive lawmaking gap approach, a substantial component of an agency's implementation of a statutory provision lies beyond intensive judicial scrutiny.[100] Further, *Cardoza-Fonseca* certainly does not hold that a reviewing court is free to disregard an agency's construction *anytime* the court would have construed the statute differently. Nonetheless, *Cardoza-Fonseca* does reaffirm the responsibility of a reviewing court to resort fully to the tools of statutory construction, including legislative history and the basic canons of statutory construction,[101] to ascertain whether Congress has shown an intent on the "precise question at issue." Courts will defer to an agency's construction of a statutory scheme only after a careful appraisal of the agency's *lawmaking* authority, based on the courts' close scrutiny of the language, context, and legislative history of the statute.[102]

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97. *Id.* at 446-48. The Court did acknowledge the existence of "some ambiguity" in the statutory term at issue. *Id.* The Court recognized, however, that while its role was not to specify everything that the term must mean, its responsibility included drawing the boundaries of permissible legislative meaning and rejecting any agency construction that crossed the line. In this regard, the Court's analysis strongly echoes the "empowering arrangement" suggested by Professor Monaghan. *See infra* note 106 and accompanying text (quoting Monaghan in arguing that a reviewing court's responsibilities should be no different when an agency promulgates a rule pursuant to a specific rulemaking delegation).

98. 480 U.S. at 454 (Scalia, J., concurring).

99. *Id.*

100. The creative role in the "interpretative" process, assumed by courts in the absence of an agency construction, is fully within the purview of the agency's reasonable exercise of its implementing authority. *See supra* notes 90-91 and accompanying text (describing application of lawmaking gap approach under *Chevron*).

101. *See* 480 U.S. at 432 (invoking a canon of construction stating that where " 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion' ") (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

102. *See generally* Survey, *Leading Cases of the 1986 Term,* 101 HARV. L. REV. 87, 349-50 (1987) (noting that *Cardoza-Fonseca* "serves as a reminder that searching judicial inquiries into congressional intent in the administrative law context are not obsolete").

II. Congressional Intent and the Rulemaking Gap Approach: The Search for Legislative Meaning in a Rulemaking World

Notwithstanding *Chevron*'s use of legislative meaning to define statutory gaps of agency lawmaking discretion, the Court still clings to the view that agency regulations issued pursuant to a *specific* rulemaking delegation are entitled to legislative effect.[103] Thus, with respect to specific rulemaking delegations, the Court holds the reviewing court to the *Batterton* and not the *Chevron* standard. In effect, the crucial first step of *Chevron* is bypassed, and a court reviews the agency's construction without careful consideration of specific legislative meaning. Again, this raises the question: Is there justification for applying a more deferential standard for reviewing agency constructions solely because of the specific nature of a rulemaking delegation?

The Court has not specifically attempted to reconcile its recognition of lawmaking gaps in the administrative context with its continued adherence to the *Batterton* standard.[104] As suggested above, however, the bases for such a distinction appear to be twofold: (1) by specifically directing or authorizing an agency to exercise rulemaking powers, Congress signals its interpretive intent that the product of the agency's rulemaking be given legislative effect; and (2) standards prescribed pursuant to a specific rulemaking delegation are legislative rules and, thus, are entitled to such effect.

The argument that Congress intended for courts to defer to any agency regulation issued under a specific rulemaking delegation sets up an apparent battle between competing indicia of congressional intent. On the one hand, Congress has enacted a statutory provision that, upon application of traditional tools of statutory construction, furnishes evidence of a specific legislative meaning. Yet, Congress has given the agency substantive rulemaking

103. *See supra* notes 1 and 62 and accompanying text (citing to cases, including post-*Chevron* cases, that have favorably invoked the *Batterton* standard).

104. *Chevron* itself might be read to affirm *Batterton* by its juxtaposition of explicit and implicit statutory gaps. As noted previously, however, the Court's dictum read in context could be interpreted to require the search for legislative meaning without regard to the manner in which Congress delegated rulemaking authority. *See supra* note 77 (discussing juxtaposition). In a recent case, *Sullivan v. Zebley*, 110 S. Ct. 885 (1990), the majority of the Court cited the more deferential explicit gap standard invoked in *Chevron* to invalidate agency regulations promulgated under a specific rulemaking delegation. *Id.* at 890. The majority was not required to consider whether a more exacting search for legislative meaning would have been appropriate in the event the regulations passed muster under the explicit gap standard. Significantly, in a dissenting opinion, Justice White specifically observed that "[a]s this case involves a challenge to an agency's interpretation of a statute that the agency was entrusted to administer, [the two-step *Chevron* analysis] provides the framework for our review." *Id.* at 897 (White, J., dissenting).

authority to prescribe legislative standards that implement a specific statutory provision. Which of these conflicting legislative signposts should courts follow?

The answer is that these respective indicia of congressional intent in no way conflict. By specifically delegating rulemaking authority, Congress has indicated that the agency is to act in a legislative capacity in implementing a statutory provision. Presumably, this means that some lawmaking gap has been left for the agency to fill, and the court's role is to determine the point at which deference to the agency's decisionmaking begins.[105] This is typically the case in the administrative context. As Professor Monaghan has observed:

> The court's task is to fix the boundaries of delegated authority, an inquiry that includes defining the range of permissible criteria. In such an empowering arrangement, responsibility for meaning is shared between court and agency; the judicial role is to specify what the statute cannot mean, and some of what it must mean, but not all that it does mean.[106]

Agencies are often legislative partners with Congress in the development of statutory policy. Agencies, however, are decidedly junior partners. In some circumstances, Congress may leave no room for agency lawmaking.[107] In others, Congress might grant broad lawmaking responsibility, providing no specific constraints on the agency's implementation of a statutory scheme.[108] In the balance of cases, Congress leaves some gap for agency participation but narrows that gap by evincing a specific legislative meaning or meanings through its enactment of a statutory provision. The rulemaking gap approach does not take into account this third category of congressional and agency interaction. Therefore, the rulemaking gap approach permits

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105. *But see infra* note 107 (arguing that the presence of a specific rulemaking delegation should not deter a court in an appropriate case from denying any lawmaking role to the agency).

