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Differentiating Deference

Anya Bernstein
University at Buffalo School of Law

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Anya Bernstein[†]

[†] Associate Professor, SUNY Buffalo Law School. J.D., Yale Law School; Ph.D., Anthropology, University of Chicago. Christine Bartholomew, Guyora Binder, Michael Boucai, Michael Coenen, Aziz Huq, James Gardner, Lise Gelernter, Michael Halberstam, Jerry Mashaw, Jud Mathews, Glen Staszewski, and Matthew Steilen provided incisive and helpful commentary. I am especially indebted to Anthony O'Rourke for invaluable conversations and suggestions. My thanks to the Journal editors for their thorough and thoughtful work on the piece, and to Thora Knight for research assistance.

Introduction

There is now some consensus that the context of a statutory term plays a crucial part in its meaning.[1] The argument continues, however, over what "kinds of context . . . matter."[2] Building on scholarship that addresses the wide range of contexts that contribute to legal meaning,[3] this Article illuminates two factors crucial to interpreting legal language: the social nature of meaning-making and the practical nature of interpretive competence. I locate my inquiry in the judicial review of agency statutory interpretation, a particularly fruitful arena for analyzing statutory interpretation more generally.[4]

Courts reviewing an agency's statutory interpretation are supposed to apply the widely familiar two-step framework drawn from *Chevron v. Natural Resources Defense Council*.[5] In the canonical expression of the doctrine,[6] a court faced with litigation over an agency's interpretation of a statutory term first uses the "traditional

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1. *See, e.g.*, ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 32 (Amy Gutmann ed., 1997) ("In textual interpretation, context is everything."); Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—And the Irreducible Role of Values and Judgment within Both*, 99 CORNELL L. REV. 685 (2014) (stating that textualists and purposivists "concur [that] the meaning of the words of a statute . . . depends on context" (citing John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 73, 79–80 (2006))); Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1027-28 (1998) (noting that textualists agree with intentionalists that "text is not self-interpreting and that text takes its meaning from and must be understood in context"); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16, 32–33 (2012).

2. Fallon, *supra* note 1, at 687-88.

3. For instance, Jonathan Siegel argues that background legal principles like proportionality, efficiency, and generality frame courts' approaches to interpreting regulatory statutes. Siegel, *supra* note 1, at 1062-70. In another example, Jill Anderson shows how unacknowledged aspects of linguistic context can influence judicial interpretations. Jill C. Anderson, *Misreading Like a Lawyer: Cognitive Bias in Statutory Interpretation*, 127 HARV. L. REV. 1521 (2014). Anderson explains that a particular class of verbs that generally have to do with mental states pose special problems for legal interpreters because they refer to categories and counterfactuals rather than specific, unique objects. *Id.* at 1528. For instance, a court interpreting a statute prohibiting the impersonation of a police officer can choose to see it as restricting a person from impersonating a specific, identifiable police officer, or, alternatively, from acting in such a way as to purposely make others believe that she holds the position of police officer. *Id.* Anderson argues that courts and lawyers systematically miss the second possibility, leading to absurd interpretations of statutes that are linguistically well-formed—for audiences that understand how to read them correctly. *Id.* at 1524.

4. *See* Abbe R. Gluck, *What 30 Years of* Chevron *Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 609 (2014) (positing that administrative review doctrines "reveal some of the most important and unanswered questions of the statutory era").

5. 467 U.S. 837, 842-44 (1984).

6. The proper way to understand the doctrine is currently a matter of debate, for which the canonical expression provides a starting point. *See infra* Parts I.A, I.C.

tools of statutory construction"[7] to discern whether the term at issue is clear or "ambiguous."[8] If, at this step, the court determines that the term is clear—that is, susceptible to only one correct interpretation—then "Congress has directly spoken to the precise question at issue" and courts and agencies "must give effect to the unambiguously expressed intent of Congress" rather than depart from it.[9] If, however, the court determines that the term is "ambiguous"—that is, multivalent, or susceptible to more than one correct interpretation—it moves on to the second part of the inquiry. At this step, the court considers whether the agency's interpretation is "reasonable."[10]

How is a court to decide whether an agency's interpretation is reasonable? That question has not received much attention, and there is "no single, established method of conducting the step two analysis."[11] As one article notes, "Step two of *Chevron* remains a mystery, beyond the observation that agencies usually win when they get to it."[12] Neither the scholarship nor the cases have set standards for how courts should evaluate an agency's interpretive reasonableness in the context of regulatory statutes.[13]

There are good reasons, however, to take the reasonableness inquiry seriously. It illuminates the depth of the challenge that regulatory statutes pose to statutory interpretation because it requires thinking through the construction of different kinds of meaning in the regulatory context. It can help address one of the enduring puzzles of the *Chevron* revolution: how judicial review of agency statutory interpretations should relate to the Administrative Procedure Act's "arbitrary and capricious" standard.[14] It promotes rule-of-law values, as leaving the inquiry standardless disrupts the basic principle that judges draw reasoned conclusions based on publicly articulated

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

8. *Id.* at 843.

9. *Id.* at 842-43.

10. *Id.* at 844.

11. M. Elizabeth Magill, *Step Two of* Chevron v. Natural Resources Defense Council, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 85, 86 (John F. Duffy & Michael Herz eds., 2005).

12. Gary Lawson & Stephen Kam, *Making Law out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1, 73 (2013); *see also* WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 338 (Foundation Press 2d ed. 2006) ("[T]he reasonableness requirement's underdeveloped status may reveal central problems with the *Chevron* framework itself.").

13. *But see* Magill, *supra* note 11, at 85 (finding that, despite a lack of doctrinal articulation, courts have converged on two primary approaches to the inquiry). For further discussion of this work and its implications, see *infra* Parts I.A, I.C.

14. 5 U.S.C. § 706 (2012); *see infra* Part IV.A.3. Note that this Article, like the rest of the scholarly literature, does not address how the relationship between statutory interpretation and policy choice works in everyday administrative practices, nor how administrators understand that relationship. Yet, this issue is crucial to understanding the relationship between *Chevron* and arbitrary and capricious review in practice. *See, e.g.*, ROBERT A. KATZMANN, JUDGING STATUTES 28 (2014) ("I observe that although there has been thoughtful writing on agency construction of statutes, there is a dearth of empirical knowledge about the methodology of agency interpretation. I urge a full empirical inquiry across agencies."). I plan to address this question in future work through interviews with administrators that probe the everyday practices of agency statutory interpretation.

standards,[15] rather than on their policy preferences or other, non-legal factors.[16] Finally, not elaborating the reasonableness inquiry can distort how courts determine whether a term is multivalent by encouraging courts to find clarity where there may be multivalence.

To fill the gap, Part I of this Article first illuminates the hidden complexities of reasonableness review. Evaluating the reasonableness of an agency's statutory interpretation sounds like the sort of work courts are used to doing, but multivalence poses a challenge to courts' traditional attempts to assign one final, correct meaning to every statutory term. And the kinds of things regulatory statutes refer to often require a knowledge of science, technology, and even social life that goes beyond judges' training. While courts and commentators have suggested several ways to solve the conundrum of reasonableness review, Part I.B. demonstrates that the doctrine remains in flux.

In Part II, I suggest one reason courts have had trouble setting standards and theorizing reasonableness—they treat both linguistic meaning and agency competence as undifferentiated. Like traditional statutory interpretation, administrative review doctrine treats all linguistic meanings as similarly constructed.[17] Yet, decades of research on language use and communicative practices have demonstrated the opposite. Linguistic signs gain meaning in a variety of ways that depend on social practices and facts that exceed the linguistic sign itself. Most prominently, statutory terms can gain meaning through different, sometimes multiple, communities of meaning-givers. Some terms refer to legal constructions; legal authorities are the key meaning-givers for such *law-based* terms. Others involve realities external to legal process, such as physical facts or social conditions. Such *world-based* terms gain meaning through non-legal communities. And, of course, many terms have a life both in and out of the law. Recognizing that linguistic signs can take multiple paths to meaning would yield a more realistic image of courts' abilities to interpret different kinds of statutory language.

Similarly, Part II.C shows that the doctrine does not distinguish between the institutional capacities of courts and agencies to interpret the meaning of a given term, on the one hand, and the capabilities institutional actors actually utilize when performing this task, on the other. This flattening of possibility and capability, or *potential competence* and *actual competence*, gives the doctrine an unhelpful idealism—it treats competence as something that inheres in the nature of an organization, rather than as something that is manifested, and changed, through practices. Although courts do sometimes acknowledge this difference in an ad hoc way, building

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15. *See, e.g.*, Mathilde Cohen, *The Rule of Law as the Rule of Reasons*, 96 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE [ARCHIVE FOR PHIL. L. & SOC. PHIL.] 1, 2 (2010) ("[L]egal reason giving is one of the essential properties of the concept of the rule of law, if not *the* essential one."). *But see* Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 20 (2001) (arguing that, in contrast to administrative action, "the legitimacy of legislative or judge-made law draws on sources other than rationality or reason-giving"). Whether leaving reasonableness review without standards results in arbitrary results or systemic trends, the workings of judgment are obscured when no standards or theories are articulated.

16. *See* Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823 (2006).

17. *See infra* Part II.

the distinction into the reasonableness inquiry explicitly would produce a more realistic assessment of the two institutions' interpretive abilities.

Taking account of differences in meaning and competence does not militate for any one course of action. In Part III, I suggest some ways to institutionalize this recognition through doctrinal orientation and institutional organization. Part IV explains how this can give courts a more nuanced, context-sensitive way to differentiate their deference. It may argue for treating more world-based terms as presumptively multivalent, leaving agencies more flexibility to alter their interpretations; encourage a beneficial dialogue between courts and agencies; help reconcile linguistic realism with rule-of-law ideals; and relate statutory interpretation doctrine with policy choice doctrine.[18] It is thus worth considering ways to integrate a recognition of these differences into judicial review. In Part V, I suggest some avenues for further research.

I. The Complexities of Reasonableness

Chevron's canonical expression divides a court's review of an agency's statutory interpretation into a *multivalence determination*[19] (Step One) and a *reasonableness assessment* (Step Two).[20] More recently, the Supreme Court has arguably been moving toward a new phrasing of the doctrine that combines the two steps into one: "*Chevron* directs courts to accept an agency's reasonable resolution of an ambiguity

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18. *See infra* Part IV. A-B.

19. "Ambiguous" is the doctrinal term of art, but "multivalent" more accurately depicts the issue. *See infra* Part I.A.

20. The scholarly literature on *Chevron* is voluminous. For a canonical explanation of the doctrine, see Thomas W. Merrill & Kristin E. Hickman, Chevron *'s Domain*, 89 GEO. L.J. 833 (2001). On determining whether *Chevron* applies as a threshold question, see Thomas W. Merrill, *Step Zero After* City of Arlington, 83 FORDHAM L. REV. 753 (2014); and Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006). For historical accounts of the doctrine's development, see William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1085-86 (2007), which describes the doctrine's formulation by Reagan administration appointees; and Lawson & Kam, *supra* note 8, at 5, which shows how the doctrine developed in a stuttering way at the appeals courts before the Supreme Court adopted it wholesale in a "series of cases that avoided, rather than confronted, the major issues" it raised. Empirical work has shown that courts do not apply the doctrine in a standardized or predictable way. Eskridge & Baer, *supra*, at 1090-91 ("*Chevron* was applied in only 8.3% of Supreme Court cases evaluating agency statutory interpretations. . . . [Instead,] the Court employ[s] a *continuum of deference regimes* [and,] in the majority of cases[,] . . . does not apply any deference regime at all. . . . [T]he Court usually does not apply *Chevron* to cases that are, according to *Mead* and other opinions, *Chevron*-eligible. . . . [In general,] explanations for why the Court chose to invoke *Chevron* when it did, and how the Court applied *Chevron* once invoked, were not apparent from the data."). Courts are so inconsistent in their application of agency statutory review doctrines that agencies litigating their interpretive choices effectively face a doctrinal lottery. Jud Mathews, *Deference Lotteries*, 91 TEX. L. REV. 1349, 1352 & n.16 (2013) (explaining that "agencies face a 'deference lottery'" in those "situations where . . . *Chevron* applies presumptively but not definitively"). Such unpredictable application probably arises from structural problems like the lack of fit between the "adversarial legalism" of American courts and the administrative work of the agencies they review. *See* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001); *see also* Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673 (2007) (noting that agencies' core function is to operationalize statutory programs, while the *Chevron* Doctrine focuses on statutory construction). At the same time, a lack of workable standards for parts of the doctrine may contribute to courts' reluctance, or inability, to be more systematic. This Article addresses one such area.

in a statute that the agency administers."[21] While the choice between two steps and one can have important implications for parts of the doctrine,[22] in both formulations, a court must recognize whether a statutory term is multivalent and must assess the reasonableness of an agency's interpretation of the term.[23] The blithe command to evaluate an agency interpretation's reasonableness seems simple enough on the surface. This Part explains why it is thornier, and more important, than it appears. Its unexpected complexity helps explain the absence of evaluative standards to guide it.

A. The Lack of Clear Assessment Tools

When reviewing an agency's statutory interpretation, the first thing a court must do—either as a separate formal step or as a less formal conceptual orientation—is determine whether the statutory term at issue is multivalent. *Chevron* uses "ambiguous" as a term of art for this determination, but what the opinion describes is in fact not ambiguity but multivalence. In ordinary parlance, "ambiguous" suggests that a term has a single, correct interpretation, but that the co-text leaves that meaning unclear. For instance, if I say, "As soon as the dog barked at the cat, it ran away," the referent of "it" is ambiguous. Although my utterance does not clearly indicate which animal ran away, I must mean *either* that the dog ran away, *or* that the cat ran away. There is, in other words, a correct answer to the question of what "it" means, even if that answer is not clear from my clumsy sentence.

This accords with how legal scholars understand ambiguity as well. For instance, Lawrence Solum states that "a term is ambiguous if it has more than one sense."[24] His examples, however, make clear that an ambiguous term is one that has more than one possible sense across different utterances, but only one possible sense within a given utterance. Thus, Solum gives the example of the word "cool," which can have a range of senses: low temperature, stylish, unenthusiastic, green and blue on the color spectrum, and so on. But, usually, "cool" only means one of those things in a given utterance, just like the "it" of the previous example would point to *either* the cat *or* the dog. "It" would neither refer to *both* the cat and the dog, nor would it be agnostic as to whether it referred to the cat or the dog, nor would it refer to the cat at this time while leaving open the possibility of referring to the dog at a later time.

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21. *Michigan v. EPA*, 576 U.S. __, slip op. at 6 (2015). For an overview of how this all-in-one position developed and a discussion of what stands to be gained and lost by expressing the inquiry in terms of one versus two steps, see Richard M. Re, *Should* Chevron *Have Two Steps?*, 89 IND. L.J. 605, 606-09 (2014). To avoid confusion, I generally refer to what a court *does* (determine multivalence, assess reasonableness) rather than to when a court does it (Step One, Step Two).

22. *See* Re, *supra* note 21, at 615 ("[I]t is a mistake to think that '*nothing of consequence* turns on whether the set of permissible interpretations has one element or more than one element.'" (quoting Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 602 (2009))). For this Article, the primary effect of the all-in-one formulation is to illuminate the centrality of the reasonableness assessment to deference doctrine. The all-in-one phrasing presents the multivalence determination as a background condition rather than the court's primary job, highlighting the need to understand and guide the reasonableness assessment that justifies deference.

23. *See* Peter L. Strauss, *Overseers or "The Deciders"—The Courts in Administrative Law*, 75 U. CHI. L. REV. 815, 820 (2008) (describing *Chevron*'s multivalence determination as the point at which the court decides whether "primary authority for a matter has been placed in agency hands").

24. Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 97-98 (2010).

In the *Chevron* context, in contrast, courts must determine whether a term can bear more than one meaning or is susceptible to more than one correct interpretation in a particular instance of use—that is, in the statute. With multivalence, there is no single correct answer to the question of what a word refers to, because there are multiple correct possibilities. The term can refer to more than one referent, or it can be agnostic as to which object it refers to, or it can leave open the possibility of referring to one thing now and another thing later. For instance, if I sing, "He . . . put out the cat, his cigar, and the light," the multivalent phrase "put out" correctly refers to several different physical acts.[25]

The *Chevron* case set a standard—albeit a very general one—for how a court should determine whether a statutory term is multivalent. To make a multivalence determination, courts should use the "traditional tools of statutory construction."[26] While this vague instruction itself can give rise to disputes as judges wrangle over the validity of different approaches to interpreting statutes,[27] courts and commentators can at least agree on the range of approaches that potentially play a part in this inquiry.[28]

In contrast, the *Chevron* opinion gives no guidance on how a court should evaluate the reasonableness of an agency's statutory interpretation.[29] Courts are supposed to evaluate reasonableness—but how? Examining the most likely possibilities shows why this process poses more of a conundrum than it may seem to at first.

Begin with an obvious first pass. Perhaps, like the multivalence determination, reasonableness review is also a matter for the traditional tools of statutory interpretation. But if so, they are a poor fit. Statutory interpretation has traditionally assumed that a term has one correct meaning, which a court determines with finality.[30] That

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25. *See* Michael Flanders & Donald Swann, THE SONGS OF MICHAEL FLANDERS AND DONALD SWANN 143 (Faber ed. 1977); *cf.* Solum, *supra* note 24, at 100 n.13 (noting that "'I would kill for some ice cream right now' . . . is ambiguous as between a literal meaning and a figurative meaning," but assuming that *one* of those meanings would be correct, rather than the utterance's having both meanings, or leaving open the possibility of its having one meaning when uttered and another at a later time, as a multivalent usage might).

26. Chevron v. Nat. Res. Def. Council, 467 U.S. 837, 843 n.9 (1984). In legal theory, "construction" is sometimes contrasted with "interpretation." *See* Guido Calabresi, *Being Honest About Being Honest Agents*, 33 HARV. J. L. & PUB. POL'Y 907, 907 (2010) ("Construction is not the same thing as interpretation."); Solum, *supra* note 24, at 103 (explaining that interpretation involves understanding the semantic content of a legal text, while "construction gives legal effect to th[at] semantic content"). This distinction is generally not discussed in the *Chevron* context, and neither scholars nor courts suggest that the opinion itself used "construction" as a term of art. Following this convention, I use the terms interchangeably here.

27. *See* Gluck, *supra* note 4, at 609-12 (summarizing major conflicts over approaches to statutory interpretation).

28. For a clear introduction to the current range of articulated approaches to statutory interpretation, see ESKRIDGE ET AL., *supra* note 12, at 219-389.

29. *See Chevron*, 467 U.S. at 842-43 (presenting the two-step framework but giving no standard by which courts should determine whether a given interpretation is reasonable). As Ronald Levin has pointed out, *Chevron*'s other description of the reasonableness analysis, which states that courts ought to determine whether the interpretation is "permissible," *id.* at 843, is "circular." Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1260 (1997).

