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Refining Statutory Construction: Contextualism & Deference

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ABSTRACT. This Article urges a novel structure for marrying statutory construction and *Chevron* deference into a paradigm best described as contextualism. All too often jurists and scholars describe modern statutory construction as dominated by textualism. Textualism is too simplistic and obscures how invariably courts employ a contextualist analysis when construing language. Contextualism, not textualism, is—and always has been—the paradigm for statutory construction. Focusing on contextualism in lieu of textualism promotes an acute focus on what aids in construction a court is willing to entertain, and the Article illustrates that liberal and conservative judges alike employ a contextual analysis while they may volley over whether that analysis includes a consideration of an act's legislative history or purpose. *Chevron's* concentration on the residual effect of that endeavor, or what happens when those aids are insufficiently instructive to warrant deferring to an agency's construction, wrested from a cloudy past an awkward articulation of deference. But it also shied away from signaling how the judicial review provisions of the Administrative Procedure Act would mesh with its announced formula.

This Article chronicles this history, exploring why *Chevron* surfaced as a loadstar, purportedly offering a formula for lawyers and courts to follow. It did so, though, with little apparent appreciation for nuance, or any pretense of resolving what was emerging in the field of statutory construction. The Article follows others in suggesting *Chevron's* demise might not be too disruptive, adding why its loss might facilitate an appropriate awareness that statutory construction is an exercise in contextualism, with seemingly little lost if the APA properly administered materializes. If we accept how contextualism better reflects the path of statutory construction, lawyers and judges can be honest as they debate what and why they accept some aids in construction and not others. It also could signal how agency deference is a residual consequence of how we approach statutory construction. When uncertainty persists after whatever aids in construction a court considers, it seems only logical that an agency's construction ought to be afforded considerable weight, if reasonable. After all, if reasonable it tilts the balance.

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> If judges refuse to discard such absurdities as *expressio unius*, if they will play fast and loose with "plain meanings" on which substantial judicial authorities can not themselves agree, if they will impute imaginary intentions to fictitious entities, if they will arbitrarily select purposes and equally arbitrarily forecast consequences, they can not hope to convince laymen that they are acting rationally or usefully.[1]

INTRODUCTION

"In the beginning was the word," so wrote Rudolph van Jhering.[2] But "word(s)" grouped together to form language invariably lack precision. Often, they are informed by the linguistic paradigm in which they are used. And sometimes, words are employed with little appreciation for how they may be understood over time as society slowly changes.[3] What happens, then, when those words and corresponding language are part of the law—directives that comprise the lex lata and instruct some actor on what behavior is acceptable, or not acceptable? How *do* and *should* words contained in statutes passed by a legislative body with political legitimacy get interpreted by those branches of government possessing the corresponding legitimate power of application or interpretation?[4] The former represents an ontological inquiry, while the latter requires developing normative judgments. These are nettlesome issues.

Understanding them, though, demands exploring the convergence of administrative law scholars' focus on discretion, pointedly *Chevron*[5] deference, and legislation scholars who debate theories of statutory construction and the corresponding tools of construction.[6] I posit that many discount this convergence,

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[1] Max Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863, 885 (1930).

[2] L. L. Fuller, *Legal Fictions*, 25 Ill. L. Rev. 363, 371 (1930).

[3] John Dewey once opined, "statutes have never kept up with the variety and subtlety of social change. They cannot at the very best avoid some ambiguity, which is due not only to carelessness but also to the intrinsic impossibility of foreseeing all possible circumstances, since without such foresight definitions must be vague and classifications indeterminate." John Dewey, *Logical Method and Law*, 10 Cornell L. Rev. 17, 26 (1924).

[4] Matthew Stephenson, for instance, explores how to assess whether Congress allocates that choice to an agency or the judiciary. Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 Harv. L. Rev. 1035 (2006). His—albeit preliminary and exploratory modeling—suggested that Congress may have a strong interest in delegating interpretive power to agencies when resolving several small issues with "long term significance," while to the judiciary for a large number of issues but with "relatively short-term significance." *Id.* at 1061.

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

[6] I prefer "construction," not "interpretation"—even though casebooks seemingly carelessly

and yet the extant approach toward statutory construction and its practical implementation drives deference. And today it relegates to the margins the *Chevron* debate. *Chevron* has served as a meta rule, placing statutory construction into one box—*Chevron's* step one, and discretion into another—step two. We now, of course, have infused into this construct the Major Questions Doctrine, seemingly adding a clear statement rule as either part of or preceding the step one analysis and engulfing everything into step one.[7] But it has, indeed, been the aggrandizement of

employ interpretation. *E.g.,* Hillel Y. Levin, Statutory Interpretation: A Practical Lawyering Course (2014); Caleb Nelson, Statutory Interpretation (2011). Interpretation connotes an unrealistic methodological process of applying particular facts to particular language. Peter Tiersma, therefore, suggests that we avoid masking what occurs by instead appreciating how the process is construction, not interpretation: "The rhetoric of interpretation hence serves to legitimize a particular construction. However, it may also mask factors besides interpretation that are at play. Passing off construction as mere interpretation obscures the real issue: how should judges construe a statute when interpretation fails?" Peter M. Tiersma, *The Ambiguity of Interpretation: Distinguishing Interpretation from Construction*, 73 Wash. U. L. Q. 1095, 1101 (1995). Back in the 1830s, Francis Lieber distinguished construction from interpretation, with the former "drawing conclusions respecting subjects, that lie beyond the direct expression of the text, from elements known from and given in the text—conclusions which are in the spirit, though not within the letter of the text." Francis Lieber, Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics, With Remarks On Precedents and Authorities, 56 (Enlarged ed. 1839). Interpretation, by contrast, "is the art of finding out the true sense of any form of words: that is, the sense which their author intended to convey, and of enabling others to derive from them--the same idea which the author intended to convey," and the accompanying "art which teaches us the principles" that inform how we "find the true sense." *Id.* at 23. Yet others suggest that construction and interpretation have been used interchangeably for years, although preferring the term construction as well. *See* Robert J. Martineau, *Craft and Technique, Non Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 Geo. Wash. L. Rev. 1 n. 1 (1993).

[7] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2609–610 (2022); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety and Health Admin, 142 S. Ct. 661, 665 (2022) (per curiam); Alabama Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2485, 2487 (2021) (per curiam); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 315 (2014); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000). Many of these cases, however, effectively employed *Chevron*. In *Brown & Williamson*, the Court applied a contextual analysis to avoid moving to step two and affording the agency discretion. *Id.* at 160–01. To be sure, the Court quoted former Justice Breyer's problematic approach toward administrative law in his article. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363 (1986). Breyer's article, soon after *Chevron* and attempting to chart the course of deference, placed deference inside the theory that agencies are more acutely capable of discerning congressional intent—that agencies have a better understanding of the law than the judiciary. *Id.* at 369. The Court further relied on its prior decision in *MCI Telecomms. Corp. v. AT&T Co.*, where the Court's reasoning first followed a traditional statutory construction approach—whether soundly or not—toward interpreting the

step one, or stated differently the corresponding appreciation that statutory construction is now animated by *contextualism*, that renders *Chevron* step two effectively muted by the resulting Administrative Procedure Act (APA) inquiry into whether an agency acted arbitrarily, capriciously, abused its discretion, or otherwise violated the law—including the APA's procedural proscriptions.[8]

Moving beyond the *Chevron* mask toward contextualism presents an honest approach toward educating and training future lawyers about the practice of law and advocacy before the judicial branch. It seems pointless to debate whether Max Radin too caustically dismissed the notion of discerning any actual, factual, or subjective intent animating the passage of particular words or phrases, or whether we can explore intellectually how public choice theory, rent seeking, or the vagaries of the legislative process influence our perception of approaching "intent."[9] At the risk of academic heresy, theories of statutory construction are equally of marginal

word modify suggested that the agency's interpretation of the Communications Act was beyond the bounds of a permissible one, arguably under *Chevron* step two. 512 U.S. 218, 229 (1994) ("Since an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear. . ."). And in *Utility Air Regulatory Group v. EPA*, the Court purportedly applied *Chevron* to conclude that the agency's interpretation of the CAA's PSD program and Title V was unreasonable, using the language of *Chevron* step two—relying on a contextual analysis. 573 U.S. at 321.

[8] In *Encino Motors*, the Court suggested that a violation of the APA—due to arbitrary and capricious decision-making or violating another APA procedural proscription—would not receive *Chevron* deference. Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 223–24 (2016). Later, in 2018, the subsequent *Encino* Court (Thomas, J.) objected to using silence in the legislative history as adding any interpretative weight to what it thought was clear statutory language. Encino Motors, LLC v. Navarro, 138 S. Ct. 1134, 1138, 1143 (2018). Justice Thomas too, though, emphasized "context" as the operating principle for interpretation. *Id.* at 1141.

[9] Radin, *supra* note 1, at 872.

utility.[10] Theories generally purport to legitimize legal process.[11] They often reflect

[10] Discussions about linguistic construction ought to distinguish theories from methodologies, and then methodologies from objectives, but often these concepts become conflated. A theory generally either explains behavior or purports to justify (legitimatize) behavior. A goal, conversely, is simply that—an actor's desired outcome; while the method is how the actor seeks to achieve that desired outcome. Often, scholars refer to "textualism" as a theory premised on "plain meaning." *E.g.,* Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 Geo. L.J. 1119, 1121 (2011). Nourse, for instance, explores what she describes as theories but perhaps more precisely are assumptions about the congressional process that inform how judges approach their task as faithful agents. *Id.* It seems easier to discuss as "theories" for statutory construction the relational or faithful agent model, which, as Professors Gluck and Bressman observe, "has had remarkable staying power as the 'umbrella' justificatory model of most interpretative approaches, even though it offers little specific assistance in answer questions" about assumptions, goals, processes or why some tools of construction might be better than others. 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, 907 (2013). Of course, their analysis then suggests that the faithful agent may be empirically unsatisfying. *Id.* They continued their empirical survey in a second article, Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation From the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 Stan. L. Rev. 725 (2014).

[11] Stanley Fish once described a theory as "something a practitioner consults when he wishes to perform correctly, with the term 'correctly' here understood as meaning independently of his preconceptions, biases, or personal preferences." Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 Yale L.J. 1773, 1779 (1987). Fish, then, in my opinion, suggests that theories have little value other than to justify a conclusion. *Id.* Ronald Dworkin, for instance, chastised constitutional theorists for attempting to easily classify modes of analysis as either interpretive or non-interpretative. Ronald Dworkin, A Matter of Principle 35 (1985) (observing that *any* methodology is necessarily interpretative). Dworkin appreciates how language is often vague and eschews suggesting that the task of exploring its vagaries involves revealing any true "right answer." *Id.* at 131. He cogently captures how a lawyer's endeavor ought to embrace "interpretation as a general activity, as a mode of knowledge, by attending to other contexts of that activity," including from literature. *Id.* at 148. Indeed, his implore to use literature and linguistics carries resonance for those engaged in testing the scope of constitutional provisions, such as the Second Amendment, where the Court referenced and relied upon an amicus brief from linguistic professors addressing language usage. N.Y. State Rifle and Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2178 (2022). But Dworkin's occasional refrains about what lawyers may argue never quite approach explicitly acknowledging that lawyers *must* argue whatever legitimate arguments they can in the adversarial system to advance zealously their client's cause. Dworkin, *supra* at 129. Fish aptly critiques Dworkin's approach (suggesting he is perhaps more a rhetorician than theorist), but of particular note is Fish's claim that Dworkin fails "to grasp the implications of an enriched notion of practice. . . is at one with his inability to understand what it would mean to be an agent embedded in that practice." Fish, *supra* at 1789. And while linguistics, for instance, seemingly justified the Court in concluding that the Second Amendment embraces an individual right,

a normative judgment about constitutional structure and the role of the judiciary vis-à-vis the legislature.[12] And they arguably mask grounds for decision-making under the guise of fabricating a unifying structure around an otherwise disparate decision-making process.[13] Cass Sunstein and Adrian Vermeule, for instance, agree that grand interpretative theories are of little value for addressing precise interpretive questions.[14] Yet academics and even some members of the judiciary cull

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advocacy and *preferences* undoubtedly produced the outcome. The germinating interpretation that the Second Amendment focused on collective not individual rights only changed when advocacy groups, emerging scholarship, and propitious circumstances combined with a conservative Court and afforded the opportunity for a new interpretation. *See generally* Marcia Coyle, The Roberts Court: The Struggle for the Constitution 123–96 (2013) (discussing the history surrounding the gun rights cases); *see also* Adam Winkler, Gun Fight: The Battle Over the Right to Bear Arms in America (2011) (chronicles history prior to and including the *Heller* case).

[12] For instance, textualists that rejects legislative history as an effective tool for statutory construction often claim that it violates the constitutional structure because Congress voted on and presented to the President only the enacted language. *See* John F. Manning, Matthew C. Stephenson, Legislation and Regulation: Cases and Materials 23 (4th ed. 2021); s*ee also id.* at 25 (many of the interpretive methods are "grounded in the principle of *legislative supremacy*"); *see infra* note 23. Purposivists—albeit not a clearly defined community—often refer to a legislature's broader aim or ultimate objective, rather than any narrow intent tied to particular legislative language. *See* Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 Tul. L. Rev. 803, 815 (1994). Former Justice Breyer, whose background with the legislative process naturally influenced his philosophy, actively supported purposivism as a mechanism for promoting democracy. Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution 98–99 (2005).

[13] Building on similar principles that animated Karl Llewellyn, some scholars during the last few decades have de-emphasized theory and focused instead on practical reason. *See* Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 Vand. L. Rev. 533, 538 (1992); *see also* William N. Eskridge, Jr., Phillip P. Frickey, *Statutory Interpretation as Practical Reason*, 42 Stan. L. Rev. 321 (1990). Farber explains how "advocates of practical reason argue that statutory interpretation cannot be a mechanical application of rules to statutory texts, but instead involves a complex judgment about how best to harmonize text, legislative history, statutory purpose, and contemporary public policy." Farber, *supra*, at 541. This statement, however, ignores the principal point of this Article, that courts are but arbiters in an adversarial system where lawyers present "stories" intent on persuading jurists that their "stories" are better than those of their adversaries. Robert Martineau, too, questions the focus on theories, and instead elevates the status of canons as having more relevance to what judges employ in practice. Martineau, *supra* note 6, at 5. Frank Cross suggested a while back that a preliminary analysis of the Court's decisions revealed a pluralism in its interpretative approach. Frank B. Cross, *The Significance of Statutory Interpretative Methodologies*, 82 Notre Dame L. Rev. 1971 (2007). Theories, however, may be more fundamental for constitutional interpretation. *See* Reed Dickerson, *Statutes and Constitutions in an Age of Common Law*, 48 U. Pitt. L. Rev. 773, 775 (1987).

[14] *See* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 Mich. L. Rev.

to the extreme theories and perceived differences among those who claim to be textualists, originalists, interpretivists, or those who ascribe to purposivism.[15] This is particularly troubling because the overwhelming majority of lawyers confront statutory construction questions before state and lower federal courts with judges who may not enjoy the same luxury in their opinion of exploring theories explicitly;[16] the Supreme Court, conversely, is by its very function deciding "hard cases" not necessarily demonstrative of the judiciary overall.[17]

Theories, after all, afford neither the legal advocate nor the judge tasked with construing language tools for advocacy or decision-making. In fact, in any particular case, each of them must coexist with the other and the outcome of the case will depend upon any optically legitimate tools of construction, marshaled first by the advocates and then by the court. We all must confront the text engendering a dispute, whether as an advocate or a judge, and address at the outset the language at issue.[18] And even those who relish the debate among competing theories acknowledge that judges often straddle theoretical camps.[19] This is where

885, 886 (2003); *see also* Adrian Vermeule, Judging under Uncertainty: An Institutional Theory of Legal Interpretation (2006). Unfortunately, they suggest instead the question should be about the capacity of particular institutions to interpret text, which theoretically could be different depending upon attentive or non-attentive legislatures. Sunstein & Vermeule, *supra* at 886.

[15] *See* Caleb Nelson, *What is Textualism*, 91 Va. L. Rev. 347, 348–49 (2005) (noting overlap between textualists and interpretivists). For articles discussing textualism, see generally John F. Manning, *What Divides Textualists from Purposivists?*, 106 Colum. L. Rev. 70 (2006). Manning favors a new purposivism. John F. Manning, *The New Purposivism*, 2011 Sup. Court Rev. 113, 119 ("[T]he new, textually-structured purposivism approach fits quite comfortably with the key premises of the Legal Process materials, particularly when viewed in light of the Court's modern recognition that Congress enjoys broad power to grant or withhold discretion from the law's implementers.").

[16] In *United States v. Safehouse*, however, District Judge Gerald Austin McHugh aptly presents at the outset of his opinion differing methods for statutory construction, with his opinion effectively employing what I characterize as modern contextualism. United States v. Safehouse, 408 F. Supp. 3d 583, 588–92 (E.D. Pa. 2019).

[17] *See* Kent Greenawalt, Statutory and Common Law Interpretation 14–15 (2013).

[18] See William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation*, 1776-1806, 101 Colum. L. Rev. 990, 1090 (2001); Jonathan R. Seigel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. Rev. 1023, 1057 (1998); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 Colum. L. Rev. 1, 30 (2006).

[19] Nelson, *supra* note 6, at 352–53. This is true for even for those select few on the bench who have had the luxury of exploring theories of statutory construction, such as Judges Posner and Easterbrook. For instance, Daniel Farber's empirical analysis of Judge Posner's and Judge Easterbrook's opinions suggests that, while the two judges overtly express differing theories for statutory construction, those differing theories seem to matter little in practice. Daniel A. Farber,

Adrian Vermeule is simultaneously incisive in his inquiry into legal interpretation and yet falters in presenting any viable suggestions for the profession. His book, *Judging Under Uncertainty*,[20] canvasses the interpretive dilemma and need for constraints on the interpretative process yet falls into the trap of believing that a limited or cabined "plain meaning" analysis is viable—an assumption I hope to debunk in this Article.[21]

Once we accept the modern paradigm for statutory construction involves *contextualism*, not textualism, the practical significance of theories dissipates. Today, it seems commonplace to describe modern judicial interpretation as promoting some form of textualism.[22] To be sure, its critics have been prolific.[23] They generally surface to portray how textualism inappropriately subverts an appropriate inquiry into a statute's purpose, its legislative history, or the evil Congress sought to remedy; while others explore a seemingly middle textualist ground, one capable of affording sufficient judicial flexibility while cabining excessive judicial power.[24] Judge Posner, for instance, posits how judges effectively

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Do Theories of Statutory Interpretation Matter? A Case Study, 94 Nw. U. L. Rev. 1409 (2000). Farber does not suggest, however, that we should "dismiss completely the potential effect of theory." *Id.* at 1433.

[20] Adrian Vermeule, Judging Under Uncertainty: An Institutional Theory of Legal Interpretation (2006).

[21] *Id.* at 192–96, 226–27. He adds that "[t]he great virtue of the wholesale exclusion of legislative history, from the standpoint of judicial decision costs, is that it provides a comparatively (although not perfect) stable and enforcement rule." *Id.* at 195–96. This is untenable, because lawyers cannot ignore potentially relevant information in presenting their case. Stanley Fish suggests that Vermeule's approach leaves the "interpreter" with unfettered discretion to implement a personal policy choice untethered to intended meaning, much more so than a search for the author's intent. Stanley Fish, *What is Legal Interpretation? There is No Textualist Position*, 42 San Diego L. Rev. 629, 639 (2005).