106. Monaghan, *supra* note 91, at 27.

107. One might assume that a specific rulemaking delegation would at least preclude a finding that there has been *no* lawmaking delegation to the agency on a particular point. Even where there is no implicit delegation of lawmaking authority to an agency, however, it is not inconceivable that Congress would prefer the agency to map out the statutory scheme by regulation. Further, as discussed below, the use of specific rulemaking delegations is almost a reflex action among some legislative draftsmen and, thus, lacks probative force as a determinant of congressional intent. *See infra* notes 121-22 and accompanying text. If there is strong evidence of a legislative meaning that preempts any lawmaking role for the agency, the presence of a specific rulemaking delegation should not deter the court from giving effect to that meaning.

108. *See, e.g.*, 42 U.S.C. § 1395ww(d)(5)(C)(iii) (1988) (authorizing the Secretary of Health and Human Services to "provide by regulation for such other exceptions and adjustments to [the Medicare Prospective Payment System] as the Secretary deems appropriate").

recalcitrant agencies, bent on carrying out the political agenda of the executive branch rather than the expressed will of Congress, to ignore congressional intent in a broad range of circumstances.

The full import of the rulemaking gap approach—and the extent of its dubious premises—is made starkly apparent by the Court's analysis in *Batterton*.[109] In *Batterton,* the Court refused to ascribe a specific meaning to the term "unemployment" as used by Congress in defining eligibility under the AFDC program. The Court distinguished a previous decision, *Nierotko,* in which it had gleaned a specific meaning from the term "wages" as used in defining eligibility under another federal social program.[110] Under the Court's analysis, the basis for the distinction was that Congress, in enacting the AFDC statute, had specifically directed the agency to prescribe standards to define the statutory term.[111] Purportedly, the intent expressed by Congress through the legislative meaning underlying the respective enactments was not the relevant consideration.

In neither *Batterton* nor *Nierotko* would it have been appropriate for the Court to tell the agency precisely what the statutory term must mean. The Court did, however, have the responsibility to tell the agency what the term "cannot mean, and some of what it must mean,"[112] if the Court ascertained legislative meaning from the statutory enactment. Surely, it is fiction of the highest order to hold that Congress intends for this fundamental role of the judiciary to be held hostage by the manner in which Congress delegates rulemaking to the agency.

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109. *See generally supra* notes 41-61 and accompanying text (discussing the *Batterton* decision).

110. *See supra* notes 49-51 and accompanying text.

111. Professor Davis asserts in the 1979 edition of his treatise that the "key" to the Court's analysis in *Batterton* was that Congress had delegated rulemaking authority to the agency—not that the delegation was specific rather than general. 2 K. DAVIS, *supra* note 1, § 7:8, at 41. Thus, Professor Davis attempts to draw from *Batterton* a more general endorsement of deference to all rules promulgated under rulemaking authority. K. DAVIS, *supra* note 30, § 7:8, at 172 (Supp. 1982). The *Batterton* Court did emphasize, however, that Congress had "expressly" conferred the delegation at issue on the agency. Batterton v. Francis, 432 U.S. 416, 425 (1977). Further, in *Nierotko,* the agency had general rulemaking authority; the Court's emphasis in *Nierotko,* as in *Batterton,* was on the lack of specific rulemaking authority. Social Sec. Bd. v. Nierotko, 327 U.S. 358, 369 (1946) (emphasizing that Congress did not specifically delegate the authority to define the statutory term). *See also supra* note 50 (discussing agency rulemaking authority in *Nierotko*). In any event, in subsequent Supreme Court cases, use of the *Batterton* standard has been confined to specific rulemaking delegations. *See supra* notes 62-66 and accompanying text (discussing post-*Batterton* case law).

112. Monaghan, *supra* note 91, at 27.

To be certain, the tools of statutory construction that courts use to ascertain legislative meaning are also replete with fictions.[113] Thus, a central feature of the interpretative function should be to fix the point at which the application of these fictions becomes too mired in uncertainty for a controlling legislative meaning to emerge with sufficient clarity.[114] While a specific meaning will at times be clear on the face of a statute, a clearly expressed meaning can also be derived from statutory context, the relevant legislative history (despite the views of Justice Scalia and a minority of other judges and commentators), and by application of the canons of statutory construction.[115] *Chevron* permits, and indeed requires, courts to search out, identify, and enforce such meaning, notwithstanding an administrative construction to the contrary.

In contrast, *Batterton*'s rulemaking gap approach limits courts to invalidating only the most egregious deviations from contrary legislative intent. The *Batterton* approach allows for no meaningful resort to statutory context or canons of construction in passing upon the validity of an agency's construction. Taken to an extreme, that standard might preclude reliance on even the most clearly enunciated and probative legislative history.[116]

113. As Professor Dickerson notes, while the rules of statutory construction provide the "best working approximation" of actual intent, "no method has yet been devised by which [actual intent] can be directly known." R. DICKERSON, *supra* note 13, at 36, 85.

114. Even many proponents of judicial lawmaking authority concede that courts should exercise lawmaking only at the point where a court cannot discern specific intent from the statutory enactment. *See, e.g.*, Luneburg, *supra* note 7, at 758 (noting that while "lawmaking may form a significant element in statutory interpretation," there "is such a thing as the intent of the enacting legislature" and that "courts should pay due deference to it on the basis of accepted separation of powers notions").