30. *See, e.g.*, Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 551-52 (2009) (noting that traditional theories of statutory interpretation have the unrealistic presumption that every statutory term has only one correct meaning); Foote, *supra* note 20, at 690 (describing judicial statutory interpretation as "affix[ing] a permanent meaning to the statute," in contrast with provisional and

assumption makes little sense in the *Chevron* context, which assumes that there is a range of permissible, even correct, meanings for a multivalent term. It makes even less sense given subsequent cases in the *Chevron* line, which have held that an agency may change the construction it gives a statutory term.[31] Traditional tools of statutory construction are not designed for multivalence. They do not yield an answer to the question *Chevron* asks: whether the agency's construction is *a* correct interpretation among several, rather than *the* correct interpretation. This first, most obvious, option cannot be correct.

Perhaps another approach would work better. What if we asked courts to focus instead on the regulated object? We could abandon the search for one true meaning that traditional statutory interpretation requires. Instead, we would ask courts to gather and assess the available empirical evidence about the thing to be regulated and use this empirical review as a basis for determining how well the agency's interpretation reflects reality. Though tempting, this approach, too, is a poor fit. Such empirical review does not play to a court's strengths. Judges lack both the qualifications and the procedures to collect and evaluate empirical information about the complex topics that regulation often addresses.[32] If a reasonable interpretation hinges on properties of the objects the term refers to, then courts are at a disadvantage in evaluating the interpretations of expert agencies.

Alternatively, rather than statutory interpretation or factual evaluation, perhaps courts should use their traditional common-law abilities to evaluate the reasonableness of an agency's interpretation. After all, courts assess reasonableness all the time

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evolving agency actions); Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 341-42 (2005) (noting that the Supreme Court has endorsed the "unitary principle" that a statutory term can have only one judicially determined meaning, while exploring exceptional areas where a contrary "polymorphic principle" of multivalence has applied without being acknowledged). As these and other scholars have shown, traditional statutory interpretation approaches have a somewhat unrealistic view of linguistic meaning, positing a simplicity and univalence that is rarely found in naturally occurring communication. *See, e.g.*, Anderson, *supra* note 3, at 1524-25 (noting that linguistic constructions lending themselves to multiple correct meanings are not unusual). Thus, the *Chevron* doctrine involves a refreshing realism about language as well as about the legislative process. *See* Gluck, *supra* note 4, at 620-22 (arguing that the *Chevron* doctrine represents a more realistic approach to legislation than most statutory interpretation doctrines). Note that even traditional statutory interpretation doctrines sometimes admit that linguistic expressions may have more than one meaning. Substantive canons like the rule of lenity and the doctrine of constitutional avoidance suggest that statutory terms may have multiple meanings. At the same time, these doctrines still rank available meanings: courts are asked to choose a second-best interpretation when the first-best one runs afoul of more important principles like justice or constitutionality. Unlike the *Chevron* doctrine, these canons do not admit of equally correct meanings for a single term. (My thanks to Anthony O'Rourke for bringing the relevance of these canons to my attention.)

31. FCC v. Fox Television Stations, 556 U.S. 502 (2009) (holding that an agency could change its previous interpretation of a statutory term, though garnering no majority on what constitutes adequate justification for doing so); Nat'l Cable and Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (holding that, when a court determines that a statutory term is ambiguous and upholds an agency interpretation as reasonable, the agency may revise the interpretation in the future, provided that the new interpretation is also reasonable).

32. *See, e.g.*, Anthony O'Rourke, *Statutory Constraints and Constitutional Decisionmaking*, 2015 WIS. L. REV. 87, 145-46 (2015) ("Appellate courts are notoriously limited in their information-gathering capacities, and the Supreme Court is frequently criticized for making policy decisions based on information . . . that the Justices are unqualified to interpret."); Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1439 (2007) ("Courts have no formal or established mechanism for consideration of empirical research.").

without the use of specialized tools. Asking how a reasonable person would act under the particular circumstances of a litigated situation is a classic kind of judicial inquiry. Yet, this seemingly straightforward approach does not solve the problem either: the particular circumstances of agency interpretation are themselves both empirically and institutionally complex. To appropriately assess the reasonableness of an interpretation in a traditional, common-law manner, a court would need to understand both the object regulated and the circumstances of the agency's decision. That would include knowing about, and weighing, other agency mandates, projects, policies, and constraints. But courts have few mechanisms for conducting such institutional analysis in a systematic or informed manner.[33]

The clearest possibilities thus fail to yield a standard by which courts should evaluate the reasonableness of an agency's statutory interpretation. Absent other guidance, a final recourse may be to simply take an agency's word for it. Given the frequency with which courts uphold the reasonableness of agency interpretations, this may be more or less what judges tend to do.[34] Simply taking an agency's word for it may sound like an abdication of judicial responsibility, but there may also be something to be said for it. As Shep Melnick has pointed out, courts are ill-equipped to evaluate how judicial rulings will affect agency administration.[35] Given that, a court's best choice may be, "defer! defer!"[36]

The statistical implications of multivalence may provide another good reason for courts' sometimes "perfunctory" deference at the reasonableness assessment.[37]

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33. As Neil Komesar has pointed out, courts routinely engage in comparative institutional analysis to determine how to distribute authority and obligation. Neil Komesar, *In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative*, 79 MICH. L. REV. 1350, 1390 (1981) ("[L]egal decisions are best understood as choices among imperfect institutions."). But—as the groundbreaking effect of Komesar's work itself attests—courts' comparative institutional analyses are not usually articulated, much less standardized or evidence-based. Although courts may in fact frequently engage in comparative institutional analysis, they have no process for doing so in a transparent, thorough, or informed way.

34. Scholarship suggests that, once a court has determined that a statutory term is indeed multivalent, the court will usually uphold an agency's interpretation as reasonable. Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 30-31 (1998) (analyzing published appeals court cases in 1995-1996 to find that "courts resolving applications at step one upheld the agency interpretations . . . 42% of the time (compared to 73% overall), [while] those resolving applications at step two upheld the agency view in 89% of the applications"); Levin, *supra* note 29, at 1261 ("In the thirteen years since *Chevron*, the [Supreme] Court has never once struck down an agency's interpretation by relying squarely on the second *Chevron* step."); Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 376-77 (1994) (finding no case in which the Supreme Court struck down an agency statutory interpretation at Step Two between 1984 and 1993). *But see* Re, *supra* note 21, at 639 (showing that, in all appellate and Supreme Court cases citing *Chevron* published in 2011, 58% of agency interpretations were upheld under reasonableness review, a lower rate than that found by earlier commentators).

35. R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245, 246 (1992) ("Courts have heaped new tasks on agencies while decreasing their ability to perform any of them. They have forced agencies to substitute trivial pursuits for important ones. And they have discouraged administrators from taking responsibility for their actions and for educating the public."); *see also* Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1322 (2014) ("Courts learn about agencies in case-by-case snapshots and have only a dim sense of how judicial oversight will affect how agencies go about their business.").

36. Melnick, *supra* note 35, at 258.

37. *See* William R. Andersen, Chevron *in the States: An Assessment and a Proposal*, 58 ADMIN. L. REV. 1017, 1020 (2006).

An agency's interpretation may simply have more chance of landing within a range of allowable meanings, once a court has determined that a term is multivalent, than of hitting a target of one allowable meaning, if a court determines that Congress has clearly spoken on the issue.

B. The Difficulty of Boundary Setting

This intuition is implied in a common visual image given for reasonableness review. In this image, courts assessing reasonableness set the boundaries of acceptable interpretation, leaving an agency a range of permissible meanings within which to make an interpretive choice. For example, Matthew Stephenson and Adrian Vermeule, in arguing that *Chevron*'s multivalence determination is actually a sub-species of reasonableness review, provide a graphical representation of the *Chevron* inquiry.[38] Along a straight line representing all possible interpretations, a court sets off a "'Zone of Ambiguity'" that contains the "Range of Permissible Interpretations."[39] For reasonableness review, a court plots the interpretation at issue along the line of all possible interpretations. If it falls within the Range of Permissible Interpretations, it survives reasonableness review. Thus, the court sets off end-points of acceptable interpretation. It then allows the agency free play within the space set off by those end-points, but prevents it from moving outside that space.

This boundary-setting metaphor has much to recommend it.[40] It seems implied in the doctrine: it sets courts the task that *Chevron* wants them to accomplish. It has a visually intuitive quality. And by allowing agencies free rein within a circumscribed range, it promises to ease the tension between a view of administrative action as properly responsive to political circumstances and one that pits political concerns as "fundamentally antagonistic" to the proper exercise of administrative expertise.[41]

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38. Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 601 (2009); *see also* Levin, *supra* note 29, at 1254 (arguing that Step Two is superfluous on doctrinal, rather than on logical, grounds, and that the "two steps in the review process should be deemed not just overlapping, but identical").

39. Stephenson & Vermeule, *supra* note 38, at 601.

40. Note that the boundary setting I discuss here is not the "boundary maintenance" that Thomas Merrill identifies as a key aspect of judicial review of administrative action. Merrill, *supra* notes 34, at 753. Merrill uses "boundary maintenance" to refer to the court's role in maintaining a proper allocation of authority among different governmental institutions, and specifically the court's ability to "resolve disputes over the scope of agency authority." *Id.* at 754. While Merrill addresses the crucial issue of determining the "boundaries of agency authority," *id.*, I address courts' ability (or practice) of determining the outer bounds of what can count as a reasonable interpretation of a statutory term. The issues are related, of course, because the scope of agency authority is itself expressed in statutory terms. But our discussions have different objects of focus.

41. Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52 (2007) (describing a series of "*expertise forcing*" Supreme Court cases that sought to combat "the politicization of expertise" in the George W. Bush Presidential Administration, and describing such expertise forcing impulses as "in tension with [a] leading rationale of the *Chevron* doctrine . . . that sees nothing wrong with politically inflected presidential administration of executive-branch agencies."). The boundary-setting image of *Chevron* as free rein within a range promises to reconcile this tension by allowing for political influence (free rein) within a predetermined arena set off by some minimum of expertise (the range of permissible interpretations).

Despite all this, the boundary-setting image does not reflect what courts do in practice.[42] One strains to find a single case of reasonableness review in which a court has considered—much less specified—the far ends of acceptable interpretation. In practice, courts do not set the borders of a Zone of Ambiguity, providing agencies with a range of interpretations within which agencies know they will be free to act. Instead, courts review agency interpretations not as one point plotted against others on a comparative interpretive continuum, but individually and in isolation. If we think of a court's evaluation as determining whether an agency's interpretation falls within permissible bounds, we should also be aware that courts do not, in fact, consider or articulate what those bounds might be.[43]

Indeed, as a practical matter, it is not clear how courts would go about setting the bounds of acceptable interpretation. Precedents themselves may help courts set such boundaries—especially in the D.C. Circuit, which sees many administrative cases. Such a court may be educated by a series of cases dealing with the same subject matter in a way that would allow it to map out a range of reasonable interpretation for a particular, frequently litigated, statutory term. Judges can surely be educated by litigation and come to understand subject areas better as they hear a series of related cases. Yet, this educational process would necessarily be limited and dependent on having serial litigation of the same term.

And finding the bounds of allowable interpretation for a given term can be difficult. The meanings of many terms in regulatory statutes depend on facts in the world—the empirical characteristics of the objects they regulate. But courts have no way to either gather or evaluate such facts. To determine the allowable range of meanings for a term such as "stationary source" (the words at issue in *Chevron* itself), a court would need to know quite a lot about how pollution is emitted and how pollution-emitting facilities are organized. To map out the interpretive boundaries for statutory provisions requiring agencies to keep the population safe or healthy, a court would need to determine what kinds of evidence an agency would need to properly understand this regulated object. It would need to gather, understand, and evaluate complex evidence from toxicology, biology, epidemiology, and other specialized disciplines. On top of all that, the court would then need to consider a range of regulatory alternatives to determine where reasonable interpretations start and end.

These are tall orders. Judges reviewing agency action see such evidence in agency records all the time, of course, and many are capable of understanding complex information. But as an institution, the judiciary has no mechanisms for independently determining the relative relevance of empirical evidence, gathering it, or evaluating it. That, however, is what would be required if courts were actually to delimit a range of permissible interpretations for a given statutory term: the court

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42. To be clear, I am not arguing that courts *ought* to first set the bounds of acceptable interpretation and then determine whether an agency interpretation fits within those bounds. Rather, I am pointing out that, although this image is sometimes casually presented as what the *Chevron* process entails, this is not, in fact, what courts do. Thus this image cannot hope to provide a standard or a procedure that guides courts' evaluations.

43. Additionally, a court that did set the bounds of reasonable interpretation could presumably do so only in dictum, since it is not a range, but a specific interpretive choice, that litigants ask a court to uphold or invalidate. *See* U.S. CONST. art. III, § 2; Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979).

would have to independently determine what evidence to consider, and then independently evaluate it, to determine the range of possible meanings a statutory term could have.

The common image of courts delimiting a range of allowable interpretation is thus neither an accurate depiction of what courts do, nor a practicable prescription for what they should do. Instead, it asks courts to play a role that is actually more appropriate for the agencies they review.

As a doctrinal matter, *Chevron*'s reasonableness assessment is thus more complicated than may first appear from its straightforward language. Perhaps this is one reason courts that undertake it have tended overwhelmingly to defer to agency interpretations.[44] Recent research suggests that the rate of upholding an agency's interpretation at Step Two may be dropping slightly.[45] Yet, this is hardly comforting if there are no standards guiding the inquiry. Perhaps neither finding should bother us too much. Deference doctrine is in disarray to begin with.[46] And commentators often have a low opinion of the judiciary's role in reviewing administrative action.[47] It may be best, as some have suggested, to retain a role for courts only for the most egregious circumstances.

William Eskridge, for instance, has proposed that court approval of agency statutory interpretation should operate as a kind of rebuttable presumption.[48] Rather than occupying a primary place in the interpretive process, courts should serve a "*boundary maintenance*" function, intervening only to ensure that federal agencies do not run roughshod over state governments, unnecessarily disrupt reliance interests, or "expand[] (or constrict[]) statutes so much that [they] usurp[] Congress's authority" or "fail to pursue congressional goals effectively."[49] Like the current doctrine, however, the proposal does not provide standards by which a court might determine if an agency has done these things.

C. The Limited Benefits of Judicial Convergence

Although there is "no . . . established method of conducting the [reasonableness] analysis" in the doctrine, in practice courts seem to have converged on two primary approaches.[50] The first stays in the realm of statutory language. Courts first determine whether a statutory term is multivalent by looking to the statutory language and

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44. *See supra* note 34.

45. Re, *supra* note 34, at 639 (showing that, in all appellate and Supreme Court cases citing *Chevron* published in 2011, 58% of agency interpretations were upheld under reasonableness review, a lower rate than that found by earlier commentators).

46. Eskridge & Baer, *supra* note 20 (showing that the application of various doctrines of judicial review appears uncorrelated to any legal indicia in the cases); Mathews, *supra* note 20 (noting that courts' application of deference doctrine is not predictable).

47. Melnick, *supra* note 35.

48. William N. Eskridge, Jr., *Expanding* Chevron*'s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 429 (2013).

49. *Id.* at 433.

50. Magill, *supra* note 11.

related statutory sources (such as legislative history or other evidence used in traditional statutory interpretation).[51] If the court determines that the term is multivalent, it goes on to evaluate whether the agency's interpretation is reasonable by looking to that same set of sources.[52]

This "statutory approach"[53] thus adheres to the original phrasing of *Chevron*'s command and the canonical description of its two steps, which treat both phases of the inquiry as an investigation of statutory meaning. It also resonates with the approach of those who argue that *Chevron* should be seen as a one-step evaluation of whether an agency's statutory interpretation is reasonable.[54] On the one-step theory, a court determines the reasonableness of an unambiguous term in much the same way as it determines the reasonableness of an ambiguous one. The difference is simply that an unambiguous term has a much narrower range of reasonable interpretations—a range of one, to be precise. These approaches—the statutory and the one-step—look to statutory sources to determine both multivalence and reasonableness.

The statutory approach has been criticized for not recognizing how courts actually undertake the *Chevron* inquiry. Specifically, critics argue that courts enact Step One not only by determining whether a term is multivalent per se, but also by "compar[ing] the statute *to the interpretation that the agency has proffered.*"[55] In other words, in practice, Step One's multivalence determination already involves evaluating the statute and comparing it to the agency's interpretation. For critics, that makes the similar inquiry at Step Two redundant at best, incoherent at worst.[56] From either perspective, moreover, the statutory approach is beset with the complexities discussed in this Part.[57]

The second approach, which may be gaining prominence, connects the *Chevron* reasonableness assessment to arbitrary and capricious review under the Administrative Procedure Act. On this approach, courts that have determined that a statutory term is ambiguous then consider "whether the agency, in reaching its interpretation, reasoned from statutory premises in a well-considered fashion," which may involve assessing "whether the interpretation is supported by a reasonable explanation and is

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51. *Id.* at 87-89.
52. *Id.*
53. *Id.* at 91.
54. *See supra* note 38.
55. Magill, *supra* note 11, at 92.
56. *Id.* Magill notes that if courts actually used the Step One phase to determine only the very limited question of whether a statutory term is "ambiguous" (as the phrasing of the doctrine prescribes), then this division of judicial labor between the Steps would make some sense. *Id.* at 92.
57. *See supra* Part I.A-B; *see also* Magill, *supra* note 11, at 91 ("There are no guidelines about what materials are to be consulted or how the inquiry is qualitatively different from the step one examination of statutory materials, and the analysis often proceeds at a high level of generality by relying on amorphous concepts like the purpose of the statute.").

logically coherent."[58] Thus, this reasonableness assessment "tends to merge with review under the arbitrary and capricious standard."[59]

A number of scholars have advocated for this merger,[60] and courts may be following suit.[61] The Supreme Court has not overruled *Chevron*'s reasonableness assessment in favor of arbitrary and capricious review, as some scholars have urged.[62] It has also not expressly modified the doctrine to incorporate arbitrary and capricious review, nor explained in detail how such an incorporation might work.[63] Nevertheless, in 2001, the Supreme Court glossed *Chevron*'s reasonableness assessment as an

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58. Magill, *supra* note 11, at 93; *see* 5 U.S.C. § 706(2)(A) (2012) (providing that courts should invalidate agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43 (1983) (holding that the "'arbitrary and capricious' standard" of review requires an agency to "examine the relevant data and articulate a satisfactory explanation for its action" and articulating a set of factors to guide courts in determining whether an agency has done so).

59. Magill, *supra* note 11, at 93.

60. This support actually takes several forms. Some argue that *Chevron* is compatible with, or implies, a kind of arbitrary and capricious review. For instance, Ronald Levin argues that, "If the courts would define the scope of the *Chevron* step one inquiry and of arbitrariness review as broadly as they should, there would be no need for a separate and distinct *Chevron* step two, and that test could simply be absorbed into arbitrariness review." Levin, *supra* note 29, at 1254-55. For Levin, importing arbitrary and capricious review into statutory interpretation review would make *Chevron* "less complicated" and "more administrable, because . . . the vast body of case law and commentary on [arbitrary and capricious] review" could serve "as a guide to . . . the *Chevron* standard." *Id.* at 1255; *see also* Strauss, *supra* note 23, at 820 (describing *Chevron*'s reasonableness assessment as a form of "oversight," for which "§ 706(2) of the APA sets the general standards").