[22] *See* Gilliam E. Metzger, *The Roberts Court and Administrative Law*, 2019 Sup. Ct. Rev. 1, 39; Jonathan T. Molot, *The Rise and Fall* of *Textualism*, 106 Colum. L. Rev. 1 (2006); Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 Yale L.J. 788, 792–93 (2018).

[23] *See* Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. Pa. L. Rev. 117, 168–78 (2009) (presenting textualism as infused with a formalistic axiom that would prove its undoing).

[24] *See* William N. Eskridge, Jr., *The New Textualism*, 37 U.C.L.A. L. Rev. 621, 623–24 (1990) (describing its emergence and endorsing aspects of the new approach and portraying the shift from soft plain meaning to a harder plain meaning approach). Professor Eskridge endorsed courts employing clear statement rules to avoid "unnecessary recourse to legislative history." *Id.* at 688. David Driesen laments the Court's tendency to avoid affording a statute's goals in the interpretative quest, albeit suggesting that the Court has and should incorporate purposeful (exploring purpose when appropriate) construction. David M. Driesen, *Purposeless*

operate within the confines of what might be called a legitimacy space: they are generally constrained pragmatists, "boxed in . . . by norms that require of judges impartiality, awareness of the importance of the laws being predictable enough to guide the behavior of those subject to it (including judges!), and a due regard for the integrity of the written word in contracts and statutes."[25] In a thoughtful comment by Tara Leigh Grove, she explores how textualism involves competing strands.[26] She distinguishes between formalistic and flexible textualism, favoring the former as a more secure method for constraining the judiciary—"emphasi[zing] semantic context, rather than social or policy context."[27]

But textualism is a mask. Its growing capaciousness allows for competing strands because those strands reflect a broader understanding of why statutory construction is an exercise in *contextualism*. The debate is not whether anyone is or is not a contextualist. Everyone is. After all, even when the Court solidified the Major Questions Doctrine, it began its analysis as it has routinely by observing how "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their *context* and with a view to their place in the overall statutory

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Construction, 48 Wake Forest L. Rev. 97 (2013). Kevin Stack somewhat relatedly argues how purposivism provides an appropriate method for agency interpretative decision-making. Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 Nw. U. L. Rev. 871 (2015). As brief writers know well, purpose and legislative history might surface implicitly in conjunction with an explanation of the statute, preceding any analysis others might find troubling. *E.g.,* Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1167 (2021) (Justice Sotomayor provided the background to the Telephone Consumer Protection Act of 1991).

[25] Richard A. Posner, How Judges Think 13 (2008); *see also id.* at 230 (describing his constrained pragmaticism). Posner, for example, portrays how Justice Scalia's approach in *Whitman v. Am. Trucking Ass'ns* reflects a measure of cabined decision-making, because Justice Scalia most likely could not have written an acceptable contrary opinion. *Id.* at 51–52 (citing Whitman v. Am. Trucking Ass'n, 531 U.S. 457 (2001)). Yet Posner acknowledges how judges operate within discretionary space, and therefore as "*occasional* legislators." *Id.* at 81. Here, Judge Posner mirrors some early twentieth century progressives, such as Chief Justice Stone. *Id.* at 258 (quoting Harlan F. Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4, 20 (1936)). Indeed, Judge Posner's affinity toward Justice Cardozo as a pragmatist underscores his roots in the progressive tradition of judging. *Id.* at 257. *See also* Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 Case W. Res. L. Rev. 179, 195 (1987) (appreciating how a statute can have a purpose). For Judge Posner's counterpart, Judge Easterbrook presents a different perspective. *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J. L. & Pub. Pol'y 61 (1994); Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533 (1983).

[26] Tara Leigh Grove, *The Supreme Court 2019 Term: Comments: Which Textualism?*, 134 Harv. L. Rev. 265 (2020).

[27] *Id.* at 269.

scheme."[28] The debate, instead, is how dueling lawyers marshal contextual arguments and which tools of construction and forms of argument a judge will consider when deploying a contextual analysis.

Deference, consequently, is a residual doctrine. Contextualism's accordion style of reasoning allows the judiciary to choose when and what informs Congress's intent, and only when uncertainty remains does deference surface. Only after that occurs may an agency express its reasonable, non-arbitrary and capricious, record supported, and otherwise consistent with law interpretation. Though the size of contextualism's umbrella may swell or shrink according to what arguments a judge will accept within its coverage, contextualism ought to be acknowledged as the operative paradigm for statutory construction. Deferring to an agency's construction only surfaces when uncertainty still persists after a court has exhausted whatever tools of construction it decided to consider.

This Article urges a structure for marrying statutory construction and deference in a paradigm governed by what has creeped into modern contextualism. Part I chronicles how the notion of affording agencies deference surfaced indirectly as a product of a cabined approach toward judicial review. From the country's nascent years onward, the path toward deference expanded, yet produced only marginal guidance.[29] *Chevron* then surfaced as a loadstar, purportedly offering a formula for lawyers and courts to follow. It did so, though, with little apparent appreciation for nuance, for its role in cases generally governed by the APA, or for how any line would be drawn between when a court would limit the inquiry to a matter of statutory construction or when it would opt to defer to any agency's construction—if permissible. I suggest, along with others who have expressed reservations before,[30] that *Chevron's* demise would resurrect a heightened awareness on statutory construction, with seemingly little lost if the APA properly administered materializes. *Chevron*, however, masked an expanding emphasis during the 1980s on statutory construction. It focused the conversation into one about the use of purpose or legislative history, suggesting a barrier between those inquiries and merely an examination of the text.

This ushered in the ostensible reigning textualist paradigm, which obscured how the judiciary always has been *contextualists*, sparring over what aids in construction (including purpose or legislative history) would be warranted in any particular case. Part II, therefore, posits that *contextualism*, not textualism, is—and always has been—the paradigm for statutory construction. If we accept how

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[28] West Virginia v. EPA, 142 S. Ct. at 2607, 2614 (emphasis added).

[29] *See* discussion *infra* Part I.

[30] *See infra* note 136–41 and accompanying text.

contextualism better reflects the path of statutory construction, lawyers and judges can be honest as they debate what and why they accept some aids in construction and not others. It also could signal how agency deference is a residual consequence of how we approach statutory construction. When uncertainty persists after whatever tools of construction are considered, it seems only logical that an agency's construction ought to be afforded considerable weight, if reasonable. After all, if reasonable it tilts the balance.

I. A PATH TOWARD DERFERENCE

Chevron wrested its precepts from a muddled antiquity. Its story ought to begin with an appreciation for how deference is inexorably linked to its parent principle of statutory construction. Discretion, after all, occurs if there is wiggle room for discerning a drafter's intention, and it surfaces only after there is a judgment by some entity that particular language enjoys some play in the joints. That means first deciding how to make that judgment—or, how a judge should construe statutory language. From the nation's founding to the early twentieth century, the issue of statutory construction often surfaced amid dialogues about the nature and function of law itself.[31] Specific discourses involving the nature and function of statutory construction, however, surfaced more prominently with the emergence of pragmatic instrumentalism in the twentieth century.[32]

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[31] In *Federalist No. 37*, James Madison observed that laws naturally are imprecise and receive their meaning through a common law methodology. The Federalist No. 37, at 228–29 (James Madison) (Clinton Rossiter ed. 1961). In Noy's well-circulated treatise on maxims, the author observed that acts of parliament ought to be given a "reasonable construction, to be collected out of the words of the act only, according to the true intention and meaning of the maker." William Waller Hening, Maxims in Law and Equity, Comprising Noy's Maxims, Francis's Maxims and Branch's Principia Legis Et Aequitatis, with a Translation of the Latin Maxims, and References to Modern Authorities Both British and American 54 (1824). William Eskridge and John Manning have a lively debate about the early founders' views toward, effectively, employing ancient law principles and what legal historians refer to as the instrumentalism of the period, that debate seemingly ignores too many variables, including the distinction between fundamental versus positive law, and the role of the common law and higher law principles in antebellum America. *See* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806,* 101 Colum. L. Rev. 990 (2001); John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 Colum. L. Rev. 1648 (2001); John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1 (2001).

[32] Robert Summers refers to those scholars reacting to nineteenth century formalism as pragmatic instrumentalists, when in the context of statutory construction exhibited an interest in facts and policy and the adoption of a purposivism rather than a plain meaning approach toward construction. Robert S. Summers, Instrumentalism and American Legal Theory 276

An early icon, Chancellor James Kent focused particularly on construing statutes and in Lecture XX he explored how discerning the "intention of the lawgiver" required deductive reasoning from an array of sources.[33] And in the 1830s, Francis Lieber wrote his *Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Land and Politics*,[34] where he explained how words are mere "signs" designed to convey ideas or thoughts from one individual to another, and that task of interpretation seeks to "discover . . . the true sense of words"[35] through the use of extraneous principles or rules—hermeneutics. Interest in statutory construction became acute as the movement toward codification and its corollary assumption of making the law more scientific—and presumably more certain—proceeded.[36] And by the close of the century, lawyers and judges could

(1982). Neil Duxbury commends Summers for attempting to characterize the movement in the early twentieth century but posits a different "legal realism" classification for describing the form of judicial reasoning. Neil Duxbury, Patterns of American Jurisprudence 70–71 (1995).

[33] James Kent, Vol. 1 Commentaries on American Law, Lecture XX, 462 (1826–1830) ("It is an established rule in the exposition of statutes, that the intention of the lawgiver is to be deduced from a view of the whole, and of every part of a statute, taken and compared together"). Employing the principles of the enlightenment, Chancellor Kent resorted to reason to afford words their ordinary, common meaning, with technical terms given their technical construction. *Id.* Interpreting statutes occasionally served a secondary function under the common law, with judges exploring the common law concern that animated legislative action. *See* Heydon's Case (1854), 76 Eng. Rep. 637 (KB). For an account of statutory construction even earlier, see Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908, 931–38 (2017).

[34] *See* Lieber, *supra* note 6.

[35] *Id.* at 25. Randall Kelso describes this approach toward construction as a "natural law" methodology and theory, employing logic and reason to implement rationally the legislative purpose. R. Randall Kelso, *Statutory Interpretation Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making*, 25 Pepp. L. Rev. 37, 41–42 (1997). Kelso quotes as an example Chief Justice Marshall's opinion in *United States v. Fisher, 6 U.S. (2 Cranch) 358, 386)* (1805), where Marshall commented that "[w]here the mind labours to discover the design of the legislature, it seizes every ting [sic] from which aid can derived." Kelso, *supra* at 46 n.40. For the Chief Justice, that would include exploring all aspects of statutory context, including statements regarding the statutory purpose. *See* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202–03 (1819). Kelso, however, posits that Marshall's opinions vacillate between a cabined construction to a more liberal construction. Kelso, *supra* at 53 n.74. But perhaps Marshall's opinions more accurately reflect the general contextualism analysis discussed in this Article.

[36] *See generally* Ellen Holmes Pearson, Remaking Custom: Law and Identity in the Early Republic 176–78 (2011). In the 1840's, for instance, New York engaged in the well-known effort to explore systematically codifying the law in the state. William G. Bishop & William H. Attree, Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York (Office of the Evening Atlas 1846),

reference several notable texts on statutory construction.[37]

Yet, it was Congress's delegation of authority to the executive branch that prodded a connected inquiry into statutory construction and deference.

A. The Court and the Executive Branch

The notion of affording an executive branch agency deference naturally required, first, having the judiciary decide it could review an agency's decision. To be sure, the administrative state surfaced almost immediately with the nascent nation.[38] As Lynton Caldwell, one of the nation's most prominent political scientists and ecologists, would observe, "[t]he debates on the executive departments began" in May 1789 when a New Jersey congressman "proposed the creation of a

https://archive.org/details/reportofdebatespoonewyrich [https://perma.cc/7LDC-FZSS].

[37] Texts included Joel P. Bishop, Commentaries on the Written Laws and Their Interpretations (1882), Henry C. Black, Handbook on the Construction and Interpretation of the Laws (2d ed. 1911), Theodore Sedgwick, A Treatise on the Rules Which Govern Interpretation and Application of Statutory and Constitutional Law (1st ed. 1857), and Peter Benson Maxwell, On the Interpretation of Statutes (4th ed. 1905). Sedgwick, for instance, explained how "written law is making inroads upon the field of unwritten, customary, or common law." Theodore Sedgwick, A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law Preface (2d ed. John Norton Pomeroy 1874). Bishop, too, emphasized that no other aspect of law was more important than understanding interpretive rules—rules of common law origin. Bishop, *supra* at 3–4. *See generally* William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 Cardozo L. Rev. 799 (1985) (describing the changing attitude toward statutes and statutory interpretation during the nineteenth century).

[38] I previously dubbed this early period as *de facto* administrative practice. Sam Kalen, *The Death of Administrative Common Law or the Rise of the Administrative Procedure Act*, 68 Rutgers L. Rev. 605, 615 (2016) (reviewing some of this history in more depth). It is beyond reproach today that the regulatory state's lineage is encoded into the nation's early and unfolding constitutional fabric. *See generally* Jerry L. Mashaw, Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law 4 (2012) (detailing origins of the federal administrative law structure); William J. Novak, The People's Welfare: Law & Regulation in Nineteenth-Century America 19 (1996); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 Yale L.J. 1256, 1258–59 (2006); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 Stan. L. Rev. 1189, 1195 (1986). John Dickinson's 1927 classic treatise acknowledged how "administrative" functions surfaced early in the young republic. John Dickinson, Administrative Justice and the Supremacy of Law in the United States 4–6 (1927). Notably, for instance, in *Williams v. United States*, the Court allowed the use of an affidavit by the Clerk of the Treasury Department to describe the agency's practice, when assessing the efficacy of having officials below the President perform executive tasks. Williams v. United States, 42 U.S. (1 How.) 290, 295–97 (1843).

Department of Finance."[39] How these departments would operate inside the newly constructed paradigm of separation of powers captivated early conversations, overshadowing whether executive branch deference would succumb to judicial or political accountability.[40] Justice Story suggested how sufficient judicial oversight was necessary to avert having executive authority intrude into the judicial realm,[41] while Justice McLean lamented how allowing the executive and judicial function to be exercised together constituted "an engine of oppression."[42] Indeed, the Court's early cases avoided deference under the banner of a limited judicial role, only interceding when the legislative branch clearly articulated ministerial functions for the executive branch.[43] In *Gaines v. Thompson*, the Court explained the judicial role when a party challenged an executive official action.[44] Recounting precedent since *Marbury v. Madison*,[45] the *Gaines* Court observed how the judiciary would afford a remedy only if an executive official neglected a legislatively prescribed ministerial act affecting the private rights of individuals.[46] Courts refrained from acting, though, if an executive official exercised discretion.[47]

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[39] Lynton K. Caldwell, The Administrative Theories of Hamilton & Jefferson: Their Contribution to Thought on Public Administration 212 (2d ed. 1988).

[40] *See id., passim* (discussing the conflicting views of Hamilton and Jefferson on separation of powers and the executive department). Counsel for the United States, for instance, argued in the 1830s that "occasional conflicts and encroachments upon each other's sphere of powers by the different departments of the government, were expected to arise; and that it was thought a matter of security, that each was left to the independent maintenance of its own rights, and bound by duty to resist the invasions of the others." Kendall v. United States, 37 U.S. (12 Pet.) 524, 530 (1838).

[41] Cary v. Curtis, 44 U.S. (3 How.) 236, 252–53, 256 (1845) (Story, J., dissenting).

[42] *Id.* at 260, 266 (McLean, J., dissenting).

[43] *See* Gaines v. Thompson, 74 U.S. (7 Wall) 347, 353–54 (1868); Litchfield v. Register & Receiver, 76 U.S. (9 Wall.) 575, 577 (1869) (following *Gaines*).

[44] *Gains*, 74 U.S. (7 Wall.) at 348–49.

[45] 5 U.S. (1 Cranch) 137 (1803). Later on, in *Martin v. Mott*, the Court added that "[w]henever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts." Martin v. Mott, 25 U.S. (12 Wheat.) 19, 31–32 (1827).

[46] *Gaines*, 74 U.S. at 349, 353 (quoting Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 498 (1866)). In *Johnson*, Mississippi wanted to prevent President Johnson from enforcing the Reconstruction Act. Johnson, 71 U.S. at 497. A ministerial duty, according to the Gaines' Court, is one where "the performance . . . [by] the head of a department by judicial process, is one in respect to which nothing is left to discretion." *Gaines*, 74 U.S. at 353.

[47] *See* Bruce Wyman, The Principles of the Administrative Law Governing the Relations of Public Officers 12 (1903) (an early administrative law treatise describing the practice). When officials exercised discretion, sovereign immunity constrained judicial review as well. *See, e.g.,*

This tasked the judiciary with examining whether relevant statutory language delegated discretion to the executive department. After all, "[i]t has been repeatedly adjudged," the Court observed, "that the courts have no general supervising power over the proceedings and action of the various administrative departments of government."[48] But a court could search for "clear and precise" language directing agency behavior to warrant mandamus.[49] And if such language existed, the court could issue a writ of mandamus.[50] This led two early administrative law scholars to draw the line between ministerial and discretionary space, with the latter cabining a court's involvement.[51]

By affording an executive official discretion, Congress effectively obviated the need for courts to confront difficult issues of statutory construction. Ambiguous language conferred discretion, which in turn left the courts with little to do.[52] But

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Pennoyer v. McConnaughy, 140 U.S. 1, 8–10 (1891) (explaining how plaintiff's suit to enjoin land conveyance could proceed); *see also* Wyman, *supra*, at 56–57 (explaining that absent discretion, agency official effectively acts personally as private individual capable of being sued).

[48] Keim v. United States, 177 U.S. 290, 292 (1900).

[49] United States *ex rel.* Lisle v. Lynch, 137 U.S. 280, 285 (1890). To be sure, prior to the Court's subsequent acceptance of legislative history, Chief Justice Taney wrote in 1845 how, when expounding on the law, "the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress . . . nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority . . . and the only mode in which that will is spoken." Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845).

[50] *See, e.g.*, United States *ex rel.* Redfield v. Windom, 137 U.S. 636, 644 (1891) (A court could issue a writ of mandamus if "the duty . . . is plainly ministerial . . . and it cannot issue in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment or discretion.").

[51] *See* Wyman, *supra* note 47, at 68, 11, 150. "[T]he distinction between discretionary powers and ministerial duties is in the last analysis," Wyman observed, "the question what the law is in any particular case." *Id.* at 150; *see also id.* at 11 (foundational principle that discretionary action necessarily consistent with the law); *id.* at 135 ("[J]udicial courts would not interfere . . . in any matter where that officer had discretion."). Ernst Freund mollified those concerned with discretionary space by suggesting that any abuse would be subject to "the exercise of judgment on the basis of greater experience and at some distance from local interests" through the hierarchical structure of agencies, and ultimately by the chief executive. Ernst Freund, *The Law of the Administration in America*, 9 Pol. Sci. Q. 403, 414 (1894). For a review of Wyman, Freund, and Frank J. Goodnow, The Principles the Administrative Law of the United States (1905), see generally Nathan D. Grundstein, *Presidential Power, Administration and Administrative Law Part I – Theoretical Beginnings*, 18 Geo. Wash. L. Rev. 285, 287–91 (1950); *see also* Kalen, *supra* note 38, at 620–22.