115. Justice Scalia is at the forefront of a vocal minority of conservative judges and scholars who have been highly critical of what they perceive as excessive reliance on legislative history in statutory interpretation. These advocates of strict adherence to statutory language argue that legislative history is unreliable, and that such reliance contravenes constitutionally prescribed procedures for lawmaking and permits judges to override the political bargains struck in a statutory enactment. *See generally* Aleinikoff, *supra* note 13, at 28-31 (summarizing the views of Justice Scalia and other advocates of "the new plain meaning"). While these views have been thoroughly aired in academic circles, they have yet to carry the day in the courts.

116. If a court construed a specific delegation of rulemaking authority as clear evidence of congressional intent not to restrict an agency to any specific legislative meaning, then even the most clearly expressed contrary intent in the legislative history could only be given effect if a court were willing to use legislative history to override the "plain meaning" of the statute. Whether it is permissible to affix such weight to legislative history is a disputed point. *Compare* INS v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12 (1987) (majority opinion) (stating that a court may "look to the legislative history to determine . . . whether there is 'clearly expressed legislative intention' contrary to that language, which would require [the Court] to question the strong presumption that Congress expresses its intent through the language it chooses") *with id.* at 452 (Scalia, J., concurring) (citing the "venerable principle that if the language of

Whatever the intent behind a congressional choice to prescribe specific rulemaking authority, it seems farfetched in the least that Congress by such choice intended, in direct contravention of the traditional "empowering arrangement" between Congress and agencies,[117] to strip a reviewing court of any meaningful authority to enforce legislative meaning in an administrative context.

Indeed, *Batterton*'s assertion that a specific rulemaking delegation is intended to connote extreme deference to agency authority ignores a more plausible explanation as to why legislative draftsmen may elect to make a rulemaking delegation specific. As a general rule, agencies are given broad discretion over the manner in which they proceed to implement statutory provisions.[118] In the absence of a specific direction in the enabling statute, or in the individual enactments that amend that statute, agencies are free to choose between rulemaking and adjudication as the primary or exclusive means of implementing their governing statutes.[119] In some cases, however, Congress may not want an agency to bury implementation in informal case-by-case adjudication, wherein affected parties may have difficulty identifying the governing standards, and the risk of arbitrary or inequitable application of the agency's construction is substantial. Accordingly, Congress may make a specific rulemaking delegation to indicate its preference that the agency follow rulemaking procedures in implementing a statutory provi-

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the statute is clear, that language must be given effect"); *see also* Matter of Sinclair, 870 F.2d 1340, 1341-44 (7th Cir. 1989) (concluding that legislative history can be used to "show the meaning" of the text but cannot be used to "trump the text").

117. Monaghan, *supra* note 91, at 27. While there is a legal tradition of deference to agency action, the view that courts must enforce legislative meaning, regardless of the nature of the agency's delegated power, also carries substantial historical support. For example, in a well-known case decided prior to enactment of the APA, Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607 (1944), the Court confronted a specific rulemaking delegation similar to that in *Batterton*. *Id.* at 608 (statutory provision exempted employees " 'within the area of production (as defined by the Administrator)' "). Although noting that "Congress gave the Administrator appropriate discretion to assess all the factors relevant to the subject matter," the Court invalidated the Administrator's regulation based upon "[c]ongressional purpose as manifested by text and context," as well as the "[m]eagre legislative history." *Id.* at 614-15. According to the Court, "[t]he details with which the exemptions in this Act have been made preclude their enlargement by implication," notwithstanding the Administrator's delegated authority. *Id.* at 618.

118. *See generally* FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940) (noting that agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties") (footnote omitted) (quoted in Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 543 (1978)).

119. *See, e.g.*, SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) (emphasizing that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency").

sion.[120] Ironically, under the *Batterton* standard, this attempt to *control* agency decisionmaking is read conversely as having effected broad deference to the product of the agency's action.

Further, the principal assumption underlying the *Batterton* standard, that there is a reasonably coherent pattern of use or nonuse of specific delegations reflecting circumstances where Congress intends to effect extreme deference and where it does not, fails to comport with legislative realities. The use of phrases like "as determined under standards prescribed by the Secretary" reflects the prevailing assumption among congressional staff that Congress should steer away from micromanaging every detail of a federal program. Nevertheless, an enormous leap of logic is required to suggest that this language alone is meant to free the agency to pursue its own policy agenda without careful judicial oversight.[121] The use or nonuse of specific delegations is haphazard, involving an incalculable number of separate drafting choices made without any reasonable reference point.[122] Under any reasonable standard of statutory construction, reliance on such a hollow fiction cannot be supported. The *Batterton* line of cases purports to adopt deference to congressional intent in the operation of statutory provisions subject to agency construction. In reality, by potentially ignoring the most plausible indicia of congressional intent reflected in the statutory enactment, these cases strike an activist blow in favor of agency usurpation of the lawmaking function.

If the *Batterton* rulemaking gap approach cannot be sustained on the basis of congressional intent, then all that remains to support the approach is the wooden application of the legislative-interpretative rule distinction. The problem with this justification is twofold. First, a regulation issued pursuant to a general rulemaking delegation has as much claim to legislative rule status as one issued under a specific delegation.[123] In *Chevron,* the agency regu-

120. *See infra* notes 131-47 and accompanying text (discussing how legislative draftsmen may use specific rulemaking delegations to control agency decisionmaking).

121. It is this author's opinion, based on his experience as an attorney in the Senate Legislative Counsel's office in drafting federal legislation, that congressional staff, professional and political, do not understand using a specific rulemaking delegation to give heightened deference to agency action. At most, the phrase is used reflexively, if erratically, to express the agency discretion that is inherent in the congressional-agency lawmaking partnership.

122. A specific rulemaking delegation may be used when there is basic agreement on the meaning of a statutory term. Conversely, because of either circumstance or the preferences of the draftsman no specific delegation may be used when there is little, if any, consensus on specific issues. If a tool of statutory construction yields a clear legislative meaning, that meaning should not be held hostage by the congressional "decision" to interpose specific rulemaking authority.

123. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, A GUIDE TO FEDERAL AGENCY RULEMAKING 36 (1983) (noting that "it is now accepted that agencies can adopt

lation under review had been promulgated under general rulemaking authority.[124] Nevertheless, *Chevron* required the use of lawmaking gaps to define the area of deference to agency decisionmaking. If *Chevron* requires this in the context of general delegations, the same requirement should pertain to specific delegations.

More fundamentally, the distinction between legislative and interpretative rules is not grounded in any coherent policy related to the appropriate implementation of statutory provisions by administrative agencies.[125] The distinction is reflected in the Administrative Procedure Act's notice and comment provision, but nothing in the APA provides that this distinction should profoundly affect the standard for reviewing an agency rule.[126] There are strong indications that the distinction has not played a significant role, since the enactment of the APA, in shaping the intensity of judicial review of agency decisionmaking.[127] *Chevron* and its progeny firmly estab-

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legislative rules under general rulemaking delegations"); *see* K. DAVIS, *supra* note 30, § 7:8, at 175 (Supp. 1982) (asserting that "[a] typical statute which provides in broad terms that an agency has authority to issue regulations to carry out the statute should be interpreted to mean that the agency may issue legislative rules, not merely interpretative rules").

124. *See supra* note 70 (discussing statutory authority for regulation at issue in *Chevron*).

125. In one recent case, Midtec Paper Corp. v. United States, 857 F.2d 1487 (D.C. Cir. 1988), the court rejected the argument that an agency interpretation is entitled to less deference when it is invoked in an adjudicative proceeding rather than adopted through rulemaking. According to the Court:

> Our inquiry is the same in each procedural context. We first examine the text of the implicated statute and, where appropriate, its legislative history; using the traditional tools of statutory construction, we seek to determine whether and how Congress resolved the specific issues of law raised in the proceeding under review, and confine the agency to consistency with Congress's intent.

Id. at 1496. If there is no basis for distinguishing between interpretations reached through adjudication and rulemaking, then it is difficult to see why any distinction should be made between types of agency rules.

126. Professor Davis argues that the legislative history of the APA evidences an intent to give substantially more deference to legislative rules. 2 K. DAVIS, *supra* note 1, § 7:9, at 43-50. His analysis, however, begs the question of what is meant by "legislative rule." While there has been much confusion surrounding the legislative-interpretative rule distinction, an important component of the distinction has traditionally centered on the content of the rule, not on whether the rule was issued under statutory rulemaking authority. *See* Saunders, *supra* note 35, at 349, 352-53 (citing the Attorney General's Manual on the APA and noting that *Batterton* blurred this distinction by according legislative effect to an agency interpretation merely because the agency issued the rule under rulemaking authority). "Thus, while legislative rules grant new rights and impose new obligations, interpretative rules merely explain the rights and obligations already created, albeit in masked form, by the statute." *Id.* at 350 (footnote omitted). Under this view, a court could not accord legislative rule status to any rule that involves a substantial interpretative component, including many rules issued under a rulemaking delegation and most rules where there is controversy over legislative meaning.

127. *See* Asimov, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 521, 563-65 (1977) (arguing that judicial scrutiny of legislative rules has become far more exacting in recent years, while review of interpretative rules is less intense

lish that it is the judiciary's responsibility to enforce strict adherence to discernible legislative meaning in the application of statutory provisions. The manner in which an agency construction is authorized and carried out should not significantly alter this fundamental role.

In this regard, *Chevron,* often attacked for having "sold the farm" to administrative agencies, may in fact have restored legislative meaning as the controlling force in determining the allocation of lawmaking power among the three branches. Undoubtedly, *Chevron* rejected the view that courts can project their own understanding of Congress' policy preferences onto a statutory scheme once the courts determine that *lawmaking* authority has been effectively delegated to the agency. Arguably, this is justifiable reconciliation of separation of powers concerns.[128] On the other hand, the case clearly holds that within the legitimate domain of statutory interpretation, the judiciary is supreme and must exercise its power of review with vigilance to ensure that legislative meaning is given full effect in agency decisionmaking.[129] Under this view, legislative supremacy is preserved in the adminis-

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than commonly believed). With the exception of the specific rulemaking delegation cases, the distinction is typically invoked only when there is an argument made that an agency was required to follow notice and comment procedures under the APA. *See* 5 U.S.C. § 553(b) (1988). In such cases, courts can reach the merits of the rule only if the rule is classified as interpretative, assuming notice and comment procedures were not followed. A determination that the rule is legislative for purposes of the notice and comment requirement results in invalidation of the rule on procedural grounds. *See, e.g.,* Arrow Air, Inc. v. Dole, 784 F.2d 1118, 1122-25 (D.C. Cir. 1986) (reviewing validity of rule characterized as interpretative for purposes of notice and comment requirement); General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1564-67 (D.C. Cir. 1984) (same), *cert. denied,* 471 U.S. 1074 (1985).

128. *Compare* 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, 1118-22 (1987) (deferring to agencies is favorable because it promotes uniform application of statutory policy) *with* Survey, *supra* note 102 at 252-55 (*Chevron* deference permits agencies to pursue the executive's political agenda even though inconsistent with basic purpose of statute).

129. The purpose of this Article is not to offer a "revisionist" view of *Chevron,* nor is adoption of such a view necessary to make the Article's central point. Whatever the level of scrutiny permitted under *Chevron,* that level is surely more exacting than the cursory examination of agency action permitted under the *Batterton* standard. *See infra* note 130 (contrasting lower court invalidation rates under *Chevron* and *Batterton*). Nonetheless, the uproar in some quarters over *Chevron*'s implications seems, in this author's judgment, to be misplaced. *Chevron* is well-grounded in the tradition of deference to agency authority within the clearly prescribed statutory limits. Properly applied, *Chevron* permits a court, in defining the limits of agency authority, to extract legislative meaning from facially ambiguous provisions. (Such applications are found in the decisions of Chief Judge Wald for the Court of Appeals for the District of Columbia Circuit). If *Chevron* effected any change to the established order, it was in erecting a specific framework for review which makes it difficult for an activist court to substitute its views on wise public policy, based loosely on statutory purpose, for those proffered by the agency charged with administering the statutory program in question. While

trative context using the same general framework as it is, or should be, where no agency construction precedes judicial action.