Others, in contrast, argue that arbitrary and capricious review is *not* compatible with *Chevron*, and should replace it. For instance, Jack Beermann argues that the *Chevron* doctrine is so incoherent and impracticable that it ought to be overruled: "when a federal court conducts judicial review, it should decide all questions of law as the APA appears to direct." Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 729, 786 (2010).

Still others are agnostic on the precise doctrinal form the merger should take. Elizabeth Foote, for instance, argues that *Chevron* obscures fundamental differences in what courts and agencies do when they interpret statutes. Foote, *supra* note 20, at 677 (arguing that *Chevron* distorts courts' ability to "allocate decision-making responsibilities between" courts and agencies "based on their comparative institutional strengths"). For Foote, *Chevron* incorrectly overlays judicial interpretive methodologies onto agencies, which work within different paradigms. *Id.* (explaining that courts "exist to issue disinterested and authoritative interpretations of statutes based on strictly legal processes" while "[a]dministrative rules represent interstitial, provisional, operational applications that can be, and often are, altered as agency expertise evolves and political currents shift"). Foote suggests that courts approach the institutional relationship more realistically. *Id.* at 676-77 (endorsing a "hybrid formulation of *Chevron* and the APA").

For ease of reference, I call all these views support for "merging" *Chevron* and arbitrary and capricious review.

61. *See* Magill, *supra* note 11, at 94-95 (discussing cases).

62. *See supra* note 60 and accompanying text.

63. Jack Beermann argues that attempting to combine the two forms of review makes no sense: *Chevron* "asks simply whether the agency's interpretation is reasonable or permissible" while, under *State Farm*, arbitrary and capricious review "asks whether the agency took a hard look at the issues relevant to the policy decision under review, whether the agency considered the relevant factors, whether there is a rational connection between the facts found and the choice made, whether the agency made a clear error in judgment, and whether the agency decision is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Beerman, *supra* note 60, at 116 (internal quotation marks omitted). "In the *Chevron* opinion the Court disavowed judicial review of the policy implications of statutory construction, while the heart of arbitrary and capricious review is examination of the

inquiry into whether the agency's interpretation is "arbitrary or capricious in substance."[64] Since then, the Court has used that gloss four times.[65] It remains to be seen whether the Court will ultimately incorporate arbitrary and capricious review into its review of agency statutory interpretations. If it does, it will still have to address the question of *how* courts should determine whether an agency's "interpretation is supported by a reasonable explanation."[66]

Passing on the proper relationship between *Chevron* and arbitrary and capricious review is beyond the scope of this Article.[67] This debate, however, demonstrates that *Chevron*'s reasonableness assessment is so lacking in elaboration that it is not even clear to what extent the inquiry is supposed to be guided by the precedent that created it, and to what extent it should rely on doctrine from a related area of administrative law.[68]

As the following Part suggests, there may be more underlying this problem than the vagueness of the doctrine. The difficulty may also have to do with the linguistic characteristics of multivalence.

II. Meaning-Giving Communities and Interpretive Competence

The previous Part explained why the doctrine behind Step Two is less clear than it may seem. This Part suggests that one factor underlying the doctrinal difficulty is a misunderstanding of how linguistic meaning is constituted. Current articulations of the *Chevron* doctrine treat linguistic meaning as the same across all linguistic

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policy basis for agency action. The analysis could not be more different." *Id.* (internal quotation marks omitted).

64. United States v. Mead Corp., 533 U.S. 218, 227 (2001). *Mead* appears to be the first use of this phrase to describe the *Chevron* reasonableness assessment. *Id.* ("When Congress has 'explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,' . . . and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." (citing Chevron v. Nat. Res. Def. Council, 467 U.S. 837, 843–44 (1984))).

65. *See* Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2021, 2034 (2012); Mayo Found. for Med. Educ. and Research v. U.S., 562 U.S. 44, 52 (2011); Judulang v. Holder, 132 S. Ct. 476, 483 n.7 (2011); Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 242 (2004). A Westlaw search for the phrase reveals that it has been used at the circuit court level forty-nine times, of which forty-three were reported, since *Mead*. An additional four reported circuit-level opinions have rendered the phrase as "arbitrary and capricious in substance." *See* Mitchell v. CIR, 775 F.3d 1243, 1248 (10th Cir. 2015); Atl. City Elec. Co. v. FERC, 295 F.3d 1, 9 (D.C. Cir. 2002); Sierra Club v. EPA, 292 F.3d 895, 898 (D.C. Cir. 2002); Michigan v. EPA, 268 F.3d 1075, 1082 (D.C. Cir. 2001).

66. Magill, *supra* note 11, at 93; *see* 5 U.S.C. § 706(2)(A) (2012) (providing that courts should invalidate agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43 (1983) (holding that the arbitrary and capricious standard of review requires an agency to "examine the relevant data and articulate a satisfactory explanation for its action" and put forth a set of factors to guide courts in determining whether an agency has done so).

67. For ease of exposition, the analysis here hews, for the most part, to the traditional, two-part statutory approach.

68. The analysis presented in this Article is broadly compatible with an arbitrary and capricious standard of review for agency statutory interpretation. *See infra* Part III.

terms.[69] On this view, words may be multivalent or clear, but all words acquire meaning in the same way. This, however, is a flawed understanding of how linguistic meaning works.

As this Part explains, words come in more kinds than merely clear and multivalent, and gain meaning not just from linguistic structure, but also from sociological realities. Different meaning-giving communities are authorized to give meaning to different terms because of particular kinds of access they have to the things to which those terms refer. This social division of linguistic labor suggests that, for some statutory terms, whether an interpretation is reasonable depends on what non-legal communities believe about the empirical realities that characterize a term's referents.[70] Although they are currently not acknowledged in the doctrine, such differences in the bases for meaning are relevant to a court's ability to assess the reasonableness of an agency's interpretation of a statutory term.

A. The Social Production of Linguistic Meaning

The doctrine governing court review of agency statutory interpretation presupposes that all words have meanings inherently, and have them in the same way.[71] But decades of research on language and communication have demonstrated something different: different kinds of words take different routes to meaning. And, crucially, these routes to meaning pass through social, and not only semantic, practices. In fact, even semantic meaning—that part of meaning that seems inherent in the word and independent of context—turns out to precipitate from social practices.

Drawing on empirical and philosophical studies of language use, this Section explains why regulatory statutes implicate a mix of meaning-making processes that complicate reasonableness review. I start with *shifters*, which demonstrate that much linguistic meaning depends on the situation of the communicative event rather than on the inherent, denotational content of words. I then turn to *speech acts*, which show how linguistic efficacy can depend on culture-specific authorization from particular communities. These two aspects of language use help introduce the *linguistic division of labor*, in which various social groups participate differently in the production of meaning for particular terms.

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69. For example, *Chevron* explains that a court reviewing an agency's statutory interpretation "is confronted with two questions": "whether Congress has directly spoken to the precise question at issue" and "whether the agency's answer [of how to interpret a term] is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 842-43. Here, the main factor affecting the institutional distribution of interpretive authority is whether a term is clear or multivalent. *Chevron* does not suggest that different kinds of terms may have different kinds of meanings, and that these differences might affect the proper distribution of interpretive authority. Similarly, when *Mead* explained how a court should determine whether *Chevron* deference should apply, it focused on whether "Congress delegated authority to the agency . . . to make rules carrying the force of law" and whether the interpretation at issue "was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226-27. Neither factor looks to the linguistic characteristics of the statutory term, nor does *Mead* anywhere suggest that linguistic characteristics should influence the distribution of interpretive authority.

70. That an institution other than the judiciary should have the authority to interpret statutory terms is not, in itself, surprising. "For many decades, Congress has been assigning the authority to act with the force of law—to create legally binding, statute-like texts and/or to decide 'cases' that it might have assigned to the judiciary—to executive authorities rather than exercising it completely itself or conferring the task on the courts." Strauss, *supra* note 23, at 816.

71. *See supra* note 69.

1. Particular Communities Confer Meaning

Scholars have long recognized that, for some words, meaning "differs according to the situation, so that [the word is] now applied to one thing and now to another."[72] The meaning of such *shifters* cannot be ascertained without reference to the situation in which they appear: they "single out objects . . . in terms of their relation to the . . . interactive context in which the utterance occurs."[73] For instance, the meaning of the word "I" depends largely on the situation in which it is uttered. Because it refers to the speaker who utters the word "I," its referent shifts in response to its communicative context. It points to something different every time a different speaker takes it up.[74] To understand who "I" is, you must have some sort of "access (cognitive, perceptual, spatiotemporal) . . . to objects of reference in the . . . speech event."[75] Spatial and temporal terms like "here," "there," "now," "then," and even "today" and "tomorrow" are also grounded in the speech event[76]: to give them meaning, an interpreter must know where or when they were uttered.[77] She must be part of an audience—a community—that knows something about the communicative situation.

Giving meaning to shifters thus requires some kind of "access" to the communicative event.[78] This can be based in physical co-presence: you can tell what "I" means by observing who says it. It can also be based in cognitive access: you might know from a separate source the identity of the "you" I address in a telephone conversation. General cultural understandings can play a role as well: you, a reader, know that, in formal American writing, authors occasionally address hypothetical readers directly in the text.

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72. OTTO JESPERSON, LANGUAGE: ITS NATURE, DEVELOPMENT, AND ORIGIN 123 (1928).

73. William Hanks, *The Indexical Ground of Deictic Reference*, *in* RETHINKING CONTEXT, LANGUAGE AS AN INTERACTIVE PHENOMENON 43, 47 (A. Duranti & C. Goodwin eds. 1990).

74. *See* EMILE BENVENISTE, PROBLEMS IN GENERAL LINGUISTICS 318 (Mary Elizabeth Meek trans., Univ. of Miami Press 1971) (1966) ("Each instance of use of a noun is referred to a fixed and 'objective' notion . . . always identical with the mental image it awakens. But the instances of the use of *I* do not constitute a class of reference since there is no 'object' definable as *I* to which these instances can refer in identical fashion. Each *I* has its own reference and corresponds each time to a unique being who is set up as such."). For simplicity, I describe the communicative situation here as involving speech, but the same principles apply to writing, insofar as it used for a communicative purpose.

75. *Id.* at 60.

76. Moreover, shifting is not confined to discrete words but can play a part in grammatical categories as well. For instance, grammatical tense creates temporal distinctions precisely by specifying a temporal relationship between a speech event—the occurrence of my utterance—and a narrated event—the thing my utterance is about.

77. Other layers of complexity can be added here, such as the role of reported speech and counterfactual narrative. Here, I use shifters simply to help show the centrality of socially constituted communities to the construction of meaning.

78. Hanks, *supra* note 73.

Personal pronouns and spatiotemporal markers form the prototypical core[79] of shifters. But many words gain some meaning from the "speech event," or communicative situation.[80] Indeed, Otto Jesperson originally introduced the concept of shifters with the examples "father," "mother," "enemy," and "home."[81] Giving meaning to these words does not require immediate access to the communicative event itself, but it does take a diffuse understanding of things like social structure, political history and ideology, or local genres of affective and practical attachment. It may also depend on knowing the social context in which the utterance is made. "Enemy" said on the soccer field is likely to mean something different than "enemy" in a rousing political speech.

Shifters thus show that some terms are subject to interpretation by particular communities of people. Such interpretive communities are not ancillary to meaning-making. Rather, they lie at the very heart of interpretation. The embeddedness of meaning in understandings of speech genres[82] and social norms extends to legal language. A competent interpreter would read the term "clean energy" in a statute addressed to the Environmental Protection Agency to have a different meaning than the term "clean energy" in a yoga video. Even within legal texts, "the meaning of the phrase 'domestic violence' in the United States Constitution (referring to . . . rebellions . . . within . . . a state) is not the same as . . . in contemporary writing to refer to violence within families."[83] Meaning shifts as terms are entextualized in different genres of writing and social practice.[84]

Shifters thus have profound implications for understanding legal meaning-making. They take us beyond the "referential-and-predicational" focus of semantics,[85]

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79. The prototype theory of semantics posits that speakers understand semantic categories not (or not only) in terms of necessary and sufficient conditions, but at least partly in terms of a core of best exemplars upon which everyone can agree, surrounded by exemplars that become increasingly uncertain and debatable as one moves out from the central core. *See* Lawrence M. Solan, *The New Textualists' New Text*, 38 LOY. L.A. L. REV. 2027, 2040-44 (2005) (reviewing the primary insights of prototype theory and citing some of its classic elaborations).

80. Roman Jakobson introduced the concept of "speech event" in his system for characterizing utterances: the system "distinguishes between speech itself (s) and its topic or narrated matter (n) and between the event itself (E) and any of its participants (P). Combining these distinctions yields four categories: a narrated event (E^n), a speech event (E^s), participants in the narrated event (P^n), and participants in the speech event (P^s)." BENJAMIN LEE, TALKING HEADS: LANGUAGE, METALANGUAGE, AND THE SEMIOTICS OF SUBJECTIVITY 159 (1997); *see* 2 ROMAN JAKOBSON, *Shifters, Verbal Categories, and the Russian Verb*, *in* SELECTED WRITINGS 130 (1971).

81. JESPERSON, *supra* note 72, at 123.

82. *See* MIKHAIL BAKHTIN, *The Problem of Speech Genres*, *in* SPEECH GENRES AND OTHER LATE ESSAYS 60 (Caryl Emerson & Michael Holquist eds., Vern W. McGee trans., 1st ed. 1986).

83. Solum, *supra* note 24, at 101 (citing Mark S. Stein, *The Domestic Violence Clause in 'New Originalist' Theory*, 37 HASTINGS CONST. L.Q. 129 (2009)).

84. *See* Greg Urban, *Entextualization, Replication, and Power*, *in* NATURAL HISTORIES OF DISCOURSE 21, 21 (Michael Silverstein & Greg Urban eds., 1996) (defining entextualization as "the process of rendering a given instance of discourse a text, detachable from its local context").

85. "Reference and predication" indicates the most easily recognized aspects of language use: those that support pointing to an object in the world (reference) and making propositions about it (predication). *See* Michael Silverstein, *Language Structure and Linguistic Ideology*, *in* THE ELEMENTS: A PARASESSION ON LINGUISTIC UNITS AND LEVELS 193, 208 (Paul R. Clyne et al. eds., 1979) (noting the widespread "tendency to rationalize the pragmatic system of a language . . . with an ideology of language that centers on reference-and-predication," ignoring the other factors that go into communication and meaning creation). Reference and predication can be described as what we think of as "language in the

which treats words as encoded with independent, trans-contextual meanings.[86] Shifters demonstrate that much of linguistic communication is not so independent; meaning often depends on something beyond the word itself, as well as beyond its grammatical context.

Linguistic communication is thus not just a matter of idiomatically correct word use, but also "a form of *social action*, a . . . meaning-generating activity," to which the stable, denotational content of some words is only one contributing factor.[87] Shifters show that the meanings of many terms that seem amenable to stable semantic definition in fact depend on non-semantic factors that characterize the speech event, its participants, or its place in the available genres of expression. In the context of judicial review of agency statutory interpretation, this suggests at least the possibility that judges will not always be in the best position to interpret a statutory term—that they will not always have the most thorough access to the range of factors that give meaning to a word.

2. Authorization Grounds Meaning

The notion of *speech acts*, or *performative utterances*, also helps explain how legal meaning exceeds the denotational content of words. Speech acts are utterances that not only describe or refer to a state of affairs, but also create one.[88] A speaker who says, "I promise to buy milk today" does not describe or refer to a promise. Her utterance itself creates a state of affairs in which she has committed herself to the promised act. A judge who performs a marriage ceremony does not merely describe or refer to a couple's relationship. By uttering the correct words in the correct context, she creates the legal fact of marriage for the couple. Legislation also shares this quality. A statute making the *Star Spangled Banner* the national anthem of the United States creates the situation it describes.[89]

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usual sense," that is, "some grammatically conforming system of expression-types, tokens of which refer to some universe of referents and predicate-about some universe of states-of-affairs." MICHAEL SILVERSTEIN, *Metapragmatic Discourse and Metapragmatic Function*, *in* REFLEXIVE LANGUAGE: REPORTED SPEECH AND METAPRAGMATICS 33, 33 (John Lucy ed., 1993).

86. Michael Silverstein, *Cognitive Implications of a Referential Hierarchy*, *in* SOCIAL AND FUNCTIONAL APPROACHES TO LANGUAGE AND THOUGHT 125 (Maya Hickmann ed., 1987); *see also* Michael Silverstein, *Shifters, Linguistic Categories, and Cultural Description*, *in* MEANING IN ANTHROPOLOGY 11, 19-20 (Keith Basso & Henry Selby eds., 1976) (arguing that semantics, the study of the referential meaning of signs, is only a subpart of the more general enterprise of pragmatics, the "study of the meaning of linguistic signs relative to their communicative functions").

87. Silverstein, *Cognitive Implications of a Referential Hierarchy*, *supra* note 86, at 130; *see also* Elizabeth Mertz, *Legal Language: Pragmatics, Poetics, and Social Power*, 23 ANN. REV. ANTHRO. 435, 438 (1994) ("[T]he social-expressive function of language is what structures and makes possible the expression of semantic meaning . . . . From the vantage of language as it is actually used in human interactions, indexicality [shifting] is primary, and expressing semantic meaning is one of the many functions language fulfills while performing in context. Thus, semantic meaning can be seen as a special subset of pragmatic function . . . .").

88. J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962); JOHN SEARLE, SPEECH ACTS (1969). For an extended exploration of the role of speech acts in legal discourse, see MARIANNE CONSTABLE, OUR WORD IS OUR BOND: HOW LEGAL SPEECH ACTS (2014). *See also* Paul Kockelman & Anya Bernstein, *Semiotic Technologies, Temporal Reckoning, and the Portability of Meaning. Or: Modern Modes of Temporality—Just How Abstract Are They?*, 12 ANTHRO. THEORY 320, 323-24 (2012) (relating speech acts to temporality).

89. *See* 36 U.S.C. § 301 (2012).

To be efficacious, a speech act must happen under the proper *felicity conditions*.[90] Some of these conditions arise from general cultural understandings of action and speech genre. A speaker who says, "My mother said, 'I promise to buy milk today,'" may utter the words of a promise, but will not be understood to have made the promise herself. Cultural conventions of quotation make it clear that this speaker merely animates another's speech act, rather than making her own.[91]

Any efficacious speech act, then, must happen under the felicity conditions determined by cultural norms. Felicity conditions are equally important, and often more explicit, in the legal realm. A judge who declares two passersby married will not effectuate a change in the world: the declaration does not conform to the felicity conditions governing the legal creation of marriage. Similarly, if a couple is pronounced married by a person who is not vested with authority to create a legally recognized marriage, that couple will not be legally married. And of course, laws determine who may efficaciously enter into a legally recognized marriage with whom. Speech acts with legal effect, thus, must adhere to specifically legal strictures of authorization. Indeed, as Marianne Constable has explained, speech acts are prevalent throughout the law. Oaths of office, contracts, objections in legal process, legal holdings and findings—all of these "depend[] for their success as law not only on the meaning of words but also on the circumstances in which they are spoken" or written.[92]

In the context of judicial review, shifters and speech acts show that correct, efficacious meaning can depend on sociological factors that are exogenous to the linguistic sign. Much of meaning making depends not on the inherent characteristics of a word, but on the actions, knowledge, and authorization of specific communities that become involved in giving it meaning. That may include communities with particular access to knowledge relevant to interpreting a word, as well as those that set the felicity conditions required for an efficacious speech act. Beyond the question of efficacious action, moreover, different communities are differently authorized to pass on the meanings of linguistic signs. Some people know better what a word can mean than others, as the next Section discusses.