[52] In one instance, the Court rebuffed an agency's effort to fix unambiguous statutory language

whether the language provided a clear mandate would be a judicial judgment. In the seminal case of *Decatur v. Paulding*, the Court opined that an agency might request from the Attorney General advice about the construction of a statute, but that "the Court certainly would not be bound to adopt the construction given by the head of a department. And if they supposed his decision to be wrong, they would, of course, so pronounce their judgment."[53] To be sure, the Court could accept an agency's construction, but when it did so the decisions elided any hint of deference.[54] For instance, in *United States ex rel. Ness v. Fisher*, a party challenged a General Land Office decision involving falsely acquired public property.[55] The Court commented on how the Secretary's construction of the law was neither arbitrary nor capricious, and if "room for difference of opinion as to the true construction" existed, then the issue "necessarily involved the exercise of judgment and discretion."[56] Notably, though, the Court occasionally appeared willing to treat an agency's contemporaneous practice or construction of a statute with "great respect."[57] If a statute was ambiguous, the Court in an early public land case

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when Congress apparently erred on imposing duties on sugar. *See* Merritt v. Welsh, 104 U.S. 694, 704 (1881).

[53] 39 U.S. (14 Pet.) 497, 515 (1840); *see also Kendall*, 37 U.S. at 619.

[54] *E.g.*, Tex. & Pac. Ry. Co. v. Interstate Com. Comm'n, 162 U.S. 197, 210, 217–19 (1896); Stairs v. Peaslee, 59 U.S. (18 How.) 521, 529 (1856); Stuart v. Maxwell, 57 U.S. (16 How.) 150, 158–59, 163 (1853). *See* Bamzai, *supra* note 33, at 950–96 (describing the Marshal to Taney period and beyond).

[55] 223 U.S. 683, 689 (1912).

[56] *Id.* at 691; *see also* United States *ex rel.* Hall v. Payne, 254 U.S. 343, 347–48 (1920) (another land office case where the Court observed how the Secretary's construction was neither arbitrary nor capricious, and "involved the exercise of judgment and discretion"); United States v. Hammers, 221 U.S. 220, 224–26, 228–29 (1911) (holding a public land law ambiguous and affording persuasive weight to the land office's practice and interpretation). Justice Holmes arguably rejected this style of reasoning in a characteristically cryptic opinion rejecting the Secretary's construction. Santa Fe Pac. R.R. Co. v. Fall, 259 U.S. 197, 199–200 (1922).

[57] United States v. Pugh, 99 U.S. 265, 269 (1878); *see also* United States v. Ala. Great S. R.R. Co., 142 U.S. 615, 621 (1892) ("It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced."); United States v. Philbrick, 120 U.S. 52, 59 (1887); Brown v. United States, 113 U.S. 568, 571 (1884); Hahn v. United States, 107 U.S. 402, 406 (1883). Sometimes the Court confronted a practice or interpretation of an earlier act when examining a subsequently passed statute. *E.g.*, United States v. Healey, 160 U.S. 136, 145–46, 148–49 (1895) (not affording an interpretation respect due to lack of uniform interpretation). Public lands cases during this period presented unique challenges, as they often involved factual judgments by the agency. *See* Bates & Guild Co. v. Payne, 194 U.S. 106, 109–10 (1904). Of course,

afforded a contemporaneous construction "great respect."[58] And when the Court considered an agency's interpretation beyond Congress's charter, it said so.[59]

B. The Administrative State Pushing Deference Forward

Once progressives and then New Dealers dominated conversations about the importance of administrative agencies and the corresponding flexibility technocrats should enjoy when rendering pivotal policy decisions, neither past precedent nor the APA provided a neat unifying structure for deference and how courts ought to approach statutory construction.[60] A line of troubling cases sought

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in *Bates & Guild* Court, Justice Harlan opined how the Court had abandoned roughly seventy-five years of precedent affording deference to an agency's construction. *Id.* at 111–12 (Harlan, J., dissenting). Jerry Mashaw posits how the infusion of arbitrary and capricious review in the land office cases presaged "a more modern form" of judicial review. Mashaw, *supra* note 38, at 246. He identifies two early cases, *Lindsey v. Hawes*, 67 U.S. (2 Black) 554, 554 (1862), and *Johnson v. Towsley*, 80 U.S. (13 Wall.) 72, 83-84 (1871). *Id.* at 246–48. But these cases arguably focused on a court's equitable power. In *Johnson*, for example, the Court observed "there has always existed in the courts of equity the power in certain classes of cases to inquire into and correct mistakes, injustice, and wrong in both judicial and executive action." Johnson v. Towsley, 80 U.S. (13 Wall.) 72, 84 (1871); *see also* Downs v. Hubbard, 123 U.S. 189, 211–12 (1887); Moore v. Robbins, 96 U.S. 530, 535–36 (1877); Shepley v. Cowan, 91 U.S. 330, 340 (1875); Stark v. Starrs, 73 U.S. (6 Wall.) 402, 409–10 (1867); Garland v. Wynn, 61 U.S. (20 How.) 6, 8 (1857); Barnard v. Ashley, 59 U.S. (18 How.) 43, 44 (1855). Yet on matters involving land surveys, the Court opined how "it [was] not the province of this court to" review those decisions. United States v. Maxwell Land-Grant Co., 121 U.S. 325, 377 (1887). And in *Hewitt v. Schultz*, the Court feared ignoring the Interior Department's long-standing construction of public land laws might produce "endless confusion" and upset an array of expectations, which the Court would only do if the language of the statute expressly excluded the construction or if the construction was not uniform. Hewitt v. Schultz, 180 U.S. 139, 156–57 (1901).

[58] Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827).

[59] *See, e.g.*, Morrill v. Jones, 106 U.S. 466, 467 (1883) (rejecting an agency's regulation for importing live breeding animals as beyond its authority).

[60] *See* Reuel Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 Mich. L. Rev. 399, 404–06 (2007). Allowing agency technocrats to develop policy arguably replaced the earlier notion of majoritarian rule prevalent during the prior century. *See* William E. Nelson, The Roots of American Bureaucracy, 1830-1900 113–14 (1982). In a masterful historical inquiry, Blake Emerson examines, in part, how progressives accepted aspects of a Max Weberian (or a Weber-Hegelian) conception of the administrative state. Blake Emerson, The Public's Law: Origins and Architecture of Progressive Democracy 64–65 (2019). They accepted how agencies rather than courts could promote the public will and protect social institutions. As he summarizes Woodrow Wilson, Emerson observes "[w]hen administrative officials interpreted the commands of a statute, they were mediating between the institutionalized opinions and needs of a past public and the inchoate opinions and needs of a present public." *Id.* at 80.

to justify a court's review of *jurisdictional facts* that would, if a court could confirm those necessary facts, afford an agency discretionary space to operate.[61] Other cases selectively expanded how a court might review an agency's decision.[62] And not all scholars favored shifting authority toward experts and away from the judiciary.[63] For some, as Paul Verkuil explains, expanding agency authority clashed with classical liberalism's emphasis on our adversarial system and procedural correctness.[64]

But the political landscape veered sufficiently by the post-New Deal era to solidify affording experts an ability to establish policy within some discretionary space.[65] In 1927, Justice Frankfurter observed how statutory law had become

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Characteristically, the Court in *Rochester Tel. Corp. v. United States*, observed how the progressive and New Deal programs reflected a "widespread recognition" and "general movement" toward making "increasingly manifest the place of administrative agencies in enforcing legislative policies." Rochester Tel. Corp. v. United States, 307 U.S. 125, 138 (1939). Justice Frankfurter often expressed agency expertise as a justification for deference. *E.g.,* Bd. of Trade of Kan. City v. United States, 314 U.S. 534, 535, 546 (1942); R.R. Comm'n of Tex. v. Rowan & Nichols Oil Co., 311 U.S. 570, 573–75 (1941). He would not, however, rubber stamp an agency's exercise of expertise. *See* Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591, 624, 626–67 (1944) (Frankfurter, J., dissenting).

[61] *See* Kalen, *supra* note 38, at 622.

[62] *Id.* at 623. One salient case is *American School of Magnetic Healing v. McAnnulty*, identified in Louis Jaffe's prominent administrative law casebook. Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902); Louis J. Jaffe & Nathaniel L. Nathanson, Administrative Law: Cases and Materials 801 (2d ed. 1961). *See also* Bamzai, *supra* note 33, at 956–57, 967 (discussing case).

[63] Ernest Freund commented how "[t]he most important point in the development of administrative law is the reduction of discretion." Ernest Freund et al., The Growth of American Administrative Law 24 (1923). Roscoe Pound questioned affording experts, presumably disconnected from political accountability, too much authority. *See* Schiller, *supra* note 60, at 423. Pound reflected the views of other prominent ABA members, including future Justice George Sutherland. *See* Kalen, *supra* note 38, at 625.

[64] Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 Colum. L. Rev. 258, 265 (1978). This theme may explain why Professor Davis favored following correct procedures as a check against broad delegations absent sufficient transparency. Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry 44–51, 221 (1969).

[65] Joanna Grisinger observes how "[t]he organizational structures, official rules, specialized expertise, and ostensible independence from the democratic process that characterize administration had become the dominant form of American governance," with the new "agencies and commissions offer[ing] an alluring alternative to the inherent irrationality and apparent corruption of democratic politics." Joanna L. Grisinger, The Unwieldly American State: Administrative Politics Since the New Deal 3 (2012). The procedural changes ushered in by the Administrative Procedure Act, moreover, afforded the public some comfort in constraining the

pervasive, and that Congress seemingly left "lodged in the vast congeries of agencies" the task of deciding how best to implement this statutory law regime.[66] Reuel Schiller's historical account portrays how the late 1930s and early 1940s witnessed an "extreme judicial deference" to agency actions.[67] Courts and scholars generally responded by elevating legislative history,[68] a statute's purpose, and canons of construction all as legitimate tools for suggesting that a judge was not legislating when interpreting language but merely effectuating congressional intent as a faithful agent.[69]

1. Fits and Starts

This is body text. Yet, the convergence of broadly worded statutory provisions, discretion's ascendency, and statutory construction's broader ambit produced little guidance. Justice Cardozo opined in 1936 how a court should not substitute its judgment for that of an administrative agency when the agency has "kept within the bounds of their administrative powers."[70] It should instead examine merely whether the decision is an expression of a "whim" rather than judgment.[71] Later, in

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new bureaucracy. *See id.* at 11. She also observes how "the Legislative Reorganization Act of 1946 reflected Congress's fundamental uneasiness that bureaucrats had become the primary makers of law and policy." *Id.* at 109.

66 Felix Frankfurter, *The Task of Administrative Law*, 75 U. Pa. L. Rev. 614, 614 (1927).

67 Schiller, *supra* note 60, at 406. William Chase suggests this occurred slightly earlier. William C. Chase, The American Law School and the Rise of Administrative Government 134 (1982).

68 See Nicholas R. Parrillo, Leviathan and Interpretative Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950, 123 Yale L.J. 266 (2013). For the Court's subsequent approach toward the use of legislative history, see David S. Law & David Zaring, Law Versus Ideology: The Supreme Court and the Use of Legislative History, 51 Wm. and Mary L. Rev. 1653 (2010); Charles Tieffer, The Reconceptualization of Legislative History in the Supreme Court, 2000 Wisc. L. Rev. 205 (2000). Notably, Law and Zaring's analysis concluded that Chevron did not appear to affect the Justices' likely use of legislative history from 1953 through 2006. Law & Zaring, supra, at 1725.

69 Archibald Cox touted Judge Hand's opinions as illustrating how best to effectuate legislative intent without crossing a line. Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 Harv. L. Rev. 370 (1947). The same year Cox discussed Hand, Julius Cohen noted the importance of teaching legislation, with Justice Frankfurter adding his voice, joined by Jerome Frank. Julius Cohen, *On the Teaching of "Legislation,"* 47 Colum. L. Rev. 1301 (1947); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947); Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 Colum. L. Rev. 1259 (1947).

70 Am. Tel. & Tel. Co. v. United States, 299 U.S. 232, 236 (1936).

71 *Id.* at 236–37.

Gray v. Powell,[72] the Court rebuffed any suggestion of replacing the agency's fact-finding function, further indicating it would leave an agency's judgment about the applicability of a broad statutory term "undisturbed" unless it was "so unrelated to the tasks entrusted by Congress" to the agency.[73] In other cases, the Court similarly opined how it would afford an agency's view of a broadly worded statute "great weight."[74] In the classic yet arguably obsolete case of *NLRB v. Hearst Publications, Inc.*,[75] the Court ostensibly justified affording an agency discretion by seemingly carrying forward older attempts to distinguish between legal and factual matters.[76] The Court further explained why deference to the agency seemed warranted because the definition of the word "employee" lacked sufficient clarity at common law and that the agency might be better able to ascertain, based on the history, terms, and purposes of the Wagner Act, whether newsboys ought to be treated as employees.[77] The Court acknowledged its role when interpreting statutory terms, but added how it ought to "giv[e] appropriate weight" to those with expertise—indeed, accepting an agency's judgement if supported by the record and a "reasonable basis" in the law exists.[78]

Skidmore v. Swift & Co.,[79] however, is where the Court announced a deference doctrine now widely discussed, reflecting the lineage of precedent affording an agency's consistent construction weight. The litigation involved the Fair Labor Standards Act (FLSA) and its requirement that employers pay overtime to workers employed in excess of specified hours.[80] The question was what constituted

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[72] 314 U.S. 402 (1941).

[73] *Id.* at 413. *See also* Bamzai, *supra* note 33, at 977–78 (discussing case).

[74] *E.g.*, United States v. Am. Trucking Ass'ns, 310 U.S. 534, 549 (1940). In *Dobson v. Commissioner of Internal Revenue*, the Court distinguished between reviewing facts and law, affording an agency's understanding of the law "weight" due to its expertise—albeit not binding, though. Dobson v. Commissioner, 320 U.S. 489, 501–02 (1944).

[75] 322 U.S. 111 (1944).

[76] *See* Kalen, *supra* note 38, at 631–34 (discussing case).

[77] 322 U.S. at 121–26. The NLRB had argued that absent sufficient clarity by Congress the agency's expertise ought to be respected. Brief for N.L.R.B. at 50 n.43, 55, N.L.R.B. v. Hearst Publ'ns, 322 U.S. 111 (1944) (Nos. 336-339), 1944 WL 66445.

[78] 322 U.S. at 131; *compare* Packard Motor Car Co. v. N.L.R.B., 330 U.S. 485 (1947) (majority effectively deferred to agency's interpretation while dissenters disagreed because they believed it thwarted the statute's purpose); *and* Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951) (interpreting labor to mirror the common law substantial evidence standard, incorporated into the APA).

[79] 323 U.S. 134 (1944). *See* Kalen, *supra* note 38, at 634–637 (discussing *Skidmore*).

[80] *Skidmore*, 323 U.S. at 135–36.

"working time" and relatedly how to treat the agency's interpretive bulletin.[81] Writing for the Court, Justice Jackson explained why the Division's policy more than its statutory construction warranted consideration.[82] He considered the issues as involving principally a factual rather than statutory inquiry, and consequently that deference to policy judgements should inform the judiciary's response to factual findings.[83] As such, Jackson announced how he would respect the Division's policy, which was "based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case" (and used during Division enforcement proceedings).[84] In now classic language, he added (bereft of any references):

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[85]

And the following year, in a related area, the Court added how an agency's construction of its own regulation should be controlling unless "plainly erroneous or inconsistent with the regulation."[86]

2. Left Unsettled by the APA?

Congress's passage of the APA presumably offered guidance to agencies and the courts, particularly with respect to judicial review.[87] Congress, according to Blake

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[81] In *Walling v. A.H. Belo Corp.*, the Court rejected the agency's construction of the statute's reference to "regular rate," reasoning the task of statutory construction is for the Court to define a term undefined by Congress. Walling v. A.H. Belo Corp., 316 U.S. 624, 630–31 (1942). That same year Justice Frankfurter commented that FLSA "puts upon the courts the independent responsibility of applying ad hoc the general terms of the statute to an infinite variety of complicated industrial situations." A. B. Kirschbaum Co. v. Walling, 316 U.S. 517, 523 (1942). Notably, in *Skidmore's* companion case, the Court deftly avoided the agency's interpretation. Armour & Co. v. Wantock, 323 U.S. 126, 126, 128, 134 (1944). In *Skidmore*, though, the agency's amicus brief naturally prompted the Court to confront deference. *See* Kalen, *supra* note 38, at 636–37.

[82] *Skidmore*, 323 U.S. at 138–40.

[83] *Id.* at 139.

[84] *Id.*

[85] *Id.* at 140.

[86] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

[87] *See* Kalen, *supra* note 38, at 641–42 (collecting information on the history).

Emerson, encoded deference into the APA: rendering a policy choice that would require marrying economic and societal circumstances to the congressionally articulated objectives would become part of a federal agency's function.[88] Aditya Bamzai offers a slightly different interpretation, concluding that the APA encodes traditional tools of statutory construction (*e.g.,* canons of construction), but "[i]t did *not*, however, incorporate the rule that came to be known as *Chevron* deference, because that was not (at the time) the traditional background rule of statutory construction."[89] The difficulty, though, is that the APA's language directing a court to review whether an agency acted in accordance with the law, as well as whether the agency's action is arbitrary, capricious, or an abuse of discretion,[90] failed to draw any overt lines for when or how deference would occur. Even one of the nation's most eminent jurists, Judge Friendly, expressed reservations about the efficacy of broad delegations to agencies.[91] Not surprisingly, therefore, in the seminal case of *Pittston Stevedoring Corp. v. Dellaventura*,[92] he began by lamenting how the Benefits Review Board (BRB) had not gathered enough jurisdictional facts to aid the court's interpretive task,[93] a throwback to the pre-APA precedent. When discussing deference, immediately following a recognition that factual judgements will be upheld if they are supported by substantial evidence,[94] Judge Friendly reviewed opposing views about whether an agency ought to be afforded deference when interpreting a statutory term, eventually concluding the BRB should not enjoy deference for several reasons.[95] Other cases further illustrated that when deference

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[88] Blake Emerson, *"Policy" in the Administrative Procedure Act: Implications for Delegation, Deference, and Democracy*, 97 Chi.-Kent L. Rev. 113, 118–19, 123–24 (2022). Emerson argues persuasively how the conservative Justices on the Court misapply political theory when they challenge the administrative state—failing to appreciate how the administrative state promotes liberty and democracy. Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 Hastings L.J. 371, 408–21 (2022).

[89] Bazmai, *supra* note 33, at 987, 994–95.

[90] 5 U.S.C. § 706(2)(a).

[91] Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv. L. Rev. 863, 874 (1962).

[92] 544 F.2d 35 (2d Cir. 1976).

[93] *Id.* at 47.

[94] *Id.* at 48.