III. Drafting Around the Express Delegation Rule: The Lawmakers' Dilemma

For the legislative draftsman, the above discussion is of academic interest only; as long as courts continue to invoke the *Batterton* legislative effect standard in circumstances where rulemaking is expressly delegated, the danger persists that a legislative meaning intended by Congress will go unenforced because of the specific nature of the rulemaking delegation.[130] If this is the case, then the responsibility for avoiding this unintended result falls to the draftsman. The question is: What steps can be taken to ensure that legislative meaning is not inadvertently displaced under the *Batterton* standard?

One drafting solution is simple: avoid using specific delegations. As indicated above, however, there are alternative reasons why lawmakers may choose to issue specific rulemaking instructions to agencies. Because of its desire to control agency decisionmaking, Congress may wish to make clear that an agency is expected to exercise rulemaking with respect to a specific statutory provision. One way of accomplishing this is to indicate, as part of the amendatory language,[131] that the agency is to promulgate standards to implement the provision. Thus, by inserting the words "as determined under standards prescribed by the Secretary," or similar language, after a statutory term in an agency's enabling statute, Congress effectively directs the agency to exercise rulemaking with respect to that term.[132] Yet, by seek-

adoption of this framework for review is noteworthy, it is hardly as portentous as some commentators have suggested.

130. The notion that *Batterton* results in more deference to agency action than permitted under the *Chevron* framework is supported by the lower courts' application of the two decisions. A 1987 survey of lower court decisions conducted by one student commentator found that approximately 40 percent of the courts applying *Chevron* overturned agency regulations. *See* Note, *supra* note 81, at 993. The percentage of cases applying *Batterton* to overturn agency regulations does not approach that figure.

131. *See supra* notes 31-32 (describing the distinction between amendatory and freestanding legislative language).

132. Such language undoubtedly vests the agency with substantive rulemaking authority. *See, e.g.*, W. Gellhorn, C. Byse, & P. Strauss, Administrative Law 211 (7th ed. 1979) (noting that the phrase " 'as defined by the Administrator' " gives "substantive rulemaking power" to the agency). The most natural reading of that language requires an agency to exercise rulemaking when implementing the specific statutory provision to which the language applies. *See generally* United States v. Markgraf, 736 F.2d 1179, 1185 (7th Cir. 1984) (holding that an agency had discretion in deciding whether to implement statutory provisions through rulemaking or adjudication, in part, because the phrase " 'under regulations prescribed by the Secretary,' " contained in the original House version of the Act, was omitted from the final version passed by Congress).

ing to make the rulemaking gap explicit *in this manner,* Congress is held to have accorded legislative effect to whatever standards the agency fashions. The dilemma for the draftsman is this: How does Congress exert control over the manner of agency decisionmaking without signaling substantial deference to the agency's implementation of a statutory provision?

As an initial matter, this drafting dilemma is softened by the practicalities of agency decisionmaking. While there may be doubt as to whether an agency is *required* to exercise rulemaking in a particular circumstance,[133] an agency typically will possess general authority to exercise rulemaking powers, and often will exercise this authority in any situation in which additional administrative input is anticipated.[134] In some cases, the enabling statute may in fact require an agency to exercise rulemaking where "necessary" to carry out its responsibility for administering the statutory scheme.[135] Certainly, the APA requires notice and comment procedures for any legislative rule.[136] Depending on the circumstances, an agency that chooses not to implement a statutory provision by appropriate rulemaking procedures faces the prospect of having its construction invalidated as being improperly promulgated. This prospect alone provides strong incentive for an agency to exercise rulemaking in any doubtful circumstance.[137]

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133. *See, e.g.,* Young v. Community Nutrition Inst., 476 U.S. 974, 980-82 (1986), *rev'g* 757 F.2d 354, 357-61 (D.C. Cir. 1985) (finding that a statutory provision that an agency "shall" promulgate regulations establishing tolerance levels "to such extent as [it] finds necessary for the protection of the public health" did not require the agency to conduct rulemaking).

134. *See* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, A GUIDE TO FEDERAL AGENCY RULEMAKING 74 (1983) (noting that while only a minority of statutes contain "forthright instructions to make rules, most regulatory agencies have no difficulty in pointing to statutory language authorizing them to [promulgate regulations]"). The Administrative Conference lists the advantages of both rulemaking and adjudication, noting that "[g]enerally speaking, unless the agency's underlying statute indicates otherwise, the agency should feel reasonably confident that its choice between rulemaking and adjudication will be respected by the courts." *Id.* at 83. It concludes, however, that "[w]here the agency is, in effect, announcing a future policy, we believe it generally is best to use the rulemaking process." *Id.*

135. *See, e.g.,* 42 U.S.C. § 1395hh(a)(1) (1988) (provision of Social Security Act stating that Secretary of Health and Human Services "shall prescribe such regulations as may be necessary to carry out the administration of the [Medicare] insurance programs under this subchapter").

136. 5 U.S.C. § 553(b) (1988).

137. The incentive to adopt rulemaking procedures is particularly strong if agencies are prevented from employing retroactive rulemaking to correct procedural defects in a previous agency action. In a case decided under the Medicare Act, Bowen v. Georgetown University Hosp., 488 U.S. 204 (1988), the Supreme Court struck down an agency's attempt to remedy its initial failure to follow notice and comment procedures by providing for retroactive application of a subsequently (and properly) promulgated rule. The majority of the Court, noting that "an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress," concluded that "[t]he statutory provisions establishing the [agency's] general rulemaking power contain no express authorization of retroactive rulemaking." *Id.* at

Still, situations will arise in which an agency does not exercise rulemaking with respect to its construction of a particular statutory provision. Moreover, in some cases, Congress may want more control than notice and comment rulemaking allows and will want to ensure that congressional control directives are telescoped to a specific provision in a statutory enactment.[138] Accordingly, the sensitized draftsman should be prepared to consider methods by which decisionmaking control can be exerted without implicating *Batterton*'s rulemaking gap approach. There appear to be several possibilities.