3. Meaning Depends on Social Organization

The philosopher of language Hilary Putnam has called this sociological aspect of meaning creation a "*division of linguistic labor*."[93] Putnam focused particularly on natural kinds—what we might call scientific language. Such terms are arguably somewhat special insofar as they refer to facts in the world that exist independently

90. *See* AUSTIN, *supra* note 88, at 14; SEARLE, *supra* note 88, at 54.

91. *See* ERVING GOFFMAN, FORMS OF TALK 144-45 (1981) (dividing the *speaker* into constituent roles or functions: a "principal" committed to or bolstered by what the words say; an "author" who selects the form of expression; and an "animator" who utters the words).

92. *See* CONSTABLE, *supra* note 88, at 21.

93. Hilary Putnam, *The Meaning of "Meaning,"* 7 MINN. STUD. PHIL. SCI. 131, 144 (1975) *reprinted in* ANDREW PESSIN & SANFORD GOLDBERG, THE TWIN EARTH CHRONICLES: TWENTY YEARS OF REFLECTION ON HILARY PUTNAM'S "THE MEANING OF 'MEANING'" 13 (1996) (first emphasis added).

of social or linguistic practices, such as chemical composition or physical relationship. For Putnam, the division of linguistic labor allows words to circulate in general use even when the specific, technical meanings of those words are accessible only to particular communities of speakers. "We could hardly use such words as 'elm' . . . if no one possessed a way of recognizing elm trees," Putman writes, "but not everyone to whom the distinction is important has to be able to make the distinction."[94] In everyday speech, in other words, I can be rather cavalier in ascribing elm-hood to a tree. But my ascription will give way before the determination of an expert who is skilled at distinguishing elms from other trees.

The division of linguistic or definitional labor, thus "rests upon and presupposes the division of *non*linguistic labor."[95] Society contains subgroups of people who are expert at providing definitions for words that override their everyday usages, even though those less precise, everyday usages may remain in use and even serve their everyday purposes quite well. Such expert communities provide one example of the phenomenon of authorization and access discussed in the previous Sections. So, for instance, physical, cognitive, or cultural access can undergird an interpreter's ability to define a shifter. Legal or cultural strictures can authorize the performance of speech acts by setting felicity conditions for their efficacy. Similarly, the division of nonlinguistic labor in society sets off particular groups of experts authorized to speak to the underlying structures and characteristics of certain kinds of objects.

Moreover, although Putnam himself focused on natural kind terms, it is not clear that his insight should be limited to them. Putnam notes that not all terms are involved in divisions of linguistic labor, but posits that, "with the increase of the division of labor in society and the rise of science, more and more words begin to exhibit this kind of division of labor."[96] He suggests "chair" as an example of a term that exists outside the linguistic labor distribution,[97] but this very suggestion may prove his prediction correct: with the rise of ergonomics and alternative health approaches to stationary labor, one can imagine the production of a subclass of experts authorized to define what is, and is not, truly a chair.

The division of linguistic labor shows that, at least for some terms, what seems to be context-independent semantic content actually depends on sociologically determined communities of meaning-givers who have particular kinds of access to the terms' empirical referents. For scientific and other empirically based terms, moreover, the primary community of meaning-givers may be scientists rather than judges or administrators.[98] This approach also suggests that meaning can be flexible across both time and social space. As knowledge about an empirical reality develops, a word can change for a community of expert meaning-givers even as it stays largely stable in lay use.

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94. *Id.* at 13.
95. *Id.* at 13.
96. *Id.* at 14.
97. *Id.* at 14.
98. *See, e.g.*, Todd S. Aagaard, *Factual Premises of Statutory Interpretation in Agency Review Cases*, 77 GEO. WASH. L. REV. 366, 371 (2009) ("[C]ourts often interpret statutes based on factual premises that are outside of the judges' expertise and experience."); *see also* Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 62-63 (2013) (arguing against citing courts' factual assertions as precedent).

Indeed, research on scientific language use demonstrates that meaning can be flexible even within communities of experts. Peter Galison has shown that scientists immersed in different scientific paradigms—that is, different understandings and beliefs about the empirical realities of the objects they study—can collaborate to produce practical results irrespective of their theoretical differences.[99] Even within the realm of semantics, then, meaning can be both socially dependent and multivalent across time and persons. Galison's work also highlights the complexity of the division of linguistic labor. There is often more than one group that claims, and is recognized by some, to possess meaning-giving authority over a given class of terms.[100]

The division of linguistic labor has implications for the interpretation of regulatory statutes. It suggests that, for some statutory terms, whether an interpretation is reasonable depends on what expert communities believe about the empirical realities of the objects to which the terms refer. For instance, some statutory terms refer to empirical realities such as the toxicity of a chemical or the level of an animal population. Expert communities outside the legal system will have close access to the meanings of these terms, even while lay populations may continue to use separate, perhaps even contradictory, meanings.

Shifters, speech acts, and the division of linguistic labor make clear that meaning making is a social activity. It is social not only in the sense that any interpreter is a social being. It is also social in the sense that any interpretation is grounded in, and depends on, social structures, events, and customs.

B. The Law-Based to World-Based Spectrum

A natural object like water can be studied independently of any legal text that mentions it. Evaluating the reasonableness of interpretations of *world-based* legal language requires evaluating expert assessments of the empirical realities to which the terms refer. In contrast, some statutory terms refer to concepts that are themselves

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99. PETER GALISON, IMAGE AND LOGIC: A MATERIAL HISTORY OF MICROPHYSICS 138 (1997). "Two groups," he writes, "can agree on rules of exchange even if they ascribe utterly different significance to the objects being exchanged; they may even disagree on the meaning of the exchange process itself. Nonetheless, the trading partners can hammer out a *local* coordination despite vast *global* differences." *Id.* at 783. Moreover, the way changes in expert meanings infiltrate everyday speech, or fail to do so, is highly mediated by government institutions such as regulatory agencies, legislatures, and courts. *See generally* Anya Bernstein, *The Hidden Costs of Terrorist Watchlists*, 61 BUFF. L. REV. 461, 494-99 (2013) (explaining how government designations influence understandings of social categories and collecting sources). These institutions are largely ignored in linguistic studies of the division of meaning-making labor and authority. For instance, while Putnam, *supra* note 93, notes that the "*division of linguistic labor* rests upon and presupposes the division of *non*linguistic labor," he focuses on the division between scientists and lay speakers. But there are clearly other institutions crucial to distributing meaning-giving power, and legal institutions play a key role in mediating relationships among expert, lay, and other definitions of terms.

100. *See, e.g.*, Eric Biber, *Which Science? Whose Science? How Scientific Disciplines Can Shape Environmental Law*, 79 U. CHI. L. REV. 471, 473 (2012) (arguing that scientists tend to arrive at different conclusions depending on the research paradigm they use). Biber's discussion suggests that internal divisions among scientific or expert communities are pervasive. This recognition complicates the concept of judicial deference, since it makes clear that there will often not be one unified, authorized community to which a court should defer. But it also illuminates the absurdity of asking non-expert judges to form supposedly legal evaluations of facts about which even experts disagree. As Biber's work suggests, differences among expert communities at least indicate the scope of expert understandings, which can serve as a guide to judicial interpretations.

legal constructs. Such *law-based* legal language includes words that gain meaning by reference to other legal words or concepts.[101] The primary meaning makers for this language are members of the legal community itself—the judges, administrators, and legislators who, in different ways, say what the law is in the contemporary state.[102] The objects of law-based legal language cannot be studied independently of legal texts. Their meanings are internal to legal language: such terms are legal all the way down.[103] Evaluating the reasonableness of an interpretation of a law-based legal term does not require recourse to expert knowledge beyond the community of legal interpreters themselves.

One can draw a relatively clear distinction between natural kind terms and legal terms, insofar as natural kind terms are uniquely subject to definition by expert scientific communities, while ascribing meaning to law-based legal language is uniquely the province of expert legal communities. Regulatory statutes, however, routinely ask agencies to evaluate objects in the world with reference to legal, normative, or policy judgments that exceed purely factual, scientific assessment.[104] They are thus replete with mixed terms that range from more world-based to more law-based.

Some examples can help demonstrate how this range works. In *Judulang v. Holder*, a plaintiff challenged a Board of Immigration Appeals (BIA) policy limiting an alien's eligibility for discretionary relief from removal.[105] The policy linked discretionary relief from *deportation*, one form of removal, to discretionary relief from *exclusion*, another form of removal. The two forms of removal are governed by different standards. But the BIA made relief from *deportation* available only when the reason for deportation found some parallel among the reasons for *exclusion*.[106] The Supreme Court rejected this policy, ruling that it had no statutory basis and yielded arbitrary results.[107]

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101. *See, e.g.*, Siegel, *supra* note 1, at 1024 (arguing that "background principles of . . . law" often guide courts' statutory interpretations).

102. *See, e.g.*, Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT. L. REV. 321, 321-22 (1990) (noting that judges and agency administrators both play a key role in interpreting statutory terms, but do so in different ways and under different circumstances).

103. *See* CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 28-29 (1973) ("There is an Indian story—at least I heard it as an Indian story—about an Englishman who, having just been told that the world rested on a platform which rested on the back of an elephant which rested in turn on the back of a turtle, asked (perhaps he was an ethnographer; it is the way they behave), what did the turtle rest on? Another turtle. And that turtle? 'Ah, Sahib, after that, it is turtles all the way down.'").

104. In this sense, much interpretation of regulatory statutes takes place "between facts and norms." *See* Jerry L. Mashaw, *Between Facts and Norms: Agency Statutory Interpretation As an Autonomous Exercise*, 55 U. TORONTO L.J. 497, 501 (2005) ("[W]e have yet to construct an ideal of administrative legitimacy that accommodates the generalized discourse of law in courts to the profoundly different discourse of law in action, particularly where most of that action is in the form of public administration."); *see also* Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145, 146 (2011) (arguing that doctrinal shifts often result from changes in underlying assumptions about facts that are not reflected or articulated in the doctrine itself).

105. Judulang v. Holder, 132 S. Ct. 476 (2011).

106. *Id.* at 482 ("If the deportation ground consists of a set of crimes 'substantially equivalent' to the set of offenses making up an exclusion ground, then the alien can seek [discretionary] relief [under the statutory provision at issue].").

107. *Id.* at 486. The Supreme Court found the policy arbitrary and capricious because it lacked statutory authorization, and because the grounds for deportation differed from those for exclusion

Judulang dealt with law-based legal language. It revolved around whether, and how, separate statutory provisions related to and depended upon one another. Evidence or analysis exogenous to law is of little help in evaluating the reasonableness of the agency's interpretation: the language at issue in *Judulang* was legal all the way down and therefore maximally available to courts to interpret. A doctrinally standard *Chevron* analysis could have explicitly drawn on the Court's expertise in connecting statutory provisions and lending coherence to the whole act to interpret *Judulang*'s law-based legal language.[108] Courts have the most competence to evaluate law-based legal language like that at issue in *Judulang*, which rested not on facts in the world so much as on the relationship among dispersed statutory provisions.

In contrast, the statutory language at issue in *FDA v. Brown & Williamson* was markedly world-based.[109] The Food, Drug, and Cosmetic Act (FDCA) gives the Food and Drug Administration (FDA) the responsibility to regulate "articles (other than food) intended to affect the structure or any function of the body."[110] For decades, the agency denied authority to regulate tobacco,[111] either for lack of evidence that tobacco affected the structure and function of the body, or for lack of evidence that it was marketed with an intent to do so, as the statute impliedly requires.[112] In 1996, the FDA changed course with a rule asserting jurisdiction over tobacco products.[113] The final rule explained that the FDA had "determined that nicotine is a

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in historically contingent ways that had no clear normative basis. *Id.* at 483 n.7, 486 (concluding that the BIA policy "turns deportation decisions into a 'sport of chance'" (quoting Rosenberg v. Fleuti, 374 U.S. 449, 455 (1963))). The Court here declined to apply the *Chevron* inquiry at all, proceeding instead under an arbitrary and capricious standard on the grounds that the agency's policy was "not an interpretation of any statutory language." *Id.* at 483 n.7. As Jack Beermann has noted, this is a puzzling choice: it essentially decided that the BIA's statutory interpretation was unreasonable before asking whether it was unreasonable. Jack M. Beermann, Chevron *at the Roberts Court: Still Failing After All These Years*, 83 FORDHAM L. REV. 101, 117 (2014) ("Under *Chevron*, if the statutory language does not address the issue involved in the case, then the legal decision . . . would be reviewed under *Chevron* Step Two."). Indeed, the Court's approach implied that, when an agency interprets a statute in an egregiously incorrect way, a court should not acknowledge that the agency is attempting or claiming to interpret the statute at all, but treat the agency's conduct as a policy decision ungrounded in any statutory language. But this creates problems for administrative review doctrine, since agency conduct must be grounded in a statutory authorization at some level. It also suggests that courts should determine the egregiousness of an agency's claimed interpretation before they evaluate its quality—a sequence that makes little sense.

This internal incoherence is relevant here to the extent that, although the Court did not describe *Judulang* as an agency statutory interpretation case, it nonetheless treated the issue posed as a matter of statutory interpretation. It would have been more doctrinally sensible for the Court to recognize the BIA's claim to interpret the statute, then evaluate it as so removed from any statutory language as not to constitute a reasonable interpretation. Following the *Chevron* analysis, the Court should first have recognized that statutory language was multivalent.

108. Indeed, despite describing its approach as arbitrary or capricious review, this is largely what the Court did in its opinion. *See, e.g.*, *Judulang*, 132 S. Ct. at 488 (concluding that the provision at issue could not provide a "textual anchor" for the agency's position). Using the *Chevron* approach and acknowledging the law-based nature of the statutory terms at issue would not have changed the result in *Judulang*.

109. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

110. 21 U.S.C. § 321(g)(1)(C) (2012).

111. *Brown & Williamson*, 529 U.S. at 125.

112. *Id.* at 172 (Breyer, J., dissenting) (discussing congressional hearings at which tobacco manufacturers denied that nicotine is addictive).

113. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,418 (Aug. 28, 1996) (codified at 21 C.F.R. pts. 801, 803-04, 807, 820, 897).

'drug' and that cigarettes and smokeless tobacco are 'drug delivery devices'" because of their "significant pharmacological effects" and physically addictive qualities.[114] Moreover, "the FDA determined that these effects were 'intended' under the FDCA because they 'are so widely known and foreseeable that [they] may be deemed to have been intended by the manufacturers.'"[115] These qualities, the rule asserted, put cigarettes and other tobacco products within the agency's jurisdiction.[116]

The Supreme Court disagreed. Focusing on post-enactment history, specifically the federal statutes that had addressed tobacco products since the passage of the FDCA, the five-Justice majority concluded that Congress could not have intended that the FDA regulate such products.[117] It would be incongruous, the Court concluded, to give the FDA authority over tobacco products when separate statutes already addressed tobacco directly.[118] The Court also concluded that the FDCA's structure precluded FDA jurisdiction. The Court noted that "one of the Act's core objectives is to ensure that any product regulated by the FDA is 'safe' and 'effective' for its intended use," and there is no safe use of tobacco products.[119] This "logically impl[ied] that," if the FDA were to have authority to regulate tobacco products under the FDCA, the agency "would be required to remove [tobacco products] from the market" as unsafe.[120] This result, the Court decided, would contradict Congress's intent: the statutes aimed at *controlling* tobacco products demonstrated that Congress had no intent to *ban* them altogether.[121]

Justice Breyer's dissenting opinion noted that tobacco products clearly fit the statutory words: nobody could seriously deny that tobacco products were intended to affect the structure or some function of the human body.[122] He argued that the conclusions the majority drew from post-enactment legislation were negative inferences that could as easily go the opposite way.[123] And he rejected the majority's reading of the range of actions the FDA could take under the FDCA, noting that the statute's

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114. *Brown & Williamson*, 529 U.S. at 127 (quoting 61 Fed. Reg. 44,397, 44,402, & 44,631 (Aug. 28, 1996) (codified at 21 C.F.R. pts. 801, 803-04, 807, 820, 897)).

115. *Id.*

116. *Id.* (quoting 61 Fed. Reg. 44,687 (Aug. 28, 1996) (codified at 21 C.F.R. pts. 801, 803-04, 807, 820, 897)).

117. *Id.* at 126 (concluding that the FDA's assertion of "authority is inconsistent with the intent that Congress has expressed in the FDCA's overall regulatory scheme and in the tobacco-specific legislation that it has enacted subsequent to the FDCA").

118. *Id.*

119. *Id.* at 133-34 (quoting 21 U.S.C. § 393(b)(2) (1994 ed., sup. III)).

120. *Id.* at 135.

121. *Id.* at 137 ("Congress, however, has foreclosed the removal of tobacco products from the market.").

122. *Id.* at 162 (Breyer, J., dissenting) ("[T]he majority nowhere denies . . . [that] tobacco products (including cigarettes) fall within the scope of th[e] statutory definition, read literally.").

123. *Id.* at 163 ("The inferences that the majority draws from later legislative history are not persuasive, since . . . one can just as easily infer from the later laws that Congress did not intend to affect the FDA's tobacco-related authority at all."); *see also id.* at 182 ("[T]he later statutes are . . . consistent with . . . the intent to proceed without interfering with whatever authority the FDA otherwise may have possessed," and to "leav[e] the jurisdictional question just where Congress found it," that is, undecided).

language and purpose allow the agency great leeway in deciding on the best approach to preserving health and safety.[124]

The *Brown & Williamson* majority emphasized that "[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context."[125] The majority chose a markedly, and exclusively, law-based context for interpretation: it includes only statutes relating to tobacco and some reference to the FDA's regulatory relationship to tobacco. The dissent, focused on rebutting the majority opinion, also focuses on the legal surround. The ensuing debate turns on whether the statutory language should be read broadly or specifically.[126]

There is, however, another aspect to determining the meaning of the statutory language. Whether a substance affects the structure or function of the body is a matter for a scientific elaboration that occurs independently of its relevance to any legal provision. Without arguing about whether Congress meant to give the FDA broad or narrow jurisdiction, then, one can note that the language Congress chose clearly implicated expert communities exogenous to the legal process.

When the FDCA specifies its regulatory object, its definition inherently depends on society's knowledge about empirical realities. This wording choice suggests that the precise set of referents over which the statute gives the FDA jurisdiction was meant to develop over time. The terms themselves are hooked to developing expert understandings of how substances affect bodily structures and functions. The enacting legislature, in other words, wrote its lack of conclusive knowledge about bodily effects right into the statute itself.[127]

The FDCA's reference to the structure and functions of the body is thus substantially world-based. This suggests that its *legal* context is not the most relevant one within which to interpret it. Acknowledging the distinction between world-based and law-based terminology may have pushed the Court to focus on the more appropriate context: the expert understandings on which the statutory language hinged.[128]

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124. *Id.* at 175-76 (noting that the statute permissively provides that the agency "may" initiate procedures to ban devices determined to be unsafe, and requires not total safety but a relative, "'reasonable' assurance of safety in a world where the other alternatives [may be] yet more dangerous").