[95] *Id.* at 49–50. The court's resulting approach toward statutory construction is interesting, because the court, after discounting the parties' arguments, first employed a canon of construction that remedial legislation ought to be interpreted liberally, it then looked at the mischief Congress sought to rectify, and only then did it "address ourselves, at long last, to the words of the statute with the aid of the legislative history." *Id.* at 51 (using, arguably, about as

would apply remained unclear.[96]

Indeed, in the year preceding *Chevron*, the Court in *Bureau of Alcohol, Tobacco and Firearms v. FLRA*[97] offered a somewhat contradictory approach toward deference. The case involved the Federal Labor Relations Authority and whether the Court would afford deference to the Authority's earlier interpretation and guidance of what constituted "official time" (and thus requiring compensation) for employees working with a union during a collective bargaining process. The Authority issued an "Interpretation and Guidance" requiring federal agencies to pay the union representative's salaries, travel expenses, along with a per diem.[98] Writing for the majority, Justice Brennan observed, first, that the APA would govern.[99] He next explained how the agency's expertise justified affording it "considerable deference when it exercises its 'special function of applying the general provisions of the Act

broad of a contextual analysis as possible).

[96] In *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910 (3d Cir. 1981), the court observed that deference, in some cases, might be governed by whether the issue involved a factual or legal judgment—albeit acknowledging the difficulty with the law/fact dichotomy. It also added how courts could not relinquish their judicial review function, bolstering this point by noting expertise resides not only in agencies. *Id.* at 915. Muddying the waters more, the court accepted the Court's language in an earlier case that suggested that, when Congress delegates broad power to an agency and the agency exercises its expertise in implementing that delegation, its interpretation ought to be upheld if "not irrational." *Id.* But not necessarily, it continued, if the agency is construing its own "authorization statute." *Id.* Yet perhaps some deference might be warranted if the agency was involved in what led to the legislative activity or the agency's construction, assuming not erroneous, is longstanding. *Id.* at 916. In *Frank Diehl Farms v. Sec'y of Labor*, 696 F.2d 1325, 1329 (11th Cir. 1983), the Labor Secretary urged the Court to defer to the agency's interpretation of what constitutes a "workplace." The court declined to follow the agency's construction, noting not only how it departed from a longstanding prior interpretation but also that it found the agency's construction wanting. *Id.* Notably, the court observed, followed by a quote from *Skidmore*, that "[c]ourts give great deference to agencys' statutory constructions that involve the agency's expertise and a lack of judicial expertise," or when it is contemporaneous with the statutory language. *Id* (citation omitted). The court considered it important whether the construction was announced through expressly delegated authority, such as in a rulemaking, or in another fashion. *Id.* at 1330. It also added that the issue involved solely an interpretative question, equally within the ken of the judiciary and that an agency's construction can only serve as guidance. *Id.* at 1330–31. *See also* Prod. Tool Corp. v. Dep't of Lab., 688 F.2d 1161, 1167 (7th Cir. 1982) (noting importance of the rulemaking process for concluding that an agency's interpretation should be "entitled to great deference provided it is consistent with the congressional purpose").

[97] 464 U.S. 89 (1983).

[98] *Id.* at 94.

[99] *Id.* at 97 n.7.

to the complexities' of federal labor relations."[100] In fact, he added that "courts should uphold reasonable and defensible constructions of an agency's enabling Act."[101] But in the same breath, he cautioned how courts may not "rubber-stamp" a decision they believe "inconsistent with a statutory mandate or that [would] frustrate the congressional policy."[102] He accompanied this cautionary note by referencing *Skidmore* and other cases. And he concluded that, if the issue involved discerning a "specific congressional intent," that would be a "quintessential judicial function of deciding what a statute means," with *Skidmore* counseling that, if the agency's understanding is premised on a factual judgment within its expertise, then the judgment "may be influential, but it cannot bind a court."[103] In this case, the Court concluded that neither "specific congressional intent" nor the purpose of the Act justified the Authority's judgment.[104]

C. Chevron's *Simplicity*

1. "The Times They Are A-Changin'"[105]

This historical foray suggests why *Chevron's* decade was rife for refining principles of statutory construction and a corresponding deference doctrine. The earlier nineteenth century legal realism merged with the post WWII liberal progressivism's focus on process[106] to nudge both legal scholars and the judiciary

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[100] *Id.* at 97 (citations omitted). Responding to petitioner's suggestion otherwise, the Court added how Congress did afford the agency "broad authority to establish policies consistent with the Act." *Id.* at 98 n.8.

[101] *Id.* at 97. Repeating this thought in a footnote, he added how "an agency acting within its authority to make policy choices consistent with the congressional mandate should receive considerable deference from courts, provided, of course, that its actions conform to" the APA's requirements. *Id.* at 98 n.8. Two years earlier, the Court similarly concluded an agency interpretation of a statute ought to be upheld if it reflects a "sufficiently reasonable" construction. FEC v. Democratic Senatorial Camp. Comm., 454 U.S. 27, 39 (1981) (quoting Train v. Nat. Res. Def. Council, 421 U.S. 60, 75 (1975)). But in 1980 the Court signaled how narrowly focused legal issues could be resolved simply by the judiciary. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 120 (1980).

[102] 464 U.S. at 97 (quoting NLRB v. Brown, 380 U.S. 278, 291–92 (1965)).

[103] *Id.* at 98 n.8.

[104] *Id.* The Court's inquiry focused principally on legislative history and the Act's purpose. *Id.* at 99–108.

[105] Bob Dylan, The Times They Are A-Changin' (Columbia Records 1964).

[106] *See* Henry Hart & Albert Sacks, The Legal Process: Basic Problems in the Making and Application of Law (Harvard Univ. 1958); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959); *see also* Neil Duxbury, Patterns of American

toward an organizing structure. Once the legal realists, after all, had promoted exploring the "science of law" and how judges approached decision-making,[107] principles of statutory construction emerged as essential sources of inquiry. Max Radin taught how canons of construction, for instance, are not rules but instead consist of "a vocabulary and a method of presentation" for applying and, thus, interpreting statutes.[108] Karl Llewellyn famously added how canons of statutory interpretation could not be employed neutrally to discern congressional intent, although he appreciated that courts often reflect a dominant stylist paradigm—or style of reasoning prevalent at the time.[109] And the eminent legal historian James Willard Hurst expressed frustration with the approach toward law as if it were an exercise in Euclidian geometry and believed that law schools had to explore legislation and agency administration.[110]

Process, though, became the benchmark for justifying a legal method, with some in the process school echoing Karl Llewellyn when observing how "[t]he hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation."[111] This school of thought effectively promoted exploring statutory context,[112] a reigning approach toward statutory construction but arguably masked by rhetorical debates over theory. Judge Katzmann observes how Henry M. Hart, Jr. and Albert M. Sacks crystalized the emerging approach toward statutory construction, when those two articulated the judicial role as one of a faithful agent charged with "discern[ing] Congress's purposes and to interpret laws consistent with those purposes."[113] Once judicial review of administrative agencies became established, a contextual analysis

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Jurisprudence 205–99 (Clarendon Press 1995).

[107] *See* James E. Herget, American Jurisprudence, 1870-1970: A History 194–227 (Rice Univ. Press 1990); John Henry Schlegel, American Legal Realism and Empirical Social Science (Univ. N.C. Press 1995).

[108] Max Radin, *A Case Study in Statutory Interpretation:* Western Union Co. v. Lenroot, 33 Calif. L. Rev. 219, 219, 223 (1945) (responding to James Landis' prior effort to justify legislative history by chastising such efforts as future).

[109] Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are To Be Construed*, 3 Vand. L. Rev. 395, 396 (1950).

[110] *See* Daniel R. Ernst, *Willard Hurst and the Administrative State: From Williams to Wisconsin*, 18 Law & Hist. Rev. 1, 8 (2000).

[111] *See* Hart & Sacks, *supra* note 106.

[112] *See* Kelso, *supra* note 35, at 37–38. Even Justice Scalia when rejecting a legal process school theory employs that school's methodological emphasis on context, excluding, of course, the use of legislative history. *See infra* note 176 and accompanying text.

[113] Robert A. Katzmann, Judging Statutes 33 (Oxford Univ. Press 2014).

became essential as courts confronted broadly worded Progressive and New Deal programs that only through context or legislative history could be understood.[114] New Dealers such as James Landis believed that the administrative state encouraged congressionally delegated authority to agencies to implement congressional purposes.[115] To the extent the judiciary could intrude on this shift of power to administrators was only in ensuring that agencies were faithful to the congressional purpose.[116] It became logical, therefore, for the judiciary to elevate the role of purpose in statutory construction when reviewing agency decisions.

2. Legislation Legitimized

While prior to the 1980s, only few organized casebooks on statutory construction appeared on the scene, this would soon change. A "consensus" surrounded the claim that "law schools . . . largely ignored legislation as a separate course in the curriculum."[117] Eskridge and Frickey lamented how, in the modern era of statutes, schools nonetheless "d[id] not approach statutes as a systematic topic of inquiry and d[id] not teach general skills of dealing with legislatures and their statutory products."[118] Change began creeping along. Cass Sunstein, for instance, chronicled how old, pre-New Deal notions of statutory construction had not fully dissolved as society changed from a common law to statutory based legal system,

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[114] *E.g.*, Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co., 289 U.S. 266, 282, 285 (1933) (public convenience and necessity standard for radio stations). The use of legislative history too became elemental as a tool for discerning Congress' objective or purpose. *See* Nicholas R. Parrillo, *Leviathan and Interpretative Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 Yale L.J. 266 (2013).

[115] *See* James M. Landis, The Administrative Process 67–68 (Yale Univ. Press 1966).

[116] James M. Landis, *A Note on "Statutory Interpretation"*, 43 Harv. L. Rev. 886, 892 (1930) ("It must be insisted that the legislative purposes and aims are the important guideposts for statutory interpretation, not the desiderata of the judge.").

[117] Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 Geo. Wash. L. Rev. 1, 3 n.8 (1993). *See* Joseph Dolan, *Law School Teaching of Legislation*, 22 J. Legal Educ. 63 (1969); *see also* Robert J. Araujo, *Suggestions for a Foundation Course in Legislation*, 15 Seton Hall. Legis. L. 17 (1991).

[118] William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. Pitt. L. Rev. 691 (1987). In 1980, Otto Hetzel wrote Otto J. Hetzel, Legislative Law and Process (1980). Then, in 1982, Dean Guido Calebresi published his paradigmatic work, Guido Calebresi, A Common Law for the Age of Statutes (1982). This appeared the same year as James Willard Hurst penned his monograph on statutes, James Willard Hurst, Dealing with Statutes (1982). And a year later, Judge Posner published an article on the efficacy of teaching legislation. *See* Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800 (1983).

and he explained that the "ultimate task" is to develop constitutionally and politically acceptable ex-ante norms of construction.[119] The early 1980s witnessed scholarly interest in principles surrounding statutory construction emerging in earnest; according to Professor Philip Frickey, this interest in statutory construction, from the early 1980s to the early 1990s, consisted of two facets: an interest in theories or principles of statutory construction, as well as contemplating teaching legislation.[120] A deluge of articles followed, articulating theories of statutory interpretation/construction and specific topics such as the use of legislative history.[121] Admittedly it would take a few decades, however, until schools began infusing legislation into the mainstream curriculum, with Harvard pioneering the way by promoting it as a required first year course.[122]

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[119] Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 412 (1989).

[120] Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 Minn. L. Rev. 241, 245, 249–50 (1992). Professor Frickey referred to Robert Weisberg, *The Calebresian Judicial Artist: Statutes and the New Legal Process*, 35 Stan. L. Rev. 213 (1983), when suggesting that few law schools had embraced legislation as a serious doctrinal course.

[121] *See e.g.*, Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J.L. & Pub. Pol'y 61 (1994) (favoring text and structure over history); Elizabeth Garrett, *Teaching Law and Politics*, 7 N.Y.U. J. Legis. & Pub. Pol'y 11 (1993); Frickey, *supra* note 120; Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation,* 75 Minn. L. Rev. 1045 (1991); Denise W. DeFranco, Chevron *and Canons of Statutory Construction*, 58 Geo. Wash. L. Rev. 829 (1990); Eskridge & Frickey, *supra* note 118; Eskridge & Frickey, *supra* note 13; Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452 (1989); Cass Sunstein, *supra* note 119; William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 Cal. L. Rev. 543 (1988); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223 (1986); William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 Cardoza L. Rev. 799 (1985); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. Pa. L. Rev. 549 (1985); Frank Grad, *Legislation in the Law School*, 8 Seton Hall Legis. J. 1 (1984); Quintin Johnstone, *Some Thoughts on Legislation in Legal Education*, 35 Mercer L. Rev. 845 (1984); Robert F. Williams, *Statutory Law in Legal Education: Still Second Class After All These Years*, 35 Mercer L. Rev. 803 (1984); Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 Hofstra L. Rev. 1125 (1983); Patricia Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195 (1983). By the early 1990s, scholars began to explore the role of linguistics in judicial construction of language as well. *See e.g.*, Judith N. Levi, "*What Is Meaning in a Legal Text"? A First Dialogue for Law and Linguistics*, 73 Wash. U. L.Q. 771, 773 (1995).

[122] *See* Ethan J. Leib, *Adding Legislation Courses to the First Year Curriculum*, 58 J. Legal Ed. 166, 167–69 (2008); *see also* John Copeland Nagle, *Saxe's Aphorism*, 79 Geo. Wash. L. Rev. 1505, 1508 (2011) (reviewing JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION

3. "Stuck in the Middle with You."[123]

Chevron reflects an arc of change, situated in the middle between the jurisprudence from the first half of the century and subsequent developments. It incorporated what I previously referred to as a mélange of historical artifacts flowing from the vagaries of both pre and post-APA scope of review.[124] Indeed, Aditya Bamzai's detailed examination illustrates "how the *Chevron* Court misinterpreted the precedents on which it relied."[125] Jack Beermann called it a failure and inconsistent with the APA.[126] Examining the Environmental Protection Act's informal regulation issued pursuant to the Clean Air Act (construing the word "source" and the bubble concept), the *Chevron* Court announced that judges should determine, first, "whether Congress has directly spoken to the precise question at issue," and if so, then agencies must accede to Congress's intent—an intent so understood by a court when employing all the traditional tools of statutory construction.[127] If, however, a court concludes that the statutory language is ambiguous, then secondly it ought to defer—in appropriate circumstances—to an agency's reasonable interpretation.[128] The Court seemingly crafted its test from

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(Foundation Press 2010)).

123 Stealers Wheel, *Stuck in the Middle with You*, *on* Stealers Wheel (A&M Records 1972).

124 *See* Kalen, *supra* note 38, at 671. Some of the earlier cases were *Motor Vehicle Mfrs. Ass'n v. State Farm Auto. Ins. Co.*, 463 U.S. 29, 46 (1983); *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983); and *Bowman Transp., Inc. v. Ark-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974).

125 Bamzai, *supra* note 33, at 929.

126 Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779, 798–99 (2010).

127 Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842, 843 n.9.

128 *Id.* at 842–43. Though the Court has been less than clear, *Chevron* deference applies when a court concludes that Congress delegated the type and form of interpretative power to the agency to construe language in such a way that it will carry the force and effect of law. For cases attempting to articulate *Chevron's* applicability, see *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001); and *Barnhart v. Walton*, 535 U.S. 212, 217–18 (2002). Thomas Merrill and Kathryn Watts posit how this inquiry is often illusive. Thomas W. Merrill & Kathryn T. Watts, *Agency Rules With the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467 (2002). For some articles illustrating the confusion, see Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 57 Vand. L. Rev. 1443 (2005); Robin K. Craig, *Agencies Interpreting Courts Interpreting Statutes: The Deference Conundrum of a Divided Supreme Court*, 61 Emory L.J. 1, 15 (2011); Michael P. Healy, *Reconciling* Chevron, Mead, *and the Review of Agency Discretion: Source of Law and the Standards of Judicial Review*, 19 Geo. Mason L. Rev. 1 (2011); Ronald M. Levin, Mead *and the Prospective Exercise of Discretion*, 54 Admin. L. Rev. 771 (2002); Thomas W. Merrill, *The* Mead *Doctrine: Rules and*

disparate antecedents.[129] Borrowing from 19th century concepts, the Court considered deference justified as an exercise of authority by experts charged by Congress with exercising that authority.[130] It accepted that agencies would enjoy *legitimacy* if Congress either expressly or impliedly delegated the necessary *authority* to construe what otherwise is ambiguous language.

As federal officials susceptible to the whims of the democratic process, expert agency personnel seem better situated than the judiciary to render policy level decisions when Congress's intent is less than clear, or so reasoned the *Chevron* Court.[131] This political accountability within the Executive Branch conceivably

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Standards, Meta-Rules and Meta-Standards, 54 Admin. L. Rev. 807 (2002); and Russell L. Weaver, *The Emperor Has No Clothes*: Christensen, Mead, *and Dual Deference Standards*, 54 Admin. L. Rev. 173 (2002). Indeed, the Ninth Circuit cavalierly observed how "*Chevron* deference applies only to agency decisions rendered through formal procedures." Turtle Island Restoration Network v. U.S. Dep't of Comm., 878 F.3d 725, 733 (9th Cir. 2017). Also, the Court appears reluctant to assume that Congress delegates to an agency scope of review questions. *See* Salinas v. U.S. R.R. Ret. Bd., 141 S. Ct. 691, 700 (2021) (quoting Smith v. Berryhill, 139 S. Ct. 1765, 1778 (2019)).

[129] The CAA contains its own review provision, but the Court looked beyond the CAA. The EPA presented a slim array of cases: a summary disposition in *INS v. Jong Ha Wang*, 450 U.S. 139, 144 (1981); *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 626–27 (1971) (invoking older cases that afford "great weight to any reasonable construction"); *Beal v. Doe*, 432 U.S. 438, 447 (1977) (noting in passing to be mindful of agency construction); *Morton v. Ruiz*, 415 U.S. 199, 231–32 (1974) (agency needs to formulate policy and make rules when Congress leaves a gap); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 (1969) (invoking nineteenth century principle of accepting agency construction unless "compelling indications that it is wrong"); *Union Elec. Co. v. EPA*, 427 U.S. 246, 256 (1976) (afford "great deference to Administrator's construction of the" CAA); and *Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 75 (1975) (accept a "sufficiently reasonable" construction). Brief for Adm'r of the EPA, Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (No. 82-1005). Cass Sunstein demonstrates how *Chevron* reflects the New Deal "enthusiasm for agency autonomy." Cass R. Sunstein, *Law and Administration after* Chevron, 90 Colum. L. Rev. 2072, 2074 (1990). And John H. Reese examines the Court's precedent. John H. Reese, *Bursting the* Chevron *Bubble: Clarifying the Scope of Judicial Review in Troubled Times*, 73 Fordham L. Rev. 1103 (2004).

[130] *Chevron*, 467 U.S. at 843–46. *See* William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. Rev. 878, 887 (2013) ("The academic discussion of the deference question has largely focused on issues of comparative expertise and authority.").