In any case in which legislative meaning is potentially an issue, Congress can clarify its intended meaning of a statutory amendment. Thus, in the freestanding language that accompanies a statutory enactment containing a specific delegation, Congress could indicate that the use of a specific delegation should not be construed to affect the standard of review applicable to any agency action under the rulemaking delegation. The use of this type of clarifying provision is not uncommon.[139] In this context, however, the use of such a provision could raise the implication that where such language is not employed, Congress did intend for a more deferential standard of review to apply.[140] Because such a clarifying provision contemplates that a specific delegation could be read as signaling deference to the agency's rulemaking, its use on a piecemeal basis would further institutionalize the *Batterton* standard of review.

208, 213. Justice Scalia went further in his concurrence, arguing that such retroactive rulemaking was fundamentally inconsistent with the APA, which defines a rule as an " 'agency statement of general or particular applicability *and future effect*.' " *Id.* at 216 (Scalia, J., concurring) (quoting 5 U.S.C. § 551(4) (1988)). According to Justice Scalia, to permit retroactive rulemaking in these circumstances would " 'make a mockery . . . of the APA,' since 'agencies would be free to violate the rulemaking requirements of the APA with impunity if, upon invalidation of a rule, they were free to 'reissue' that rule on a retroactive basis.' " *Id.* at 225 (quoting from opinion of lower court).

138. For example, Congress may want to require that final regulations be promulgated within a specified period of time to ensure that an agency does not deliberately delay implementation of a statutory provision. Congress might also want to regulate the notice and comment procedure more carefully to ensure that an agency gives adequate consideration to particular policy proposals.

139. *See, e.g.*, 42 U.S.C. § 1395g(c) (1988) (setting forth prohibition against direct payment of Medicare reimbursement to third parties, but stating that "nothing in this subsection shall be construed" to prohibit two types of payment arrangements).

140. Use of this type of clarifying provision can often lead to unintended results. For example, in the case of the statute cited in note 139, *supra*, the administering agency has construed it to prohibit all but the two types of payment arrangements explicitly placed outside the reach of the prohibition. *See* 45 Fed. Reg. 36,701 (1980) (promulgating final regulations implementing statutory provision). Some of the arrangements subject to the prohibition under the agency's construction, however, are no more offensive to the statutory prohibition than the types of arrangements specifically "exempted" under the statute.

A more desirable approach is for the lawmakers to state affirmatively that the agency is to employ rulemaking with respect to a particular statutory amendment without implicating the rulemaking gap approach under *Batterton*. This can be done either by using *freestanding* language which requires an agency to issue regulations implementing the amendatory language,[141] or by including within the amendatory language itself a rulemaking delegation that does not employ the "as determined under . . ." phraseology.[142] While each of these approaches expressly effects a rulemaking delegation, neither results in the type of amendatory delegation that signals deference under the *Batterton* line of authority.

Admittedly, reliance on freestanding delegations is problematic in that a rulemaking directive is not usually affixed to any specific provision included in a statutory amendment; freestanding delegations are typically referenced to amendments made by particular sections or subsections of the enacted bill, of which a specific amendatory provision may be but one part.[143] Thus, in the absence of amendatory language indicating that an agency is to promulgate standards with respect to a specific term or provision, a freestanding delegation would not always ensure that an agency would exercise rulemaking with respect to that term or provision. Nonetheless, while it may be irregular, it is certainly possible to target freestanding rulemaking directives to specific amendatory provisions.[144] Indeed, in some circumstances, such

141. The most common freestanding approach is to set forth the delegation in plain terms: "The Secretary of —— shall issue regulations to implement the amendments made by section — of this Act [the statutory enactment in question]." A freestanding delegation could also be achieved either by stating that the notice and comment rulemaking provision of the APA applies to the statutory amendment or by referencing the general rulemaking provisions of the enabling statute.

142. In lieu of the "as determined under . . . " phrase, the amendatory language can state that an agency shall or may issue regulations to implement a particular term or subdivision of the Act in question.

143. Because freestanding language is not included in the amendments made to an underlying Act, the delegation must bridge the gap between the statutory enactment and the pertinent amendatory provisions. This is typically done by referencing the delegation to amendments made by particular sections or subsections of the enactment. In contrast, amendatory language, even of the non-*Batterton* variety, is inserted directly into the underlying Act and can be easily targeted to specific provisions.

144. The draftsman could provide that regulations shall be issued to implement the statutory term "——," as added by the amendment made by section — of the Act. *Cf.* Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 122(h)(2), 96 Stat. 324, (codified as amended at 26 U.S.C. § 1 (1988)). The Act states that:

> [i]n order to provide for the timely implementation of the amendments made by this Act, the Secretary of Health and Human Services shall, not later than September 1, 1983, promulgate such final regulations as may be necessary to set forth . . . the standards for payment for hospice care under part A of title XVIII of [the Social Security Act], pursuant to section 1814(i) of such Act [as added by an amendment made by the statutory enactment].

as where the specific provision is the key provision in a particular section or subsection of a bill, even the most unfocused freestanding delegation should suffice to trigger rulemaking with the desired specificity.