125. *Id.* at 132.

126. *Compare id.* at 143 ("At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. . . . This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand."), *with id.* at 165 (Breyer, J., dissenting) ("[The FDCA's] broad language was included *deliberately,* so that jurisdiction could be had over *all* substances and preparations, other than food, and *all* devices intended to affect the structure or any function of the body." (internal quotation marks and citations omitted)).

127. This way of making the meaning of legal terms depend on developments in non-legal knowledge is not a prototypical case of dynamic statutory interpretation or statutory updating, but it is encompassed by those theories. *See generally* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 98 (1982) (arguing that courts can properly update the interpretation of statutes to account for "changes in the [legal] landscape in response to changed beliefs or conditions"); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 11 (1994) (arguing that judges interpreting statutory terms necessarily depart from what the enacting legislators meant by them "as a result of changed circumstances which give rise to unanticipated problems, developments in the law and the statute's evolution, and different political and ideological frameworks").

128. In contrast to the "structure or any function" language in the statute, which is heavily world-based, the "intended to" language falls closer to the middle of the spectrum. It combines sociological understandings of human psychology with a highly elaborated legal tradition of defining and recognizing legally relevant intent.

Some have grudgingly lauded the Court's decision in *Brown & Williamson*.[129] On this account, the decision blocked the FDA from "shirking its rule of law duties" by exceeding "the established meaning of the statute, . . . [which] ha[d] generated reliance interests"[130] because it "enforce[d] statutory deals that an entire industry had relied upon for decades."[131] Yet, the FDA's conviction that it could not regulate tobacco was based on decades of mendacity by the regulated industry, as tobacco industry representatives falsely denied both tobacco's pharmacological effects and the industry's knowledge of them.[132] It is not clear that enforcing statutory deals based on purposeful falsehoods should qualify as promoting the rule of law. Nor is it necessarily a court's job to preserve reliance interests generated by deception perpetrated by the party that claims reliance.

If we instead view *Brown & Williamson* from the simpler perspective of statutory interpretation, the world-based nature of the statutory language should push away from the purely legalistic context the majority chose, and toward the meanings given by expert communities—not those expert in legal terminology but those expert in the bodily structures and functions to which the legal terms refer. *Judulang* and *Brown & Williamson* locate endpoints on the spectrum from law-based to world-based legal language. The spectrum runs from terms that are defined primarily by legal actors to those with primary definitions exogenous to legal process. In the middle lie statutory terms that refer to empirical realities but have strongly elaborated legal definitions. For instance, the "well-founded fear of persecution" that substantiates a claim to refugee status in asylum law is a concept that the law itself creates.[133] In that sense, it is law-based: whether a fear of persecution is "well-founded" for the purposes of asylum is something that can only be determined with reference to the layering of legal opinions about what constitutes "well-founded fear" for the purposes of asylum. The case law has distilled several characteristics developed by legal actors. A legally sufficient "well-founded fear of persecution" must be subjectively genuine and objectively reasonable, but need not be the sole reason for seeking asylum; moreover, persecution need not be statistically probable for a fear of it to be well-founded.[134]

At the same time, legal understandings of what constitutes persecution are based on underlying sociological understandings of what constitutes tolerable, or normal, conduct on the part of those in power. It also rests on sociologically based ideas about

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129. *See, e.g.*, Eskridge, *supra* note 48, at 450 ("Much as I lament the tobacco industry's triumph, I appreciate Justice O'Connor's opinion for the Court in *Brown & Williamson* as performing an important public function.").

130. *Id.* at 434.

131. *Id.* at 450. Note that, in its notice and comment rulemaking on this issue, the FDA received more comments than it had ever received on any other topic. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 126-27 (2000). Some scholars uncritically report the majority's conclusions as though they were facts. *See, e.g.*, ANDREI MARMOR, THE LANGUAGE OF LAW 14-15 (2014). But the *Brown & Williamson* opinion garnered only a bare majority. That four Justices joined in dissent indicates that, at the least, the majority opinion is reasonably contestable.

132. *Brown & Williamson*, 529 U.S. at 172-74 (Breyer, J., dissenting); *see also* Theodore W. Ruger, *The Story of* FDA v. Brown & Williamson*: The Norm of Agency Continuity*, *in* STATUTORY INTERPRETATION STORIES 334 (William N. Eskridge, Jr. et al. eds., 2011).

133. *See* 8 U.S.C. § 1101(a)(42)(B) (2012).

134. *See* INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); Matter of Mogharrabi, 19 I. & N. 439 (B.I.A. 1987).

what it means to be singled out or oppressed, as opposed to living in undesirable—or even terrible—conditions that are shared by a general population.[135] Such ideas and understandings often appear in legal decisions without supporting reference to expert communities. Yet, insofar as the notion of persecution refers to sociological facts, it is likely that judges and administrators are influenced—however slowly or indirectly—by developments in the understandings of those who specifically study these social facts. This kind of influence comes through in asylum cases, for instance, in references to State Department country reports and other factual findings by outside parties, which often underlie assessments of the likelihood of persecution.[136]

As this discussion suggests, the more a legal term refers to a natural kind, the more likely it is to be world-based and subject to definition by communities of experts external to the legal process. More socially-based terminology will tend to fall toward the middle of the spectrum, since such terms often become subject to legal elaboration that renders them partly terms of art in the legal process. Words that are based in other legal concepts or statutory provisions will, in turn, be primarily law-based and entirely within the definitional domain of legal actors.

This Part has shown (1) that different types of terms gain meaning through different routes and (2) that the meaning of terms is often determined by sociological realities rather than language-internal structures. These differences exceed the simple clear-versus-multivalent dichotomy recognized in the *Chevron* doctrine. But they affect a court's ability to assess reasonableness, because courts are more suited to assigning meaning to law-based terms than to world-based ones. Assuming that meaning will be similarly constructed across all terms obscures this crucial fact, flattening out a diversified conceptual space. As the following Section shows, a similar flattening obscures the diverse capabilities of interpreting agencies.

C. Potential and Actual Competence

That words take different routes to meaning suggests that courts may be more competent to assess the reasonableness of an agency interpretation in some situations than in others. It may thus make sense for courts to differentiate the amount of deference they give an agency interpretation. This does not necessarily mean, however, that courts should uncritically accept agency interpretations of multivalent, world-based terms, because the ways in which agencies construct interpretations themselves differ across interpretive instances in ways not currently recognized in the doctrine.

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135. *See, e.g.*, Zheng v. Gonzales, 475 F.3d 30 (1st Cir. 2007) (holding that a woman who opposed China's one-child policy had no well-founded fear of persecution because her circumstances did not differ from those of other women her age in China).

136. *See, e.g.*, Li v. Gonzales, 405 F.3d 171, 178 (4th Cir. 2005) (quoting State Department Country Report on China for factual matter and noting that immigration judge had adopted it); Lukwago v. Ashcroft, 329 F.3d 157, 176 (3d Cir. 2003) (weighing a factual statement in a State Department Country Report against contrary statements by the Ugandan government, Amnesty International, and the United States Embassy in Kampala).

Chevron deference rests on a judgment about the relative institutional competence implied by congressional delegation of power[137]: agencies' expertise and experience make them superior interpreters of statutory directives,[138] and their selection by Congress to implement statutes bolsters their interpretive authorization.[139] This approach thus looks to agencies' structural characteristics to determine their *potential competence* or *structural possibility*—the maximum competence that the agency could, in principle, achieve. Potentially staffed with specialists who can "spend their time focusing on a particular set of problems," agencies may have the resources to actively pursue research and evidence that improves their understandings of those problems.[140] Through trial and error, they can gain a sense of "what works and what does not work" and, over time, adjust their responses to problems as they acquire information about regulated objects and policy effects.[141] In contrast, judges are structurally constrained to focus on issues in a staccato manner driven by litigants, depend on litigant-provided information, and draw conclusions from principle and precedent rather than experience or expertise.[142] Additionally, agencies often have access to the legislative process, both as long-term observers and as active participants; this can give them special insight into what a statutory term might mean in a particular context.[143]

Agencies' structural characteristics help determine the extent of competence they may potentially have in interpreting a statutory term.[144] But this very phrasing also reveals a limitation of this approach. Behind the doctrine of deference lies the presumption that agencies will always make use of the full extent of their structural possibilities when interpreting a statutory term. As an empirical claim, such a presumption must, in principle, be rebuttable. And as a description of institutions created and populated by fallible human beings with limited resources, it is surely at least

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137. Chevron v. Nat. Res. Def. Council, 467 U.S. 837, 843-44 (1984) (describing statutory ambiguity as a delegation of authority to the agency "entrusted to administer" the statute); KATZMANN, *supra* note 14, at 27 (noting that *Chevron* "is premised in part on the Court's view of agency institutional competence, the sense that because an agency is deeply familiar with the legislation it is charged with implementing, deference to its interpretation is appropriate").

138. *See, e.g.*, Eskridge, *supra* note 48, at 421-25 (elaborating on the agency competencies implied in deference doctrine).

139. *See, e.g.*, Strauss, *supra* note 23, at 818 ("*Chevron* introduces a presumption that in creating an agency with authority to act with the force of law, Congress has delegated to it the resolution of ostensibly legal questions, to the extent that traditional tools of statutory interpretation do not produce a resolution." (internal quotation marks omitted)).

140. Eskridge, *supra* note 48, at 421.

141. *Id.*

142. *Id.*

143. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 924-64, 990-1014 (2013); Nicholas Parrillo, *Leviathan and the Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L.J. 266, 279 (2013).

144. *See, e.g.*, Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 23 ("Agencies vary in a range of ways, some more visible, others not. Formal structural differences in agency design are the most obvious, such as the legal difference between independent and executive agencies, or whether the agency/commission/board is multiheaded or singleheaded, or whether bipartisan appointment requirements exist.").

sometimes wrong. Not every instance of agency interpretation utilizes the full extent of agency interpretive potential.[145]

The *actual competence*, or *practical capability*, mobilized in any given interpretation will depend on the extent to which an agency uses the range of its potential abilities.[146] To be sure, an agency's structural possibilities and its practical capabilities in any given instance are related: an agency's potential abilities determine the outer limits of what it can do in actuality. But, they are not correlated in a predictable way: agency structure does not predict or determine what the agency will actually do in any given instance. That depends on what part of its potential competence it mobilizes in that instance.[147]

Pointing to a similar distinction, Richard Pildes has contrasted two ways that courts evaluate other government institutions. What Pildes calls the "formalis[t]" approach "treat[s] the [other] governmental institution . . . as more or less a . . . black box to which the . . . law . . . allocates specific legal powers and functions."[148] The functionalist approach, in contrast, "penetrate[s] the institutional black box and adapt[s] legal doctrine to take account of how these institutions actually function in, and over, time."[149] Pildes argues that the tension between these two approaches forms a central, though hidden, vein in public law.[150]

Supreme Court decisions, Pildes shows, often bring to bear a practical understanding of how other institutions actually function.[151] But those decisions tend to obscure that practical dimension behind a veneer of formalism. That is, court opinions speak of other institutions as though they have inherent characteristics because

145. *Cf.* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886 (2003) (arguing for an "institutional turn in thinking about interpretive issues," focused particularly on "*institutional capacities*" and the "*dynamic effects*" of inter-institutional interactions).

146. *See* Anya Bernstein, *Catch-All Doctrinalism and Judicial Desire*, 161 U. PA. L. REV. ONLINE 221, 226 (2013) ("[C]ompetence is not inherent to either a person or an institution.").

147. *Cf.* Aziz Huq, *The Institution Matching Canon*, 106 NW. U. L. REV. 417 (2012). Huq identifies a strain of reasoning in constitutional law under which, when a government actor makes a decision "that may impinge upon a liberty or equality interest[,] . . . a court should determine whether the component of government that made the decision has actual competence in or responsibility for the policy justifications invoked to curtail the interest." *Id.* at 419. Huq suggests that such actual competence may involve a more formal responsibility to "further[] the relevant policy goals," or a more functional application of expertise "in fact." *Id.*; *see also id.* at 425 (noting that a court can consider "an agency's organic statute" but also take a "more *functionalist* approach" by considering "information about the agency's past actions and current staffing," which could indicate whether the agency had "appl[ied] salient expertise," and "look[ing] at what an agency does, for example by asking whether it consulted with other, more expert colleagues").

148. Pildes, *supra* note 144, at 2.

149. *Id.*

150. *Id.* at 3-4 (arguing that, although legal doctrine is generally presented as being legally formalist, in fact "the tension between institutionally formalist and realist approaches is pervasive . . . throughout the . . . [public] law of institutions").

151. *Id.* at 5 (claiming that changes in legal doctrine often reflect an unacknowledged move from a formalist to a realist perspective on an institution, or from one realist evaluation to another).

of how they are structured.[152] But many court opinions nonetheless treat other institutions as having particular, temporary characteristics. So, for instance, the Supreme Court's treatment of state courts may change over time as Justices' perceptions of how, and how well, state courts work changes—even though the Court's opinions do not acknowledge such shifts. Judges claim to base decisions on potential competence, but find themselves rummaging about in actualities.[153]

Judicial review of administrative agency statutory interpretation highlights the enduring tension Pildes identifies.[154] The doctrine is formulated and justified largely in the terms of institutional competence. Yet, it gives courts no way to evaluate the actual competence of any given institution in any given instance. As Neil Komesar has pointed out, courts routinely engage in comparative institutional analysis to distribute authority and obligation.[155] However, courts have no process for doing so in a transparent, thorough, or informed way.[156] And judges do not necessarily have any independent expertise in institutional analysis.[157]

Part of the difficulty of reconciling these approaches may lie in the way that each seems neither fully avoidable, nor fully desirable. They are not fully avoidable because of the realities of human psychology. Like other people, judges probably cannot avoid having some preformed ideas about how other institutions work, and they are probably more influenced by their preconceptions than they realize.[158] Thus, judges, like the rest of us, must work with some idealized notions about how other

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152. *Id.* at 3 ("Supreme Court doctrine developed decades or even centuries ago on how much deference Congress is owed in a certain regulatory domain, for example, is relevant precedent today—regardless whether the actual Congress is hindered or empowered in dramatically different ways. 'Congress' is always 'Congress,' for legal purposes.").

153. *Id.* at 2.

154. *See id.* at 21-28 (discussing the realist-formalist tension in administrative law).

155. Komesar, *supra* note 33, at 1390 ("[L]egal decisions are best understood as choices among imperfect institutions.").

156. As others have noted, Komesarian comparative institutional analysis focuses on potential institutional competence rather than inquiring into actual institutional abilities and practices. *See* Pildes, *supra* note 144, at 5 n.5 ("[A]s Gregory Shaffer rightly observes, Komesar analyzes institutions 'in ideal-type terms—assessing "the political process," "the market process," and "the judicial process" as institutional alternatives.'" (quoting Gregory Shaffer, *Comparative Institutional Analysis and a New Legal Realism*, 2013 WIS. L. REV. 607, 618)).

157. *See, e.g.*, Gluck, *supra* note 4, at 628-30. Gluck argues that, although administrative review doctrines seem more attuned to legislative process than other statutory interpretation approaches, they continue to work with a radically simplified, unrealistic background image of how Congress works. "The doctrines generally assume," against all evidence, "that statutes are drafted by a single or cohesive group of people; that when there is a delegation it is to one, federal, agency; and that statutes progress from committee, to floor, to vote, to conference just as the [Schoolhouse Rock!] cartoon taught us." *Id.* at 628. Moreover, Gluck argues, statutory interpretation doctrines not only misrepresent legislative process, they also misunderstand inter-branch relations. "*Chevron* assumes that Congress is talking the language of courts, and talking to courts, when it signals delegation." *Id.* at 630. In fact, however, "Congress is focused primarily on agencies, not on courts." *Id.* In this sense, judicial doctrine systematically misconstrues the distribution of institutional abilities and even the relations among government institutions. *See* KATZMANN, *supra* note 14, at 23-43 (arguing that courts "promote[] good government" and "facilitate[] healthy interbranch relations" when they "us[e] the interpretive materials the legislative branch thinks important to understand its work," while lamenting the general lack of understanding among judges about how legislatures and agencies work).

158. *See, e.g.*, DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011) (surveying the prevalence of ungrounded preconceptions, empirically incorrect assumptions, and logical fallacies in human psychology).

institutions function and the competencies they have. At the same time, the experience of living in the same world as these institutions injects implicit evaluations of actual competence into at least some judgments. Judges, like the rest of us, hear and read about the institutions whose conflicts they adjudicate. It would be naïve to think that such information never makes its way into legal judgments and evaluations.[159]

Neither realism nor formalism, moreover, is fully normatively defensible. Rule-of-law norms encourage treating other institutions in terms of their formal structures and potential competence. Looking only to structure may serve rule-of- law norms in some ways, but also yields unrealistic appraisals of agency conduct, undermining the efficacy and accuracy of judicial decisions. Yet, evaluating an agency's actual competence can mire courts in managerial and institutional specifics they are not equipped to evaluate, opening the door to decisions based on gut feeling and making it more difficult to recognize like cases or to treat them alike.

Perhaps this is why, when courts do take actual agency competence into account, they often do so in an ad hoc way. The well-known case of *Gonzales v. Oregon*[160] demonstrates both the way courts take account of the vagaries of agency competence, and the absence of a doctrinal mechanism providing a standard for doing so. In *Gonzales*, the Department of Justice, acting on its statutory authority to license physicians who prescribe controlled substances, issued an interpretation that would deny licenses to physicians prescribing substances for use in a patient's suicide by rendering those physicians prosecutable even in states that legalize assisted suicide.[161] The Supreme Court held that this regulation exceeded the agency's authority under the statute.[162] The opinion concluded, *inter alia*, that the Attorney General lacked the medical competence to determine whether assisting with suicide was a legitimate medical use of a controlled substance.[163] But, it also emphasized that he failed to use the competence he did have.

The statute allowed, and in some cases required, the Attorney General to consult with the Secretary of Health and Human Services on issues related to medical practice. The Court emphasized, however, that the Attorney General had not consulted with anyone before issuing the regulations at issue.[164] The Court intimated that such consultation might have helped save the regulation by actualizing the structural competence the Attorney General did have: the competence to consult with and take guidance from others with expertise in the relevant area. It was, in part, the Attorney General's failure to actualize those abilities—to enact the potential competence that the statutory structure afforded him, and that might make his judgment superior to that of a court—that doomed the regulation.

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159. *See, e.g.*, Pildes, *supra* note 144, at 18 ("The willingness of other public institutions (as well as the public) to accept novel forms of presidential power is influenced by the extent to which a particular administration builds trust and credibility that suggests its actions reflect sound, well-thought-through judgment and principles; it is no great stretch to believe that similar considerations move the Court as well." (internal footnote omitted)).