[131] 467 U.S. at 865. Louis J. Virelli III describes how agency expertise and political accountability are the two "core principles motivating judicial deference," noting how transparency is elemental for an accountability rationale. Louis J. Virelli III, *Deconstructing Arbitrary and Capricious Review*, 92 N.C. L. Rev. 721, 763 (2014). *See also* Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 Yale L.J. 952, 1005 (2007) (describing the "core basis" for *Chevron* "that specialist agencies have greater expertise than generalist judges, and agencies' formulations of policy are

sanctions affording each new administration some measure of flexibility to implement policy-laden decisions flowing from Congress's implicit or explicit delegation of power. Professor (now Justice) Kagan famously referred to this as Presidential Administration.[132] "Elections have consequences," or so penned United States District Court Judge James E. Boasberg as 2017 approached its end.[133] Since *Chevron*, political accountability as a justification for deference seems no longer

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more politically accountable than those of judges."). But today,

> *Chevron* is rooted in a background presumption of congressional intent: namely, "that Congress, when it left ambiguity in a statute" administered by an agency, "understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."

City of Arlington v. FCC, 569 U.S. 290, 296 (2013) (quoting Smiley v. Citibank (South Dakota), N. A., 517 U.S. 735, 740–41 (1996)). Agency expertise nevertheless may be featured when the Court proceeds to afford the agency deference. *E.g.,* Scialabba v. Cuellar de Osorio, 573 U.S. 41, 56–57 (2014) (matters of immigration and foreign relations).

[132] Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245 (2001). Nina Mendelson added how political considerations ought to be acknowledged or at least disclosed, favoring transparency—and thus arguably legitimizing accountability. Nina A. Mendelson, *Disclosing "Political Oversight" of Agency Decision Making*, 108 Mich. L. Rev. 1127, 1130 (2010). Notably, as a theory for affording an agency deference, political accountability never garnered traction with the Court. *See* Peter M. Shane, Chevron *Deference, The Rule of Law, and Presidential Influence in the Administrative State*, 83 Fordham L. Rev. 679, 693–94 (2014); *see also* Josh Blackman, *Presidential Maladministration*, 2018 U. Ill. L. Rev. 397 (2018). Suggesting we are witnessing structural deregulation of the administrative state characteristic of the Trump Administration, the analysis by Jody Freeman and Sharon Jacobs portrays how Executive power can be wielded in the shadows with too little accountability—seemingly undermining accountability as a justification for deference. Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 Harv. L. Rev. 585, 665 (2021). *See also* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 Harv. L. Rev. 1131, 1135–36 (2012) (exploring importance of presidential oversight as a consequence of the myriad areas of shared regulatory space among various agencies). Jodi Short posits how presidential control masks the underlying assumption of the modern state, one premised on agency expertise and rational decision making rather than on the legitimacy of political decision making. Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 Duke L.J. 1811, 1815 (2012). Christopher Walker presents an alternative concern with accountability, suggesting that agencies' ability to work with legislators in the shadows when assisting behind the scenes to craft legislation counsels against affording those same agencies deference. Christopher J. Walker, *Legislating in the Shadows*, 165 U. Pa. L. Rev. 1377, 1381 (2017). And others tout process and internal administrative agency checks and balances as critical to the administrative state. *See* K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 Harv. L. Rev. 131 (2018) (reviewing John D. Michaels, Constitutional Coup: Privatization's Threat to the American Republic (Harvard Univ. Press 2017)).

[133] Nat'l Venture Cap. Ass'n v. Duke, 291 F. Supp. 3d 5, 8 (D.D.C. 2017).

palatable; we are left consequently with the assumption that Congress either explicitly or implicitly has delegated authority to agencies to fill gaps.[134]

Chevron's formulaic methodology effectively obfuscates several issues. To begin with, the Court's directive that the inceptive inquiry is whether Congress has *directly* spoken to the *precise* issue is a façade. Adversaries are in court because of a dispute about whether Congress intended its language would apply to a circumstance not expressly covered by the language. Tools of statutory construction surface and become marshalled by those adversaries (and then the court) to assist, not whether the issue has been *directly* or *precisely* addressed, but rather whether a court can be convinced that a reasonably objective person could conclude that Congress intended to address the precise factual circumstance. The panoply of profuse tools of construction necessitates that zealous advocates explore and present any tools favoring their position. And proceeding to *Chevron's* step two and deference often depends upon how searching is the inquiry during a step one analysis.[135] This is where contextualism is critical, as I explain in Part II.

Second, once a court advances beyond step one, it presents an awkward pairing with the APA—which councils that, for matters better left to an agency, a court will examine whether the agency's action (or its interpretation) is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.[136] *Chevron's* step two overlaps sufficiently with traditional APA review. Jason Czarnezki, for example, observes how "[j]udges and students commonly conflate *Chevron* step two and

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[134] Justice Gorsuch suggests the principal basis for *Chevron* deference is this presumed delegation of authority, adding how only "[s]ome defend *Chevron* deference in statutory interpretation cases on the theory that agencies are technical experts in the fields they are charged with regulating." Scenic Am., Inc. v. Dep't of Transp., 138 S. Ct. 2, 2 (2017) (Gorsuch, J., on cert. petition). For a thorough treatment of the delegation issue, see Lisa Schultz Bressman, Chevron's *Mistake*, 58 Duke L.J. 549 (2009). Bressman initially assumed that *Chevron's* delegation rationale reflects a fiction, and that Congress "probably does not draft statutes with *Chevron* in mind." *Id.* at 562. A more recent empirical analysis undermines that assumption. Gluck & Bressman, *supra* note 10. Justice Scalia endorsed substantive canons as reliable background guides for congressional drafting. *E.g.*, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 261 (2010) (applying presumption against extraterritoriality).

[135] In *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2291 n.9 (2021), for instance, the Court avoided a claim of *Chevron* deference (though still holding for the government) by observing in a footnote that it had decided the language was clear, while Justices Breyer, Sotomayor, and Kagan would have reached a different result under a step one analysis—not even suggesting any ambiguity that might allow for a different governmental interpretation in the future (under *Brand X*). *See id.* at 2297–98 (Breyer, J., dissenting).

[136] If, however, the interpretation is contrary to law, that should have been resolved during a step one inquiry.

arbitrariness/hard look review."[137] Judge Silberman once found step two indistinguishable from APA review.[138] And in a seminal article, Ronald Levin cogently described how and why *Chevron* step two and APA review "should be deemed not just overlapping, but identical."[139] Similarly, before he ascended the bench, then Judge Gorsuch suggested little would change in a world without *Chevron*.[140] Already, the D.C. Circuit today suggests that "[a]t *Chevron* step two, we ask whether the agency's interpretation is 'arbitrary or capricious in substance, or manifestly contrary to the statute.'"[141]

Chevron undoubtedly "is at a crossroads."[142] In some instances, the government even avoids asserting *Chevron* deference altogether.[143] Also, the Major Questions Doctrine (MQD) seemingly cuts a slice out of its applicability, albeit only once a court determines an issue presents such a significant political and economic matter that it would appear unlikely that Congress implicitly delegated that interpretative

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[137] Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law*, 79 U. Colo. L. Rev. 768, 810 (2008).

[138] *See* Laurence H. Silberman, Chevron—*The Intersection of Law & Policy*, 58 Geo. Wash. L. Rev. 821, 827–28 (1990).

[139] *See* Ronald M. Levin, *The Anatomy of* Chevron: *Step Two Reconsidered*, 72 Chi.-Kent. L. Rev. 1253, 1254 (1997). Lisa Bressman similarly writes how "[a]lthough the relationship between the *Chevron* inquiry and the arbitrary and capricious test has confused courts, the effect of each is much the same." Bressman, *supra* note 134, at 585.

[140] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring). Notably, Justice Thomas announced he considers *Chevron* (along with his opinion in *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005)) unconstitutional. Baldwin v. United States, 140 S. Ct. 690, 690–91 (2020) (Thomas, J., dissenting from denial of certiorari).

[141] Nasdaq Stock Market LLC v. SEC, 38 F.4th 1126, 1136 (D.C. Cir. 2022). The court quoted an earlier D.C. Circuit case relying on the Court's statement in *Mayo Found. for Medical Educ. & Rsch. v. United States*, 562 U.S. 44, 53 (2011). Admittedly, in other cases the court refers to *Chevron's* step two in *Chevron's* language, that it will defer to an agency's interpretation as long as it is a permissible construction. *E.g.,* Am. Fuel & Petrochemical Mfrs. v. EPA, 3 F.4th 373, 380 (D.C. Cir. 2021).

[142] Kristin E. Hickman & Aaron L. Nielson, *The Future of* Chevron *Deference*, 70 Duke L.J. 1015, 1024 (2020). Hickman and Nielson, notably, would resolve one of *Chevron's* problems by limiting its applicability to rulemakings. Kristin Hickman & Aaron Nielson, *Narrowing* Chevron's *Domain*, 70 Duke L.J. 931, 964–65 (2021).

[143] *E.g.,* HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass'n, 141 S. Ct. 2172, 2180 (2021) (While industry referenced *Chevron*, "the government does not" and "[w]ith the recent change in administrations, 'the government is not invoking *Chevron*,'" and "[w]e therefore decline to consider whether any deference might be due." (citation omitted)).

power to the agency.[144] Next, *Chevron*'s relationship to the APA might counsel that *Chevron*'s second step, as Justice Gorsuch posits,[145] could be replicated somewhat under the APA. When language is ambiguous, the APA's demand that agencies engage in reasoned decision-making[146] could lead to a similar form of deference as *Chevron's* directive that an agency's interpretation will be upheld if it is reasonable or permissible.[147] Finally, if one appreciates how contextualism allows for an expansive inquiry into whether Congress has made its intention clear, the instances where *Chevron* step two (deference) will surface could diminish. With one caveat, then, *Chevron* could wither quietly.

The caveat is agency flexibility, particularly associated with changing administrations. Though he later repudiated his decision,[148] Justice Thomas in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*[149] held that an agency's interpretation afforded deference under *Chevron* would not necessarily preclude the agency from reaching a different interpretation later on.

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144 *See supra* note 7 and accompanying text. *See generally* Jonathan H. Adler, West Virginia v. EPA*: Some Answers About Major Questions*, 2022 Cato Sup. Ct. Rev. 37. Jonathan Adler aptly notes how the Court confronted a choice between deploying the MQD as a canon of construction as "icing on the Court's interpretive cake" or as a requirement for a clear statement before the Court even begins its interpretative task, with the latter reflecting what the Court employed in *West Virginia v. EPA*. *Chevron* also may lack currency when interpreting criminal statutes. *Id.* at 53. Gun Owners of Am., Inc. v. Garland, 992 F.3d 446, 454–66 (6th Cir. 2021), *reh'g en banc*, 19 F.4th 890 (6th Cir. 2021) (a Sixth Circuit panel held *Chevron* inapplicable in criminal statutes, detailing the Court's precedent and analysis, but the en banc court split evenly).

145 *See supra* note 140.

146 *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 31 (1983).

147 As Levin explains, in reviewing how the D.C. Circuit addressed the overlap, whether an interpretation is permissible (*Chevron* step two) "could simply be absorbed into arbitrariness review." Levin, *supra* note 139, at 1254–55. And he presciently opined that we would "hear more about 'overlap' over time." *Id.* at 1296. To be sure, in *Cuomo v. The Clearing House Ass'n, L.L.C.*, 557 U.S. 519 (2009), the majority and dissent disagreed over whether to afford the agency deference, though both accepted that the language was ambiguous—albeit with the majority later intimating that the statute's language was "plain." *Id.* at 525, 534; *id.* at 555–56 (Thomas, J., concurring in part and dissenting in part). In rejecting the agency's interpretation, the majority merely concluded that the interpretation exceeded the outer bounds of statutory uncertainty, because it did not "comport with the statute." *Id.* at 531 (majority opinion). It never said that the interpretation was unreasonable, however. This type of weak analysis might be foreclosed absent *Chevron* step two.

148 Baldwin v. United States, 140 S. Ct. 690, 695 (2020) (Thomas, J., dissenting from denial of certiorari).

149 545 U.S. 967, 1000–02 (2005).

Peter Strauss suggests, therefore, that we ought to refer to *Chevron* discretion as *Chevron* space, allowing an agency latitude when interpreting ambiguous language.[150] That latitude, or the *Chevron* space, flows from having Congress implicitly entrust to the agency in the first instance the task of rendering policy-laden decisions, rather than the judiciary. *NLRB v. Hearst Publications, Inc.*[151] is a classic example: assessing whether newsboys are "employees" (or independent contractors) should be a policy-laden decision within the bounds of a *Chevron* space.[152] Mark Seidenfeld bolsters this formulation, when he writes how a soft constitutional norm for separation of powers promotes having agencies establish policy in a *Chevron* space, rather than the judiciary.[153] If, consequently, we abandon *Chevron* and its accompanying *Brand X* principle, it remains uncertain whether APA review will produce the same result.

II. CONTEXTUALISM: UNMASKING STATUTORY CONSTRUCTION

This is body text. When scrambling to shape how law in a lex legis world is both understood and taught, we should accept the naked truth that ours is an adversarial system, with lawyers who will and, indeed, must deploy all available tools for effective advocacy.[154] Then, we must accept the judiciary will inevitably confront questions of construction within this adversarial arena.[155] For lawyers and future

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[150] Peter L. Strauss, *Essay: "Deference" Is Too Confusing—Let's Call Them "Chevron Space" and "Skidmore Weight"*, 112 Colum. L. Rev. 1143, 1145, 1147 (2012).

[151] 322 U.S. 111, 120–24 (1944); *see supra* note 75 and accompanying text.

[152] *But cf.* Packard Motor Car Co. v. NLRB, 330 U.S. 485, 492–93 (1947) (not affording the agency deference). Employing *Chevron* space seems preferable to the awkward mixed question of law and fact justification. *See* Kalen, *supra* note 38, at 672.

[153] Mark Seidenfeld, Chevron's *Foundation*, 86 Notre Dame L. Rev. 273, 275, 289 (2011). Seidenfeld expands on (with significant changes) John Manning's notion of *Chevron* as a soft substantive canon (protecting the Constitution's structure), *id.* at 290. *See* John. F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 623–27 (1996).

[154] *See* Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 Duke L.J. 1405 (2000) (focusing on delivered law). The idea also appears embedded in discussions about adversarial legalism. *See* Robert A. Kagan, Adversarial Legalism: The American Way of Law (Harvard Univ. Press 2003).

[155] The Court decades ago observed how "few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions." Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952).

lawyers, it is about effective advocacy. It is this dynamic between the advocacy of the parties and the obligation of the judiciary to respond to that advocacy, within the bounds of legitimacy, which form the basis for judicial resolution of statutory construction debates. Characteristic of others who overlook how the judiciary is an arbiter in an adversarial system, Duncan Kennedy's seminal critique of judicial reasoning misses advocates' elemental role.[156] Issues of statutory construction, after all, typically devolve into how well advocates present persuasive arguments, not into a meta-theory or prioritization of canons of construction.[157] Of course, we should appreciate Frederick Schauer's admonition, echoing the sentiments of Karl Llewellyn, Jerome Frank, and others, that quite possibly the motive for a decision may differ from the reasons proffered by a judge to reach a particular result.[158] Judges may overtly or subtly employ a measure of pragmatism and examine the likely effects and consequences of reasoning a particular way.[159]

A. Replacing Textualism with Contextualism

While it remains commonplace to refer to modern construction as textualism,[160] textualism is a misnomer. Dan Farber notes how "the need to understand context and purpose is inherent in language."[161] Thomas Merrill too

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[156] Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. Legal Educ. 518 (1986).

[157] Scholars occasionally tend to assume that some meta-theory is necessary to cabin judicial discretion without regard to how, in practice, it would comport with principles of advocacy. Carlos González falls into this trap when positing the need for some ordering principle surrounding the use of extrinsic aids, as if advocacy, logic, and persuasion serve no role. Carlos E. Gonzalez, *Turning Unambiguous Statutory Materials into Ambiguous Statutes: Ordering Principles, Avoidance, and Transparent Justification in Cases of Interpretive Choice*, 61 Duke L.J. 583, 589, 593 (2011). Implicit in this search for ordering principles is an assumption that judicial legitimacy is dependent upon *a priori* rules that operate with sufficient certainty as predictive tools. But our legal system is adversarial, it relies on logic and the power of persuasion; it does not presume the presence of pre-ordained outcomes or ex ante truths.

[158] Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 Vand. L. Rev. 715, 716 n.4 (1992). *See also* Jerome Frank, Law and the Modern Mind (1930); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 Harv. L. Rev. 1222 (1931).

[159] J. Harvie Wilkinson III, Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right to Self-Governance 87 (Oxford Univ. Press 2012) ("There is even evidence that explicit pragmatism is on the rise, as evidenced by a marked jump in references to effects and consequences in statutory interpretation opinions.").

[160] *E.g.*, Nourse, *infra* note 216, at 90.

[161] Farber, *supra* note 13, at 534–35.

observes how "[t]extualism is not simply a revival of the old plain meaning rule. It is a sophisticated theory of interpretation which readily acknowledges that the meaning of words depends on the context in which they are used."[162] Plain meaning—or modern textualism—is subservient to the now almost universally obvious and logical acknowledgement of the importance of context.[163]

Contextualism *is* the governing paradigm for statutory construction.[164] Courts long ago warned about the need to appreciate words in context.[165] In the seminal *NLRB v. Hearst*[166] opinion, Justice Jackson noted how the word "employee" in the Wagner Act could only be understood in context. And Congress itself elevates the

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[162] Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 Wash. U. L.Q. 351, 351–52 (1994).

[163] *E.g.*, Johnson v. United States, 559 U.S. 133, 139 (2010) ("Ultimately, context determines meaning" when deciding whether ordinary meaning or term of art (citation omitted)); Nken v. Holder, 556 U.S. 418, 426 (2009) ("[S]tatutory interpretation turns on 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)); Env't Def. v. Duke Energy Corp., 549 U.S. 561, 575–76 (2007) ("[c]ontext counts"); Gustafson v. Alloyd Co., 513 U.S. 561, 574–76 (1995) (majority rejects relying on a word out of context); Brown v. Gardner, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context . . . ." (citation omitted)); Deal v. United States, 508 U.S. 129, 132 (1993) (words must be understood in context).

[164] *See, e.g.*, Caraco Pharm. Lab'ys, Ltd. v. Nordisk, 566 U.S. 399, 412 (2012) (consider language of statute "in context of the entire statute" and meaning of particular phrase dependent on context); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000) ("The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context."); Brown v. Gardner, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context . . . ."); Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). In one of the well-known statutory construction cases, the Court observed that the provision, "like every Act of Congress, should not be read as a series of unrelated and isolated provisions." Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 570 (1995) (giving the term "prospectus" the same meaning under two different provisions, which the Court found reinforced by the structure of the Act). *See also* United States Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 455 (1993) (when addressing a scrivener's error, the Court explained how "[s]tatutory construction 'is a holistic endeavor'" (quoting United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988)).

[165] *E.g.*, United States v. St. Paul, Minneapolis & Manitoba Ry. Co., 247 U.S. 310, 313–20 (1918) (examined context of language, including legislative history); Int'l Tr. Co. v. Am. Loan & Tr. Co., 65 N.W. 78, 79 (1895) ("It is always an unsafe way of construing a statute or contract to divide it, by a process of etymological dissection, into separate words, and then apply to each, thus separated from its context, some particular definition. . . .").