The more specific the reference to a particular amendatory term or provision, the more closely the rulemaking delegation resembles the amendatory language that has invoked the express delegation rule. Perhaps at some point, particularly in the case of an amendatory delegation, a court would be inclined to view the language as a specific delegation intended to give legislative effect to an agency's rulemaking. On the other hand, the *Batterton* line of Supreme Court cases have *all* involved the use of a particular type of amendatory delegation.[145] It is entirely possible, and perhaps likely, the draftsman's use of specifically targeted freestanding language, or even appropriate amendatory language, may preclude courts from applying the *Batterton* standard in favor of the *Chevron* lawmaking gap analysis.[146]

If no ironclad, practicable method exists for ensuring specific legislative control over agency decisionmaking without inadvertently providing deference to the agency's construction of a statutory provision, the above discussion at least suggests viable alternatives that might succeed where the prevailing use of express amendatory language has failed. Where decisionmaking control is of genuine concern to the lawmakers, these alternatives should be considered by the legislative draftsman. Further, while concerns about agency control are legitimate and undoubtedly present in some circumstances where the amendatory language is used, the use of such language results at least as often from the general workings of the congressional agency legislative partnership as from any desire to ensure control over the manner of agency decisionmaking. In many cases, the language simply reflects the prevailing sense, expressed haphazardly with reference to specific amendatory provisions, that some lawmaking gap often is left for agency

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Id.

145. For example, "as determined under standards prescribed by the Secretary." *See supra* notes 62-66 and accompanying text (discussing post-*Batterton* case law).

146. Although not intended to give substantially more deference to agency action (as presumed under *Batterton*), the "as determined under . . ." amendatory delegation is more reasonably read as a statement of deference than are other rulemaking delegations. Thus, apart from the fact that controlling Supreme Court precedent applies solely to that type of amendatory delegation, use of the other types of rulemaking delegations is less likely to result in heightened deference to an agency's rulemaking. *See infra* notes 148-65 and accompanying text (discussing recent case involving non-*Batterton* amendatory delegation in which the *Batterton* standard was not invoked by the government). *But cf.* Sullivan v. Zebley, 110 S. Ct. 885, 890 (1990) (Court applying *Batterton*-like standard to invalidate agency regulations promulgated under non-*Batterton* amendatory delegation).

consumption.[147] Certainly, the indiscriminate use of specific amendatory delegations, which are redundant in many circumstances and dangerously misleading under current Supreme Court jurisprudence, should be discontinued. Indeed, where there is no immediate control concern, such delegations should be studiously avoided. As long as the Supreme Court continues to embrace the *Batterton* standard, lawmakers must draft with an eye on preserving legislative meaning in the application of statutory provisions subject to agency construction.

IV. *OHIO V. UNITED STATES DEPARTMENT OF THE INTERIOR*: *CHEVRON*, SPECIFIC DELEGATIONS, AND THE PRECISE QUESTION AT ISSUE

The major themes explored in this Article recently came to the forefront in *Ohio v. United States Department of the Interior*.[148] In what may be the most significant amplification of *Chevron* to date, the United States Court of Appeals for the District of Columbia Circuit, per Chief Judge Wald, invalidated a portion of an agency regulation promulgated under a specific rulemaking delegation.[149] Over the agency's objection that its regulation was required to be followed by the court, virtually without any consideration of legislative meaning, the court relied heavily on the "precise question at issue" component of the *Chevron* standard to provide meaningful review of the regulatory challenge within the *Chevron* step one framework.

In *Department of the Interior,* Congress specifically delegated to the agency the responsibility for establishing regulations that identified " 'the best available procedures' " for determining damages " 'for injury to, destruction of, or loss of natural resources resulting from a release of oil or a hazardous substance.' "[150] The regulations were to " 'take into considera-

147. *See supra* notes 121-22 and accompanying text (arguing that a specific rulemaking delegation is not intended to connote extreme deference to agency action).

148. 880 F.2d 432 (D.C. Cir. 1989).

149. In addition to its use of *Chevron* to invalidate an agency regulation issued under specific rulemaking authority, the court in *Dep't of the Interior* employed the *Chevron* framework to reject the government's claim that its regulatory construction had been ratified by a "reenactment" of the statutory provision. *Id.* at 457-59. *See generally* Eskridge, *Interpreting Legislative Inaction,* 87 MICH. L. REV. 67 (1988) (discussing legislative ratification doctrine). The court strongly suggested that an agency construction unable to survive step one review under *Chevron,* based on examination of the original statutory enactment, should not be sustained on the basis of subsequent legislative developments. *See Dep't of the Interior,* 880 F.2d at 458 (court stating that it "would be reluctant to hold that the failure to amend an already-clear statutory command generates 'ambiguity' where none existed before").

150. *See Dep't of the Interior,* 880 F.2d at 442-43 (quoting 42 U.S.C. § 9651(c)(1)-(2) (1988)). The statute actually delegated the rulemaking authority to the President, who then assigned the responsibility to the Department of the Interior. *Id.* at 443.

tion factors including, but not limited to, replacement value, use value, and ability of the ecosystem or resource to recover.' "[151] Significantly, the rulemaking delegation, although included in the amendatory language, was not the type of amendatory delegation that had elicited heightened deference under *Batterton*.[152]

Predictably, the agency claimed that the regulation was entitled to almost unlimited deference.[153] The agency did *not*, however, invoke the *Batterton* line of authority in support of its claim of deference.[154] Thus, perhaps because of the nature of the rulemaking delegation chosen by the draftsman, the court did not review the regulation under the deferential rulemaking gap analysis of *Batterton*.

Instead, the agency relied on the *Chevron* framework to substantiate its claim of deference. Specifically, the agency argued that by authorizing the agency to promulgate regulations governing the assessment of damages, Congress had left to the agency "the decision of what the measure of damages will be."[155] Under this view, the presence of the specific delegation meant that Congress had not spoken to the precise question at issue, and the agency's regulation had to be reviewed under step two of *Chevron*.[156] Thus, although the agency did not rely on *Batterton per se*, the agency attempted to secure *Batterton* deference by exploiting the specific rulemaking delegation to end run step one of the *Chevron* analysis.