160. Gonzales v. Oregon, 546 U.S. 243 (2005). The *Gonzales* Court held that the regulation at issue was not subject to *Chevron* deference, *id.* at 258, but the case illustrates the way that courts evaluate an agency's actions against its competence.

161. *Id.* at 254-55.

162. *Id.* at 258.

163. *Id.* at 243-44.

164. *Id.* at 253-54.

The *Gonzales* analysis suggests that courts can be sensitive to an agency's failure to actualize its potential. At the same time, there is no clear doctrinal basis for this sensitivity. Courts have no standard doctrinal inquiries that probe whether an agency has taken advantage of those features that make it potentially competent to evaluate statutory language. Instead, they evaluate actual agency competence ad hoc.

Assessing agency competence in an ad hoc way limits courts' analytic power. To make such evaluations, judges must use only the information they happen to have. The record of agency rulemaking or adjudication, after all, is supposed to reveal how the agency evaluated the object under its purview, not how it evaluated or utilized its own capabilities. Yet, this is crucial to determining whether the agency is actually competent to make the interpretation at issue.

Relatedly, lacking standards to evaluate actual agency competence, judges must rely on their own sense of how an agency ought to work.[165] Yet, there is no conduit for teaching judges how an agency's potential competence—the structural parameters of its authority—relates to its ability to actualize its competence in a given situation.[166] That ability depends on budgetary constraints, managerial structures, other agency projects, and similar conditions of public administration.

Courts thus make judgments about agencies' actual interpretive competence, but lack standards or mechanisms that would allow them to make such judgments comparable, much less predictable, across cases. As a factual matter, it is likely that courts cannot avoid basing at least some judgments on their evaluations of actual agency competence. And as a normative matter, it is not clear that evaluations of actual competence should be banned from court judgment. Currently, however, doctrinal silence leaves courts to conduct such evaluations in a mostly ad hoc and *sub silencio* way, obscuring the process by which they do so and obstructing its standardization or development.

This Part has shown that the interpretive abilities of both courts and agencies vary from situation to situation. That different terms take different routes to acquire meaning suggests that the competence of a court to evaluate the reasonableness of an agency's statutory interpretation will be uneven, differing depending on the kind of term at issue. That agencies do not always actualize the potential competence afforded by their structural set-up suggests that agencies' competence at interpreting will also be uneven, differing depending on the interpretive steps the agency takes in a particular situation. Reviewing courts sometimes intuit these distinctions and take them into account. The Part that follows considers how this recognition might be embedded into the judicial review of agency statutory interpretations. I then weigh the advantages and disadvantages of doing so.

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165. *See, e.g.*, Melnick, *supra* note 35, at 258 (noting that there is no judicially cognizable system for keeping track of or connecting the various parts of an agency's mandate and the pressures put on it from courts or other sources, and arguing that "[c]ourts are particularly likely to make . . . conflicting demands [on agencies] because they are so decentralized, their exposure to policymaking is so episodic, and the opportunities for forum-shopping are so apparent to interest groups.").

166. *See, e.g.*, *id.* Melnick argues that courts' inability to evaluate agency capabilities, combined with courts' powerful effects on agencies, has led to destructive results. *Id.* at 246 ("Courts have heaped new tasks on agencies while decreasing their ability to perform any of them. They have forced agencies to substitute trivial pursuits for important ones. And they have discouraged administrators from taking responsibility for their actions and for educating the public.").

III. Instituting Differentiated Deference

Recognizing differences in how terms gain meaning and how institutions interpret them illuminates a crucial fact: the relative abilities of courts and agencies to give meaning to statutory terms differ from situation to situation. Their relative institutional competence, in other words, is not static—not over subject matter, and not over time.

The dynamic nature of relative institutional competence is crucial for understanding the vagaries of judicial review of agency interpretation. Given that, embedding recognition of these dynamics into courts' analyses of agencies' interpretations would likely benefit both judicial review and agency action.[167] At the same time, these dynamics happen at fairly abstract levels and depend on local particularities such as the social structure underlying a linguistic term and agency actions in particular cases.

Illuminating these dynamics, therefore, does not necessitate any one course of action. It does not give rise to simple, bright-line rules, or even, necessarily, to static standards.[168] Instead, we can consider how to incorporate this recognition into judicial review as a more general method to reorient how judges approach changing circumstances that require flexibility and local knowledge.[169] This Part sketches two possible ways to do so.

A. Institutional Adjustment

Probably the best way to help courts differentiate their deference across terms and situations would be to charge a separate institution within the judicial branch with advising courts on matters of agency statutory interpretation and helping them make such assessments. This would provide an information source from which courts could take judicial notice of issues that fall outside of their normal sphere of competence and the information provided by litigants. The idea would be to help produce more realistic assessments of statutory meaning and institutional competence. This

167. *See infra* Part IV.

168. *See, e.g.*, Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644, 646 (2014) ("With rules, the Court can buy itself uniformity, predictability, and low decision costs, at the expense of rigidity, inflexibility, and arbitrary-seeming outcomes. With standards, it can buy itself nuance, flexibility, and case-specific deliberation, at the expense of uncertainty, variability, and high decision costs."); Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803, 803-04 (2005) ("[W]hat we conventionally call rules are directives that are comparatively precise . . . [applied by] making largely mechanical decisions . . . . In contrast, . . . what are conventionally called standards leave most of the important choices to be made . . . at the moment of application.".

169. In this sense, the methods I consider here are compatible with what Charles Sabel and William Simon have called "experimentalism" in the realm of administration. Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 54-55 (2011) (contrasting a "minimalis[t]" approach to administration, which emphasizes "efficiency and consistency" through minimizing front-line discretion, with an "experimentalist" approach that emphasizes "reliability" achieved through "the capacity for learning and adaptation").

work could build on the kind of guidance already provided by the Federal Judicial Center.[170]

Each branch of government houses offices charged with compiling and analyzing information for that branch's use. Within the executive branch, the Office of Information and Regulatory Affairs (OIRA) is an organization that, inter alia, "helps to collect widely dispersed information . . . held throughout the executive branch and by the public as a whole."[171] Additionally, the Administrative Conference of the United States (ACUS) studies the workings and effects of the federal agencies.[172] Within the legislative branch, the Congressional Budget Office (CBO) is an information-gathering and analysis organization. It provides independent, non-partisan research on the budgetary effects of proposed legislation.[173] Additionally, the Congressional Research Service (CRS) provides policy analyses that range broadly over government undertakings.[174]

The Federal Judicial Center, in turn, "is the research and education agency for the federal courts."[175] It is tasked, among other things, with providing "education and training for federal judges."[176] In that capacity, the Federal Judicial Center has already published a highly praised manual on the use of science in the courtroom.[177]

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170. Fed. Judicial Ctr. & Nat'l Research Council, *Reference Manual on Scientific Education 3d*, NAT'L ACADS. PRESS (2011), http://www.fjc.gov/public/pdf.nsf/lookup/SciMan3D01.pdf/$file/SciMan3D01.pdf [hereinafter Reference Manual]; *see* Stephen Breyer, *Introduction*, *in id.* at 5 ("The Federal Judicial Center is collaborating with the National Academy of Sciences through the Academy's Committee on Science, Technology, and Law. The Committee brings together on a regular basis knowledgeable scientists, engineers, judges, attorneys, and corporate and government officials to explore areas of interaction and improve communication among the science, engineering, and legal communities. The Committee is intended to provide a neutral, nonadversarial forum for promoting understanding, encouraging imaginative approaches to problem solving, and discussing issues at the intersection of science and law." (internal footnotes omitted)).

171. Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1840 (2013). OIRA has other functions—some of them controversial, *see id.* at 1838-39—but the information-gathering one is most relevant to the discussion here. In its role as "information aggregator" for the executive branch, OIRA helps "ensure that rulemaking agencies are able to receive the specialized information held by diverse people . . . within the executive branch," who might otherwise not have contact with one another. *Id.* at 1841.

172. *See* ADMIN. CONFERENCE OF THE UNITED STATES, www.acus.gov (last visited Nov. 15, 2015) (describing ACUS as an agency working "to promote improvements in the efficiency, adequacy, and fairness of the procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions . . . through a variety of activities that include scholarly research projects, development of recommendations directed primarily to agencies and Congress, and publications and seminars on best procedural practices").

173. *See Overview*, CONG. BUDGET OFF., http://www.cbo.gov/about/overview (last visited Nov. 15, 2015).

174. *See About CRS*, LIBR. OF CONG., http://www.loc.gov/crsinfo/about (last visited Nov. 15, 2015).

175. FED. JUD. CTR., www.fjc.gov (last visited Nov. 15, 2015).

176. *Id.*

177. Reference Manual, *supra* note 170; Adam Dutkiewicz, *Book Review: Reference Manual On Scientific Evidence-Third Edition*, 28 T.M. COOLEY L. REV. 343, 344 (2011) (noting that the Reference Manual is "already recognized as the leading manual on the growing world of scientific evidence in courtrooms"); Valerie P. Hans, *Judges, Juries, and Scientific Evidence*, 16 J. L. & POL'Y 19, 20 (2007) (describing the Reference Manual as "includ[ing] superb comprehensive overviews of scientific fields and techniques").

The *Reference Manual on Scientific Evidence* aims to help judges evaluate the quality of scientific evidence presented in litigation, specifically in order to determine the admissibility of expert testimony.[178] Chapters in the *Manual* provide an overview of a range of important areas that come up in expert testimony, such as statistics, multiple regression, forensic sciences, economic damages calculations, epidemiology, survey methodologies, and others.[179] In other words, the *Manual* helps judges assess the quality of evidence-based claims.

As Justice Breyer states in his introduction, the *Manual* "seeks to open legal institutional channels through which science—its learning, tools, and principles—may flow more easily and thereby better inform the law." While the *Manual* is aimed primarily at helping judges evaluate the viability of expert testimony,[180] the Federal Judicial Center could build on this example and go further to help judges address issues in administrative law. It could do so through a separate, regularly updated manual. Even better, it could establish a new Administrative Agency Research subsection within the Federal Judicial Center itself.

Such a subsection could have a small staff dedicated to teaching judges about two broad fields of information: research relevant to agency action, and actual agency capacity. The first field would help judges determine the relevant meaning-giving communities in a given area of regulation, while the second would help them assess the extent to which an agency had actualized its potential interpretive capacities. Here, I sketch how such a new section could function. For the purposes of this Article, I describe this new subsection in terms of the assistance it could lend to judicial assessments of agency statutory interpretation. But, such a subsection could play a broader role in the ongoing project of educating judges and facilitating inter-branch understanding—a project supported by some prominent judges, among others.[181]

The Administrative Agency Research section could build on the impressive overviews of scientific fields and methods provided by the *Reference Manual*. But, it would not duplicate the research performed by agencies themselves—nor could it,

178. Breyer, *supra* note 170, at 4 ("[M]ost judges lack the scientific training that might facilitate the evaluation of scientific claims or the evaluation of expert witnesses who make such claims."); Barbara J. Rothstein & Ralph Cicerone, *Foreword*, *in* Reference Manual, *supra* note 170, at ix (introducing the collaboration between the Reference Manual's institutional authors as a way to help courts "serve as 'gatekeepers' in determining whether the opinion of a proffered expert is based on scientific reasoning and methodology," as required by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)).

179. Reference Manual, *supra* note 170, at xvi (providing a Summary Table of Contents).

180. A Westlaw search for "Reference Manual on Scientific Evidence" returned only five Supreme Court cases citing the *Reference Manual*. *See* Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN), 134 S.Ct. 1623 (2014); Comcast Corp. v. Behrend, 133 S.Ct. 1426 (2013); Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27 (2011); Atkins v. Virginia, 536 U.S. 304 (2002); Nguyen v. INS, 533 U.S. 53 (2001). The *Reference Manual* was also cited by only two cases in the D.C. Circuit—the circuit court that deals most with administrative cases. *See* American Petroleum Institive v. EPA, 684 F.3d 1342 (D.C. Cir. 2012); Appalachian Power Co. v. EPA, 135 F.3d 791 (D.C. Cir. 1998). Most cases that do cite the *Reference Manual*, moreover, do not address administrative law, but rather expert testimony and the admissibility of evidence in litigation—the issue the *Manual* was created to address. *See supra* note 178.

181. *See, e.g.*, KATZMANN, *supra* note 14, at 92 (proposing institutional developments to help federal government branches better understand one another, such as CRS-sponsored seminars and papers to educate Congress about judicial approaches to statutes and to educate judges about the workings of Congress); Breyer, *supra* note 170, at 9.

given the judiciary's limited size and funding.[182] Instead, it would provide a broad overview indicating what *kinds* of research addressed what *kinds* of issues. Thus, section staff could produce reports on the terrain of inquiry in a range of fields relevant to agency action, from natural science to social science to technology. The section could also produce more in-depth overviews of specific areas of inquiry upon request, much as the CRS produces reports on specific issues upon request from members of Congress.[183] This work would help judges assess the extent to which a statutory term was subject to elaboration by communities exogenous to legal process, and understand which communities were most relevant to that elaboration.

But the more important work of an Administrative Agency Research section would be to help judges make informed choices about relative institutional competence by giving them resources for assessing the capabilities of the agencies they review. It would provide overview information about the mandates, structures, programs, budgets, and staffing of agencies across the executive branch. This would give judges a sense of both agency potential and of the constraints agencies work under, making courts better evaluators of relative institutional competence.

Crucially, the section would keep track not only of agencies' statutory mandates, but of judicial ones as well. As Shep Melnick has observed, courts lack a system for understanding judicial interactions with the administrative state.[184] They therefore lack a way to gauge the systemic effects of judicial judgments.[185] This lack of centralized information and understanding, Melnick argues, leaves courts "particularly likely to make . . . conflicting demands [on agencies,] because [courts] are so decentralized, their exposure to policymaking is so episodic, and the opportunities for forum-shopping are so apparent to interest groups."[186]

Of course, judges can find judicial rulings about particular agencies in legal databases. But collecting all judicial rulings about any given agency is a huge task—and one that is not likely to seem relevant to any given case a judge is working on. More importantly, even for the unusual judge who did undertake the task, such information would be of limited utility in isolation. Absent knowledge of other factors like statutory mandates, structures, programs, budgets, and staffing, it would not be much help to a judge interested in understanding institutional functioning.

An Administrative Agency Research section would thus give judges a realistic understanding of both agency capacities and meaning-giving communities. Against that background, courts would be in a better position to assess the reasonableness of a given statutory interpretation—and, indeed, of the quality of a range of agency actions, including policy decisions. It would add an element of what has been called "experimentalism," "new governance," and "responsive regulation" to the judicial

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182. *See, e.g.*, Andrew Coan & Nicholas Bullard, *Judicial Capacity and Executive Power*, __ VA. L. REV. __ (forthcoming 2016) (discussing the limited size and resources of the federal judiciary, especially as compared to the executive branch), http://ssrn.com/abstract=2558177.

183. *See supra* note 174.

184. *See* Melnick, *supra* note 35.

185. *Id.*

186. *Id.* at 258. In Melnick's example, when an environmentalist group sues to enforce a statutory deadline, an industry group is sure to follow with a suit challenging the quality of the data, given the rushed deliberation that went into creating the rule. *Id.*

institution, increasing its "capacity for learning and adaptation" by teaching judges about "local variation" in the words and institutions they evaluate.[187]

B. Doctrinal Adjustment

Another, less radical but likely less effective, way to differentiate deference by type of term and actual agency competence would be to focus *Chevron*'s reasonableness assessment on the integrity of the agency's interpretive process. Rather than taking on the impossible task of evaluating the reasonableness of an agency's interpretation of a world-based term itself, a court would ask whether the agency constructed its interpretation in a reasonable way. This would involve looking to whether the agency relied on the relevant meaning-giving communities in formulating its interpretation. The more an agency has actualized its interpretive potential in this way, the more confident a court can be in deferring to the agency's interpretation.

Such an *interpretive process* approach would give the court a job it could actually do—evaluate process—instead of one it is not equipped to do—evaluate the substantive reasonableness of specialized interpretations. It would also push beyond arguments about whether courts should give more, or less, deference to agency interpretations.[188] Instead, it would allow deference to be tailored to differences in how meaning is constructed and how institutions approach it.

On this approach, a reviewing court would first consider the nature of the term at issue in a statutory interpretation case. To what extent is it legal all the way down and left to definition by the legal community? To what extent does it refer to objects in the world, our understanding of which develops independently of the legal community? To what extent, in other words, does it make sense to define the term with reference only to legal discourse, and to what extent does interpreting it require stepping out into the discourses of other communities?

The inquiry would not seek to shove statutory terms into strictly delimited categories, since statutory terms will rarely be purely world- or law-based. Rather, the questions allow courts to approach statutory terms against a realistic background understanding of how they gain meaning. The hallmark of a reasonable interpretation would be a reasonable interpretive process that makes use of the agency's potential advantages in managing and understanding regulatory statutes.

The more a term is subject to meaning-giving through legal processes like litigation and legislation, the more a court can be confident in its own ability to establish whether an interpretation is reasonable. The more the term is subject to meaning-giving in ways exogenous to legal process, the more the court should look to the agency to assess reasonableness. To avoid the difficulties of passing judgment on a substantive interpretation of a world-based term in which the court lacks expertise, the court would look to the agency's own interpretation-producing process.

The court could ask, for instance, whether the agency had based its interpretation in the work of the relevant meaning-giving communities.[189] While courts are not

187. Sabel & Simon, *supra* note 169, at 55-56.

188. *See* Michael Herz, *Deference Run Riot*, 6 ADMIN. L.J. 187, 188-89 (1992) (describing the debate between those who believe that *Chevron* gives agencies too much deference and those who believe it vindicates democratic principles).

189. I assess the benefits and difficulties of this approach in Part IV.

in a position to pre-set the boundaries of acceptable interpretations themselves,[190] the conclusions of such expert communities can help illuminate that range. In the not unusual cases where that work gave suggestive, but no conclusive, answers, the court could consider whether the agency's interpretation came closer to the bell curve of consensus or lay further out on the tail.

A court could also consider the extent to which the agency itself had taken into account the level of uncertainty and the possibility of future change. Unlike courts, which end their inquiries once they publish their opinions, agencies can and often do continue working on a problem after giving it a provisional solution, further developing their understanding of both the empirical realities of the regulated object and the effects of regulations themselves.[191] The world impinges on agency considerations in an ongoing way.

This impingement has the deflating tendency to illuminate mistakes. But it also provides agencies the means to improve their regulatory abilities in a process that can resemble the basic outline of the scientific method, which requires continuous testing of hypotheses to refine and improve conclusions. Considering how an agency understood a given interpretation to fit within an ongoing process of adjustment and refinement would allow the court to judge interpretations for what they are: provisional statements embedded in ongoing policy developments.[192] It would also encourage an orientation toward self-assessment that some have argued is the best way to regulate the executive branch and that has found some support within the executive branch itself.[193]

This two-step inquiry echoes the two general approaches that courts seem to be converging on already.[194] Elizabeth Magill argues that some courts take a "statutory approach" to *Chevron*'s reasonableness assessment, while others attempt to incorporate a form of arbitrary and capricious review.[195] In the absence of authoritative standards guiding *Chevron*'s reasonableness assessment, Magill describes courts as deciding on their own to take either the statutory approach or the arbitrary and capricious one.[196]

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190. *See supra* Part I.B.