[166] 322 U.S. 111, 124 (1944).

importance of context in the Dictionary Act, where it directs that the word "person" must be explored in its context.[167] Justice Breyer, for instance, writes how exploring a particular provision in isolation might suggest ambiguity but not when considered in context.[168] Justice Ginsburg, invoking *General Dynamics Land Systems, Inc. v. Cline*, began her analysis of the Internal Revenue Code's use of the term "assessment" with the observation that it is a "cardinal rule that statutory language must be read in context."[169] Similarly, in *Yates v. United States*,[170] Justice Ginsburg explored the meaning of the phrase "tangible object," and observed how "[w]hether a statutory term is unambiguous . . . does not turn solely on dictionary definitions" but instead on context.[171] Justice Sotomayor similarly cautions that when statutory

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[167] 1 U.S.C. § 1. *See also* Inyo County, CA v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony, 538 U.S. 701, 704 (2003) (Native American tribes not "persons" under 42 U.S.C. § 1983); Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council, 506 U.S. 194, 196 (1993) (person not include associations for *in forma pauperis* benefits).

[168] Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 7–8 (2011) (quoting Dolan v. Postal Serv., 546 U.S. 481, 486 (2006) for the same proposition). In *Kasten*, Justice Breyer began by examining the ordinary meaning of the statutory text, including referring to dictionary definitions, ordinary parlance, and usage elsewhere in general and in the statute itself. *Id.* Although dissenting, Justice Scalia too married up analyzing the plain meaning of the language within its statutory context. *Kasten,* 563 U.S. at 17 (Scalia, J., dissenting). Also, for instance, dissenting in *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 230 (2009), Justice Breyer began by observing how a "drafting history" and history of "related provisions" informed an interpretation contrary to that of the majority. In *Lozman v. City of Riviera Beach*, 568 U.S. 115, 121–22 (2013), Justice Breyer examined the Rules of Construction Act definition of "vessel," and applied what he considered an ordinary understanding (he did look at dictionaries), consistent with the text, precedent, and importantly the relevant purpose of the maritime statutes. Justice Breyer discussed the importance of context in *Making Our Democracy Work*. Stephen Breyer, Making Our Democracy Work: A Judge's View 90–91 (Vintage Books 2011).

[169] Hibbs v. Winn, 542 U.S. 88, 101 (2004) (quoting General Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 596 (2004)). In another case, Justice Ginsburg suggested that courts must first examine the ordinary meaning of the words in the statutory provision, although her subsequent analysis effectively employed broad contextualism. Lawson v. FMR, LLC, 571 U.S. 429, 441–46 (2014). Indeed, its breadth prompted Justice Scalia to respond that he did not "endorse . . . the Court's occasional excursions beyond the interpretative terra firma of text and context." *Id.* at 459 (Scalia, J., concurring).

[170] 574 U.S. 528 (2015).

[171] *Id.* at 537 (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)). Justice Ginsburg acknowledged some drafting conventions and canons, and employed what she termed "familiar interpretative guides," *id.* at 539, including even discussing the rule of lenity, *id.* at 547–48, to solidify a construction. Justice Alito, concurring, countered how he would have narrowed the scope of tools to reach the result. *Id.* at 549–52 (Alito, J., concurring). Dissenting, Justices Kagan,

language "in isolation, is indeterminate" then context—including statutory scheme—becomes fundamental.[172] When a majority of the Court interpreted the word "individual" in the Torture Victim Protection Act to embrace only natural persons rather than organizational entities such as the Palestinian Authority, the Court in an opinion by Sotomayor relied upon the ordinary meaning as "fortified by its statutory context."[173] And writing for the Court in *Loughrin v. United States*,[174] Justice Kagan emphasized how textual limitations in the federal bank fraud statute precluded adding an intent element, even though such an element would avert significant policy issues posed by a broad reading of the statute.[175]

Scalia, Kennedy, and Thomas examined context as well—notably context included the "evident purpose" and how the language was used elsewhere, including state laws, *id.* at 553 (Kagan, J., dissenting), its "endless uses of the term in statute and rule books as construed by courts," *id.* at 554, accepting how "context matters in interpreting statutes" and that "here the text and its context point the same way." *Id.* at 555. And finally, among other things, the dissent examined the aptness of the various canons, *id.* at 560–61, 563–67, and read the legislative history differently than the plurality. *Id.* at 562. Perhaps reflective of the contextual disagreement, the dissenters asked "[i]f none of the traditional tools of statutory interpretation can produce today's result, then what accounts for it?" The question suggests the answer was a pragmatic results-driven effort to lessen the statute's harshness—an observation that the dissenters likely agreed with but suggested the matter is for Congress. *Id.* at 569.

[172] Roberts v. Sea-Land Servs., Inc., 566 U.S. 93, 101 (2012).

[173] Mohamad v. Palestinian Auth., 566 U.S. 449, 453–54 (2012). The Court dismissed petitioners' initial argument, as well, by noting how their argument was an "awkward fit in the context." *Id.* at 457.

[174] 573 U.S. 351 (2014).

[175] *Id.* at 356–57. The defendant argued that the statute required proof of intent, and the Court engaged in a textual analysis, suggesting that defendant presented a purportedly "extra-textual limit" that is not sanctioned under the language, or general canons of construction that included exploring the statute. *Id.* at 357. Justice Kagan agreed that defendant's extra-textual arguments about how the Court interpreted another similar statute (mail fraud) and how the broad interpretation might intrude into traditional state areas carries some force, just not enough. *Id.* at 359–60. In a concurrence, Justice Scalia questioned the majority's understanding of the word "means," engaging in a quite interesting dialogue. *Id.* at 369 (Scalia, J., concurring in part and concurring in judgment, and joined by Justice Thomas). The defendant argued that the statute required proof of intent, and the Court engaged in a textual analysis, suggesting that defendant presented a purportedly "extra-textual limit" that is not sanctioned under the language, or general canons of construction that included exploring the statute. Justice Kagan agreed that defendant's extra-textual arguments about how the Court interpreted another similar statute (mail fraud) and how the broad interpretation might intrude into traditional state areas carries some force, just not enough. In a concurrence, Justice Scalia questioned the majority's understanding of the word "means," engaging in a quite interesting dialogue. *Id.* at 366 (Scalia, J., concurring in part and concurring in judgment, and joined by Justice Thomas).

On the other side of the judicial spectrum, Justice Scalia too acknowledged how context informs the meaning of statutory language.[176] As one of the leading ostensible "textualists," Justice Scalia readily accepted that context is the touchstone of statutory construction. In *Reading Law: The Interpretation of Legal Texts*, Justice Scalia and his co-author Bryan Garner propose a "fair reading" method that examines the textual language from a contextual perspective.[177] Justice Scalia, therefore, may have eschewed resort to legislative history or statutory purpose(s),[178] but several of his opinions do more than examine the specific language at issue.[179] Indeed, shortly before his passing, Justice Scalia indicated a willingness to explore legislative history as part of an effort to understand context.[180] Chief Justice Roberts similarly observes how "[t]he construction of statutory language often turns on context."[181] Justice Thomas too highlights context when he notes how statutory construction begins with both the language itself as well as its "specific context."[182]

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[176] *See, e.g.,* Arizona v. Inter-Tribal Council of Arizona, Inc., 570 U.S. 1, 10 (2013). *See generally* Bradley C. Karkkainen, *"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 Harv. J. L. & Pub. Pol'y 401, 403 (1994) (noting how Justice Scalia advocated for exploring words in their context).

[177] Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 33 (2012) (footnote omitted). *Cf.* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation,* 17 Harv. J. L. & Pub. Pol'y 61 (1994) (similarly observing how "[w]ords take their meaning from contexts.").

[178] *E.g.*, Carr v. United States, 560 U.S. 438, 458 (2010) ("only the text Congress voted on, and not unapproved statements made or comments written during its drafting and enactment process, is an authoritative indicator of the law.").

[179] In *United States v. Castleman*, 572 U.S. 157, 173 (2014), for instance, Justice Scalia employed the canon of consistent usage in an instance involving more than statute where those statutes have "similar *purposes*." *Id.* at 174 (quoting Smith v. City of Jackson, 544 U.S. 228, 233 (2005)) (emphasis added). He even resorted to a variety of extra-textual justifications for his opinion, including "common sense." *Id.* at 183. In *CTS Corp. v. Waldburger*, 573 U.S. 1, 19–20 (2014) (Scalia, J., concurring in part), he joined the majority opinion's reliance on a contextual analysis that included examining usage surrounding statutes of repose, other textual clues in the statute, and even how the Dictionary Act would not govern if context suggested otherwise.

[180] *See* Hon. Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 Geo. Wash. L. Rev. 1610, 1616 (2012) ("I don't object to all uses of legislative history.").

[181] FCC v. AT & T Inc, 562 U.S. 397, 404 (2011) (citation omitted). In *FCC*, the Court confronted how to construe the term "personal," and Chief Justice Roberts concluded that context did not "dissuade us from the ordinary meaning" (and in the Dictionary Act) rather than as a term of art. *Id.* at 404–05.

[182] McNeill v. United States, 563 U.S. 816, 819 (2011) (quoting Robinson v. Shell Oil Co., 519 U.S.

As does Justice Gorsuch.[183] In a case involving the scope of a sovereign immunity waiver under the Privacy Act, Justice Alito emphasizes how general tools of statutory construction must be employed when construing the breadth of the phrase "actual damages"—which he said has a "chameleon-like quality" that necessitates considering the "the particular context in which [the term] appears."[184] Of course, the dissenters too consider context when they conclude that the "statute's text, structure, drafting history, and purpose" all provided a contrary and clear answer. Indeed, the dissent includes Justices Sotomayor, Ginsburg, and Breyer, and while they accept the importance of context, they were willing to invoke "plain meaning" because they found context wanting.[185] Justice Kavanaugh, moreover, suggests

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337, 341 (1997)). Thomas' opinion interpreting the Armed Career Criminal Act considered a contextual analysis even though the Justice claimed that the ordinary meaning dictated the outcome. *Id.* at 821. His opinion evinced a purported sensitivity toward the statutory purpose to deflect a plain use of a present tense verb, *id.* at 820 ("That argument overlooks the fact that ACCA is concerned with"), as well as an examination of the broader statutory context. *Id.* at 821 ("The 'broader context of the statute as a whole'"). The opinion, moreover, invoked the absurd results doctrine—with analysis lengthier than the purported ordinary meaning analysis. *Id.* at 822.

[183] In *Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929 (2022), Justice Gorsuch explored the ordinary meaning of a word, but added how it could not be read in isolation or out of context, or without an appreciation of some "longstanding canons." *Id.* at 1939–40. Indeed, he observed that a "clincher" was the Court's assumption that Congress is generally aware of the Court's precedents when it enacts statutes—a contextual analysis. *Id.* In *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), Justice Gorsuch agreed context matters, and as part of that examined customary usage, adding how "[s]ometimes Congress' statutes stray a good way from ordinary English. Sometimes, too, Congress chooses to endow seemingly familiar words with specialized definitions. But until and unless someone points to evidence suggesting otherwise, affected individuals and courts alike are entitled to assume statutory terms bear their ordinary meaning"—starting with accepted rules. *Id.* at 1481–82. *See also* United States v. Taylor, 142 S. Ct. 2015, 2023–24 (2022) (a contextual analysis employing rules of construction and statutory structure).

[184] Fed. Aviation Admin. v. Cooper, 566 U.S. 284, 294 (2012). *See, e.g.,* Brnovich v. Dem. Nat'l Comm., 141 S. Ct. 2321, 2330–31 (2021) (where Justice Alito relied heavily on the mischief Congress sought to address in §2 of the Voting Rights Act of 1965).

[185] 566 U.S. at 308–09 ("Thus, while context is no doubt relevant, the majority's cited authority does little to help its cause in the stated context of this statute."); ("Indeed, the relevant statutory context . . . only reinforces the ordinary meaning of "actual damages."). When interpreting the Sex Offender Registration and Notification Act, Justice Sotomayor found that the defendant's interpretation better "accord[ed]" with the "statutory text," but her reasoning implicitly relied upon a contextual analysis: she quickly examined the verb tense and then turned to examining how the "statutory context strongly support[ed]" the particular construction. Carr v. United States, 560 U.S. 438, 446, 449 (2010). The bulk of her opinion engaged in a broader contextual analysis, rationalizing Congress' choice, as well as placing it in the context of federal sex offender laws and congressional purpose. *Id.* at 446–50. When she examined the legislative history in

judges front load their analysis into *Chevron* step one by employing effectively a broad contextual analysis before pulling the ambiguity trigger.[186]

The subdued jurisprudential disagreement among judges often teeters on how expansive or narrow they accept a contextual argument.[187] Exploring purpose, for instance, might expand the context beyond the relevant language, as might considering the entire statutory scheme, or other related statutes, as well as possibly

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response to the Government's arguments, it prompted Justice Scalia to remark that the examination was unnecessary because of the "Court's thorough discussion of text, context, and structure." *Id.* at 457–58 (emphasis added). Even the dissent arguably explored a broader contextual analysis when it examined context as well as the legislative drafting manuals to illustrate why the verb tense used in the text and accepted by the majority (that is, explaining the context) was in error. *Id.* at 464–65.

[186] Hon. Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 Notre Dame L. Rev. 1907, 1912–13 (2017). "[J]udges should strive to find the best reading of the statute, based on the words, context, and appropriate semantic canons of construction," but also using any appropriate substantive canons (including, even, the absurdity canon), as well as possibly a limited role for legislative history. *Id.* Judge Kavanaugh previously discussed the difficulty with the ambiguity trigger and how to use of canons. Hon. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2152 (2016) (reviewing Robert A. Katzmann, Judging Statutes (2014)).

[187] In *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560 (2012), for example, the Court resolved whether compensation could be paid under the Court Interpreters Act for costs associated with translating documents. *Id.* at 562. The statute allowed costs for interpreters, and the issue was whether interpreter includes those who translate written documents, as well as oral conversations. *Id.* Both the majority and dissent accepted the need to examine context, including the ordinary (dictionary versus technical) meaning. *Id.* at 566, 576. The majority accepted an ordinary meaning confirmed by a narrow contextual analysis of the statute, while the dissent expanded the contextual analysis to include a long history of awarding costs and the absence of anything in the statute to circumscribe a measure intended to "expand access to interpretation services." *Id.* at 576 (Ginsburg, J., dissenting); *see also id.* at 578–79 ("I agree that context should guide the determination" and "the context key form me is the practice of federal courts both before and after" the statute's enactment). In *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011), the Court addressed whether the National Childhood Vaccine Injury Act preempted a state design defect claim (for a vaccine). *Id.* at 226. The case might have been easily resolved by employing the clear statement canon applicable to preemption in cases involving areas of traditional state regulation, as advocated by Erwin Chemerinsky (promoting political safeguards of federalism) in an *amicus* brief. Brief of Amici Curiae Kenneth W. Starr and Erwin Chemerinsky in Support of Petitioners Urging Reversal at 4, 8, Bruesewitz v. Wyeth LLC, 562 U.S. 223 (2011) (No. 09-152). But instead, while even the dissent relegated this point to a footnote, *Bruesewitz*, 562 U.S. at 266–67 n. 15 (Sotomayor, J., dissenting), the dissent, Justice Breyer in a concurrence, and the majority all afforded different weight to the various tools of construction. *Id.* at 243–44.

the legislative and social history (context in which the statute was being passed).[188] Modern ostensible textualists conversely might limit the contextual inquiry. Legislation students, therefore, often review *West Virginia University Hospitals, Inc. v. Casey*[189] to explore the different approaches by Justices Scalia and Stevens. In excluding non-testimonial expert fees as part of reasonable attorney fees under 42 U.S.C. § 1988, Justice Scalia emphasized context by how Congress had elsewhere employed the phrase (statutory usage), while Justice Stevens disagreed, focusing instead on the unique context in which Congress enacted the particular provision.[190] But it is a mistake to conclude that the breadth of any contextual analysis aligns neatly with any jurisprudential leaning. In a five to four decision in *United States v. Wong*,[191] the then liberal majority (with Justice Kennedy joining) held that a statute of limitations was not jurisdictional. Its contextual analysis included applying a clear statement rule for when something operates as jurisdictional bar, indicating that Congress must make its intention "plain" before a Court will construe language as a jurisdictional bar, adding that neither the text nor the context evinced such an intent.[192] The Court's conservatives embraced a larger contextual inquiry, examining the text, the historical roots, and 100 years of precedent.[193] In *Barber v. Thomas*,[194] Justice Breyer joined with Justice Sotomayor and the Court's conservatives to rely on statutory language and purpose when examining the calculation of a prisoner's good time credit, while Justices Kennedy, Stevens, and Ginsburg similarly engaged in a contextual analysis, considering purpose, other parts of the statute, but emphasizing that their interpretation enjoyed better "textual integrity."[195]

Take, for instance, *Dean v. United States*.[196] There, the Court addressed whether a penalty enhancement provision applies when a gun discharges accidentally during the commission of a crime. Because the discharge was accidental, the issue was whether the statute required *mens rea*. The government

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188 Justice Breyer often embraced examining a statute's purpose to discern Congress' likely intent. *E.g.*, Begay v. United States, 553 U.S. 137 (2008) (an issue under the Armed Career Criminal Act, examined text, purpose, history), *abrogated by* Johnson v. United States, 576 U.S. 591 (2015).

189 499 U.S. 83 (1991).

190 *Id.* at 88–89, 91–92, 103.

191 575 U.S. 402 (2015).

192 *Id.* at 420.

193 *Id.* at 421 (Alito, J., dissenting).

194 560 U.S. 474 (2010).

195 *Id.* at 493, 497.

196 556 U.S. 568 (2009).

argued the language was "clear."[197] It reached that result, though, by examining the statutory structure, Congress's use of the passive voice, as well as various "textual and structure clues," along with the statute's purpose and some legislative history.[198] Effectively a contextual analysis. The defendant countered that the language and legislative history requires *mens rea*.[199] The contrary argument merely deployed different clues, all within the confines of a contextual analysis as well. During oral argument, Chief Justice Roberts even asked defense counsel about why the passive use of having a firearm discharged did not dictate the outcome, while Justices Ginsburg and Scalia asked about whether the statute would apply if a police officer offer used and then discharged the defendant's weapon—illustrating why the passive voice might not be dispositive.[200] In a five to two decision, the Chief Justice examined the statute and Congress's use of the passive voice and then addressed the statute's structure and, given that structure, the "most natural reading" of the provision—as not requiring an intent element.[201] The dissent's contextual analysis simply weighted different clues. Justices Stevens and Breyer opined that the statutory structure and common law presumption favoring an intent element counseled requiring mens rea.[202] Of course, when the dissenting opinion talked about structure, it included adding a discussion of the legislative history.[203]

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[197] *See id.*

[198] *See* Brief for the Petitioner at 11, 15, 21, 25, Dean v. United States, 556 U.S. 568 (2009) (No. 08-5274).

[199] Reply Brief of Petitioner at 7–8, Dean v. United States, 556 U.S. 568 (2009) (No. 08-5274).

[200] Transcript of Oral Argument at 4–6, Dean v. United States, 556 U.S. 568 (2009) (No. 08-5274).

[201] *Dean*, 556 U.S. at 573. Chief Justice Roberts rejected an absurd results argument, as well, avoiding hypothetical scenarios what would test the limits for an intent element. *Id.* at 574. He also rebuffed the suggestion for applying a presumption of having an intent element when Congress is silent, reasoning that the underlying unlawful act resembled the policy behind such offenses as the felony-murder rule, where a defendant adds to the risk of additional harm. *Id.* at 577. All these considerations are part of a contextual analysis, not simply examining the language itself in isolation.