The District of Columbia Circuit rejected the agency's argument, recognizing that a specific delegation of rulemaking authority did not relieve the court of the obligation to employ " 'traditional tools of statutory construction' " to determine if Congress had evinced a specific legislative meaning that restricted agency action.[157] In synthesizing the *Chevron* standard, the court reaffirmed that *Chevron* requires a reviewing court to look beyond the statutory language at issue in assessing the validity of an agency construction. According to the court:

> Whether Congress had made its intent clear and unambiguous does not depend on whether a particular phrase of the statutory

151. *See* 880 F.2d at 444 (quoting 42 U.S.C. § 9651(c)(2) (1988)).

152. The amendatory language provided that the agency "shall promulgate regulations for" determining the damages, and directed that "[s]uch regulations" had to take into account certain factors. 42 U.S.C. § 9651(c)(1)-(2) (1988).

153. *Dep't of the Interior*, 880 F.2d at 443.

154. *Id.* at 442-43.

155. *Id.* at 442.

156. *See id.* at 443 (setting forth agency's argument that since Congress "delegated the matter" to the agency, the case "is governed by *Chevron* Step Two" and the agency's rule "must be upheld if not unreasonable or inconsistent with the statutory purpose").

157. *Id.* at 441 (quoting Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 843 n.9 (1984)).

> text standing all alone resolves the matter. . . . "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[158]

Accordingly, a reviewing court must study "the statutory text, structure and history" to determine whether the agency has contravened clearly expressed congressional intent.[159]

In rejecting the agency's argument that its regulatory construction was entitled to step two *Chevron* analysis, the court focused on the "precise question at issue" factor of the Chevron discourse. The court emphasized that the precise issue in the case was not "what measure of damages should apply in any or all cases which are brought under the Act." Rather, the court articulated the issue as the far more "discrete" question of whether the agency could select the disputed measure.[160] Thus, while the agency had been delegated a "considerable measure of discretion" in formulating an overall standard for measuring damages,[161] consistent with the traditional "empowering arrangement" between Congress and agencies,[162] the agency was not, by virtue of its specifically delegated authority, given unbridled policy discretion in implementing the statutory provision.

Having delimited the scope of judicial inquiry, the court "submerge[d]" itself "in the minutiae of [the statutory] text and legislative materials."[163] The court concluded that the regulation was invalid because the agency had restricted the measure of damages when Congress had intended that it be broadened.[164] While the agency was given considerable latitude to use its expertise in formulating regulatory standards, it could not establish standards that failed to give effect to a specific congressional preference revealed by the statutory context and legislative history.[165] In sum, notwithstanding the agency's specifically delegated rulemaking authority, the court relied heavily on an exhaustive examination of the legislative history and statutory context, and invalidated the agency regulation under step one of *Chevron.* By doing so, the court firmly established that *Chevron* can provide meaningful

158. *Id.* (quoting Davis v. Michigan Dep't of Treasury, 109 S. Ct. 1500, 1504 (1989)).

159. *Id.*

160. *Dep't of the Interior,* 880 F.2d at 443. The issue was whether the agency was "entitled to treat use value and restoration cost as having equal presumptive legitimacy as a measure of damages." *Id.* The agency's " 'lesser of' [restoration or replacement costs] rule squarely reject[ed] the concept of any clearly expressed congressional preference for recovering the full cost of restoration from responsible parties." *Id.* at 444.

161. *Id.* at 443.

162. Monaghan, *supra* note 91, at 27.

163. *Dep't of the Interior,* 880 F.2d at 442.

164. *Id.* at 450-52.

165. *Id.*

review of agency constructions formulated under specific rulemaking authority.

V. CONCLUSION

It is inevitable that a certain amount of lawmaking responsibility is going to cede to those entities responsible for overseeing the application of statutory provisions in specific cases. The notion that courts exercise such responsibility in many circumstances has been recognized in academic literature for years, if not fully realized in the actual decisions of judges. Agencies owe the same fidelity to congressional intent as do courts. Seemingly, they would be required to give the same effect to discernible legislative meaning as would their judicial counterparts. Yet, historically, there has been an ill-defined perception that agency constructions are immune from the rigorous application of the tools of statutory construction which, at least in theory, characterize judicial application of statutory provisions.

This perception appears to stem, in part, from the fact that agencies, unlike courts, are invited to act in a legislative capacity in implementing statutory enactments.[166] How can Congress delegate rulemaking and still insist on strict adherence to legislative meaning? The answer is that Congress can and frequently does. It simply misconceives the unique legislative partnership between Congress and administrative agencies, and stretches congressional intent beyond the breaking point, to hold that the traditional signposts of legislative meaning are not to be followed in the administrative context simply because Congress has called for rulemaking with respect to the statutory provision in question.

In *Chevron,* the Supreme Court took a tentative step toward reaffirming the principle that it is the role of the judiciary to ensure that a clearly ascertainable intent of Congress is given effect in the application of statutes. Post-*Chevron* judicial decisions have clarified that the lawmaking gaps derived from an exhaustive search for legislative meaning, not the gaps of rulemaking delegations, define the zone of judicial deference to agency decisionmaking. Unfortunately, the *Batterton* line of specific delegation cases prevents full implementation of the lawmaking gap approach. The Court should make clear that step one of *Chevron* applies in any rulemaking context. In the interim, lower courts can lead the way by invoking the *Chevron* standard regardless of the manner in which rulemaking is delegated.[167] For their

166. *See supra* notes 35-36 and accompanying text (describing basis for view that an agency rulemaking is entitled to greater deference).

167. Certainly, where the precise *Batterton*-like delegation language is not involved, a court should be free to review the case within the *Chevron* framework. Even where that type of delegation is involved, there are legitimate (indeed persuasive) grounds for holding that the

part, legislative practitioners must take care to avoid language that will inadvertently result in unwarranted deference to the product of agency rulemaking.

court must review the agency regulation under step one of *Chevron*. *See supra* note 77 (arguing that *Chevron* can be read to require enforcement of specific legislative meaning notwithstanding the interpretative format).