191. *See, e.g.*, Federal Motor Vehicle Safety Standards; Occupant Crash Protection, 65 Fed. Reg. 30,680 (May 12, 2000) (codified at 49 C.F.R. pts. 552, 571, 585, 595) (noting agency's existing airbag standard has been found to make airbags dangerous for people of small stature, and initiating revision to the rule that would better accommodate the needs of this population).

192. Foote, *supra* note 20, at 675 (explaining that, unlike court decisions, agency action is provisional, in a state of ongoing development).

193. *See* Bernstein, *supra* note 99, at 518-30 (discussing the importance of administrative self-assessment and review, and proposing mechanisms for implementing it in the context of government knowledge-production); *see also* Exec. Order No. 13,563, 3 C.F.R. pt. 13563 (2011) (requiring agencies to "consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned"); Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227, 291 (2006) (discussing the limitations of judicial review mechanisms for executive actions); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2319-24 (2006) (urging greater executive use of procedures that assess and constrain executive policy).

194. *See supra* Part I.C.

195. *See id.*; Magill, *supra* note 11, at 87-93.

196. Magill, *supra* note 11, at 87-93.

Differentiating deference would unify the two approaches into one inquiry. The direction of the inquiry would differ depending on the nature of the statutory term. A more law-based term would warrant a more statute-based inquiry, while a more world-based term would look outward to other meaning-giving communities. Furthermore, attending to the interpretive process surrounding world-based terms would improve on the current approach as Magill describes it. Currently, courts taking the arbitrary and capricious approach consider "whether the agency, in reaching its interpretation, reasoned from statutory premises in a well-considered fashion," which may involve assessing "whether the agency interpretation is supported by a reasonable explanation and is logically coherent."[197] An interpretive process approach would add the recognition that, in many instances, agencies reason not only from "statutory premises,"[198] but also from empirical facts.

Considering the communities involved in giving a statutory term meaning would give a court better purchase on what constitutes a reasonable interpretive process in a particular case, and facilitate its determination of whether an agency has actualized its potential competence in a given instance. And acknowledging that judges' expertise waxes and wanes depending on whether terms are subject to definition by legal communities or by others would give courts a nuanced way to modulate the intensity of their review.

Where statutory terms are legally derived, judges can feel more comfortable evaluating an agency's interpretation themselves, using evidence produced by legal communities. A case in point is the well-known case of *Bob Jones v. United States*.[199] In 1970, the Internal Revenue Service (IRS) reinterpreted a statutory provision exempting nonprofit "[c]orporations . . . organized and operated exclusively for religious, charitable[,] . . . or educational purposes" from tax liability.[200] Where the agency had previously granted all schools tax exemptions, in 1970 it announced that schools that discriminated on the basis of race were no longer eligible for the tax exemption.[201]

The Supreme Court supported this reinterpretation, agreeing with the IRS that the tax exemption provision encompassed only institutions that would qualify as charities under common law.[202] This required that an institution's "activity is not contrary to settled public policy."[203] For evidence about contemporary public policy regarding discrimination, the Court looked to a range of legal and law-like sources: judicial decisions, congressional legislation, and executive actions.[204] Based on these

197. *Id.* Magill describes this approach as effectively incorporating a form of arbitrary and capricious review into the *Chevron* inquiry. *Id.*; *see* 5 U.S.C. § 706(2)(A) (2012) (providing that courts should invalidate agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43 (1983) (holding that the arbitrary and capricious standard of review requires an agency to "examine the relevant data and articulate a satisfactory explanation for its action" and articulating a set of factors to guide courts in determining whether an agency has done so).

198. Magill, *supra* note 11, at 93.

199. 461 U.S. 574 (1983).

200. *Id.* at 585 (quoting 26 U.S.C. § 501(c)(3) (2012)).

201. *Id.*at 578.

202. *Id.* at 585.

203. *Id.*

204. *Id.* at 593-94.

sources, eight Justices agreed that "there [could] no longer be any doubt that racial discrimination in education violate[d] deeply and widely accepted views of elementary justice."[205] The Court therefore approved how the agency had updated its interpretation of the statutory provision.

In *Bob Jones*, then, the Court's interpretation stayed within the bounds of the legal community. It first connected the existence of a statutorily-granted tax exemption with a notion of "charity" based in common law.[206] The legal community had already defined that common law concept itself with reference to public policy, so the Court turned from the historical concept of charity in common law to the contemporaneous notion in public policy. It derived public policy from legal and law-like acts by the three branches of the federal government. The Court thus felt justifiably comfortable evaluating the meaning of public policy, even though its reliance on the common-law concept and evaluation of contemporary public policy affirmed a radical change to the normative orientation of an agency statutory interpretation.

Bob Jones involved heavily law-based statutory language. It dealt with a purely statutory construct, exemption from tax, and a common-law contextualization. Law-based legal language can be relatively pure in this way when the meaning-giving community matches the law-writing community of legal actors. World-based legal language will, of necessity, usually be messier: even "natural kind" terms must have one foot in the scientific community and one foot in the statute. This is part of what makes court-agency interpretive competence so dynamic in the regulatory context.

Incorporating this dynamism into judicial review would bring review closer to the complex realities of how linguistic meaning develops. But it would also mean engaging with those complexities. One reason that the inter-institutional dynamics described here do not give rise to a bright-line rule is that statutory terms are only rarely entirely world-based or law-based. Rather, they often involve both legal meaning making and meanings that develop independently of legal discourse. Courts that take the difference into account must thus engage with the way that different meaning givers can participate in interpreting a single term.

For instance, in *United States v. Deaton*, a Clean Water Act case, the court based its reasonableness assessment on both legally-derived and empirically-derived meanings.[207] The Clean Water Act requires landowners to acquire a permit from the Army Corps of Engineers before discharging "fill material into 'navigable waters.'"[208] The

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205. *Id.* at 592; *id.* at 607 (Powell, J., concurring) ("[I]f any national policy is sufficiently fundamental to constitute such an overriding limitation on the availability of tax-exempt status under § 501(c)(3), it is the policy against racial discrimination in education.").

206. *Id.* at 585. Grounding the meaning of statutory terms in antecedent legal forms like common law and equity is a well-known judicial approach to interpretation. *See, e.g.*, Great-W. Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209-10 (2002) (holding that the availability of equitable relief under the Employee Retirement Income Security Act of 1974 was limited to relief available under equity). It is, however, sometimes controversial. *See, e.g.*, Tracy A. Thomas, *Justice Scalia Reinvents Restitution*, 36 LOY. L.A. L. REV. 1063, 1064-65 (2003) (criticizing *Great-West*'s reliance on, as well as its understanding of, equity). The point in my discussion of *Bob Jones* is merely to note the way that the Court treats the concept of exemption as law all the way down, not to evaluate the specific sources of law the Court draws on for its interpretation or how it uses them. I provide a fuller examination of how judicial opinions construct such legal contexts in forthcoming work. Anya Bernstein, *The Construction of Context* (unpublished manuscript)(on file with author).

207. United States v. Deaton, 332 F.3d 698 (4th Cir. 2003).

208. *Id.* at 704 (quoting 33 U.S.C. § 1344(a), (d) (2012)).

statute defines "navigable waters" as "waters of the United States."[209] The Corps had interpreted this term, in relevant part, to include non-navigable tributaries of waters that are themselves navigable, as well as wetlands next to such tributaries.[210]

The *Deaton* plaintiffs had dug a ditch across a wetland on their property, piling the excavated dirt on either side.[211] Runoff from the wetland drained into a separate roadside ditch that bordered their property.[212] That ditch, in turn, drained eventually into the Chesapeake Bay and a navigable river.[213] The Corps had "assert[ed] jurisdiction over the [plaintiffs'] wetlands because they [were] adjacent to the roadside ditch, which [was] a tributary of . . . a traditional navigable water."[214] The Fourth Circuit held that the Corps had properly asserted jurisdiction, rejecting the plaintiffs' argument that the roadside ditch was not subject to Corps jurisdiction because it itself was non-navigable.

The Fourth Circuit engaged with the primarily world-based nature of the term, while situating it within a legal history of interpretation. The court drew on Supreme Court precedent approving the Corps' "jurisdiction [over] adjacent wetlands . . . because of . . . 'the significant nexus between the wetlands and navigable waters.'"[215] While the term "waters of the United States" may originally have been a term best defined by legal communities, Supreme Court precedent itself had injected a crucial world-based element into the interpretive process. Whether wetlands affect navigable waters is not primarily a question for legal actors. It is, rather, an empirical fact, knowledge of which develops as the sciences of water ecology develop.

With this legal background in mind, the Fourth Circuit noted that the Corps had based its interpretation on facts in the world: "The Corps argues, *with supporting evidence*, that discharges into nonnavigable tributaries and adjacent wetlands have a substantial effect on water quality in navigable waters."[216] The court thus based its rationality review on the agency's actual collection and presentation of empirical evidence in support of its statutory interpretation. The agency's interpretive process, in other words, utilized its superior expertise in evaluating non-legal evidence of how water pollution works, and the court deferred to that.[217]

Three years later, the Supreme Court would reject this approach, ruling in *Rapanos v. United States* that the statute granted the Corps jurisdiction over wetlands only if they had a "continuous surface connection" with a "relatively permanent body of water connected to" a navigable body of water.[218] As Todd Aagaard has pointed

209. *Id.* (quoting 33 U.S.C. § 1362(7) (2012)).

210. *Id.* at 708-12 (citing 33 C.F.R. § 328.3(a)(7) (2015)).

211. *Id.* at 703.

212. *Id.* at 702.

213. *Id.*

214. *Id.* at 704.

215. *Id.* at 712 (quoting Solid Waste Agency v. U.S. Army Corps of Eng's, 531 U.S. 159, 167 (2001)).

216. *Id.* at 712 (emphasis added).

217. These cases demonstrate the difficulty of crafting statutory terms to apply to ecological relations. The way that ecological systems involve many seemingly disparate, even scattered, factors that contribute to systemic effects continues to be difficult to capture in the more static, isolationist terminology of traditional legal language, partly because knowledge of ecosystem functioning continues to evolve.

218. Rapanos v. United States, 547 U.S. 715, 742 (2006) (plurality opinion).

out, the plurality opinion in *Rapanos* relied on an uncorroborated—and apparently incorrect—factual premise that "dredged and fill material placed in waterways 'does not normally wash downstream.'"[219]

Unlike the Fourth Circuit in *Deaton*, the *Rapanos* Court treated the terms at issue as primarily law-based—that is, primarily subject to definition by the legal community. It downplayed the world-based aspect of the inquiry by relying on the Justices' own intuitions about how water pollution works, treating the issue of how wetlands affect navigable waters as a question for the legal community to answer.[220] Recognizing the world-based nature of terms at issue, in contrast, would have prevented the Court from summarily adopting a factually ungrounded interpretation of a world-based term.[221]

At the same time, differentiating deference will not solve all of *Chevron*'s problems. Specifically, it will be of limited help in situations involving world-based terms that are themselves the topic of strong political contestation. In especially politicized, polarized situations, differentiated deference may have less to offer, in part because the conflicts within the meaning-giving communities themselves will be greater than agencies or courts can resolve. For instance, when the opinions in *Massachusetts v. EPA* addressed the world-based statutory language of pollution, the Court was unable to find consensus on the scientific views of highly politicized and polarized understandings of climate change, greenhouse gases, and their relation to the types of emissions that the EPA had traditionally regulated.[222] To some extent, any approach to improving and standardizing judicial review of agency decisions will likely be subject to this limitation. We might like an approach to judicial review to resolve major political dilemmas, but in reality it seems unlikely to do so.

This limitation does not, however, present an argument against adjusting the doctrine. For one thing, institutional adjustments of the sort proposed in the previous Section could support and expand the salutary effects of a doctrinal change. For another, the highly politicized and polarizing nature of administrative law issues may be overrated. The most divisive issues heard by the Supreme Court may be the most

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219. Aagaard, *supra* note 98, at 368 (quoting *Rapanos*, 547 U.S. at 744).

220. *Rapanos*, 547 U.S. at 737.

221. An interpretive process approach is thus congruent with Aagaard's proposed approach to "premise facts." *See* Aagaard, *supra* note 98, at 410. Aagaard argues that when courts base evaluations of agencies' statutory interpretations on factual premises not specifically addressed in the administrative record, those judicial interpretations should remain presumptively available for agency reconsideration in the same way that a court's reasonableness assessment remains available for agency reconsideration under *Brand X*. *Id.*

222. *Compare* 549 U.S. 497, 528-29 (2007), *with id.* at 553-559 (Scalia, J., dissenting). At the same time, that case may demonstrate a desire by at least some members of the Supreme Court to give primacy to expert opinions; it has been described as "a companion case to *Gonzales v Oregon*, *Hamdan v Rumsfeld*, and other episodes in which Justice Stevens and Justice Kennedy . . . joined forces to override executive positions that they found untrustworthy, in the sense that executive expertise had been subordinated to politics." Freeman and Vermeule, *supra* note 41, at 52 (citations omitted); *see also* Stephanie Tai, *Uncertainty About Uncertainty: The Impact of Judicial Decisions on Assessing Scientific Uncertainty*, 11 U. PA. J. CONST. L. 671, 674 (2009) (arguing that how courts evaluate scientific knowledge may itself "creat[e] incentives for bias in the production and communication of scientific research, as well as [in courts'] own capacities for assessing such bias," and that courts should approach scientific evidence with caution).

noticeable, but they are not necessarily the most representative.[223] The Supreme Court, after all, is not the only court to review agency action. And even before the Supreme Court, not all issues are equally polarized. For instance, questions about the proper scope of the Army Corps of Engineers' jurisdiction may be quite divisive. Whether "dredged and fill material placed in waterways '. . . normally wash[es] downstream,'"[224] however, should be considerably less so. In other words, differentiating deference will be at its weakest at the points where any judicial standard is at its weakest: when political convictions severely divide opposing parties on every aspect of an issue. But, despite the attention that such situations receive, there is no reason to think that this level of contentiousness characterizes most agency statutory interpretation cases before the Supreme Court—much less the Courts of Appeals.

I call the approach described in this Section an adjustment rather than a change because it fits comfortably into both existing doctrine and existing practice. At the same time, the doctrinal approach is not a panacea, and would certainly work better in combination with the institutional adjustment described in the preceding Section.

This Part has sketched two possible ways to embed the variability of meaning and competence into statutory interpretation review. One implicates a doctrinal shift; the other a new institutional player. There are, however, likely a number of other ways to introduce this understanding into judicial review. Indeed, simply making judges and litigants more aware of these dynamics may help differentiate deference.

IV. The Benefits and Difficulties of Differentiating Deference

This Part elaborates on ways that differentiating deference would improve the doctrines and practices of judicial review of agency statutory interpretations. It then addresses some concerns that my suggestions may raise.

A. Benefits

As this Article has explained, recognizing the dynamics of meaning and competence would give reviewing courts a more realistic understanding of the quality of agency statutory interpretations. Increasing courts' knowledge about the objects they review would help courts make more rational decisions, and give them a way to better articulate the reasoning behind their reasonableness assessments. This Section canvasses some other benefits this recognition would bring.

1. Softening Step One

Recognizing that meaning construction happens differently for different kinds of terms has implications for how *Chevron*'s reasonableness assessment relates to its

223. It is well known that people in general overrate the frequency and probability of situations that are particularly noticeable, even though such situations may be less frequent and probable than other, less salient, ones. *See, e.g.*, KAHNEMANN, *supra* note 158, at 109-98 (explaining decades of work on heuristics and biases that suggest a general human tendency to overrate the importance of highly salient situations).

224. Aagaard, *supra* note 98, at 368 (quoting *Rapanos*, 547 U.S. at 744).

multivalence determination. Specifically, a realistic understanding of meaning production suggests that the more world-based a term is, the more it should be viewed as presumptively multivalent.

Traditional statutory interpretation assumes that every statutory term has one correct meaning, and that courts have the job of identifying that one meaning for good and all.[225] On these assumptions, it makes sense for courts to focus on whether a term is multivalent, while looking for definitive definitions of the kind traditional statutory interpretation assumes must exist. After all, if all terms are imbued with meaning in the same way, and the general run of terms is susceptible to only one meaning, then multivalence must be anomalous—an exception rather than the norm.

Recognizing that meaning is constructed differently for different classes of terms changes this logic. It reveals that, for at least world-based legal terms, multivalence over time and community will be the norm, not the exception. Because of the sociological processes through which they gain meaning, world-based legal terms will *usually* be multivalent. Different communities of meaning givers, themselves bearing different kinds of authorization, will define world-based legal terms differently. And, at least for scientific meaning-giving communities, those definitions will likely change over time. Such terms, therefore, can be presumed to be multivalent both across different communities at a given time, and across time within at least some communities.

This recognition changes the *Chevron* calculus. If world-based legal language is presumptively multivalent, courts do not need to search for the one true meaning that traditional statutory interpretation assumes must exist. Instead, courts, recognizing that at least one class of statutory terms will be expertly defined not by other legal texts but through extra-legal inquiry, can cut short their multivalence determination and proceed to ask whether the agency has undergone a reasonable process to arrive at its current interpretation. This means that, even if the court rejects an agency interpretation in a particular case, it will be more likely to leave the agency flexibility to propose an alternative interpretation at a later time. Reflecting the inherent multivalence of many terms in regulatory statutes, differentiating deference thus promises to give agencies more interpretive flexibility over time.

2. Integrating Realism with the Rule of Law

The rule of law is generally associated with the uniform and predictable application of legal standards.[226] Varying the amount of deference a court gives an agency interpretation from situation to situation may therefore seem to be in tension with that normative commitment. In fact, however, differentiating deference does not undermine rule-of-law values; it supports them. Currently, no standards guide a court's inquiry into the reasonableness of an agency's interpretation of a multivalent statutory term. *Chevron* itself does not specify what tools or approaches courts are to use to make a reasonableness evaluation; neither has subsequent doctrine provided any

225. *See supra* Part I.A.

226. *See, e.g.*, William C. Whitford, *The Rule of Law*, 2000 WIS. L. REV. 723, 724 (describing one common understanding of the rule of law as the norm that "government decisions must be . . . accountable to predetermined standards applied by an independent body" such as a court).

meaningful standards to guide the inquiry. If anything, it is current doctrine that undermines rule-of-law values by providing a blank space in which courts may accept or reject an agency's interpretation without much consideration.[227]

Differentiating deference can give meaning to *Chevron*'s concept of "reasonable" interpretation and give courts a meaningful way to fulfill their "boundary maintenance" work.[228] By asking courts to be realistic about the limits of their own interpretive powers as well as about the actual interpretive processes employed by the agency in a given case, differentiating deference would help courts ensure that neither agencies nor courts interpret blithely.

It could also help balance the formalist and functionalist tendencies that Pildes describes.[229] This conclusion seems elusive if all evaluations of statutory interpretation are considered equally within the expertise of a reviewing court. But, as Part II explained, statutory terms differ not just in multivalence and clarity, but in the linguistic communities that contribute to, and take charge of, their development.[230] Different kinds of statutory terms are differently available for court interpretation. A court can feel more comfortable taking a formalist approach with law-based legal language, where courts are at least as expert as agencies in attributing meaning, and a functionalist approach with world-based legal language, where actual agency capabilities and conduct become more important to interpretation. Differentiating their approach to deference would present courts with a way to accommodate both linguistic reality and the formalist-functionalist tensions within existing doctrine.