[202] *Id.* at 578 (Stevens, J., dissenting).

[203] *Id.* Notably, the opinion starts by identifying "[f]irst the structure" and then "[s]econd, even if the statute did not affirmatively support that inference, the common-law presumption . . . would lead to the same conclusion." *Id.* at 577. Both in the very next breadth and at the end of his opinion, however, Justice Stevens writes how it is "clear from the structure and history" of the provision, coupled with other similar circumstances where the presumption favoring an intent element applies absent a clear statement otherwise, that *mens rea* is required. *Id.* at 578, 583.

B. Contextualism's Box

Contextualism councils that effective advocates appreciate why they must address the text and any relevant canons, along with the structure, purpose, and history, and they would be remiss if they neglected to employ all available tools of construction and respond to any different tools presented by their opponent.[204] Canons and other traditional tools of statutory construction, therefore, invariably will serve as both swords and shields for lawyers dueling over a contextual analysis.[205] And courts will continue to employ canons of construction, while our law school textbooks will remain wedded, appropriately, in their discussion of any number of the multitude of linguistic and substantive canons.[206] Therefore, when

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[204] Lower courts might appear more willing to canvass canons when engaging in a contextual analysis, along with exploring a statute's history and purpose. *E.g.*, Ctr. for Cmty. Action v. Burlington N. Santa Fe Ry. Co., 764 F.3d 1019, 1024, 1026 (9th Cir. 2014) (looked for contextual clues, and then confirmed its preliminary judgment by exploring the statutory and legislative histories of the two relevant acts to resolve any ambiguity). Courts that acknowledge the principle that legislative history cannot subvert what a court concludes is unambiguous statutory language nevertheless may explore a party's use legislative history—albeit sometimes concluding that the historical account simply underscores why the statutory language is a better indicator of intent. Justice Kennedy opined how "[a]s we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." Exxon Mobile Corp. v. Allapttah Servs., Inc., 545 U.S. 546, 568 (2005). This statement, of course, is nonsensical. Extrinsic aids, such as dictionaries, are used constantly to assess ordinary usage in a quest to ascertain whether language is, indeed, ambiguous or how the language should be interpreted, and the same may be true with legislative history. Here, Justice Kennedy's use of "otherwise" obscures what he believes should be the ambiguity trigger. *Exxon*, 545 U.S. at 568. Similarly, in the infamous Native American case, *Carcieri v. Salazar*, 555 U.S. 379, 389–92, 394–95 (2009), Justice Thomas employed odd linguistic tools to cabin a statute, but in doing so examined extrinsic evidence consistent with his interpretation and merely said he was not deferring to it; and he relied on a contextual analysis to announce that the language was not ambiguous.

[205] The oft-employed textual canons of construction, such as *in pari materia*, *noscitur a sociis*, *expressio unius est exclusio alterius*, and *ejusdem generis*, underscore the importance of context and the corresponding role of advocacy.

[206] Stephen F. Ross, *Where Have you Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 Vand. L. Rev. 561, 563–64 (1992). Textbooks typically explain how canons are tools of statutory construction and accept Karl Llewellyn's admonition that canons are devices invoked to justify a result. Mikva, Lane & Gerhardt, for instance, aptly note that "[t]he use of canons of construction for the interpretation of statutes has been held in scholarly ill repute for over a century." Abner J. Mikva, Eric Lane & Michael Gerhardt, Legislative Process 690 (4th ed. 2022). They are "but a grab bag of individual rules, from which a judge can choose to support" her decision. *Id.* Many canons, they add, are even wrong. *Id.* Even the Supreme Court overtly

Cass Sunstein posits that language, structure, and history are inadequate from both a phenomenological and normative perspective as theories of interpretation, he diminishes that, regardless of whether the academy and some judges may criticize how these tools get prioritized, the advocate must confront each of these tools and the judiciary necessarily must respond.[207]

Some scholars suggest that canons, appropriately prioritized, might operate as background norms capable of providing coherence to statutory construction.[208] Robert Martineau, for example, proffers how we should focus our legislative courses and study of statutory construction on how judges use canons, as well as possibly theories, "as techniques . . . to support their construction of statutes."[209] This dialogue occurs despite almost universal approbation for Karl Llewellyn's historic critique of canons,[210] emerging empirical evidence about congressional understanding of canons, or more recently Judge Katzmann's warning that singular reliance on canons can be quite problematic.[211] Canons, quite frankly, cannot serve as ex-ante rules governing construction; for every one of the multitudes of canons there is likely an available counter-canon for the circumstance, as Llewellyn and others have recognized for quite some time.[212] Canons are mere tools for the legal advocate and the judge who must weigh—or balance—the tools of construction advanced by opposing parties.[213] As Justice Ginsburg once explained in rejecting the

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acknowledges the dilemma posed by canons in tension. *See* POM Wonderful LLC v. Coca-Cola Co., 573 U.S. 102, 112 (2014) ("A principle of interpretation is 'often countered, of course, by some maxim pointing in a different direction.'"); Landgraf v. USI Film Products, 511 U.S. 244, 263 (1994) ("It is not uncommon to find 'apparent tension' between different canons of statutory construction. As Professor Llewellyn famously illustrated, many of the traditional canons have equal opposites.").

[207] Sunstein, *supra* note 119 at 414.

[208] *E.g.*, *id.* at 412. Judge Easterbrook once suggested a meta-canon that would direct courts to apply a statute as expressly written. Frank H. Easterbrook, *Statutes' Domain*, 50 U. Chi. L. Rev. 533, 544 (1983).

[209] Martineau, *supra* note 6, at 5.

[210] According to Macey and Miller, Llewellyn's critique of canons "derailed for almost a quarter century" the "intellectual debate" about their use. Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 Vand. L. Rev. 647, 647–48 (1992).

[211] Katzmann, *supra* note 113, at 52–53.

[212] See Karl N. Lewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to be Construed*, 3 Vand. L. Rev. 395, 401 (1950).

[213] Former Justice Breyer warns that too much reliance on canons and other linguistic interpretive aids can undermine democracy by ignoring legislative will. Breyer, *supra* note 12, at 98–99. But he concedes that if "courts [were] fully consistent in their use of canons; were

application of the last antecedent rule, this grammatical presumption is not absolute and can be "overcome by other indicia of meaning"[214]—that is, by other contextual clues![215]

Even Victoria Nourse's critical lament that those exploring statutory meaning ought to be more versed in the institutional rules of Congress, and how those rules may serve as a decision theory—ultimately supporting the use of legislative history, neither discusses actual congressional practice nor explains the role of the House or Senate office of legislative counsel and what texts they may use when drafting legislation.[216] And it is through this adversarial process that judges resolve

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congressional drafters fully aware of those canons; were Congress to rely consistently upon the work of those drafters . . .then reliance upon those conventions alone could provide interpretations likely to reflect congressional purpose." *Id.* at 99. Abbe Gluck portrays the use of canons as too formalistic and a failure. Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways that Courts Can Improve on What They Are Already Trying to Do*, 84 U. Chi. L. Rev. 177, 178, 198 (2017). Nicolas Rosenkranz suggested such congressionally sanctioned canons. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085, 2143 (2002). Einer Elhauge has written more extensively on how statutory default rules for judges might minimize arguable judicial discretion. Einer Elhauge, Statutory Default Rules 5 (2008). Perhaps the most insightful discussion is by Nina Mendelson, who describes the use of canons and suggests how they can serve as useful evidentiary or procedural type rules for guiding courts. Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretative Canon Use in the Roberts Court's First Decade*, 117 Mich. L Rev. 71, 137–38 (2018). It seems likely that any such prescriptive rules could have the same fate as the Dictionary Act, and not necessarily dispositive in any particular case. *See* United States v. Hayes, 555 U.S. 415, 421–22 (2009) (rejecting application of the Dictionary Act).

[214] United States v. Hayes, 555 U.S. 415, 425 (2009) (quoting Barnhart v. Thomas, 540 U.S. 20, 26 (2003)).

[215] In *Hayes*, a group of linguistics and cognitive science professors presented the Court with how to approach the concept of ordinary meaning—favoring a much more sophisticated (I would add a more nuanced contextual) analysis about how language works. Brief of Professors of Linguistics and Cognitive Science as Amici Curiae in Support of Neither Party at 1–2, United States v. Hayes, 555 U.S. 415 (2009) (No. 07-608). The government responded that the amici failed to present a compelling case for how a phrase would ordinarily be understood, and effectively employed a contextual analysis by examining other clues such as the statute's purpose and legislative history. Reply Brief of the United States at 6, 10, 17–18, United States v. Hayes, 555 U.S. 415 (2008) (No. 07-608).

[216] Victoria F. Nourse, *A Decision of Statutory Interpretation: Legislative History by the Rules*, 122 Yale L.J. 70, 96–97 (2012). The same is true with others, who posit theoretical constructs for elevating the importance of legislative history by suggesting that courts can rely on the expressed views of the cadre of critical legislative proponents. *See* Daniel B. Rodriquez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives of the 1964 Civil Rights Act*

disagreements over statutory construction.

C. Contextualism Informing Plain Meaning

Perhaps of all the statements about statutory construction, the notion that statutes should be construed according to their ex-ante plain or ordinary meaning most acutely illustrates that statutory construction is an exercise in contextualism through an iterative process between adversarial parties and the judiciary, nothing more, nothing less. Courts seemingly enjoy parroting the refrain that statutory construction requires looking first at the plain or ordinary meaning (the text), the structure, and then any relevant legislative history.[217] The mantra that

and its Interpretation, 151 U. Pa. L. Rev. 1417, 1422–23 (2003). While Congress may deem its history important, the Justices remain somewhat divided over its use. *See, e.g.,* Digit. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 782 (2018). In their empirical study of congressional staffers, Gluck and Bressman note how staff purportedly considers legislative history as the most informative reflection of congressional intent. Gluck & Bressman, *supra* note 10, at 907. Unfortunately, not all legislative endeavors are created equal, and the suggestion that such ex ante approaches can match particular legislation is too sophomoric. More generally, the difficulty with legislative history is not necessarily appreciating its probative value, but rather whether the lawyers are trained sufficiently in the legislative process to construct effective arguments around legislative history—the Court occasionally easily dismisses legislative history as a secondary argument by explaining how the advanced history far from supports the advocate's claim. *E.g.*, Mohamad v. Palestinian Auth., 566 U.S. 449, 458–59 (2012). Too often it seems lawyers rely on "isolated fragments of legislative history" to "divin[e] the intent of Congress," only to be told that such "an exercise [is] fraught with hazards, and 'a step to be taken cautiously.'" New England Power Co. v. N. H., 455 U.S. 331, 342 (1982). And even when those fragments are less isolated, courts generally demand much more than remarks from one congressional (even if important) member. *E.g.,* Nat'l Cable & Telecomm. Ass'n v. Fed. Commc'ns Comm'n, 567 F.3d 659, 665 (D.C. Cir. 2009) ("even if legislative history could carry petitioners all the way from statutory language that literally authorizes the Commission's action to the proposition that the statute unambiguously forecloses the agency's view, *this* legislative history cannot."). The judiciary arguably contributes to clumsy approaches toward legislative history. For example, the Ninth Circuit accepted the Court's broad statement that a bill's committee report contains the most authoritative source of legislative (albeit also discussing conference report). N. Cal. River Watch v Wilcox, 633 F.3d 766, 775 (9th Cir. 2011) (quoting Garcia v. United States, 469 U.S. 70, 76 (1984)). That is only true if the bill language did not go to conference, if it remained the same in conference, and then if there was no significant discussion of the issue in the conference report. Nourse, *supra* note 215, at 94 (discussing rules for conferences).

[217] *E.g.,* Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 251 (2010) (internal citations and quotations omitted) ("As in all such cases, we begin by analyzing the statutory language . . . [and] must enforce plan and unambiguous statutory language according to its terms."). In *Muscarello v. United States*, 524 U.S. 125 (1998), for instance, Justice Breyer, an ardent supporter of exploring a statute's purpose, initiates his analysis by noting how "[w]e begin with the statute's language."

unambiguous statutory text should be afforded a plain or ordinary meaning appears routinely in texts and judicial opinions.[218] This is particularly true when an agency first interprets a statute and a court then must examine whether that construction enjoys *Chevron* deference.

Yet plain or ordinary meaning effectively serves as a linguistic conduit for funneling two ostensibly logical arguments presented by adversaries zealously representing their clients and attempting to persuade arbiters that context supports their plain or ordinary meaning.[219] Here, we should pause and clarify that ordinary is preferred over plain meaning. "Plain's" connotation suggests no analysis is necessary, while "ordinary" refers to how language is used, a more accurate description. Considerable scholarship surrounds the theoretical dynamic of ordinary meaning, and much of it centers on the use of dictionaries.[220] Here, it is

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Id. at 127. He then explores how to construe the word carry in the phrase "carries a firearm." *Id.* at 127–28. Carry, he concludes, has two common understandings, one an ordinary understanding and another connoting a special understanding. *Id.* at 131–32. After canvassing numerous sources illustrating uses of the word, including even the Bible, he opts for the former by simply reasoning that he believes it would be unlikely that Congress intended the latter. *Id.* at 129, 131. Then he proceeds to explore more deeply why "carry" is being used in its ordinary sense, by examining the statute's purpose, its legislative history, as well as practical considerations. *Id.* at 132, 137–38. Justice Ginsburg's dissent, joined by Justices Scalia, Souter, and the Chief Justice, believed that the "relevant context" favored the special (and narrower) understanding. *Id.* at 140 (Ginsburg, J., dissenting).

[218] *See, e.g.*, HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass'n, 141 S. Ct. 2172, 2176 (2021) ("Where Congress does not furnish a definition of its own, we generally seek to afford a statutory term 'its ordinary or natural meaning'" (quoting FDIC v. Meyer, 510 U.S. 471, 476 (1994)); Sebelius v. Cloer, 569 U.S. 369, 376 (2013) ("As in any statutory construction case, '[w]e start, of course, with the statutory text,' and proceed from the understanding that '[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning" (quoting BP Am. Prod. Co. v. Burton, 549 U.S. 84, 91). *See also* Roberts v. Sea-Land Servs., Inc., 566 U.S. 93, 100 (2012) (internal citations and quotations omitted); Milner v. Dep't of Nay, 562 U.S. 562, 568–72 (2011). The D.C. Circuit, for instance, has noted how it must "as always" begin with the statute's ordinary language. *Nat'l Cable & Telecomm. Ass'n*, 567 F.3d at 664 (quoting Citizens Coal Council v. Norton, 330 F.3d 478, 482 (D.C. Cir. 2003)). *See also* Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 252 (2010).

[219] Judge Raymond M. Kethledge of the Sixth Circuit appropriately observed how plain meaning is "overused" and a "misnomer." Hon. Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench,* 70 Vand. L. Rev. *En Banc* 315, 319 (2017).

[220] *See generally* Anita S. Krishnakumar, *Metarules for Ordinary Meaning*, 134 Harv. L. Rev. F. 167 (2021); Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 Yale L.J. 788, 799 (2018*); see also* James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 Wm. & Mary L. Rev. 483, 494–96 (2013).

important to distinguish between the use of dictionaries to decipher an ordinary understanding of a word or phrase rather than a technical (or often common law) meaning,[221] and the overall concept of ordinary meaning. Because ordinary meaning means little more than which parties' argument is more plausible—or, stated differently, more logical or reasonable. This means, for instance, that advocates should appreciate the practical dynamic of how *arguments* about words will be received by a judge. As explained by Michael Smith, an argument that the word "chair" includes a "couch" will need to overcome how our minds, including those of judges, employ stock structures or mental images invoked by words.[222] And so, for instance, logic and experience might affect how a judge cogitatively approaches ordinary meaning.[223]

Ordinary meaning in practice arguably serves as a surrogate for weighing the parties' purported logical arguments about ostensibly ambiguous language. Courts today accomplish this sleight-of-hand when they note that *context* is perhaps the most critical component in any textual endeavor.[224] The idea of *context*, after all, is fundamental to hermeneutics.[225] The classic example is an ordinance prohibiting

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[221] *E.g.*, Taniguchi v. Kan Pac. Saipan, Ltd., 566 U.S. 560, 566–67 (2012) (canvassing an array of dictionaries to search for an ordinary meaning of "interpreter").

[222] Michael R. Smith, *Linguistic Hooks: Overcoming Adverse Cognitive Stock Structures in Statutory Interpretation*, 8 Legal Comm. & Rhetoric 1 (2011). Others emphasize the importance for lawyers to appreciate how to expand their research into areas designed to influence the particular arbiter. *See* Thomas M. McDonnell, *Playing Beyond the Rules: A Realist and Rhetoric-Based Approach to Researching the Law and Solving Legal Problems*, 67 Univ. Miss. Kan. City L. Rev. 285, 295–96 (1998).

[223] An interesting example is where Justices viewed a videotaped recording of a car chase and arguably could not escape having seen the recording when deciding that the lower court had erred. *See* Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 Harv. L. Rev. 837, 903 (2009) (authors describe how the Court effectively adopted a "brute sense impression" based on a culturally constructed and implicitly biased paradigm). *See e.g.,* Rouse v. L. Off. of Rory Clark, 603 F.3d 699, 704 (9th Cir. 2010) (court influenced by its ex ante conception of "costs" as not including attorney fees).

[224] *See* Brown v. Gardner, 513 U.S. 115, 118 (1994) ("Ambiguity," after all, "is a creature not of definitional possibilities but of statutory context.").

[225] "Although human communication rests on individuals having linguistic competence about the meaning of words in a language, the exact meaning of words uttered in ordinary conversation depends on context." Greenwalt, *supra* note 17, at 9. *See also id. at 53.* ("Related to the focus on ordinary understanding is a recognition of context. That language is understood in context is a premise of every influential modern writer on human communication."). "None of us," after all, "speak in single words," but rather we convey ideas through "collective word use and . . . convey

loud music near a "bank," with the word bank undefined and yet susceptible to being interpreted as the shores along a water body, the slope alongside a mountain or road, an array of items, or an institution or building engaged in financial transactions. Only context tells us whether the word is more likely than not referencing only one of those concepts.[226] When, therefore, we think something is clear, context can confirm it.[227] Context, moreover, informs whether Congress intended a word or phrase be interpreted in an ordinary sense or as a term of art.[228]

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meaning by the aggregate of our symbols interpreted in the surrounding of their use." Frank E. Horack, Jr., *The Disintegration of Statutory Construction*, 24 Ind. L.J. 335, 338 (1949).

[226] Dictionaries, therefore, may aid the inquiry when exploring a word's ordinary usage in context. *See generally* Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 Buff. L. Rev. 227, 230 (1999). *Cf.* Cabell v. Markham, 148 F.2d 737, 739 (2nd Cir. 1945) (Judge Learned Hand admonishing against making a "fortress out of the dictionary"), *aff'd*, 326 U.S. 404 (1945).

[227] When reviewing whether something is "administratively final" under the immigration laws for an entitlement to a bond hearing during a removal process, the Court announced that the language "is clear" and then how "[c]ontext confirms this interpretation." Johnson v. Guzman Chavez, 141 S. Ct. 2271, 2284 (2021). In another part of the opinion, Justice Alito for the majority addressed another textual argument, concluding that both the text and the statutory structure (i.e., context) confirm the government's position. *Id.* at 2289. The dissenters interpreted the operative language differently, implicitly employing a contextual analysis when examining the structure of the relevant provisions to reach the "most natural reading" of the language. *Id.* at 2296 (Breyer, J., dissenting, joined by Sotomayor, J., and Kagan, J.). A contextual analysis is likely necessary, as well, to confirm whether a particular grammatical rule ought to govern. *See e.g.*, Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1170–71 (2021) (applying series-qualifier canon, and then examining other parts of the statute and dismissing the alternative rule of the last antecedent canon not appreciating this is a contextual analysis, and then shortly thereafter noting that the "statutory context confirms" its conclusion); Lockhart v. United States, 577 U.S. 347, 352 (2016) (applying last antecedent rule, and confirming that "context fortifies the meaning").

[228] In *Johnson v. United States*, for instance, the Court held that a prior battery conviction in Florida was not a "violent felony" under the Armed Career Criminal Act. 559 U.S. 133, 145 (2010). Writing for a 5-2 majority, Justice Scalia interpreted the phrase "physical force." *Id.* at 138–41. Affording the word "force" its ordinary meaning (using dictionaries as guides), he concluded that force required something more than mere touching. *Id.* at 138–39. But if "force" reflected a common law term of art, then a simple touching would suffice. *Id.* at 139–40. Although he suggested that a "common law term of art should be given its established common-law meaning," he observed how only context could determine which meaning would prevail. *Id.* ("Ultimately, context determines meaning"). Justices Alito and Thomas favored the common-law meaning, concluding that nothing else in a contextual analysis supported departing from that presumption, examining nearby textual language and "other standard canons of statutory interpretation," as well as expressing a practical concern of what the interpretation would do to other statutes. *Id.* at 147, 152 (Alito, J., dissenting).

In *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n*, for instance, Justice Gorsuch addressed the word "extension" in the troubled renewable fuels program, and began by noting how it could "mean different things depending on context."[229] In *Bostock v. Clayton County, Ga.*, he construed the word "sex" in the 1964 Civil Rights Act, making it unlawful "for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[230] Asking what the word "sex" ordinarily would have meant to the public back in 1964 ("orient[ing] ourselves to the time of the statute's adoption"), his majority opinion employs a contextual analysis by canvassing the ordinary meaning of other surrounding words[231] and the statutory structure,[232] along with an illustration of how the language would most likely be perceived to operate in practice.[233] This implicit contextual analysis prompted Justices Alito and Thomas to assert—albeit

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[229] 141 S. Ct. 2172, 2176–77 (2021). Justice Gorsuch's opinion follows a broad contextual analysis, as he explores how to interpret the word extension. *Id.* at 2175, 2177–79. He references dictionaries, looks at how the word has been used elsewhere, discusses the consistent usage canon and the notion that exemptions should be read narrowly, and he examines other "statutory clues." *Id.* at 2179. And yet he refers to his analysis as examining only the statute's text. *Id.* at 2183. That is after observing "[n]either the statute's text, structure, nor history afford us sufficient guidance to be able to choose with confidence between the parties' competing narratives and metaphors. We mention this only to observe that both sides can offer plausible accounts of legislative purpose and sound public policy." *Id.* at 2183. Dissenting, Justices' Barrett, Sotomayor, and Kagan, concluded that the statute's text and structure provided a "clear [but contrary] answer." *Id.* (Barrett, J., dissenting). The difference between the dissent and majority was how they engaged in their respective contextual analyses. The dissenters believed respondents' interpretation reflected an ordinary use of the word and that "context matters" and here "context cuts respondents' way." *Id.* at 2184.

[230] 140 S. Ct. 1731 (2020).

[231] *Id.* at 1738–40 (construing "because of" as well as "discriminate").

[232] *Id.* at 1740 (describing what the statute assigns liability for). His analysis of how the word discriminate is used throughout the provision, however, justifies his conclusion. *Id.* at 1740–41.

[233] *Id.* at 1741 (offering an example). This analysis leads the majority to conclude that "a straightforward rule emerges" "[f]rom the ordinary public meaning of the statute's language at the time of the law's adoption." *Id.* Rather than rejecting outright the use of subsequent congressional history to inform the analysis, the majority merely rebuffs its portrayal as insufficiently probative. *Id.* at 1747. Of course, Justice Gorsuch opines later that, while some Justices might mine legislative history when language is ambiguous, it carries little currency when used to create ambiguity rather than clear it up. *Id.* at 1749. This begs the question: it assumes other tools of construction already cleared it up.

with minimal analysis—the majority engaged in "legislation."[234]

Notably, a contextual analysis may creep into an opinion without an overt recognition. In *Wooden v. United States*,[235] Justice Kagan addressed whether the "Occasions" Clause in The Armed Career Criminal Act (ACCA) applied to the defendant's ten convictions of robbing, during one nightly escapade, ten different storage units at a single facility. The government claimed each storage unit (for which he was separately convicted) was a distinct occasion, temporally, because each unit was burglarized at different times, thus warranting the ACCA's penalty enhancement. For the majority, Justice Kagan began by examining the ordinary meaning of the word "occasion."[236] But she implicitly did so by employing a contextual analysis. She considered how, in everyday parlance, the defendant's crime would be described, not how the word would be understood. By focusing instead on an ordinary understanding of how language would be used to describe the crime,[237] she shifted the analysis toward a broader inquiry. When, therefore, she next explored dictionary definitions, she similarly described other scenarios illustrating how the use of language in context would likely dictate its meaning, whether for a singular event or a series of simultaneous or "non-simultaneous activities."[238] And she even bolstered her contextual analysis again implicitly, when she explored other aspects of the ACCA to explain why treating the burglary of each unit on the same night (like a barroom brawl with several victims) would undermine the objective of the ACCA.[239] Of course, Justice Kagan then broadened her contextual analysis by recounting how the ACCA's history and its broader purpose

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[234] *Id.* at 1754 (Alito, J., dissenting). The dissent, in part, followed a similar methodological approach, though concluding instead that ordinary meaning would have meant something different. *Id.* at 1755–56. "The Court," Justice Alito claims, "attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated." *Id.* at 1755–56. Once one appreciates that textualism ought to be described as contextualism, these types of disagreements will be more precise as judges weigh and debate the application of specific tools of construction.

[235] 142 S. Ct. 1063 (2022).

[236] *Id.* at 1069.

[237] *See id.* ("She would, using language in its normal way, group his entries into the storage units, even though not simultaneous, all together").

[238] *Id.* at 1069–70.

[239] *Id.* at 1070 ("But for the most part, the Government's hyper-technical focus on the precise timing of elements—which can make someone a career criminal in the space of a minute—gives ACCA's three-occasions requirement no work to do.").

supported reading the Occasions Clause to exclude the defendant's episode.[240] Indeed, Justice Kagan's hidden contextual analysis prompted Justice Gorsuch to pen possibly the most insightful approach toward invigorating the rule of lenity.[241]

Also, if courts appreciate that contextualism includes an appreciation for whatever tools of construction they consider acceptable at the outset, contextualism as a style of judicial reasoning should promote precision in analysis. In *Borden v. United States*,[242] for instance, the Court addressed whether the ACCA would apply to offenses criminalizing reckless conduct. The issue was whether the phrase "against another" modified the operative phrase "use of force." A plurality held it did.[243] Their reasoning, though, followed an implicit contextual analysis because it examined the "rest of the elements clause" and had to address the "critical context" of the language.[244] They also served up examples of how the language is ordinarily used.[245] But they began this analysis by opining how its "reading of the relevant text finds support in its context and purpose."[246] It is not that it finds support; it is that the plurality understood the language because of its contextual analysis, including purpose![247] While adding purpose in a contextual analysis may not be palatable to

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[240] *Id.* at 1072. The concurring opinions focused principally on the rule of lenity, while Justices Barrett and Thomas objected not specifically to using legislative history but the portrayal of that history. *Id.* at 1075–77 (Barrett, J., concurring in part and concurring in judgment).

[241] *Id.* at 1082. Justice Gorsuch's opinion and approach toward the rule of lenity may garner a future majority, as his thoughtful opinion explains why, when a grievous ambiguity remains after employing the traditional tools of construction, lenity is necessary. *Id.* at 1084–86. He also observes how Justice Kagan's use of "legislative history and purpose to limit, never expand, punishment under an ambiguous statute" may be a new rule, yet "if that is so, why take such a long way around to the place where lenity already stands waiting?" *Id.* at 1085. Justice Gorsuch here resembles Justice Scalia, when Justice Scalia concluded that the ACCA's residual clause contravened a defendant's due process rights. Johnson v. United States, 576 U.S. 591, 606 (2015).

[242] 141 S. Ct. 1817 (2021).

[243] *Id.* at 1834.

[244] *Id.* at 1826. Concurring, Justice Thomas explained that, because the Court previously held a part of the ACCA unconstitutional, prosecutors sought to use the ACCA's elements clause broadly—beyond a fair reading of the text. *Id.* at 1835 (Thomas, J., concurring).

[245] *Id.* at 1825–27.

[246] *Id.* at 1825. Indeed, later in its opinion, the plurality adds an additional section that begins by observing how "[w]ere there any doubt about the elements clause's meaning, context and purpose would remove it." *Id.* at 1830. And, while this part of the opinion appears to be bolstering its prior analysis, it notes here that its prior cases held that "context determines meaning." *Id.* at 1830.

[247] The four dissenters proffered a contrary contextual analysis that included examining some historical roots (and other extrinsic evidence) to conclude that Congress intended to adopt a term

some, the disagreement ought to be what tools are appropriate for the particular contextual analysis and the weight afforded those tools—including possibly a statute's purpose.

CONCLUSION

Modern administrative law affords the executive branch with sufficient space to allow Presidents to tilt the scales of administrative policymaking. For instance, Daniel Farber observed how the former Trump administration "can be partly seen as a continuation of the methods identified by Kagan by which a president can control executive branch policy through publicity and instructions to agencies and can seize credit for administrative actions as his own."[248] When one administration releases a Clean Power Plan,[249] the next can alter it to an Affordable Clean Energy Plan,[250] although neither would survive judicial review and need to be revisited by the Biden administration. The same is true with the Obama administration's release of the Waters of the United States (WOTUS) rule,[251] only to be superseded by the Navigable Waters Protection Rule.[252] But other examples abound, from national

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of art, *id.* at 1837, 1839 (Kavanaugh, J., dissenting), and that the plurality's ordinary meaning from a contextual analysis could be something else. *Id.* at 1846–47. The plurality countered how the words the dissenters claimed were a term of art did not even appear in the statute. *Id.* at 1828.

[248] Daniel A. Farber, *Presidential Administration: Then and Now*, 43 Admin. & Regul. L. News 4, 5 (2017).

[249] Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

[250] Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32520 (July 8, 2019); Am. Lung Ass'n v. EPA, 985 F.3d 914 (D.C. Cir. 2021), *rev'd*, 142 S. Ct. 2587 (2022).

[251] Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37053 (June 29, 2015), *repealed by* Definition of "Waters of the. United States"-Recodification of Pre-Existing Rules, 84 Fed. Reg. 56626 (Dec. 23, 2019).

[252] The Navigable Waters Protection Rule: Definition of "Waters of the United States", 85 Fed. Reg. 22250 (April 21, 2020), *vacated and remanded by* Pascau Yaqui Tribe v. EPA, 557 F. Supp.3d 949, 951 (D. Ariz. 2021), *followed by* Revised Definition of "Waters of the United States," 88 Fed. Reg. 3004 (Jan. 8, 2023).

monuments,[253] to wildlife regulations,[254] to applying environmental regulation to a major California water pipeline.[255] In these and other numerous instances, successive administrations' agencies are construing language they believe affords sufficient latitude to arrive at often opposite conclusions. This fluctuation has occurred principally since the Reagan administration, with *Chevron* indicative of how changing administrations can wield interpretative power and why the courts must respond and assess deference.

This conversation about executive flexibility triggers examining the judicial function when reviewing agency decision-making. Should courts check politically troubled decision-making, and does the modern approach toward deference toward executive agencies sufficiently protect against swift and radical changes of the sort we witnessed during the first year of the Trump administration? Today's ostensible formulae for deference, though simple in formulation, often confounds in application. And the MQD now exacerbates it. Should we, therefore, accept that modern administrative law is at a *Marbury* moment, demanding something greater from lawyers, scholars, agencies, or the courts?

I suggest the answer is yes, but it is simple: honesty. We should acknowledge how statutory construction involves an exercise in contextualism, regardless of whether one accepts that extrinsic aids such as legislative history are woven into the contextual analysis. This means abandoning masks that obscure how to construe language. To say that we begin by examining the text means little, because it cannot just be the text but rather the text in *context*.[256] To say that we start with an

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[253] *See Press Release, White House, Fact Sheet: President Biden Restores Protections for Three National Monuments and Renews American Leadership to Steward Lands, Waters, and Cultural* Resources (Oct. 7, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/07/fact-sheet-president-biden-restores-protections-for-three-national-monuments-and-renews-american-leadership-to-steward-lands-waters-and-cultural-resources/ [https://perma.cc/Y9VA-WJRM].

[254] *See* U.S. Dept. of Interior, M-37050, The Migratory Bird Treaty Act Does Not Prohibit Incidental Take (2017) (reversed the contrary interpretation by the former administration). *But see* Lisa Friedman & Catrin Einhorn, *Biden Administration Restores Bird Protections, Repealing Trump Rule*, N. Y. Times (Sept. 30, 2021) https://www.nytimes.com/2021/09/29/climate/biden-birds-protection.html [https://perma.cc/UR9L-ARDZ] (only to be reversed by the next administration).

[255] U.S. Dept. of Interior, M-37048, Withdrawal of Solicitor's Opinion M-37025 issued on November 4, 2011, and Partial Withdrawal of Solicitor's Opinion M-36964 issued on January 5, 1989 (2017).

[256] In lieu of parroting the usual refrain at the outset that "we consider the statute's text, structure, and context", Truck Trailer Mfrs. Ass'n, Inc. v. EPA, 17 F.4th 1198, 1201 (D.C. Cir. 2021), it seems more accurate to say simply that we examine the language in its context, employing the

assumption that words are used in their ordinary sense seems spurious, when only through *context* can we discern whether an ordinary usage is what ought to govern, or what ordinary usage would be in the particular context. This, of course, is not to elide the need to appreciate ordinary usage. All textualists, therefore, are by nature contextualists. The same is true for all others, who similarly must confront the text and employ, along with those purported "textualists," an array of grammatical principles and linguistic and substantive canons. To be sure, logic and implicit biases will lead some to accord weight and apply the various conventions differently. And some may acknowledge that a statute's purpose or legislative history can inform their judgment, while others ostensibly may disdain mining those sources, although doing so anyway.[257] But contextualism reigns regardless.

Contextualism unmasks *Chevron's* marginal utility. Lawyers will naturally argue how statutory language ought to be interpreted in their favor, and contextualism acknowledges how the interpretative quest can be as capacious and searching as a judge or judges will allow. I suspect, moreover, that future empirical analyses of lower court opinions might reveal that increasingly courts are concluding that their inquiry demonstrates why the relevant language is not ambiguous.[258] Instances where deference as a residual matter might surface could,

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appropriate tools of construction (and for some, including the statute's legislative history and purpose). *See also In re* Rail Freight Fuel Surcharge Antitrust Litigation - MDL No. 1869, 34 F.4th 1, 9 (D.C. Cir. 2022) ("this court begins 'with the language of the statute itself' and, if necessary, 'may turn to other customary statutory interpretation tools, including structure, purpose, and legislative history.'").

[257] *See supra* notes 12, 15, 24.

[258] Lower federal courts often employ a contextual analysis. *E.g.*, Janko v. Gates, 741 F.3d 136, 139–42 (D.C. Cir. 2014) (exploring context to inform whether statutory language is ambiguous); *In re* Friedman's Inc., 738 F.3d 547, 554 (3d Cir. 2013) ("Context is therefore key in determining the meaning of a particular provision and whether or not it is ambiguous.") (internal citation omitted); United States v. Vargas-Cordon, 733 F.3d 366, 380–81 (2nd Cir. 2013) (look to text first for whether ambiguous and plain meaning is best understood by examining context and statutory scheme); United States v. Havelock, 619 F.3d 1091 (9th Cir. 2010) (employed contextual analysis when examining whether addressee under modern Linbergh Law must be natural person), *reh'g en banc*, 664 F.3d 1284 (9th Cir. 2012); Tex. Pipeline Ass'n v. Fed. Energy Regul. Comm'n, 661 F.3d 258, 264 (5th Cir. 2011) (citation and quotations omitted) (noting importance of overall statutory context); United States v. Am. Soc'y of Composers, Authors, & Publishers, 627 F.3d 64, 72–73 (2nd Cir. 2010) (citations and quotations omitted) (implicitly employed a contextual analysis of the Copyright Act to conclude that statutory language plainly excluded downloads of musical works); Nielson v. Shinseki, 607 F.3d 802, 805–06 (Fed. Cir. 2010) (citations and quotations omitted) (employed a contextual analysis of the phrase "service trauma"); Cal. Indep. Sys. Operator Corp. v. Fed. Energy Regul. Comm'n, 372 F.3d 395, 400 (D.C. Cir. 2004) (citations and quotations omitted) (examining the word "practice" in context); Genus Med. Tech., LLC v. FDA, 994 F.3d 631,

correspondingly, shrink. Even if that does not occur—and agencies remain capable of filling in the gaps left by Congress, neither contextualism nor *Chevron*'s demise necessarily diminishes deference. Agency flexibility can remain within the parameters of arbitrary and capricious review.[259]

Perhaps a principal formulaic change, moreover, should be refraining from pronouncing language as unambiguous. Courts should be honest. When a court engages in a contextual analysis, it is because there is some uncertainty about what Congress intended. Contextualism may allow a court to remove that uncertainty, and when that occurs a court should merely announce it believes that Congress intended X, and not say the language is unambiguous. "Ambiguity" merely operates as a legal conclusion, unnecessarily obscuring the process of statutory construction. Once a court honestly concludes that uncertainty remains after engaging in the appropriate inquiry, it should so state that Congress's intent is unclear and thus defer to an agency interpretation so long as it is not arbitrary and capricious. It might be fanciful to believe that, at what might be administrative law's *Marbury* moment, we can achieve progress long eluding us, but today's conversations about *Chevron* might steer us there.

637 (D.C. Cir. 2021) (observing how the text could not be understood in isolation and required employing the "'customary statutory interpretation tools,' including 'structure, purpose, and legislative history[,].'" *i.e.*, a contextual analysis).

[259] *See supra* notes 145–47 and accompanying text. In *Genus Med. Tech.*, the D.C. Circuit rebuffed the FDA's request for deference, in part by reasoning that the FDA offered no "limiting principle" for its claim to deference and thus prompted the court to hold that the agency's interpretation of the statute was erroneous. 994 F.3d at 643 ("what the FDA attempts to claim for itself is the near-limitless authority to classify *any* device as a drug, subject only to a highly deferential standard of judicial review. We cannot reasonably infer such broad discretion without a clearer statement.").