3. Reconciling *Chevron* and Arbitrary and Capricious Review

One of the enduring mysteries of the *Chevron* revolution is how its judge-made standard of review for agency statutory interpretations should relate to the APA's statutory standard of review for agency policy decisions.[231] Scholars have pointed to *Chevron*'s reasonableness assessment inquiry as an indication of the doctrine's incoherence and the judiciary's inability to reconcile statutory with judge-made standards of judicial review.[232] Courts, in turn, vary in their approach.[233] Some distinguish *Chevron* from arbitrary and capricious review,[234] while others attempt to combine the two.[235] The Supreme Court, in turn, has walked a fuzzy line, stating that when a

227. *See supra* Part I.

228. *See* Eskridge, *supra* note 48, at 621.

229. *See* Pildes, *supra* note 144, at 2.

230. *See supra*, Part II.

231. *See* 5 U.S.C. § 706(2)(a) (2012) (requiring courts to determine whether an agency decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

232. *See* Jack M. Beermann, Chevron *at the Roberts Court: Still Failing After All These Years*, 83 FORDHAM L. REV. 731, 746 (2014); Foote, *supra* note 20.

233. *See supra* Part I.C.

234. *See, e.g.*, Nat. Res. Defense Council v. EPA, No. 12-1321, slip op. at 14 (D.C. Cir. Dec. 23, 2014).

235. *See, e.g.*, Verizon v. FCC, 740 F.3d 623, 636 (D.C. Cir. 2014) ("The APA's requirement of reasoned decision-making ordinarily demands that an agency acknowledge and explain the reasons for a changed interpretation."); Agape Church, Inc. v. FCC, 738 F.3d 397, 410 (D.C. Cir. 2013) ("The analysis of disputed agency action under *Chevron* Step Two and arbitrary and capricious review is often 'the same, because under *Chevron* step two, [the court asks] whether an agency interpretation is arbitrary or capricious in substance.'" (quoting Judulang v. Holder, 132 S. Ct. 476, 483 n.7 (2011))).

court evaluates the reasonableness of an agency statutory interpretation, it "ask[s] whether an agency interpretation is 'arbitrary or capricious in substance.'"[236] Yet the Court has never advocated using the tests, standards, or doctrine that guide arbitrary and capricious review of agency action to guide *Chevron*'s reasonableness assessment.[237]

It is not immediately clear, then, what it means for a court to ask whether "an agency interpretation is 'arbitrary or capricious in substance.'"[238] Scholars, in turn, have suggested a range of approaches to this uncertain relationship, from separating the standards, to integrating them, to overruling *Chevron* altogether and using the APA standard for all administrative review.[239] Differentiating deference cannot solve this problem, but can ameliorate it by giving the reasonableness inquiry standards and coherence.

If the doctrine treats statutory interpretation review as a separate inquiry, differentiating deference can help give courts a realistic sense of how meaning is constructed in the administrative context. If, on the other hand, the doctrine incorporates statutory interpretation review with the arbitrary and capricious standard, differentiating deference will give content to the arbitrary and capricious inquiry. Insofar as arbitrary and capricious review requires courts to determine whether the agency considered relevant factors, for instance, differentiating deference can help specify what constitute relevant factors for the construction of statutory interpretation. Specifically, as I have demonstrated, the social distribution of linguistic labor presents a relevant consideration when interpreting a statutory term. Insofar as *Chevron* reasonableness moves toward arbitrary and capricious review, then, the analysis presented here would help to define the factors relevant to a non-arbitrary interpretation of a term. In that sense, differentiating deference can help make sense of the reasonableness assessment regardless of which direction it takes.

Moreover, differentiating deference echoes the arbitrary and capricious standard's general orientation toward the process of agency decision-making. Arbitrary

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236. *Judulang*, 132 S. Ct. at 483 n.7 (quoting Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 53 (2011)).

237. As Jack Beermann has emphasized, *Chevron*'s reasonableness assessment "asks simply whether the agency's interpretation is reasonable or permissible," while arbitrary and capricious review is more elaborated, "ask[ing] whether the agency took a hard look at the issues relevant to the policy decision under review, whether the agency considered the relevant factors, whether there is a rational connection between the facts found and the choice made, whether the agency made a clear error in judgment, and whether the agency decision 'is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" Beermann, *supra* note 232, at 745 (quoting Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

238. *Judulang*, 132 S. Ct. at 483 n.7 (quoting *Mayo Found.*, 562 U.S. at 53).

239. *See, e.g.*, Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611 (2009) (arguing that arbitrary and capricious review should be doctrinally separate, and serve a different purpose, than statutory interpretation review under *Chevron*); Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 779 (2010) (arguing that arbitrary and capricious review should be the standard for statutory interpretation review); Foote, *supra* note 20, at 676 (arguing that the statutory interpretation inquiry, while potentially useful in marginal cases, has undergone "mission creep" and displaced arbitrary or capricious review, which should remain primarily because it is both the more coherent and the statutorily mandated form of judicial review); Levin, *supra* note 29, at 1254 (arguing that *Chevron* Step Two and arbitrary and capricious review "should be deemed not just overlapping, but identical"); *see also* discussion *supra* note 60.

and capricious review, after all, primarily asks not whether the agency made a good decision, but whether it made its decision in an acceptable way: by considering relevant factors and drawing plausible conclusions. Recognizing the differentiated quality of meaning construction and of institutional competence suggests a similar orientation. Rather than asking about the quality of an agency's statutory interpretation per se, such differentiation pushes courts to ask how well the agency manages its interpretive process, and how much better it is at doing that interpretation than a court would be.

Because it shares this orientation, a differentiated approach to the reasonableness inquiry echoes arbitrary and capricious review in a way that can increase the coherence of judicial review across different kinds of agency decisions. Asking whether an interpretation is "arbitrary or capricious in substance"[240] may thus mean taking the process-focused orientation of arbitrary and capricious review into the statutory interpretation context, while tailoring it to the particularities of linguistic meaning making.

4. Facilitating Inter-Institutional Dynamics

A differentiated approach treats both meaning production and agency competence in a realistic way. This is particularly appropriate in the administrative review context, which has been described as the realist avant-garde of statutory interpretation.[241] As Abbe Gluck has pointed out, most statutory interpretation approaches do not attempt a realistic appraisal of how statutes are actually drafted, relying instead on normative principles and ideal-typic representations of the legislative process.[242] In contrast, agency statutory interpretation review doctrine reflects an unprecedented interest in, and attention to, the realities of statutory drafting.[243] In this area, then, courts are already using doctrine to take into account how other institutions actually work.

So far, however, they have done so with respect to legislatures, rather than agencies. Courts' primary focus in this project has been on the drafting of statutes by legislatures. This focus, moreover, has had dynamic inter-institutional effects. As Gluck's research with Lisa Shultz Bressman has shown, congressional statute draft-

240. *Judulang*, 132 S. Ct. at 483 n.7 (quoting *Mayo Found.*, 562 U.S. at 53).

241. *See* Gluck, *supra* note 4, at 620 (arguing that the doctrine governing judicial review of agencies' statutory interpretation is more sensitive to, and interested in, the realities of the legislative process than are other approaches to statutory interpretation).

242. *Id.* (noting that, even when justifications for statutory interpretation canons—such as the claim that canons reflect how Congress drafts statutes—rest on empirical claims, "the Court does not seem at all interested in verifying the accuracy of these assumptions").

243. *Id.* at 621 (explaining that the Court has been more explicit about the relation between statute drafting and interpretation in the agency review context than elsewhere in statutory interpretation doctrine, and that the doctrine "has occasioned a vigorous public debate in the Court . . . about how much doctrine should or does reflect congressional practice; how much complexity the system will tolerate; and the costs and benefits of tailored or transsubstantive interpretive rules").

ers are more aware of agency statutory review doctrines than of other statutory interpretation maxims,[244] and use these doctrines more than others when they draft statutes.[245] This finding illustrates a dynamic, dialogic process at work. The *Chevron* doctrine describes Congress as using multivalence to signal delegation, and courts therefore interpret multivalence as signaling delegation. Having become aware of this doctrinal development, statute drafters in fact use multivalence to signal delegation: they understand that this is how the doctrine instructs courts to interpret multivalence.

This reality of statutory drafting, in other words, does not arise from some independent development in congressional practice of which the Court has become aware. Rather, it reflects an ongoing interplay between the two institutions. Courts' administrative review doctrine has affected how Congress drafts statutes, in a dynamic inter-institutional process.

Up until now, most scholarly and judicial attention has focused on Congress and the courts—not on agencies.[246] Yet, Gluck and Bressman's work suggests that attending to agency-internal practices could have salutary effects on both doctrine and agency practice.[247] Elaborating standards for evaluating interpretive reasonableness could initiate the kind of dynamic inter-institutional process that Gluck and Bressman have shown in the statute-drafting realm. Setting standards in this area thus has the potential to increase predictability and rationality in both judicial review and agency practice.

B. Difficulties

Differentiating deference can make judicial review of agency statutory interpretation both more predictable and more meaningful, and can contribute coherence to a doctrine that badly needs it. At the same time, it inevitably raises concerns and questions. This Section addresses the most pressing ones.

1. Doctrinal Fit and Reliance Interests

Since differentiating deference tweaks the well-worn terminology of the *Chevron* inquiry, it may be natural to think that it violates that doctrine's requirements. After all, *Chevron*'s command seems relatively clear: determine whether a term is multivalent and, if it is, decide whether the agency's interpretation of it is reasonable.

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244. Gluck & Bressman, *supra* note 143, at 924-64, 990-1014.

245. *Id.*

246. Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 501-02 (2005) ("[V]irtually no one has even asked, much less answered, some simple questions about agency statutory interpretation: As a factual matter, how do agencies interpret statutes?"). For an investigation of how agencies interpret judicial doctrines of administrative review, see Christopher J. Walker, *Chevron Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 715–21 (2014), which finds that agency employees responding to a survey hold understandings of judicial doctrines of agency statutory interpretation review that resemble those held by the statutory drafters interviewed by Gluck and Bressman. *See* Gluck and Bressman, *supra* note 143 at 924-64, 990-1014.

247. *See supra* notes 244-245 and surrounding text.

As I have shown, however, deciding whether an agency's interpretation is reasonable is not a straightforward task for a court. In fact, how a generalist court is supposed to go about doing that remains quite mysterious.[248] The thrust of the *Chevron* doctrine, meanwhile, lies in letting agencies exercise their authority while ensuring they do not overstep their authorization, and letting agencies use their capabilities while ensuring they do so responsibly. That is entirely compatible with taking account of differential access to the construction of meaning and of the realities of interpretive competence.

Moreover, studies of judicial review of agency statutory interpretation reveal great unpredictability.[249] At first glance, differentiating deference may seem to exacerbate this problem: insofar as it acknowledges that meanings can change over time, my approach may seem to act against whatever reliance interests the current doctrine may serve. But this tension is illusory. In fact, differentiating deference would ground statutory interpretation in meaning-making processes that are more predictable and publicly available than the opaque and unpredictable ones courts currently rely upon. This is because interested parties can have a good sense of which communities will be key meaning makers for specific terms. Just as differentiating deference can help courts learn and adapt to new developments,[250] it can also help interested parties predict what a court will pay most attention to.

That would allow parties to possess reasonable predictive capacities even within the developing, changing situations that often accompany regulatory statutes. For instance, a party with an interest in whether the FDA could regulate tobacco in 1996 might have been forgiven for thinking that, insofar as the statute referred to factual predicates for regulation, the scientific consensus on the effects of tobacco, along with facts about tobacco manufacturers' business practices, would have been key to interpreting it. And indeed, in *Brown & Williamson*, four Justices would have followed this fairly predictable approach.[251] But, five Justices instead found the true meaning of the statutory terms in post-enactment legislative histories. Differentiating deference would have given interested parties reasonable reliance even within a developing situation. Of course, differentiating deference cannot solve the problem of unpredictability, but it can ameliorate it.

It is clear that courts themselves have not settled on a clear standard to guide deference doctrine. If it is to survive—and not everyone thinks it should—the doctrine needs refinement, not retrenchment. Differentiating deference can ground court evaluations in the realities of the things they evaluate, lend coherence to administrative review doctrines, and nudge agencies to improve their interpretive practices. It thus fits into existing doctrinal strictures, but seizes on their gaps to suggest improvements.

248. *See supra* Part I.
249. Eskridge & Baer, *supra* note 20; Mathews, *supra* note 20.
250. *See* Sabel & Simon, *supra* note 169.
251. *See supra* text accompanying notes 109-132.

2. Agency Burden

Once it is clear that differentiating deference fits comfortably with existing doctrine, the strongest objection comes from the perspective of agency function. Courts and Congress impose heavy burdens on already resource-strapped agencies.[252] Requiring agencies to show procedural propriety in statutory interpretation may simply be piling on. Worse yet, it can provide openings for private parties unhappy with the practical effects of agency decisions to use objections to interpretive process to get into court. Surely courts evaluating agency interpretive process will invalidate more interpretations at the reasonableness assessment than courts do now.

One response to this objection would be that making current doctrine more meaningful and rule-bound should be its own reward. From a purely doctrinal perspective, which sees the role of courts as limited to preventing agency overreach and enforcing purely legal standards, this may suffice. But this response is not satisfying to those who believe that inter-institutional dynamics should be harnessed to improve the functioning of government overall. On that view, courts should not only restrain agency overreach, but also enable agency capabilities.[253]

It may be that, from this perspective, any new requirement or evaluative standard places excessive burdens on the agency. But differentiating deference can benefit agencies as well. Dissatisfied private parties are already free to challenge agency statutory interpretations, and although the agency can be fairly confident of being upheld at the reasonableness assessment, it must still worry about being struck down at the multivalence determination—a result that severely burdens its future interpretive flexibility. Treating world-based legal language as presumptively multivalent should significantly ease the initial inquiry for that class of terms, leaving agencies more flexibility to continue defining a term into the future, irrespective of whether the interpretation at issue in a particular case is upheld.[254]

Differentiating deference can thus simultaneously lead to less deference to particular interpretative choices, but to more deference to agencies' general interpretive authority. If the point is to move toward better deference, rather than just toward more or less of it, grounding court evaluations in the realities of meaning making pushes courts in the right direction.

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252. *See* Melnick, *supra* note 35.

253. *Compare* Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—And the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685, 732 (2014) ("[S]tatutory interpretation, as an aspect of law, is necessarily a cooperative endeavor" between courts and legislatures."), *with* Jonathan R. Siegel, *Symmetries—And Asymmetries—Between Theories of Statutory Interpretation*, 99 CORNELL L. REV. ONLINE 182, 192 (2014) (arguing that proponents of textualism, at least, do not see statutory interpretation as a cooperative endeavor because "[t]he fundamental axiom that the text *is* the law leaves much less room for judicial cooperation. The textualists believe that the job of the courts is to apply the law according to its text. If doing so fails to achieve the legislature's objective, that is the legislature's problem, not the courts' problem").

254. *See supra* Part IV.A.1.

3. Court Competence

Some might object that differentiating deference would plunge courts too deeply into agency practices that they are unable to assess. If courts are bad at assessing the substantive reasonableness of agency statutory interpretations, won't they be even worse at assessing how an agency comes to its interpretation of a world-based term?

Not necessarily. With the appropriate background understandings of agency capacities and meaning-giving communities, a court can make a fairly realistic assessment of the extent to which an agency actualizes its interpretive potential. Does the agency consider other possible interpretations and select this one for a reason? Does it consider what might lead it to change its interpretation over time? Courts do not have much experience or expertise in evaluating the meaning of scientific terminology; in contrast, they have considerable experience with evaluating procedures at a relatively high level of generality.

Indeed, courts already undertake this kind of inquiry when applying the arbitrary and capricious standard of review.[255] Differentiating deference would thus cohere, without necessarily conflating, the two primary administrative review doctrines, while posing questions that are uniquely appropriate to evaluating interpretive choices. In addition, a Federal Judicial Center subsection on Administrative Agency Research could help judges determine which meaning-giving communities are the most relevant to a given interpretive process.

V. Toward Better Deference

Chevron's reasonableness assessment is moribund, but it could become a productive part of the judicial review of agency statutory interpretation. Such a change, however, requires recognizing the inherent tension between traditional statutory interpretation and the regulatory statutes to which it increasingly applies. Rather than assuming this tension away, this Article has unearthed some of the factors underlying this poor fit between doctrine and practice.

Interrogating the doctrine's assumptions reveals that *Chevron*'s command to evaluate interpretive reasonableness is more difficult to follow than it claims to be. Traditional tools of statutory interpretation are—by design—no help in evaluating multivalence, and courts are not competent to map out a range of reasonable interpretations themselves. More fundamentally, as this Article has shown, the doctrine conflates distinctions in the interpretive process that are key for evaluating the reasonableness of any given interpretive choice.

First, law-based legal language gains meaning from legal discourse, while world-based legal language is elaborated by communities external to legal process. Second, agencies make that potential competence actual only to varying extents. Acknowledging these distinctions suggests that, in order to face the realities of the administrative state, courts need to become more knowledgeable about the range of both meaning-giving communities and agency capabilities. While the suggestions presented in this Article may lead to more deference in some cases and less in others, the aim should be to improve the quality, not modify the quantity, of deference.

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255. *See supra* Part IV.A.3.

At the same time, a number of issues require further attention. The key question that remains unanswered, and all but unasked, in the literature and the courts is how agency personnel actually go about interpreting statutory terms in practice.[256] Without more information about those practices, judicial review will inevitably remain on an abstract and idealist plane. Learning about agency capacity more generally through the research of an Administrative Agency Research office can help ameliorate this problem, though it will not solve it.

In a similar vein, while it seems quite likely that increased judicial attention to the inter-institutional distribution of interpretive competence and to agency interpretive practices will contribute to an inter-institutional dialogue,[257] it is not clear how that dialogue would actually work in practice. Recent research has illuminated how such a dialogue has operated between courts and Congress,[258] but agencies are, of course, a different beast: they perform a far wider range of work involving statutory interpretation than either courts or Congress; they employ many more people; they are subject to many more mandates and constraints; and so on. Much work remains to be done to investigate the current dynamics of court-agency interaction, in addition to contemplating how my approach might change those dynamics.

Finally, my discussion is pitched largely at the level of doctrine. I do not conduct a wide-ranging, in-depth investigation of how different levels of federal courts treat different kinds of statutory terms. That kind of investigation would give us a better sense of whether deference doctrine is as disaggregated and unpredictable as it seems. It may be, for instance, that some of the observed variation in courts' application of deference doctrines has a foundation in unarticulated intuitions about the different qualities of the terms at issue.

Much relevant research, in other words, remains to be done. This Article takes a first stab by illuminating important facets of statutory interpretation and suggesting ways that recognizing them can improve judicial review.

256. *See supra* note 14.
257. *See supra* Part IV.A.4.
258. *See id.*